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THE ENGLISH REPORTS

HOUSE OF LORDS

CONSULTATIVE COMMITTEE

THE RIGHT HONOURABLE THE EARL OF HALSBURY,
LORD HIGH CHANCELLOR OF GREAT BRITAIN

THE RIGHT HONOURABLE LORD ALVERSTONE,
LORD CHIEF JUSTICE OF ENGLAND

THE RIGHT HONOURABLE LORD JUSTICE HENN COLLINS

THE HONOURABLE MR. JUSTICE WRIGHT

SIR R. B. FINLAY, K.C.,
ATTORNEY-GENERAL

GENERAL EDITOR

A. WOOD RENTON, ESQ., BARRISTER-AT-LAW

THE

ENGLISH REPORTS

VOLUME VI

HOUSE OF LORDS

CONTAINING

BLIGH, N.S., VOLUMES 10 and 11; DOW & CLARK, VOLUMES 1 and 2; and CLARK & FINNELLY, VOLUMES 1 to 3.

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PREFATORY NOTE

THE 11th and last volume of Bligh N.S. ends abruptly in the course of the opinion of Baron Bolland in the case of *Garland* v. *Carlisle*. The completion of the case will be found in 4 Clark and Finnelly at page 760. In the original paging of 2 Dow and Clark, the numbers of pages 125-128, inclusive, were omitted. The original pagination has not been altered.

LORD CHANCELLORS

1827 to 1837.

1827 (April 30)–1830 (Nov. 16)	John Lord Lyndhurst.
1830 (Nov. 22)–1834 (Nov. 21)	Henry Lord Brougham and Vaux.
1834 (Nov. 21)–1835 (April 23)	John Lord Lyndhurst.
1835 (April 23)–1836	Sir Charles Christopher Pepys, afterwards Lord Cottenham Sir Lancelot Shadwell Sir J. B. Bosanquet Lords Commissioners.
1836 (Jan. 16)–1841	Sir Charles Christopher Pepys, Lord Cottenham (Jan. 20, 1836).

CHIEF JUDGES OF THE SUPERIOR COURTS, AND LAW OFFICERS, OF ENGLAND, SCOTLAND, AND IRELAND DURING THE PERIOD COVERED BY BLIGH N.S. 10, 11; DOW & CLARK: AND CLARK & FINNELLY 1 TO 3.

1827 to 1837.

ENGLAND.

LORD CHANCELLORS.—See preceding page.

MASTERS OF THE ROLLS.

1826 (Sept. 14)–1827 . . Sir JOHN SINGLETON COPLEY, afterwards LORD LYNDHURST.
1827 (May 3)–1834 (Sept. 16) . Sir JOHN LEACH.
1834 (Sept. 29)–1836 . . Sir CHARLES CHRISTOPHER PEPYS, afterwards LORD COTTENHAM.
1836 (Jan. 19)–1851 . . HENRY BICKERSTETH (LORD LANGDALE, Jan. 23, 1836).

VICE-CHANCELLORS OF ENGLAND.

1818 (Jan.)–1827 . . . Sir JOHN LEACH.
1827 (April)–1827 (Oct.) . . Sir ANTHONY HART.
1827–1850 . . . . Sir LANCELOT SHADWELL.

LORD CHIEF JUSTICES OF THE COURT OF KING'S BENCH.

1818 (Nov.) 1832 . . . Sir CHARLES ABBOTT (LORD TENTERDEN, April 30, 1827).
1832 (Nov.) 1850 . . . Sir THOMAS DENMAN (LORD DENMAN, March 22, 1834).

LORD CHIEF JUSTICES OF THE COURT OF COMMON PLEAS.

1824–1829 . . . . Sir WM. DRAPER BEST, afterwards LORD WYNFORD (June 5, 1829).
1829–1846 . . . . Sir NICOLAS CONYNGHAM TINDAL.

LORD CHIEF BARONS OF THE COURT OF EXCHEQUER.

1824–1831 . . . . Sir WILLIAM ALEXANDER.
1831 (Jan.)–1834 (Dec. 23) . JOHN LORD LYNDHURST.
1834–1844 . . . . Sir JAMES SCARLETT (LORD ABINGER, Jan. 12, 1835).

LAW OFFICERS.

ATTORNEYS GENERAL.

1824–1826 (Sept.)	Sir John Singleton Copley, afterwards Lord Lyndhurst.
1826 (Sept.)–1827 (April)	Sir Charles Wetherell.
1827 (April)–1828 (Jan.)	James Scarlett (Sir James Scarlett, April 30, 1827), afterwards Lord Abinger.
1828 (Feb.)–1829 (June)	Sir Charles Wetherell.
1829 (June)–1830 (Nov.)	Sir James Scarlett.
1830–1832	Thomas Denman (Sir Thomas Denman, Nov. 24, 1830).
1832–1834	Sir William Horne.
1834 (March 1)–1834 (Dec. 17)	Sir John Campbell, afterwards Lord Campbell.
1834 (Dec. 17)–1835 (April)	Frederick Pollock (Sir Frederick Pollock, Dec. 29, 1834).
1835 (April)–1841	Sir John Campbell.

SOLICITORS GENERAL.

1824–1826	Charles Wetherell (Sir Charles Wetherell, March 10, 1824).
1826–1829	Sir Nicolas Conyngham Tindal (Knt., Nov. 27, 1826).
1829–1830	Sir Edward Burtenshaw Sudgen, afterwards Lord St. Leonards.
1830–1832	Sir William Horne.
1832–1834	Sir John Campbell, afterwards Lord Campbell (Knt., Dec. 3, 1832).
1834 (Feb. 22)–1834 (Sept.)	Sir Charles Christopher Pepys, afterwards Lord Cottenham (Knt., Feb. 26, 1834).
1834 (Nov. 6)–1834 (Dec. 20)	Robert Monsey Rolfe, afterwards Lord Cranworth.
1834 (Dec. 20)–1835 (April)	William Webb Follett (Knt., Dec. 22, 1834).
1835 (May 4)–1839	Robert Monsey Rolfe (Knt., May 6, 1835).

SCOTLAND.

LORD PRESIDENT OF THE COURT OF SESSION.

1811–1841	Rt. Hon. Charles Hope.

LORD JUSTICE CLERK.

1811–1841	Rt. Hon. David Boyle.

LORD CHIEF BARONS OF THE COURT OF EXCHEQUER.

1819–1830	Sir Samuel Shepherd.
1830–1832	James Abercromby, afterwards Baron Dunfermline (1839).

No further appointments were made. See 2 Will. IV. c. 54; 2 and 3 Vict. c. 36.

LAW OFFICERS.

LORD ADVOCATES.

1819–1830	Sir William Rae, Bart.
1830–1834 (June)	Francis Jeffrey, afterwards Lord Jeffrey.
1834 (June)–1834 (Dec.)	John Archibald Murray, afterwards Lord Murray.
1834 (Dec.)–1835 (April)	Sir William Rae, Bart.
1835–1839	John Archibald Murray, afterwards Lord Murray.

SOLICITORS GENERAL OF SCOTLAND.

1822–1830	John Hope, afterwards Lord Justice Clerk.
1830–1834 (Nov.)	Henry Cockburn, afterwards Lord Cockburn.
1834 (Nov.)–1834 (Dec.)	Andrew Skene.
1834 (Dec.)–1835 (April)	Duncan M'Neill, afterwards Baron Colonsay and Oronsay.
1835–1837	John Cuninghame, afterwards Lord Cuninghame.
1837 (July)–1839	Andrew Rutherfurd, afterwards Lord Rutherfurd.

IRELAND.

LORD CHANCELLORS.

1827–1830	Sir Anthony Hart.
1830–1834	William Conyngham, Lord Plunket.
1834–1835 (April)	Sir Edward Burtenshaw Sugden, afterwards Lord St. Leonards.
1835 (April)–1841	William Conyngham, Lord Plunket.

MASTERS OF THE ROLLS.

1814–1837	Sir William MacMahon.
1837–1842	Sir Michael O'Loghlen.

LORD CHIEF JUSTICE OF THE COURT OF KING'S BENCH.

1822–1841	Charles Kendal Bushe.

LORD CHIEF JUSTICES OF THE COURT OF COMMON PLEAS.

1827–1830	William Conyngham, Lord Plunket.
1830–1850	John Doherty.

LORD CHIEF BARONS OF THE COURT OF EXCHEQUER.

1805–1831	Standish O'Grady, afterwards Viscount Guillamore.
1831–1838	Henry Joy.

LAW OFFICERS.

ATTORNEYS GENERAL.

1827–1831	Henry Joy.
1830–1834	Francis Blackburne.
1835 (April 29)–1835	Louis Perrin.
1835 (Aug. 31)–1836	Michael O'Loghlen.
1836 (Nov. 10)–1837	John Richards.
1837–1838	Stephen Woulfe.

SOLICITORS GENERAL.

1822–1827	Henry Joy.
1827–1830	John Doherty.
1830–1834	Philip Cecil Crampton.
1834 (Oct. 21)–1835	Michael O'Loghlen.
1835 (Jan. 27)–1835	Edward Pennefather.
1835 (April 29)–1835	Michael O'Loghlen.
1835 (Sept. 21)–1836	John Richards.
1836 (Nov. 10)–1837	Stephen Woulfe.
1837 (Feb. 3)–1839	Sir Maziere Brady (Bart., 1869).

REPORTS OF CASES heard in the House of Lords, upon Appeals and Writs of Error, and decided during the Session 1836. By Richard Bligh, Barrister-at-Law. Vol. X.

SLANE PEERAGE CASE.*

[Mews' Dig. vi. 606, 648, 697; x. 311, 312, 315. S. C. 5, Cl. and F. 23.]

Upon reference of a peerage claim to a committee of privileges of the House of Lords, the following facts appeared:

Richard le Fleming having accompanied Sir Hugh de Lacy to Ireland in the reign of Henry II., obtained a grant of the lands of Slane, in the palatine honour of Meath, of which Sir Hugh possessed the regalities; and Richard and his heirs and successors, tenants of the lands, were in ancient records styled Barons of Slane. In 3 Edw. 2. Baldwyn, Baron of Slane, was summoned to the parliament held at Kilkenny by writ directed Baldwyno le Fleming. After a succession of four peers of the family, who sat in parliaments during the reigns of Edw. 3., Hen. 4., and Hen. 6., Christopher, the fifth peer, died a bachelor, leaving two sisters; whereupon the lands of Slane went to David, his uncle of the half blood, who sat in parliament under a writ of summons, 2 Edw. 4. (1462), with the precedence of the old peerage. He was succeeded by his son Thomas, who died without issue, in 1471, leaving three sisters; whereupon the lands of Slane, with the other estates, went to his cousin, James Fleming, his male heir, who was summoned to and sat in parliament in the reigns of Edw. 4. and Rich. 3. (See stat. 12 Ed. 4.) He was succeeded by [2] Christopher, his son (1491), who sat in parliament 9 Hen. 7. He was succeeded (9 Hen. 8.) by his son James, who sat in parliament 41 Hen. 8., and died without issue, in 1577, leaving two sisters; whereupon the lands of Slane, etc. went to Thomas, his cousin and heir male. He was summoned to and sat in parliament 27 Eliz.; and from him, by descent through a female, George Bryan claimed the barony of Slane, as heir general of the three last of the Barons Slane, summoned by writ and sitting in parliament, upon the grounds that in the several instances where the male line failed, the dignity was in abeyance between the female heirs, and that the summonses and writs in those several instances operated as new creations of peerage, or as determinations of the several abeyances in favour of the party summoned, and constituted peerages in fee.

James Fleming claimed the peerage as heir male of Randall Lord Slane; he appeared by counsel only to oppose the claim of Mr. Bryan, not proceeding upon his own claim: The committee were of opinion and reported that Mr. Bryan had not established his claim.

In the year 1827, a petition was presented to His Majesty by James Fleming, claiming the barony of Slane, as heir male of Randall Lord Slane, which was referred to Sir C. Wetherell, then Attorney-General, who heard evidence thereon, but made no report before he resigned his office. Mr. Fleming having left England in quest of evidence to support his petition, it was not then further prosecuted.

In the year 1829, George Bryan, of Jenkinstown, in the county of Kilkenny, Esq. presented a petition to the King, stating that Thomas Fleming, of Slane, in the county of Meath, Esq. titular Baron of Slane, on the 26th day of April, 1585, the

* This case was argued in 1834, and decided at the close of the session 1835.

twenty-eighth year of the reign of Queen Elizabeth, was summoned to the parliament held before Sir John Perrott, Knt. then Lord Deputy of Ireland, by the title of Lord Slane. That he died [3] without male issue the 9th November, 1597, leaving two daughters his co-heirs: Catherine, who became the wife of Pierce Butler, of the Old Abbey, in the county of Kilkenny, Esq. ancestor to the Lord Viscounts Galmoy, since attainted; and Elinor, who became the wife of her cousin, William Fleming, titular Baron of Slane, in the county of Meath; who, as heir male to her father, inherited his estates. This title went into abeyance between these two ladies.

That Christopher Fleming, eldest son and heir of said Elinor by said William Fleming, was summoned to the parliament held in Dublin on the 18th May, 1613; and to that held there on 16th May, 1615: and it appears he sat in both. That by the summons of said Christopher to parliament, the abeyance of his grandfather's dignity of Lord Slane was terminated in his favour; or that a new peerage was created in the said Christopher by such summons, and sitting thereon.

That the said Christopher Lord Baron of Slane died in the year 1625, leaving six sons—First, Thomas, his eldest son and heir. Second—William, heir to his brother. Third—John. Fourth—Patrick. Fifth—James; and Sixth—Lawrence; which four last all died without issue.

Thomas Fleming, son and heir unto Christopher Fleming, during the lifetime of his father, became a professed friar in the parts beyond the seas; and that the said Baron of Slane did thereupon settle all his lands and hereditaments in the said kingdom, after his decease, upon William Fleming, his second son, and the heirs male of his body, with remainders, in like manner, to other younger [4] brothers of the said William, wholly excluding the said Thomas, as not intending that he should succeed him either in his honour or fortunes; and thereupon King Charles the First, by letter dated in 1629, reciting the fact, and upon the request of Thomas, declared his royal will and pleasure to be, that the said William, and the heirs males of his body, should be from thenceforth, during the life of his said elder brother, reputed, styled, and called Barons of Slane; and that special care be had that, in all meetings and assemblies of parliament, or otherwise, where the said William should happen to be, or the heir male of his body, in case he die in the lifetime of his elder brother, he or they should have the same places and precedency which of right belonged to his father; but with this caution, that if the said Thomas Fleming should thereafter, quitting the habit and life which he had entered into, return unto his country, claiming the said title of honour, and the estates cast upon him by the law, that this declaration of the king's pleasure should be no ways prejudicial unto him.

William Fleming, the second son, under the foregoing authority, was allowed to take his seat in parliament, as appears by the journals of the House of Lords, on the 14th July, 1634, his brother Thomas being then alive. He married Lady Anne MacDonnell, daughter of Randall, Earl of Antrim, by whom he had four sons; first, Charles his heir; second, Randall, heir to his brother; third, Michael, who died unmarried; and fourth, Thomas, whose issue are extinct: and dying in 1641, was succeeded by his eldest son:

[5] Charles Fleming, Lord Baron of Slane, who died unmarried, and was succeeded by his brother:

Randall Fleming, Lord Baron of Slane, who married two wives, first, Elinor Barnwall, daughter of Sir Richard Barnwall, of Crickstown, in Meath, Knight, by whom he had an only daughter Mary, who married, first, Richard Fleming, Esq. eldest son of Sir John Fleming of Staholmock, and secondly Oliver O'Gara, Esq.; by the latter husband she had a son, Charles, who died unmarried, at Brussels, 1685. By her first husband, Richard Fleming, the said Mary had an only son, James Fleming, who died young and unmarried; and an only daughter, Bridget, who became the wife of Randall Plunkett, eleventh Lord Baron of Dunsany, whose eldest son and heir, Edward, became twelfth Lord Baron of Dunsany, and left Randall, thirteenth Lord Baron of Dunsany, his son and heir, whose eldest son and heir is Edward, now fourteenth Lord Baron of Dunsany, heir general of Mary Fleming, eldest daughter of said Randall, Lord Baron of Slane.*

* This descent of Lord Dunsany and Charles O'Gara from the Hon. Mary Fleming has been found erroneous. See the Attorney-General's Report.

That the said Randall, Lord Baron of Slane, married as his second wife Lady Penelope Moore, daughter of Henry, first Earl of Drogheda, by whom he had three sons and one daughter; first, Christopher his heir; second, Henry, who died without issue; and third, Randall, who also died without issue. The daughter was Alice, hereafter mentioned. Randall, Lord Slane, died 1676.

Christopher Fleming, Lord Baron of Slane, succeeded his father, and taking part with King [6] James II. was outlawed for high treason, and forfeited his honours and estates, but was afterwards restored in blood, but not to his estates, by an Act of the English Parliament in 1708. He married the daughter of Sir Patrick Trant, and dying, left an only daughter and heir, Ellen, who died unmarried, and was buried in the parish of St. Sulpice, at Paris, August 8, 1748, on whose death the peerage of Lord Baron of Slane went into abeyance between the heirs of Mary and Alice, the two daughters of Randall, Lord Baron of Slane. The descent of Mary the elder has been herein-before recited.

Alice Fleming, only daughter of said Randall, Lord Baron of Slane, by his second wife, became the wife of Sir Gregory Byrne of Tymogue, in the Queen's County, Bart., by whom she had several sons. Charles, the eldest, married, and had several children, who all died without issue; and Henry Byrne, the second son, left an only daughter and heir, Catherine Xaveria, who became the wife of George Bryan, of Portland Place, London, Esq., by whom she had George Bryan, now of Jenkinstown, in the County of Kilkenny, Esq. her only surviving son and heir (the petitioner), who is now sole heir of Alice, youngest daughter of Randall, Lord Baron of Slane, and as such one of the two co-heirs general of said Randall, Lord Baron of Slane, of his father William, Lord Baron of Slane, and of his grandfather Christopher, Lord Baron of Slane, summoned to parliament in 1613 and 1615, in whose favour was terminated the abeyance of the peerage created in his maternal grandfather William, Lord Baron of Slane, in 1584-5.

That the petitioner presented a petition to his [7] Majesty in May, 1828, praying, that as one of the co-heirs of the aforesaid Randall, Lord Baron of Slane, he might be allowed to produce evidence, and use such arguments as he should be advised for the protection of his rights before his Majesty's Attorney-General for England, to whom was referred the petition of Mr. James Fleming, who claimed to be, and has assumed the title, and calls himself Lord Baron of Slane, on the allegation that he is heir male of the Hon. John Fleming, uncle of the aforesaid Randall, Lord Baron of Slane, and as such, heir male of said Randall. That the petition was referred to his Majesty's Attorney-General, before whom the petitioner attended by his agents and counsel. That Mr. James Fleming closed his case before the then Attorney-General, and the petitioner proved his descent and co-heirship, but the then Attorney-General had not made a report thereon.

That Mr. James Fleming founds his claim on a ground altogether new and unprecedented, that there are peerages in Ireland originating previously to the introduction of either writs of summons or patents, which have always descended to the heirs male, and that this peerage of Slane is one of them; thus alleging a new point of law involving the rights and privileges of the ancient peers of the realm, and the laws affecting the same; a point which requires the most solemn investigation and decision.

That a claim involving the same question has been made to the title of Athenry, another ancient Irish title, which has been twice investigated, first before Sir John Copley (Lord Lyndhurst), and secondly before Sir James Scarlet, when they re- [8]-spectively held the office of Attorney-General of England, neither of whom had made any report thereon:* that the Attorney-General, Sir Charles Wetherell, having had the whole evidence in these claims for the title of Slane before him since August last, had not made any report thereon; and as the petitioner was advancing in years, he was most anxious to have a question of such urgent importance to himself and his family decided by the highest and most competent tribunal; and as the claim of Mr. James Fleming had already been before the House of Peers, and proceedings had been had before the committee of privileges of their lordships

* Sir James Scarlet, when Attorney-General, afterwards reported on the Athenry claim.

thereon; and as all cases of claims to Irish peerages must eventually be decided by their lordships' vote, by a provision of the Act of Union:

The petition prayed that his Majesty would refer the petitioner's claim to the House of Peers, for their lordships' consideration and report, whether the said title be or be not a barony in fee by writ of summons descendible to heirs general; and whether the same is or is not now in abeyance between the said Edward Lord Dunsany,* and the petitioner; or to make such other order in the premises as to his Majesty's royal wisdom should seem meet.

This petition was referred to the Attorney-General, to consider and report his opinion thereon.

Upon this reference the Attorney-General made his report as follows:—

[9] In humble obedience to your Majesty's commands, signified to me by the Right Honourable Robert Peel, one of your Majesty's principal secretaries of state, the 8th of June, 1829,—that I should take into consideration, and report upon the petition of George Bryan, of Jenkinstown, in the county of Kilkenny, Esq.—claiming to be one of the co-heirs of Randall, Lord Baron of Slane, of the kingdom of Ireland, and of his father, William Lord Baron of Slane, summoned to the parliament of Ireland, in 1613 and 1615, or in whose favour the abeyance of the peerage created in his maternal grandfather Thomas, Lord Baron of Slane, in 1585, was terminated.

I have considered the said petition, and have been attended by the agent of the petitioner, who in the first instance stated to me:

That the family of Fleming was descended from Richard le Fleming, who accompanied Sir Hugh de Lacy to Ireland, in the reign of King Henry the Second, and obtained a grant from him of the lands of Slane, in his palatine honour of Meath, in which the said Hugh possessed the regalities; and the said Richard, and his successors, for five generations, were Barons of that palatinate, and were styled in the ancient records Barons of Slane.

That Baldwyn le Fleming (son of Richard, son of Baldwyn, son of Stephen, son of Richard, son of the first-mentioned Richard le Fleming) having married a daughter of Simon de Geneville (second son of Geoffery de Geneville, Lord of the honour of Meath in right of his wife Matilda, daughter and heir of Gilbert de Lacy, grandson and heir of Sir Hugh de Lacy, first Lord of the aforesaid honour of Meath), thereby became allied to the [10] powerful family of Mortimer, Earls of March and Ulster; the chief of which family, Roger de Mortimer, Earl of March, had married the heir of the Genevilles and Lacys, Lords of Meath, and was the King's Lieutenant in Ireland.

That in consequence of this connection, it is presumed, the said Baldwyn, Palatine Baron of Slane, acquired influence and importance, and was summoned to the parliament, held at Kilkenny on the octaves of the Purification of the Virgin Mary, the third year of King Edward the Second, not by the title of Baron of Slane, but by writ directed to him by the name of Baldwyno le Fleming.

That he was succeeded by his son, Sir Simon Fleming, Lord le Fleming, who sat in parliament in the reign of King Edward the Third, and he by his son Sir Thomas Fleming, third Lord le Fleming, who sat in parliament in the reign of King Henry the Fourth, and was succeeded by his son Sir Christopher Fleming, fourth Lord le Fleming, who sat in parliament in the reign of King Henry the Sixth, and was succeeded by his grandson Christopher, fifth Lord le Fleming, son of John, who died in his father's lifetime, who sat in parliament in the reign of King Henry the Sixth, and who dying unmarried, his two sisters, Anne and Amy, became his co-heiresses, between whom the peerage of Le Fleming went into, and is still in abeyance among their heirs, there being many descendants of both now in existence.

That the manor or barony of Slane being settled on the heirs male, and held of the Lords of Meath in *fee tail*, went to David Fleming, uncle of the half blood to the fifth and last Christopher Lord le Fleming; which David was summoned to, and [11] sat in the parliament of King Edward the Fourth, by the title of Lord David Fleming, Baron of Slane, and thus became a peer by a new writ of creation. It appears he was allowed the precedency of the old peerage, but was placed after

* This was afterwards retracted, as an admission made upon mistake.

Sir Christopher Preston, Lord of Kells in Ossory, and of Gormanstown, which first title was inherited by the Prestons from a female, heiress of the Birmingham family.

That this Lord David Fleming was succeeded by his only son Thomas Lord Fleming, who dying childless, the peerage created in his father became also in abeyance, between his three sisters, Anne, Margaret, and Elizabeth; among whose heirs it is believed to be still in abeyance.

That the manor of Slane being held as aforesaid, went to the heir male, James, son of William Fleming, second son of Sir Thomas Fleming, the third Lord le Fleming. This Sir James Fleming was also summoned to the parliament held in the twelfth year of King Edward the Fourth, and sat therein, and also in the parliament of King Richard the Third, by the title of Lord Baron of Slane. He was succeeded by his son Christopher, second Lord Baron of Slane, who sat in the parliament held in the ninth year of King Henry the Seventh; and he was succeeded by his son, James Fleming, Lord Baron of Slane, who sat in the parliament of the forty-first of King Henry the Eighth; and he dying unmarried, the peerage created by his grandfather, summons and sitting, went also into abeyance, between his two sisters Catherine and Elinor.

The foregoing statement was considered necessary, as the peerage now alleged, in the pe-[12]-tition to be in abeyance by the claimant George Bryan, in himself and Lord Dunsany, originated after the death of James, Lord of Slane, in 1577, without issue, and the abeyance of his peerage in his two sisters; the several new creations by writs to the person who inherited the estates of the family having induced an erroneous conclusion, that a different law from that of England governed the descent of Irish peerages.

Having made the foregoing statement, the claimant's agent proceeded to lay before me evidence in support of the allegations of his petition; with this difference, that he now claims to be the sole heir of the said Christopher Lord Baron of Slane, of his father Randall Lord Slane, and grandfather William Lord Slane, instead of being co-heir with Lord Dunsany, of the aforesaid peers, as stated and claimed in his petition; and he accounts for this change of claim as follows:

That Edward, the present Lord Dunsany, and Randall, late Lord Dunsany, having both alleged publicly that they considered themselves as heirs of Bridget Fleming, daughter and sole heir of Richard Fleming of Staholmock, Esq. eldest son of Sir John Fleming of Staholmock, Knt. co-heirs of the said Randall, Lord Slane, with the heir of Alice Fleming, only daughter of the said Randall, Lord Slane, by his second wife: And it also appearing in the pedigree of the said Randall, Lord Dunsany, which he produced to the House of Peers of Ireland, when he proved his right to his seat on the 4th March, 1785, that his grandfather Randall, Lord Dunsany, was married to said Bridget, daughter [13] of Richard Fleming, and that the said Bridget was grandmother to the said Lord Dunsany; and it appearing by other evidence, that said Richard Fleming was married to Mary Fleming, only daughter of said Randall, Lord Slane, by his first wife, Elinor Barnwall, the claimant believed that the said Mary was the mother of the said Bridget. But when it became necessary to prove the descent of the said Lord Dunsany from the said Mary, and searches were made for evidence to establish the same, there was found a bill filed in the Chancery of Ireland, by Michael Fleming, Esq. brother of the said Richard Fleming on the 27th January, 1724, against the said Lord Dunsany, and Bridget his wife, wherein the said Michael did aver; and in their answer, the said Lord Dunsany, and Bridget his wife, sworn by them on the 4th March, 1724, admitted it to be true that said Bridget was only daughter and child of the said Richard Fleming, and they further state that the said Bridget was entitled to the sum of £1000, as a portion, pursuant to a certain deed of settlement, made on the intermarriage of the said Richard with the Defendant, Bridget's late mother, deceased. By this discovery it was found that the said Bridget was not the daughter of the said Honourable Mary Fleming, who was then in life, and lived many years afterward, viz. to the year 1741, when she made her will; but that the said Bridget was daughter of the said Richard Fleming, by a former wife, and, consequently, that the pretensions of Lord Dunsany to be heir to the said Honourable Mary Fleming, and coheir of Christopher, Lord Slane, were groundless; and, therefore, that the said [14] claimant, George Bryan, was

sole heir of the said Christopher, Lord Slane; and his, the said claimant's, agent thereupon proceeded to substantiate these allegations by proof, and produced to me, first—An examined copy of the bill filed by the said Michael Fleming the 27th January, 1724, and of the answer thereto of the said Randall, Lord Dunsany, and Dame Bridget his wife, sworn on 4th March, 1724, from the Rolls Office of the Chancery of Ireland; by which the said Michael charges, and the said Bridget admits that she was the only daughter and child of the said Richard Fleming; and the said Bridget further states, upon oath, that she was entitled to £1000, by the settlement made on the intermarriage of the said Richard Fleming with her late mother deceased.

Secondly. To prove that the Honourable Mary Fleming, widow of the said Richard Fleming, was living in the year 1724, and for a long time afterwards, there was produced to me an examined copy of a bill filed in the Chancery of Ireland by William Fleming, in the year 1730, and an examined copy of the answer of said Mary thereto; in which she states herself to have been the daughter of Randall, Lord Slane, and widow of Richard Fleming of Staholmock, and also widow of Oliver O'Gara, Esq. thus clearly establishing her identity, and her existence in the year 1731—seven years after the period when Bridget, Lady Dunsany, states, upon oath, that her mother was deceased.

Having established these facts, the claimant's agents proceeded to produce the evidences in support of the allegations of his petition.

To prove that there was no patent creating [15] Thomas Fleming, or any other person of the name of Fleming, or of any other name, Baron of Slane, or Lord of Slane, there was laid before me an affidavit of Sir William Betham, Ulster King of Arms of all Ireland, to the effect that he had made strict search in the office of Record in the Tower of London, and in the Rolls Chapel, and in the offices of Record in Birmingham Tower, and the Rolls Office of the Chancery of Ireland, and the Records of the late Parliament of Ireland, in Dublin, where patents of peerage are recorded, and that he could find no such patent in any one of the said offices of Record, and that he verily believes that no such patent does now, or ever did exist.

To prove that the journals of the House of Peers of Ireland do not exist before the year 1634, (and that therefore secondary evidence should be admitted to prove certain facts respecting the peerage,) an affidavit of Sir W. Betham, Keeper of the Records of the late parliament of Ireland, was produced, which states that the journals of the Irish house of Peers, previous to that period, have been lost or destroyed.

To prove that Sir Thomas Fleming was Lord Baron of Slane in the year 1585, there was produced an examined copy of an inquisitio post mortem, taken 9th February, 1597, at Ratoath in the county of Meath, after the death of Christopher Lord Slane, in which he is styled Thomas Dominus Baro de Slane.

To prove that the said Thomas was summoned to the parliament of Ireland, holden before Sir John Perrott, Lord Deputy, 26th April, 1585, there was produced an examined copy of a do-[16]-cument called a parliament pawn, from the Rolls office of the Chancery of Ireland, by which it appears that the Lord of Slane was the third Baron in the list of the parliament then summoned.

In order to make good the evidence next offered, it was urged that the journals of the Irish House of Peers, previous to the year 1634, being lost, and that Ulster King of Arms being the officer of that house whose duty it was to deliver in a correct list of the peers of Ireland, at the commencement of the first session of each parliament, a certified entry in a book, kept by that officer to assist him in the discharge of that duty, is the best evidence the case will now admit of in the absence of the original journals, especially as many of those entries of lists of the peers present on certain days in parliament purport to have been copied from the original journals so far back as the reign of King Charles the First, and are all certified by the signature or initials of Thomas Preston, then Ulster King of Arms; and that this book should now be received as evidence of the facts therein entered, as to the enumeration of the words present in the said parliaments: and therefore—

To prove that the said Thomas Lord Slane was present in that parliament, there was produced an ancient manuscript book from the office of Ulster King of Arms, entitled "Cases of Precedence," containing a list of the peers of the said parliament, in which the word "ꝑsent" is placed after the name of "Dominus Slane."

To prove that the said Thomas Lord Slane died on the 9th November, 1597, without male issue, and leaving two daughters, his coheirs, Elinor [17] married to her cousin William Fleming; and Catherine, married to Peter Butler, Esq., there was produced the examined copy of the inquisitio before mentioned, taken at Ratoath, the 9th February, 1597; in which is the following passage: Quod antedictus Thomas Dns Baro de Slane, diem clausit extremum ix° die Novembris anno Dni 1597 absque aliquo hered. mascul. de corpore suo exeunt. Et qd omnia et singul. terr. tent. et hereditamenta de quibus seisitus fuit, virtute chartae predictae, descendebant in remanerio Willo modo Dño Baron. de Slane, et quod dictus Willielmus tempore mortis predicti Thome, Domini Baronis de Slane, fuit aetatis xl. annorum, vel circiter, et maritatus; et ulterius dicunt jurati super sacramentum suum, quod praedictus Thomas nuper Dominus Baro de Slane, habuit exitus de corpore suo, legitime procreatus, duas filias, viz. Elinor, quae modo prefato Willielmo Domino Baroni de Slane, maritata existit, et Katharina maritata Petro Butler, de old Abbey, in comitatu Kilkenniae.

It does not appear that the last-mentioned William, husband of Elinor the elder daughter, although styled in the inquisition Dominus Baro de Slane, ever was summoned to parliament; and it was stated that there was no parliament held in Ireland in the interval between the year 1597, when Thomas Lord Slane died, as above stated, and the year 1612, when this William died.

To prove that Elinor, the eldest daughter above mentioned, died on 24th January, 1616, and was succeeded by her eldest son and heir, Christopher, there was produced to me an original book of the funeral entries of the nobility and gentry of Ireland, from the year 1604 to the year 1622, in the [18] office of Ulster King of Arms of all Ireland, which contains the following entry: "Elinor, dr. of Sir Ths. Fleming, Knt., Lord Baron of Slane, died y^e^ 24th of Januarie, 1616; she was wife to William Fleming Ld. Baron of Slane, and mother, by him, to Christopher Fleming Ld. Baron of Slane; also to George, Thomas, and James; and to Mary, Jane, Elizabeth, and Ellis Flemyng."

To prove that Christopher Fleming was summoned to and sat in parliament, during his mother's lifetime, by the title of Lord Slane, in the year 1613, and 1615, there was produced the before-mentioned ancient MS. book from the office of Ulster King of Arms, called "Cases of Precedence," in which is an entry in the handwriting of and certified by Thomas Preston, Esq., Ulster King of Arms, purporting to be a list of those peers of Ireland, who were summoned to the parliament of Ireland, held 8th May, 1613, in which is the name "℣ Dns Slane:" and at the beginning are these words, "Copied out of the journall booke:" and in another entry in the same book, is a list of the peers summoned to the parliament of Ireland, held in Dublin, 16th May, 1615, introductory to which, also, is the same remark, "Copied out of the journall booke;" and the following among the peers, "℣ Baro de Slane."

It was urged that the said summons by the title of Slane, then in abeyance between his mother Elinor and her sister Catherine Butler, was either a termination of the abeyance of the said title in his favour, or a creation of a new peerage in fee descendible to his heirs; it being, in the first case, similar to the summoning of the eldest son of a [19] peer by a title vested in the father, which on the father's demise would vest in the person summoned, in the latter, an absolute creation.

To prove that Christopher Lord Slane died 9th June 1625, and was succeeded by his eldest son and heir Thomas, and that he had five younger sons, there was produced an examined copy of an inquisitio post mortem, taken at Navan, 13th January 1626, in which is the following sentence: "Et ulterius dicunt juratores predicti super sacramenta sua, quod predictus Christopherus nuper Dominus Baro de Slane, obiit apud villam de Newstowne, nono die Junii 1625, et quod Thomas Flemynge, modo Dominus Baro de Slane, est ejus filius et heres, qui fuit etatis viginti et unius annorum, et sex mensium, tempore mortis predicti Christopheri patris sui et non maritatus. Et quod predictus Christopherus, nuper Dominus Baro de Slane, tempore mortis sui, habuit quinque filios, viz. Willielmus, Joh. Patric. Jacob. et, Laurenc. juniores, et tres filias, viz. Maria, Margaret, et Ellinor, quae superstites sunt et non maritatae."

Thomas Lord Baron of Slane being a Roman Catholic priest, was disinherited by his father, by the settlement contained in his last will and testament. Whereupon

application was made, by the said Thomas, to King Charles the First, to substitute in his room William Fleming, his next brother, by giving him the place and dignity of Lord Slane, as a peer of Ireland; and thereupon a king's letter was issued, dated the 30th October 1629, the fifth of that monarch's reign, of which an examined copy from the Rolls office of the [20] Chancery of Ireland was produced to me, in the following terms:

"CHARLES R.

"Right trusty and welbeloved cousins and councellors, wee greete you well: Whereas wee are informed Thomas Ffleminge, sonne and heire unto Christopher Ffleminge, late Baron of Slane, within that our Realme of Ireland, did, in the life-tyme of his ffather, become and professe frier in the part beyond the seas, and that the said Barron of Slane did thereuppon settle all his lands and hereditaments in the said kingdome after his decease, uppon William Ffleminge, his second sonne, and the heires male of his boddie, with remainders in like manner to other younger brothers of the said William, wholy excludinge the said Thomas, as not intending that hee should succeed him either in his honnor or fortunes. Nowe for as much as wee are given to understand that the said Thomas Ffleaminge being resolved to persist in that course of profession, is not only content to relinquish and leave unto the said William Ffleminge, his brother and heire, the honnor and title of Baron of Slane, and all estates and fortunes which by the lawes of that kingdom are descended uppon him, but doth alsoe humblie desire that wee would be graciously pleased to give way that, dureing his life, his said brother William, and the heires male of his body might be reputed Barons of Slane. Wee takeing into our princely consideracon, the maney services in former times donne to our crowne, by the anncestors of the [21] said William; and to nourish still that good disposicon in him of whom wee conceave good hopes, we are therefore gratiously pleased, and doe hereby declare our Royall will and pleasure to bee, that the said William and the heires male of his body, shall be, from henceforth, dureing the life of his said elder brother, reputed, stiled, and called Barons of Slane; and further our pleasure is, that speciall care be had, that in all meetings, assemblyes of parliament, or otherwise, where the said William Ffleminge shall happen to bee, or the heires males of his body, in case hee dye in the life-time of his elder brother, that hee or they shall have the same places and precedency which of right belonged unto his father. But with this caution, that if the said Thomas Ffleminge shall hereafter, quittinge the habitt and life which he is now entered into, return into his country claymeinge the said title of honnor, and the estates cast upon him by the lawe, that this declaracon of our gracious pleasure, towards his said brother, shal be noe wayes preiudiciall unto him. Given under our signet at our pallace of Westminster, the thirtieth of October, in the fifth yeare of our raigne.

"To our right trusty and right wel-beloved cousins and counsellors, Adam Viscount Loftus of Ely, our Chancellor of our realme of Ireland, and Richard Earle of Corke, our Justices of our said realme of Ireland."

"Memorand. qd. vicesimo sexto die Novembr. Anno Dñi millesimo sexentesimo vicesimo nono Roland Plunkett, gener. venit' in Canc' Dñi Regis Regni sui Hibern. & petit lras supradict' irrotular' [22] ad cuius requisicoem irrotulant' de verbo, in verb. prout superius.

(Signed) "R. WOGAN, Dy. Kr. of the Rolls. Rolls Office, 16th May, 1829."

To prove that this letter was not acted upon in the way pointed out by the king, but that the lord deputy took the opinion of the parliament on the question, who decided that the king's deputy should issue a writ to the said William and his heirs, on the presumption that his brother Thomas was dead; with a salvo jure that in case the said Thomas was alive, the said William or his heirs should take no benefit of the said writ; and that the writ accordingly issued to the said William Fleming, and that he took his seat as a peer of the kingdom of Ireland in parliament thereon,—there was produced an examined copy of the following entry in the journals of the Irish House of peers:

"Die Lunae 14 Julii anno regni Dni. Caroli 10 annoque Dni, 1634o.

"Memorandum: That this day the Right Honourable the Lord Deputy and the Lords Spiritual and Temporal, being assembled in full parliament, Patrick D'Arcy, Esq. of counsel, with the Right Honourable William, Lord Baron of Slane, humbly moved the Lord Deputy that order might be given for the issuing a writ of summons to the said Lord of Slane, as son and heir unto Christopher, late Lord of Slane, and that his lordship might take his place in this high and honourable assembly of parliament, as his said father, and his ancestors, Lords of Slane, have heretofore done. Upon consideration whereof, it is thought fit, and accordingly ordered by the Lord Deputy, that the said writ shall be granted [23] unto him, and that the said William shall take his place, and have his precedency, as Lord of Slane. But, forasmuch, as it appeared that the said William had an elder brother, named Thomas, who, in the lifetime of his father, about fourteen years since, (as was alledged) went into parts beyond the seas, from whence he is not yet returned, and it appears not that he is living, but is rather presumed to be dead: It is therefore ordered that the awarding of the said writ, and the placing of the said lord, in the room of his father, shall be with a salvo jure of the said Thomas, in case the said Thomas be living and returns; and with this farther saving, that in case the said Thomas be living, and that he, or his heirs, shall at any time hereafter return into this kingdom, and re-assume the title of Lord of Slane, that then and in such case, the said William, or his heirs, shall take no advantage or benefit by the said writ or any consequent thereof, but shall be altogether secluded from any such title, place, or privilege, as he may claim by pretext of that writ, as if the honour and favour now granted to him had not been, or that no such writ had ever been awarded to him; under such conditions and salvos the said William did accept of the said favour, and fully consented it might be entered accordingly." And also an examined copy of an entry on the said journals of the day following, to the following effect: "Memorandum—That according to an order of the Right Honourable the Lord Deputy, made in full parliament on Monday last, the 14th day of this instant month, his Majesty's writ of summons was delivered to the Right Honourable William, Lord Baron of [24] Slane, who was this day brought into this house by the Lords Howth and Dunsany, and the said writ allowed, and himself placed between the Lord of Kerry and the Lord of Howth."

It appears also by the Journals, examined copies of the entries in which were produced to me, that this Lord sat in parliament on several subsequent days in this month, and also on the 4th of November following, and frequently afterwards, and on the 6th of April, 1635, held the Lord of Enniskillen's proxy, and that on the 15th February, 1640, he made a motion respecting certain grievances, and the invasion of the privileges of the nobility. From all these entries on the journals, it is evident that the said William enjoyed and exercised the right of sitting in parliament, and that the effect of this writ and sitting was to give a new barony in fee to William Fleming and his heirs, and that it must still be considered as law, that the issue of writ, and the introduction as a new peer, although the crown awarded, and the house acquiesced in his taking his seat as of the old precedence, as Baron of Slane, was to all intents and purposes a new creation.

It appears also in Clanricard's Memoirs (folio, 1751, p. 139.), that Thomas Fleming, the friar, survived his brother William Lord Slane; for, in a letter dated at Portumna, in 1642, to the Lords Justices of Ireland, Lord Clanricard states, that Sir Valentine Blake, and Thomas Fleming, a friar, brother to my Lord of Slane, and some others, were very active in the commotions in Galway in that year. William Lord Slane died in 1641, as appears by an inquisition taken at Navan 1676.

To prove that William Lord Slane died, and was [25] succeeded by his eldest son and heir Charles, and that the said Charles Fleming, Lord of Slane, died, unmarried, in 1661, and was succeeded by his brother Randall, who was restored to the estates of which his father had been deprived by the usurping powers, and married, first, Elinor Barnwall, and had an only daughter, Mary; and, secondly, Lady Penelope Moore, daughter of Henry Earl of Drogheda, by whom he had three sons, Christopher, Henry, and Randall, and an only daughter, Alice; and died in 1676, and was succeeded by his son Christopher,—there was produced an examined copy of an inquisition taken at Navan, 1676; by which it appears that said Lord William died in 1641, and was succeeded by his son Charles, who died in 1661, and was succeeded by his

brother, Randall Lord Baron of Slane; and that the said Randall married, first, Elinor Barnwall, and had by her an only daughter, Mary; that he married, secondly, Lady Penelope Moore, daughter of Henry, first Earl of Drogheda, and had by her three sons, Christopher, Henry, and Randall, and an only daughter, Alice; that said Randall died in 1676, and was succeeded by his eldest son, Christopher Lord Slane.

To prove that this Christopher, Lord of Slane, was outlawed and attainted, and afterwards restored in blood, there was produced an examined copy of a private act of the British parliament of the seventh year of her late Majesty Queen Anne, cap. 53., by which act the said outlawry and attainder were reversed.

To prove that the said Christopher, Lord Slane, married Anne, daughter of Sir Patrick Trant, Bart., and had by her an only daughter, Ellen—**[26]** there was produced to me an examined copy from the office of the Commissioners of His Majesty's woods and forests, in the Custom-house of Dublin, of a claim made before the trustees appointed under the Act made in the twelfth and thirteenth year of King William the Third, entitled "An Act for the granting an aid to his Majesty by the sale of the forfeited and other estates and interests in Ireland," by Sir Stephen Rice, Knt., for and on behalf of Ellen Fleming, only daughter of Christopher Lord Baron of Slane, begotten on the body of his wife, Anne, Lady Baroness of Slane, the daughter of Sir Patrick Trant, Bart., in which the following passage appears, viz.: "That the said Lord Baron of Slane hath issue by his said wife, the said Anne Trant, the said Ellen Fleming, their only child."

Further, to prove that Christopher Lord Slane died without issue male—there was produced to me an examined copy of a bill filed in the Chancery of Ireland, the 13th November, 1730, by William Fleming, commonly called Lord Slane, against Michael Fleming, of Staholmock, Esq., Mary O'Gara, alias Fleming, widow, and others: and also examined copies of the answers of the said Defendants: in which bill it is stated, and in the answers of the Defendants it is admitted, that the said Christopher Lord Slane died without issue male.

To prove that Ellen or Hellen Fleming, only daughter of Christopher Lord Slane, died without issue, and unmarried, there was produced to me an examined extract of an entry made in the register of funerals of the parish of St. Sulpice, in Paris, now preserved in the Hotel de Ville in the same city, as follows:—

[27] "Extrait des Registres des Convois de l'Eglise Paroissiale de Saint Sulpice, à Paris.

"Le huit du mois d'Août, de l'année mil sept cent quarante huit, a été fait le convoi et enterrement * de Helène de Flamming, fille agée d'environ cinquante ans, morte hier, rue Tournon, au petit Hotel de Luxembourg, et y ont assisté Messire Jacques Hector Chevalier de Macleane, Baronet D'Ecosse, Sieur Georges Waters, Banquier à Paris, Sieur Michel Bermingham, Maitre en chirurgie des facultés de Paris, Londres, etc., Francois Salomon Pothouin D'Huillet, ecuyer, avocat au parlement, tous amis de la defunte, qui ont signé.

"Bermingham. Geo. Waters.
"Macleane. Pothuin D'Huillet."

There was also produced a paper, with another paper affixed thereto, found among the family deeds and papers of the claimant, purporting to be a copy of the same entry in the register of funerals of the parish of Saint Sulpice, signed by Borne, the vicar of that parish, 1st May 1789, with a notarial attestation as follows:—

"Extrait des Registres des Convois de l'Eglise Paroissale de Saint Sulpice, à Paris.

"Le huit du mois d'Août, de l'année mil sept cent quarante huit, a été fait le convoi et enterrement de tres haute et tres puissante demoiselle Helene de Flamming, filee agée d'environ cinquante ans, morte hier, rue Tournon au petit hotel de Luxembourg, et y ont assisté Messire Jacques Hector de Mac Leane, Baronet d'Ecosse, Sieur Georges Waters, Banquier de Paris, Sieur **[28]** Michel Birmingham, Maitre en chirurgerie des facultes, de Paris, Londres, etc., Francois Salomon Pothuin d'Huillet, Ecuyer, avocat du Parlement, tous amis de la defunte, qui ont signé.

"Delivré par moi soussigné Prétre Vicaire de la dite Paroisse, à Paris ce premier jour du mois de Mai de l'année 1789.

(Signé) "Borne, Vic."

* Tres haute et tres puissant demoiselle.

Then follows the notarial attestation, viz.:

" Pardevant les Notaires Royaux à Amboise sousignés.

" Furent present M. Nicholas Mores, Chevalier Baronet, ancien Lieutenant Colonel du Regiment de Bluclev, Irlandois, Chevalier de l'Ordre Royal Militaire de St. Louis, et Milady Isabella Cameron de Lochyel, son epouse, demeurants à leur Hotel à Amboise, Paroisse de St. Denis.

" Lesquels certifient à tous qu'il appartiendra, savoir le dit Sieur Mores avoir connu Mademoiselle Fleming, fille de tres haut et trés puissant Seigneur Christophe Fleming, Lord Baron de Slane, Vicomte de Longford, Pair du Royaume d'Irlande: et de Madame Strant son epouse, qui etoit fille de Mre. Patrice Strant, pour avoir vu la dite démoiselle Fleming, en l'année mil sept cent quarante, chez sa parente Milady Clarfleu, à Boulogne sur Mer, ou elle étoit connue pour etre fille de Milord Slane, pour l'avoir vue depuis plusieurs fois à Paris chez le Sieur Georges de Waters Banquier.

" Qu'il a oui dire que la dite demoiselle Fleming, etoit nièce du coté maternelle, de la Princesse [29] d'Auvergne, qu'elle avoit eu proces, à raison de la succession de la dite Princesse d'Auvergne, sur laquelle succession elle avoit obtenu une somme, ou rente, à prendre sur l'Hotel de Bouillon à Paris; qu'il a oui dire aussi, que la dite demoiselle Fleming, etoit nièce de Madame Strant (Anglice, Trant), et petite fille du Chevalier Patrice Trant, de la ville de Dublin.

" Qu'il a connoissance que la dite demoiselle Fleming a demeuré a Paris, rue Tournon, où il l'a connu, et où elle est morte d'une age fort avancée, sans avoir été mariée, qu'il croit que les papières de cette demoiselle peuvent avoir été deposés chez le dit Sieur Georges de Waters, Banquier à Paris, ou chez le Sieur Abbé Crafort.

" La ditte Milady Mores, qu'étant tres jeune, elle a oui dire par Milady Lochiel, sa mere, qu'elle avoit connu la ditte demoiselle Fleming, pour une personne très respectable et de grande consideration.

" Dont, et de tout ce que dessus, les dits Sieur et Dame Morés, nous ont requis de ce que nous leur avons octroyé, fait passé a Amboisse, en leur hotel, l'an mil sept cent quatre vingt neuf, le dixieme jour d'Avril, après midi, ont signé apres lecture faite.

Morres, Chevalier Baronet.
My Ladi Morres, née Cameron de Lochiel.
Scelle—Boureau. Legendre.

Gerbonn.

" Conté à Amboise le dix Avril, 1789.
" Rien que x sous.

" Nous, Nicholas Tournyer, Conseiller de Roy, president et subdelegue de l'election de cette ville, et lieutenant du duche pairie D'Amboise, [30] soussigné certifions, pour l'eloignement de six lieues du juge royal, que les Sieurs, Legendre et Bourreau, sont notaries royaux en cette ville, et que leurs signatures apposées au bas de l'acte cydessus, et de l'autre part, en foi de quoi nous avons delivré et signe le present en notre hotel, à Amboise, ce onze Avril, mil sept cent quatre vingte neuf.

Tournyer."

To prove that such an act was done by the said parties, there was produced an examined copy of an entry in the bureau of the registration of civil acts at Amboise, in the department of the Indre et Loire, to the following effect:—

" Extrait du Registre des Actes Civils Publics.

" Du 10 Avril.

" Du 10 Avril, 1789, Acte de notorieté par lequel, Mr. Nicolas Morres, Chevalier de St. Louis, et Milady Isabella Cameron de Lochiel, son epouse, certifient avoir connu Mdle. Fleming, fille de haut et puissant Sgr. Christophe Fleming.

" Passê par Legendre, Not. à Amboise, le 10 Avril, cont. un Role.
" Renvoi rien dix sous.
" Pour extrait conformé delivré par le receveur de l'enregistrement et des domains.

Pic. Paris."

"Amboise, le trois Decembre, 1829.

"Nous soussigné, Maire de la Ville d'Amboise, certifions que la signature de dessu apposée, est bien celle de Mr. Pic. Paris, receveur de l'enregistrement et des domains, à Amboise.

TOURNYER."

To prove that Henry Fleming, brother of Christopher Lord Slane, died, without issue male— there was produced an examined copy of the same [31] bill, filed in 1730, against Michael Fleming, and the answer thereto; by which it appears that he died without issue male.

To prove that he died unmarried, there was produced an original pedigree, in the hand-writing of the late George Bryan, Esq., deceased, father of the claimant; found also among the family deeds and papers of the claimant, and verified to be of the proper hand-writing of the said George Bryan, Esq., by the affidavit of Charles Butler, Lincoln's Inn, Esq., Barrister at Law, one of the executors of the last will and testament of the said George Bryan; in which it is stated that the said Henry Fleming died unmarried.

To prove that Randall, youngest brother of Christopher Lord Slane, died without issue—there was produced an examined copy from the aforesaid office of the Commissioners of Woods and Forests, of the claim of Sir Gregory Byrne, and Dame Alice his wife, before the aforesaid trustees; and also the claim of Michael Fleming, of Staholmock, before the same trustees; in which they state that Randall Lord Slane left issue male only the said Christopher and his brother Henry.

It was urged that the said Randall, the youngest son of Randall Lord Slane, although living at his father's death, as appears by the inquisition taken in 1676, and then aged three years, two months, and three days, must have died immediately afterwards, as his relations in 1700, who made these claims, said that Randall left only two sons, Christopher and Henry.

To prove that Randall Lord Slane had a daughter by his first wife, named Mary, —there was produced the claim of the said Sir Gregory Byrne, [32] and Dame Alice his wife, before-mentioned, which contains the following passage: "The said Lord and Lady Slane died about twenty and four years since, and left issue two sons, to wit—Christopher and Henry; and the claimant the late Lord had besides, issue one daughter called Mary, by his former wife."

To prove that the said Mary (by the former wife) married Richard Fleming, son of Sir John Fleming of Staholmock, Knt., and had a son James, who died young,— there was produced to me an examined copy of the bill before mentioned, filed by William Fleming, commonly called Lord Slane, 13th Nov. 1730; and the answer of the said Mary thereto: in which bill it is averred that she did marry the said Richard, and had issue by him, a son James, who died young; and in the answer of the said Mary, then the widow of Col. Oliver O'Gara, the same is admitted.

To prove that the said Mary had no issue by her second husband, Oliver O'Gara,— there was produced an examined copy of her will, dated 4th Nov. 1741, and proved the 21st June, 1742, from the Prerogative Office, in Ireland, in which she leaves all her property to her friends and servants, and does not mention any child or relative whatever.

To prove that said Lord Randall had by his second wife, Lady Penelope Moore, an only daughter, Alice, who became the wife of Sir Gregory Byrne, Bart.,—there was produced to me the examined copy of the claim of said Sir Gregory Byrne, and Dame Alice his wife, before the trustees aforesaid, in which it appears that said Randall, Lord Slane, married Lady Penelope Moore, daughter of Henry Earl of Drogheda, and left two sons, [33] Christopher and Henry, and Dame Alice, the then claimant their only daughter.

To prove that the said Alice had, by the said Sir Gregory, four sons—Charles, Henry, Gregory, Christopher, and other children, there was produced to me an examined copy of a bill, filed 4th Jan. 1774, in the Chancery of Ireland, by Christopher Byrne, her fourth son, against George Agar, Esq., and others, with the answer thereto, in which it is charged and admitted, "that Sir Gregory Byrne died in or about the month of March, 1712, leaving the said Alice, his widow—Charles Byrne, his eldest son and heir, by the said Dame Alice, then a minor under the age of twenty-one

years—Henry Byrne, his second son—Gregory, his third son—and the suppliant, Christopher, his fourth son, by Dame Alice, and several other children." There was also produced to me a document found among the papers of James Butler, of Kilmacargy, in Kilkenny, great grandson of said Christopher Byrne, purporting to be a case respecting the manor of Kilmocar, and referring to the said proceedings in Chancery, with the opinion of Philip Tisdall, Esq., Attorney-General of Ireland, and some time Judge of the Prerogative Court of Armagh, thereon, in which those facts also appear.

To prove that the said last-mentioned document was found among the family papers of said James Butler, and that the opinion thereon written, is in the handwriting of said Philip Tisdall, there was produced the affidavit of Sir William Betham, who received the same from the said James Butler, and proved the said handwriting to be that of Philip Tisdall.

[34] To prove that Charles Byrne, Esq., the eldest son of Sir Gregory and Lady Alice, died 13th April, 1750, leaving four sons—Dudley, John, Caesar, and James—an examined copy of the aforesaid bill, filed 4th Jan. 1774, was again produced: by the contents thereof it appears, that the said "Charles Byrne died on or about the 13th day of April, 1752, leaving Margaret Byrne, his widow—Dudley Byrne, his eldest son and heir—John Byrne, his second son—Caesar Byrne, his third son—and James Byrne, his fourth son—and no other male issue."

To prove that these four sons died without issue, the aforesaid bill of 4th Jan. 1774, was again produced, in which it appears that Dudley, the eldest son, died without issue in 1756—John and Caesar died in Germany unmarried—and that James was drowned in the Liffey in the year 1773, unmarried.

To prove that Mary, Anne, Margaret, and Frances, the daughters of Charles Byrne, died also without issue, there was produced to me the aforesaid case found among the family papers of said James Butler, Esq., wherein it is stated that they all died without issue.

The claimant's agent having thus proved the extinction of all the issue of Charles Byrne, Esq., proceeded to prove that the claimant, George Bryan, Esq., is the heir of the said Alice, Lady Byrne, through Henry, her second son.

To prove that Henry Byrne, Esq., the second son, as aforesaid, had an only daughter and heir, the document found among the family papers of said James Butler, Esq., was again produced, which states, that the said Henry Byrne left an only daughter and heir.

[35] To prove that the said Henry Byrne, Esq., had an only daughter and heir named Catherine-Xaveria, who became the wife of George Bryan, Esq., there was produced the afore-mentioned pedigree, in the handwriting of the late George Bryan, Esq., and also a missal, or Roman Catholic mass book, of the family, in which is entered, in the handwriting of the said George Bryan, Esq., that he was so married at the parish church of St. Clements Danes, London, 9th Nov. 1762, to the said Catherine-Xaveria; and also an examined extract from the register of the parish of St. Clements Danes, Westminster, by which it appears that George Bryan, Esq., was married to Catherine-Xaveria Byrne, 9th November, 1762; and also,

To prove that he had a son Henry, who was born 9th March, 1764, and died 24th of the same month, there was produced the missal aforesaid, in which there is an entry to that affect.

To prove that the said George Bryan had a son Eustace Bryan, the same missal was produced, in which is an entry, in the handwriting of said George Bryan, to the effect that said Eustace was born 13th July, 1767.

To prove that said Eustace died unmarried and without issue, there was produced the act of administration to his effects, from the Office of Prerogative of the Court of Canterbury, dated April, 1789, and April, 1799.

To prove that the said George Bryan had another son George, the claimant, the missal aforesaid was produced, in which there is an entry to the effect that said George was born 3d November, 1770.

The claimant having thus proved himself sole **[36]** heir of the body of Alice, Lady Byrne, heiress of her niece Helen, only daughter of Christopher, Lord Slane, and that he is, as such, now sole heir of the said Christopher, Lord Slane, of his father Randall, Lord Slane, and of his grandfather William, Lord Slane; on these grounds he claims that the title of Lord Baron of Slane is now vested in him.

Upon the whole of the case, I am of opinion, that there are strong grounds to conclude that the summons of Christopher, Lord Slane, and his sitting in the parliament of Ireland, held in the years 1613 and 1615, may be considered as a determination of the abeyance of the peerage created in Thomas, Lord Slane, by his summons and sitting in parliament in 1585 (supposing him to have so sat), in favour of the said Christopher, or as a new creation, descendible to his heirs; and that the said title, whether a new creation, or determination of the abeyance, was inherited by his eldest son Thomas, who, being a Roman Catholic priest, left no issue, but was presumed to be dead in the year 1634; and that the writ of summons in 1634, to William Fleming, the second son of Christopher, if not a new creation, upon the supposition that his eldest brother Thomas was then living, was a recognition of the title in him upon the death of that brother without issue, which title was therefore descendible to the heirs of the said William whether his brother Thomas had issue or not.

Upon consideration of the evidence produced, and having carefully examined each document, and finding and believing them all to be genuine and free from suspicion, I humbly offer it as my opinion, that the claimant, George Bryan, Esq., has proved himself the heir of Alice Fleming, the [37] younger daughter of Randall, Lord Baron of Slane, and that the said Alice was sole heiress of Hellen Fleming, only daughter and heiress of Christopher, Lord Slane. But, as there may be some question as to what was the effect and consequence of the said writs of summons, and some doubt as to some particulars of the evidence upon it, when it comes to be judicially investigated, I am humbly of opinion that this claim should be referred to the consideration and report of the House of Peers, if your Majesty, in your wisdom, should be graciously pleased to do so. (Signed) J. SCARLETT.

The petition having been referred to a committee of privileges, the following history of the family of Fleming of Slane, in the county palatine of Meath, was drawn up and printed as explanatory of, and including, the case of George Bryan, and for the purpose of shewing the origin of the title, or denomination of Baron, in that family, to have been a palatine title, being the grant of Hugh de Lacy, Lord of Meath, to Richard le Fleming, in the reign of King Henry the Second, and not a grant from the king.

The case by way of introduction stated,—

That Baldwyn (or his son Simon) le Fleming, sixth palatine Baron of Slane, was created a baron of parliament, by the title of Lord le Fleming, by writ of summons and sitting in the reigns of King Edward the Second or Third, and that the title became in abeyance between the sisters and co-heirs of Christopher, the fifth Lord le Fleming, 36 Hen. VI.

That David, uncle to the said Christopher, the fifth Lord le Fleming, was created a baron of par-[38]-liament by writ and sitting in the reign of King Edward the Fourth, by the title of Lord Fleming of Slane, and that this title also became in abeyance among the three sisters and coheirs of his son Thomas, Lord Fleming of Slane, who died 8th December, 11 Edw. IV. 1471.

That Sir James Fleming, Knt., was summoned to parliament, and sat in the reigns of king Richard III. and Henry VII. and was thereby created a peer of parliament, by the title of Lord Baron of Slane, and that this peerage became in abeyance among the sisters and coheirs of his grandson, James, Lord Baron of Slane, who died without issue in 1577.

That Thomas Fleming was created a peer of parliament by writ of summons, by the title of Lord Slane (dominus Slane), and dying without male issue, his title became in abeyance between his two daughters, Elinor and Catherine.

That Christopher * Fleming, son of Elinor, the [39] elder daughter and co-heir, was summoned to, and sat in, parliament in 1613 and 1615, and was thereby created a peer of parliament (if the title of his mother's father, Thomas, Lord Slane, was not put virtually out of abeyance in his favour), and that this title is now vested in George Bryan, Esq., as heir general of said Lord Christopher.

The case then proceeded, by way of argument in support of the claim, to give the following historical and genealogical memoir of the peerages which were alleged to have existed successively in the family of Fleming of Slane.

Stephen Flandrensis, who was living at the time of the Norman conquest of England, married the daughter and heiress of Ercenbald, Lord of Bratton, in Devonshire; his son and heir.

Archibald Flandrensis, or le Fleming, succeeded his father and mother, as heir of both, and was Lord of Bratton and Alverdescot in Devonshire.

Richard le Fleming, his son and heir, accompanied Sir Hugh de Lacy, the elder, to Ireland, and obtained from him the grant of the lands of Slane and Newcastle, in the lordship of Meath, which being a palatine honor, the lord thereof had power to give certain rights and liberties which constituted the grantee of the land, a baron, or magnate, of the said palatine honor. The original grant to Richard le Fleming is not, as far as has been discovered, extant, but those of other baronies of Meath have been preserved, by which it appears that some of those grants contained all liberties and free customs which the grantor was able to give, and in general terms constituted what was called a barony, or the most honourable fee in gift of the donor. Some of these baronies or manors were granted to heirs [40] general, others in fee tail. It appears that this barony of Slane and Newcastle was held of the Lord of Meath, as of his manor Duleek, by the service of twenty-one marks for all service *quando scutagium currit*. This appears by an inquisition now in the Tower of London, taken after the death of Simon Fleming, Baron of Slane, in the 45th year of King Edward III. "Quod tenuit baroniam de Slane et Novum Castrum de Bartholomeo Burghershe, milite, de manerio suo de Dyveleke, et quod quidem manerium de Dyveleke, tenetur de Domino rege in capite per servitium viginti marcarum." etc. And in a statute of the Irish Parliament passed 12th and 13th Edw. IV. it appears that the manor of Slane and Newcastle were held in fee tail, by the service of a payment of money (a denier). Maurice Regan, the most ancient historian of the English invasion (secretary and interpreter to Dermot Macmurrough King of Leinster), says, that the service reserved by De Lacy from le Fleming was twenty knights' fees, which is most likely correct, as it is well known that the tenants, in many cases, concealed their real services, and tendered much less than was due: which, once accepted, a precedent was formed which, in after ages, sanctioned the fraud and established it

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* PEDIGREE OF THE BARONS OF SLANE, OF THE PALATINE LORDSHIP OF MEATH, PREVIOUS TO THEIR ELEVATION TO THE PEERAGE.

Richard le Fleming, son of Archibald Fleming, of Devonshire, attended Hugh de Lacy to Ireland and got a grant of twenty knights' fees in Meath, afterwards called the *Barony of Slane and Newcastle*. One of the Magnates, or Barons, of that palatine liberty.

Richard le Fleming, second Palatine Baron of Slane and Newcastle. =

Stephen le Fleming, living at the time of King John, third Palatine Baron of Slane = and Newcastle.

Baldwin le Fleming, fourth Palatine Baron of Slane and Newcastle. =

Richard le Fleming, fifth Palatine Baron of Slane and Newcastle. = Maria Martyn.

Baldwin le Fleming, sixth Palatine Baron of Slane, summoned to = Matilda, daughter of Sir Simon
Parliament by writ, 3 Edward II. first Peer of Parliament. de Geneville.
(See Pedigree A. p. 42.)

on record. Many instances of this are cited by Madox in his Baronia Anglica. Richard le Fleming built a castle at Slane: and in the Annals of Tigernach, under the year 1176, it is stated, that he defended it against the Irish who had besieged it. This Richard had, as before stated, a grant from De Lacy of the manor or barony of Slane and Newcastle in Meath, and thus became the first palatine Baron of Slane, and one [41] of the magnates of the lordship palatine of Meath. He had four sons: Richard, William, of Otterley Fleming, in Devonshire, Henry, and Lawrence.

II. Richard, the eldest son, became heir to his father, and was the second Palatine Baron, or lord of the manor, or barony, of Slane, and was also lord of Bratton, Alverdescot, and Crediho, in Devonshire. His son and heir:

III. Stephen le Fleming became the third Palatine Baron of Slane and Newcastle, as appears by the Plea Roll of the 1st and 2d of King Edward II. in Birmingham Tower; and on the Plea Roll of the 18th King Edward II. he is styled *proavus* to Baldwin le Fleming then Baron of Slane, and to have been seized of the lands of Astmananbeg.* He had two sons, Richard, who left a son Peter, and his son and heir:

IV. Baldwin le Fleming became the fourth Palatine Baron, or lord of the manor, or barony, of Slane. Of him little more appears on record than his existence. He was succeeded by his son and heir:

V. Richard le Fleming, fifth Palatine Baron, or lord of the manor, or barony of Slane. By the Memorandum Roll of the Exchequer of Ireland, of the 4th year of

[42]

PEDIGREE A.

FIRST PEERAGE CREATED BY WRIT.

LORDS LE FLEMING.

Baldwyn le Fleming, Lord of the manor of Slane in the lordship of Meath, one of the Palatine Barons of that lordship, was summoned to the Parliament at Kilkenny, 3 Edw. II. 1309, as *Lord de Fleming*. He was living 4 and 5 Edw. III. 1331, 1332. Pl. Roll. 4 and 5 Edw. III. = Matilda, daughter of Sir Simon de Geneville, Knt. second son of Geffery de Geneville, by Matilda, daughter of Gilbert de Lacy, son and heir of Walter, Lord of Meath, son of Sir Hugh de Lacy, the conqueror of Meath.

Sir Simon le Fleming, Knt. eldest son and heir, sat in Parliament in the reign of King Edward the Third, was placed after Sir Robert Preston, Lord of Kells, in Ossory, and Gormanstown, in Meath. Ob. 14 Edw. III. 1370. = Cecilia Champernon.

Sir Thomas le Fleming, Knt. third Lord le Fleming, aged 12 at his father's death, sat in Parliament 4th Henry IV. Ob. 30 Hen. IV. 1434. = Elizabeth, daughter of Sir Robert Preston, Lord Kells and Gormanstown.

Levita, daughter of Martin Ferrars. = Sir Christopher Fleming, fourth Lord le Fleming, had livery 16 Hen. VI. Ob. 30th Nov. 26 Hen. VI. = Elizabeth Wogan.

William Fleming, second son. *See Ped. C.* p. 53.

John Fleming, only son by first wife. = Anna Rochfort.

David Fleming, only son by second wife. *For him and his issue see Pedigree B.* p. 51.

Christopher Fleming, fifth Lord le Fleming, heir to his grandfather, sat in Parliament 29 Hen. VI. Ob. S. P. 36 Hen. VI. On his death, the peerage created by summons of Baldwyn, or Simon his son, and they, or either of them, sitting in parliament, became in abeyance between his two sisters, and is still in abeyance among their heirs. Their descendants are numerous.

Walter Dillon, Esq. = Anne Fleming, eldest sister and co-heir.

John Bellew. = Amia Fleming second sister and co-heir.

* A.D. 1199. He gave King John 100s. for a writ de Morte Antecessoris, as appears by an entry on the Oblata Roll of the 1st year of that King.

King Edward II. 1310, it appears that Baldwin le Fleming, son of Richard, Baron of Slane, made a charter of his lands of Newcastle. He married Mary, daughter of Nicholas Martin, of Darlington, in Devonshire, by whom he had a son and heir, Baldwyn.

VI. Baldwyn le Fleming, before mentioned, became 6th Palatine Baron of Slane. In an entry on the Plea Roll of the 12 Edward III. (1318) it appears that this Baldwyn le Fleming was seized of the lands of Ruscagh, and that Stephen le Fleming was his proavus. In an entry on the Plea Roll 1313, 7 Edw. II. Baldwyn le Fleming is styled Lord of the manor of Dromconerath in the county of Meath, and son and heir of Richard le Fleming, which fact also appears in an inquisition [43] taken at Exeter, 29 Edward I. This Baron of Slane married Matilda, one of the five daughters of Simon de Geneville, Lord of Culmullen, in the county of Meath, second son of Geoffry de Geneville, Lord of the palatine of Trim, or the moiety of Meath, by Matilda de Lacy, youngest daughter of Gilbert de Lacy, and with her sister Margery de Lacy (wife of Lord John de Verdon, Lord of the other moiety of Meath), were the coheirs of their grandfather Walter de Lacy, Lord Palatine of Meath, son and heir of Hugh de Lacy, first Lord Palatine of Meath. By this marriage he became connected with the noble and powerful family of Mortimer, Earls of March; for Roger Mortimer, Earl of March, married Joan, only daughter and sole heir of Peter de Geneville, Lord of Trim, eldest son of the before-mentioned Geffery de Geneville. Roger Mortimer became Lord of Trim; and his eldest son and heir, Edmond Mortimer, Earl of March and Lord of Wigmore and Trim, married Philippa, daughter and sole heir of Lionel Plantagenet, Duke of Clarence, by Elizabeth de Burgo, daughter and sole heiress of William de Burgo, Earl of Ulster, thus uniting those two great palatinates of Ulster and Trim, which together eventually vested in the crown, in King Edward the Fourth. From this match Baldwyn acquired greater influence and importance than was possessed by any preceding Barons of Slane, the cousin-german of his wife being married to Roger, Earl of March, Lord Justice of Ireland in 1317, 1319, and 1322, a nobleman of the first rank and influence in England, and possessing the sword of the sovereign in Ireland.

The barons of Ireland summoned in 1295 consisted of only twenty-nine individuals, while those [44] summoned in 1309 to the Parliament in Kilkenny, 3 Edw. II. were eighty-seven, an increase or addition of fifty-eight in fourteen years! In Spenser's View of Ireland this is referred to distinctly; and we are indebted to that acute writer for the only light we possess as to the cause of this extraordinary increase in the number of the barons of Ireland, and the introduction of peerages by writ. The passage is as follows:

"Eudoxius—You say well, for by the means of freeholders, their numbers hereby will be greatly augmented, but how shall it pass in the higher house, which still must consist of all Irish."

"Iraeneus—Marry, that also may be redressed by ensamples of that which I have heard was done in like case by King Edward the Third, as I remember, who being greatly bearded and crossed by the Lords of the Clergy, they being there, by reason of the Lords Abbots, and others, too many and too strong for him, so that he could not, for their frowardness, order and reform things as he desired, was advised to direct out his writs to certaine gentlemen of the best ability and trust, entitling them Barons, in the next Parliament, by which means he had so many Barons in his Parliament as were able to weigh down the clergy and their friends."

Among these "gentlemen of the best ability and trust" in 1309 was Baldwin le Fleming, Palatine Baron of Slane, who was summoned to the celebrated parliament held at Kilkenny by (Sir John Wogan being Lord Justice of Ireland) King Edward II. by writ in the following words:—

"Rex, Baldwyno le Fleming, salutem—Sciatis super quibusdam arduis negotiis, nos et statum [45] terre nostre contingentibus, vobiscum habere volumus tractatum specialem, vobis mandamus quod sitis, in propria persona vestra, apud Kilkenniam, die lune, in octavis purificationis beate Marie, ad tractandum et parliamentandum cum Justiciario nostro Hibernie et aliis de concilio (nostro) et cum ceteris proceribus et magnatibus terre nostre super eisdem negotiis. Et hoc nullatenus omittatis in

fide que nobis tenemini. Et habeas ibi hoc breve. Teste Johanne Wogan, Justic. etc. apud Dublin viii die Januarii, anno, regni nostri tertio." *

Similar writs were issued to Richard de Burgo, Earl of Ulster, and 86 other persons (hominibus), of whom Baldwin le Fleming was the 25th. It is to be observed that the writ is directed to Baldwin le Fleming, not to the Baron of Slane: his parliamentary title was therefore Lord Fleming.

No evidence has been discovered to shew that Baldwyn attended this parliament: and it is pro-[46]-bable that he did not, as Sir Robert Preston, the Lord of Gormanstown, had precedence of his son Simon, Lord le Fleming, in the following reign, as Lord of Kells, in Ossory, which title originated in the summons of William de Bermingham to the parliament held at Kilkenny before Roger Outlaw, L. J. in the 4th year of king Edw. III. 1330; he was attainted and executed for high treason in 1332, 6th Edward III., but his son Walter de Bermingham was afterwards restored to his estates, and had a grant of the manor of Kells, in Ossory, for life (which had escheated to the crown by the forfeiture of Lord Arnold le Poer), and sat in parliament as Lord of Kells; his daughter, Margaret, being sole heiress to her brother, carried all the estates, with the honour of Lord of Kells, to her husband Sir Robert Preston, aforesaid. It is therefore evident that this Baldwin, if he ever sat in parliament must have sat subsequently to the sitting of Lord William de Bermingham, or Lord Walter de Bermingham, Lords of Kells. William de Bermingham was a younger of John, Earl of Louth.

Baldwin, Lord le Fleming, was the first Lord of Parliament of this family, not being summoned as Baron of Slane, but, as before stated, by his name only. In the Pipe Roll in Birmingham Tower, in the account of Roger Darcy, escheator, it appears that Baldwin le Fleming died seised of the burgh, barony, and town of Slane, in Meath, which he held of the heirs of Theobald de Verdon, as of their manor of Duleek, and that Simon was his son and heir, and had livery 24th Jan. 23d Edw. III. 1349. He died in the year 1335, 9th Edward III. [47] his wife, Matilda, surviving him; and was succeeded by his son and heir:—

Sir Simon le Fleming, Knt., Lord le Fleming, seventh Baron, or lord of the manor, or barony of Slane, and the second Lord of Parliament of this family, a minor at his father's death in 1335, as appears by the Plea Roll of the Court of K. B. in Bermingham Tower of 10th Edw. III. In 1347 he claimed certain liberties in his manors of Slane and Dromcondragh in the county Meath. "Simon fil. Baldwini le Fleming clamat habere has libertates, videlicet, mercatum in manerio suo de Salne (Slane) singulis septimanis anni, per unum diem, scilicet die lune, cum sak et sok, thol et them, et infangthef, thew, assisam panis, cervisii, et carnis, et hundredum, in manerio suo de Salne, cum pertinentibus, singulis annis, de quindena in quindenam, etc. clamat habere cognitionem placitorum, in manerio de Salne, vetiti namei, lutesie et clamoris, sanguinis effusionis." Rot. Plac. B. T. 21 Ed. III.†

* This Baldwin had also a letter among other magnates of Ireland, "de credentia pro Johanne de Hotham, ad Hiberniam destinato," dated at York, 12th August, 1314, 8 Edw. II. directed "Baldewino le Fleming."

Again, 14th March, 1815.—"Ad prelatos, proceres, et communitates Hiberniae."
Ricardo de Burgo, Earl of Ulster, etc. etc. etc.
Inter alios—
"Baldewino le Fleming."

Again, 4th Jan. 1317.—De Scotis in Hiberniae reprimandis. Inter alios. "Baldewino le Fleming."

Again, 28th April, 1317.—De gestu laudabili, pro terra Hiberniae continuando.
Rex Ricardo de Clare.
Edmundo le Botiller, Comiti Carrick.
Johanni fil. Thomae, Comiti de Kildare.
Et inter alios—
"Baldewino le Fleming."

† Rot. Claus. 4 Ric. 2. No. 4. R. Johi fil. Rery, Esc. Hib. ad petic. etc. mand. quod Tho. filio et heredi Simonis Fleming, Baronis de Slane, defuncti, qui de manerio de Dyveleek, quod de rege tenetur in cap. obiit seisit. (de licentia E. nuper regis existen. nup. in man. Petri Houth et Hugonis Boice, Capill. ex dono Bartholomeo de Burghersh) de terris predictis plen. seisin. habere fac. 17 Oct.

He sat in parliament in the reign of Edward the Third, and was placed after the Lord of Gormanstown, Sir Robert Preston, also Lord of Kells, in right of his wife. This appears by acts of parliament of the 38th Hen. VI. 1460, and the 2d Edw. IV. 1462. This Lord Fleming married Cecilia, daughter of Thomas Champernon, of Modbury, in [48] Devonshire, by whom he had Thomas, his heir, Reginald, and John He died in October, in the 44th year of the reign of King Edward the Third, A.D. 1370, and was succeeded by his eldest son and heir, Thomas.

An inquisition was held at Slane, before Roger Hakenlow, escheator of Ireland, 45th Edw. III. (now in the Tower of London) 1371, to ascertain what lands this Simon held of Edmond de Mortimer, Earl of March, and Lord of Trim, who found as follows:—

"Qui jurati dicunt super sacramentum suum quod Simon Fleming, Baro de Slane, nihil tenuit in dominio, neque in servitio, die quo obiit, de Edmundo, filio et heredi Rogeri de Mortuomari, nuper comitis Marchie, sed dicunt quod tenuit, die quo obiit, baroniam de Slane et Novum Castrum de Bartholomeo Burghershe, Milite, de manerio suo de Dyveleek, et quod quidem manerium de Dyveleek tenetur de domino rege in capite, per servitium xxi. marcarum, de regali servitio, quando scutagium currit, pro omni servitio, etc. etc. Et predictus Simon obiit die veneris, proximo ante festum exaltationis sanctae crucis, anno domini regis nunc xliv. et dicunt quod Thomas Fleming est filius et propinquior heres etatis xii. annorum et non maritatus, etc. etc."

Bartholomew Burghershe married Elizabeth, daughter of Theobald Lord Verdon, lord of the moiety of Meath, and coheir to her brother John Lord Verdon, who died without issue, grand-daughter and coheir of Margery de Lacy, who was grand-daughter and coheir of Walter de Lacy, Lord of Meath, which Margery divided the lordship of Meath with her sister, Matilda de Geneville.

[49] VIII. Sir Thomas Fleming, Knt. third Lord le Fleming, Palatine Baron, or lord of the manor, or barony, of Slane, and third lord of parliament, was twelve years old at his father's death, 1370, and in ward to Sir Robert Preston, Lord Gormanstown. He sat in parliament during the reign of King Richard the Second, being of age in the second year of his reign, 1378, as appears by the statute of 38 Hen. VI. and 2 Edw. IV., and was placed in parliament below the Lord of Gormanstown. In 1405, in a Plea Roll of 7 Hen. IV. he is stated to have been heir to his grandmother Matilda de Geneville. In 1407 he had a pardon for intrusion into his estates without livery. He married Elizabeth, daughter of Sir Robert Preston, Lord of Gormanstown, by whom he had, among other children, Christopher, his heir, and William hereafter mentioned, and dying 13 Hen. VI. 1434, was succeeded by his eldes son and heir:

IX. Sir Christopher Fleming, Knt. fourth Lord le Fleming, ninth Baron, or lord of the manor, or barony, of Slane, and fourth peer of parliament. He did homage for his estate 15 Hen. VI. 1436, as appears by an entry on the Memorandum Roll of the Exchequer of Ireland of that year, and by an entry on the Great Roll of the Pipe of the 16 Hen. VI. 1437, it appears had livery. He married two wives, first, Levita, daughter of Martin Ferrars, of Beer Ferrars, in Devonshire, by whom he had an only son, John; and second, Elizabeth Wogan, *alias* Fitzgerald, by whom he had an only son, David. He died 30th Nov. 26 Hen. VI. 1447, and was succeeded by his grandson:

X. Christopher Fleming, fifth Lord le Fleming, tenth Baron, or lord of the manor of Slane, and [50] fifth peer of parliament, only son of John Fleming, only son of Christopher, Lord Fleming of Slane, by his first wife. This John Fleming died before his father, leaving issue by his wife Anna Rochfort, the said Christopher, heir to his grandfather, and two daughters, Anne and Amia: this Lord le Fleming died without issue, 1457, 36 Hen. VI.; and his two sisters became his co-heirs. An inquistion taken at Holdsworthy, in Devonshire, 12 Edw. VI. 1472, recites a deed made by Sir Christopher Fleming, and his son John, settling their English estates in Devonshire, of Bratton and Alverdescot, on the said Christopher for life, remainder to the heirs male of his body, remainder to his right heirs. The inquisition finds that he married first Levita Ferrars, by whom he had one son, John, and secondly, Elizabeth Wogan, by whom he had one son, David; that said John died before his father, leaving Christopher, heir to his grandfather, and two daughters, Anne, wife of Walter Dillon, and Amia, wife of John

Bellew. That Sir Christopher died, and was succeeded by his said grandson, Christopher, who died without issue, and was succeeded by his uncle David, who married Alice Dillon, and had issue, Thomas, and three daughters, Anne, Margaret, and Elizabeth: that David died, and was succeeded by his son Thomas, who died without issue 11 Edw. IV. 1471, on whose death the settled Devonshire estates went to Anne Dillon and Amia Bellew, as right heirs of Sir Christopher, under the settlement. By an entry on the Close Roll in the Tower of London, it appears that those lands were divided between those co-heirs, 12 Edw. IV.

On the death of this Christopher, Lord le [51] Fleming, the fifth peer of parliament, the peerage created by the summons and sitting of his ancestors, Baldwin, or Simon le Fleming, went into abeyance between his two sisters, Anne Dillon and Amia Bellew, and it continues in that state to this day, among the heirs of those two ladies, of whose descendants there are many families extant. The palatine barony of Slane being held in fee tail, and the Devonshire estates being settled on the heirs male of the body of Sir Christopher Fleming, the fourth Lord Fleming, David, uncle to the last Lord, succeeded to both.

PEDIGREE B.

SECOND PEERAGE CREATED BY WRIT.

PEERAGE OF FLEMING.

David Fleming (only son of Christopher, fourth Lord le Fleming, by his second wife) inherited the manor or barony of Slane, as heir male of his nephew Christopher, the fifth and last Lord le Fleming, who died without issue, and whose title went into abeyance between his two sisters. These ladies inherited the Devonshire property of the family. He was summoned to parliament (with the precedence of the old peerage), and sat 2 Edw. IV. 1462. An act of parliament passed to settle his precedence, and he was placed after Lord (Gormanstown) Kells. Ob. 3 Ed. IV. 1463. = Alice Dillon.

Thomas, Lord Fleming, was aged seven years at his father's death. Ob. s. p. 11 Ed. IV. 1471. On his death, the title created by the summons and sitting of his father, became in abeyance between his three sisters—the manor or barony of Slane, with the other estates, went to his cousin, James Fleming, his male heir. (See p. 53.)	Anne, coheir, æt. 16, 1463.	Margaret, coheir, æt. 15, 1463.	Elizabeth, coheir, æt. 14, 1463.

XI. Sir David Fleming, eleventh Palatine Baron, or lord of the manor, or barony, of Slane, was summoned to Parliament, and sat therein 2 Edw. IV. by the title of Lord David Fleming, Baron of Slane: he is so described in the act of Parliament passed to decide the precedence between him and Lord Gormanstown. It appears that he was allowed, probably by the royal favour of his cousin [52] King Edw. IV. the precedence of the original barony then in abeyance between his nieces. An act was passed that he should be placed after Lord Gormanstown, whose grandfather, Sir Christopher Preston, sat above Lord Thomas Fleming, Baron of Slane, and his great grandfather sat above Lord Simon Fleming, Baron of Slane. He died the year following, 1463, leaving an only son, Thomas, and three daughters, Anne, Margaret, and Elizabeth.

XII. Thomas Fleming, twelfth Palatine Baron, or lord of the manor, or barony, of Slane, and second lord under the summons and sitting of his father, died without issue, 8 Dec. 1471. On which the peerages created by the summons and sitting of his father, went into abeyance among his three sisters, Anne, Margaret, and Elizabeth. The statute 10 Edw. IV. c. 13. enacts, that Thomas Fleming, son of David Fleming, Baron of Slane, should have livery of the lands which his father died seized and possessed of, as if he had been of full age, without process, or inquisition, saving all rights.

On the death of Thomas Lord Fleming, Baron of Slane, the heirs male of the body of Christopher, the fourth peer, became extinct, and the Devonshire estates (excepting the manor of Crediho) reverted to Anne Dillon and Amia Dillon, right heirs of Lord Christopher the settler. But the manor, or barony of Slane, being held in fee tail, went to James Fleming, son of William, brother of Christopher Fleming, father of David, Lord Fleming, and Baron of Slane.

[53]

PEDIGREE C.

THIRD PEERAGE CREATED BY WRIT.

BARONY OR PEERAGE OF SLANE.

William Fleming, of Newcastle, in the county of Meath, Esq. second son of Sir Thomas Fleming, third Lord le Fleming, by Elizabeth Preston. — Genetta Rochfort.

Sir James Fleming, Knt. succeeded to the manor or barony of Slane on the death of his cousin Thomas, Lord Fleming, as cousin and heir male, that estate being held in *fee tail*. He was summoned to and sat in parliament 12 Edw. IV.; at least he is called a baron of parliament in an act 12 Edw. IV. He sat and signed a representation of the Irish Parliament to Richard III. as *James Fleming, Baron of Slane*. Ob. 7 Hen. VII. 1491. — Elizabeth, daughter and heir of Sir William Wells, Knight, Lord Chancellor of Ireland.

Sir Christopher Fleming, Knight, second Lord Slane, aged eighteen at his father's death. Sat in parliament 9 Hen. VII. Ob. 7th Aug. 9 Hen. VIII. — Lady Elizabeth Fitzgerald, daughter of Gerald, Earl of Kildare.

Sir George Fleming, of Stephenstown (See Pedigree D.)

Thomas Fleming, of Derpatrick.

James Fleming, third Lord Slane, aged nine at his father's death. Sat in parliament 41 Hen. VIII. and 2 Elizabeth. Ob. 20 Eliz. s. p. 1577, when the peerages created in his grandfather's summons and sittings became in abeyance between his two sisters. The manor and barony of Slane went to his cousin and heir male, Thomas Fleming.

Catherine, wife of Sir Christopher Barnwell, of Crickstown, Knt. coheir.

Elenor, coheir.

XIII. Sir James Fleming, Knt. (the thirteenth Palatine Baron, or lord of the manor, or barony of Slane) was created a peer of parliament by writ of summons to and sitting in parliament during the reign of King Edward IV. He is, in the statute of the 12 and 13 Edw. IV. cap. 5., called a peer of parliament, and is by that act made sheriff of the county of Meath for one year, which county had hitherto a seneschal appointed by the lord of the palatinate, but being merged into the crown, a sheriff was made by act of parliament. He sat in the parliament held by the Lord Lieutenant of King Richard the Third, and after in the reign of King Henry the VII. The statute of 12 and 13 Edw. IV. cap. 17 and 18. states, that the manors of Slane and Newcastle were held in fee taile, and [54] that James was heir male of Thomas, son of David, late Baron of Slane, and that Alice, widow of David, had a third part of the manor of Slane in dower.* It is rather extraordinary that this Act traces the pedigree of James incorrectly; it says, "that said James is cousin and heir male of Thomas, son of David, that is to say, the son of William, son of Sir Thomas, father of Sir David, father of Thomas;" when in fact the true pedigree is, "son of William, son of Sir Thomas, father of Christopher, father of David, father of said Thomas," as is proved by the inquisition at Holdsworthy, 12 Edw. IV. and other documents. This James succeeded to the manor of Credilio, in Devonshire, which had been formerly settled in taile male, and was not included in the settlement recited in the inquisition at Holdsworthy, 12 Edw. IV. He married Elizabeth, daughter of Sir William Welles, Knt. Lord Chancellor of Ireland, by whom he had three sons, first, Christopher, his heir, second, Sir George Fleming, of Stephenstown, Knt., and third, Thomas Fleming, of Derpatrick, in the county of Meath, Esq. He died 7 Hen. VII. 1491, and was succeeded by his eldest son.

XIV. Sir Christopher Fleming, Knt. (the fourteenth Palatine Baron, or lord of

* 1472—Stat. 11 and 12 Ed. IV. c. 62. Licence of absence to James Fleming, Esq. Lord of Slane, and others.

Ibid. c. 73.—An Act that the King pass an *amoveas manum*, and resoration of James Fleming, Esq. Baron of Slane, to his lands.

Stat. Roll 12 and 13 Edw. IV. c. 18.—Act to remove the hands of the King from the lands of James Fleming, Esq. Baron of Slane.

Ibid. c. 19.—Act to enable said James to enter other lands.

the manor of Slane) was aged 18 at his father's death. By an [55] entry on the Memorandum Roll of the Exchequer of Ireland, it appears he had livery of his estates, as heir of his father, 21 Hen. VII. 1505. An inquisition taken at Navan, 9 Hen. VIII. recites many deeds and settlements of Christopher, Lord Slane; and among them is one, founding a cell for friars, to pray for the souls of himself and family. By patent, dated the 13th Jan., 4 Hen. VIII. 1512, he was appointed Lord High Treasurer of Ireland, was summoned to the parliament which met 9 and 10 Hen. VII.; made a settlement of his estate in 1506, 22 Hen. VII.; and died 7th August, 9 Hen. VIII. By his wife, Lady Ellis Fitzgerald, daughter of Gerald, Earl of Kildare, he had an only son James, and two daughters, Catherine, who became the wife of Sir Christopher Barnwall, and Eleanor.

XV. James Fleming (the fifteenth Palatine Baron, or lord of the manor, or barony, of Slane) was aged nine at his father's death, 1519. By patent, dated 30 Sept. 32 Hen. VIII. 1540, he was made Lord Justice of Ireland. He sat in the famous parliament held the following year, in which Henry VIII. was made King of Ireland. His name also appears on the parliament pawn of the second year of Queen Elizabeth, 1559, among the peers who were then summoned to parliament. In an inquisition held at Ratoath, 40 Elizabeth, 1597, is recited a settlement of his estates made in 1568, first on himself, and the heirs male of his body; then on Thomas Fleming, son and heir of James Fleming, son and heir of Sir George Fleming, of Stephenstown, Knt. and the heirs male of his body. In default thereof, on William Fleming, of Derpatrick, son and heir of George Fleming, of the [56] same, and his heirs male, remainder to the heirs male of Thomas Fleming, of Derpatrick, grandfather of said George.

This Lord James was twice married, first, to Lady Alice Fitzgerald, daughter of Gerald, Earl of Kildare, and secondly, to Ellis, daughter of Christopher Plunket, Lord Killeen. He died 20 Eliz. 1577, when the peerage created by the summons of his grandfather, Sir James Fleming, became in abeyance between his two sisters, Catherine, and Elinor, among whose heirs it is presumed still to remain. The manor of Slane, being settled on the heir male (being also held in tail male, could not, it is presumed, go otherwise) with the other estates, went to Thomas Fleming, of Stephenstown, son of James, son of Sir George Fleming, agreeably to the settlement of 1568, before recited.

[57]

PEDIGREE D.

FOURTH PEERAGE CREATED BY WRIT.

LORD BARON OF SLANE, CLAIMED BY GEORGE BRYAN, Esq.

James, First Lord Slane. See Pedigree C. = Elizabeth Wells.

Sir George Fleming, of Stephenstown, Knt. second son of James, first Lord Slane, or Lord Fleming, of Slane. See Pedigree C. | Elinor Butler.

Thomas Fleming, of Derpatrick, in Meath, Esq. third son of James, Lord Slane. | Mary Cruise.

James Fleming, of Stephenstown, Esq. only son and heir. | Ismay Dillon.

William Fleming of Derpatrick. | Anne Eustace.

Thomas Fleming, of Stephenstown, succeeded to the estates of Slane, &c. on the death of his cousin James, Lord Baron of Slane. Was summoned to parliament 1585, as Lord Slane, and sat that year. Ob. 9 Nov. 1597, when this peerage became in abeyance between his two daughters. = Catherine Preston.

George Fleming, of Derpatrick. | Mary Cusack.

Pierce Butler, of Old Abbey, in Kilkenny, Esq. = Catherine, daughter and coheir.

Elinor Fleming, daughter and coheir. = William Fleming inherited the manor of Slane, as heir male, on the death of Thomas, Lord Slane. Ob. 10 Jas. I. 1612.

Christopher Fleming, son and heir, summoned to and sat in parliament, 1613 and 1615, as Lord Baron of Slane, by which the abeyance of the peerage of his maternal grandfather was terminated. Ob. 1625. | Elinor Barnwall.

Thomas Fleming, Lord Baron of Slane. a friar. Ob. s. p.

William Fleming, Lord Baron of Slane, in his brother's lifetime, with his father's precedence. Summoned to and sat in parliament 1634, his brother living. Ob. 1641. = Lady Anne Macdonnell.

Charles Fleming, Lord Baron of Slane. Ob. s. p.

Elinor Barnwall, first wife. = Randall, Lord Baron of Slane. Ob. 1677.

Lady Penelope Moore, daughter of Henry, Earl of Drogheda.

Richard Fleming, of Staholmock, Esq. = Mary Fleming, only child by first wife. Ob. 1741. = Colonel Oliver, O'Gara, second husband, no issue.

Christopher, Lord Baron of Slane, attainted, but restored in blood 7 Ann. Ob. 1728. = Anne, daughter of Sir Patrick Trant, Bart.

Henry Fleming died unmarried.

Sir Gregory Byrne, Bart. Ob. 1713.

Alice Fleming. only daughter by second wife. Ob. 1753.

James Fleming, only child, died young.

Hellen Fleming, only child, died unmarried, at Paris, Aug. 7. 1748. Buried at St Sulpice.

Charles Byrne Esq. eldest son. Ob. 1752. = Margaret Colclough.

Henry Byrne, of Oporto, in Portugal, second son.

Catherine, daughter of James Eustace, Esq.

Dudley Byrne. Ob. s. p.

John Byrne. Ob. s. p.

Cæsar Byrne. Ob. s. p.

James Byrne. Ob. s. p.

Mary Byrne. Ob. s. p.

Anne Byrne. Ob. s. p.

Margt. Byrne. Ob. s. p.

Frances Byrne. Ob. s. p.

George Bryan. Esq.

Catharine Xaveria, only child.

Eustace Bryan. Ob. s. p. 1876.

George Bryan, of Jenkinstown, now, as sole heir, claims to be Lord Baron of Slane.

[58] XVI. Thomas Fleming (sixteenth Baron, or lord of the manor, or barony, of Slane) had livery of his estates 20 Eliz. 1577. By a parliament pawn, it appears he was summoned to the parliament of the 27th Eliz. 1585; and by other documents it appears he sat therein; and thus a new barony was created in him. He married Catherine, daughter of Jenico, Viscount Gormanstown, by whom he had two daughters, his coheirs, Catherine, who became the wife of Pierce (or Peter) Butler, of the Old Abbey, in the county of Kilkenny, Esq., ancestor to the Lords Viscounts Galmoy; and Elinor, who became the wife of her cousin, William Fleming, heir male to her father. Lord Thomas died 9th Nov. 1597, when the peerage created by his summons and sitting in parliament, went into abeyance between his two daughters, Catherine and Elinor. But the manor, or palatine barony of Slane, went to the heir male, William Fleming, of Derpatrick, son of George, on whom it was settled by the deed of 1568.

The foregoing descent is proved by the recitals in the inquisition of the 40th Eliz. 1597, taken at Ratoath, before alluded to, which states "that James Fleming, of Stephenstown, died, and was succeeded by his son Thomas, who died without issue male, 9th Nov. 1597, and was succeeded by his cousin, William Fleming, of Derpatrick: that Thomas Lord Slane, left two daughters his coheirs, Elinor, wife of her cousin, William Fleming, and Catherine, wife of Pierce Butler, of Kilkenny.

Thus four creations by writ, successively, became in abeyance among coheirs.

XVII. William Fleming (the seventeenth Baron, [59] or lord of the manor, or barony, of Slane) of Derpatrick, succeeded his cousin in the manor or barony of Slane, of which he had livery, 3 Jas. I. 1605. He never was summoned to or sat in parliament, but was called Baron of Slane, and Lord of Slane, as are the heirs of the Husseys, Barons of Galtrim, and of the Nangles, Barons of Navan, to this day. He married Elinor, daughter and coheir of Thomas, Lord Fleming of Slane, by whom he had three sons, first, Christopher, his heir; second, George Fleming of Stephenstown, and third, James Fleming, of Staholmock and Derpatrick. He died 10 James I. 1612, and was succeeded by his eldest son, Christopher.

XVIII. Christopher Fleming, eldest son of William, the seventeenth, became the eighteenth Baron, or lord of the manor, or barony, of Slane; he had livery of his estate the 24th Nov. 10 James I., and was summoned to parliament the 11th and 15th years of King James the First; and it appears he sat in those parliaments. He thereby acquired a peerage descendible to his heirs general, or it should rather be considered as operating as a termination of the abeyance of the peerage created in his mother's father, Thomas, Lord Fleming Baron of Slane, which was then in abeyance between him and his aunt Catherine Butler, mother of Edward Butler, afterwards created Lord Viscount Galmoy. The crown determines an abeyance by patent, only in case of the favoured coheir being already a peer of higher dignity than the barony in abeyance, or in the case of a female, who cannot be summoned to parliament, and whose right is therefore recognised by patent.

By deed (recited in an inquisition taken at [60] Ardee, 1 Char. I. 1625,) dated 29th June, 1624, this Lord Christopher settled his estates first on himself for life, then on his (second) son William, and his heirs male, remainder to his younger sons, John, Patrick, James, and Laurence, in tail male, remainder to his nephew George, of Stephenstown, son of George, remainder to his brother James Fleming of Derpatrick and Staholmock, remainder to Edward Fleming, of Siddon, in the county of Meath, with divers remainders over.

This Lord Christopher Fleming married Elinor, daughter of Sir Patrick Barnwall, of Turvey, Knt., by whom he had six sons; first, Thomas, his heir—second, William—third, John—fourth, Patrick—fifth, James—and sixth, Laurence. The four last died without issue. His lordship died 9th July, 1625.

Thomas Lord Baron of Slane, the eldest son, having embraced the profession of a friar, renounced all his rights to his next brother, William. He was excluded from the estates by his father's settlement of 1625, was a turbulent actor in the troubles of 1641, and the great rebellion which followed, and died without issue.

One of those strange anomalies occurred in the case of this title which exhibits the strongest evidence that the restraints of law influenced the sovereigns of these times very little in their acts. A dispensing power was exerted by the king, whereby he wished to transfer the rights of the peerage from the elder brother to the younger, and even made the transfer a contingency, depending on the will of a subject: thus

William and his heirs male were to be Lords of Slane, during his brother's lifetime, under a king's letter, with a salvo jure, [61] that if the said Thomas renounced his profession of a friar, he should be at liberty to reclaim the honour of the peerage, whilst his brother should descend to the rank of a commoner : but this mandate of the king was not acquiesced in by the House of Lords.

XIX. William Fleming, under his father's settlement, and by his brother's renunciation, became the nineteenth Baron, or lord of the manor, or barony, of Slane; as his brother Thomas never possessed the manor or palatine barony, although he was found by inquisition to be, as he unquestionably was, a baron of parliament, and was entitled to a writ as such.

This William Fleming, as before stated, having obtained a letter, under the signet and sign manual of King Charles the First, commanding that he and the heirs males of his body, should be Lords Baron of Slane, during the life of his elder brother Thomas, provided, however, that if the said Thomas abjured the profession of a friar, and claimed his right, this letter should not be prejudicial to him ; the Lord Deputy took, thereon, the advice of the House of Lords, who recommended and resolved, that William, and his heirs, should be called to parliament by writ ; and, accordingly, a writ issued to call William Fleming to parliament, with the same precedence his father had ; which appears to have been following the practice which had obtained on former occasons : for when David Fleming was called to parliament, in the reign of King Edward the Fourth, it appears he obtained the precedence of the old peerage created in his ancestors, Baldwyn, or Simon, and took his place after Lord Gormanstown ; and so it [62] appears that on all the subsequent creations the new peers obtained the old precedency. From the frequent occurrence of creations, even by patent, giving precedence over old peers, it is evident the crown, in early times, conceived it possessed the power of giving such precedence ; a right which, however, has long since ceased to be asserted or admitted as law. Under this writ, William Fleming, as Lord Baron of Slane, being introduced, took his seat in parliament the next day, the 14th July 1634, as a new peer, between Lords Howth and Dunsany. He married Lady Anne Macdonnell, daughter of Randall, Earl of Antrim, by whom he had four sons, first, Charles his heir—second, Randall, heir to his brother—third, Michael, who died unmarried, whose will is dated 24th April, 1669, and proved in Dublin, and—fourth, Thomas of Gillanstown, in the county of Meath, who left an only son William, who on the death of Christopher, Lord Slane, son of Randall, assumed the title of Lord Baron of Slane, as heir male, under, it is presumed, the import of King Charles's letter ; but that letter, if it had been acted on, only said that William and his heirs male should be Lords Barons of Slane during the lifetime of Thomas his elder brother, who survived his brother William, Lord Slane. William, Lord Slane, was, after his death, outlawed for high treason, (18 Char. I. 1642,) but was afterwards declared innocent. He died in 1641, and was succeeded by his eldest son :

XX. Charles Fleming, the twentieth Baron, or lord of the manor or barony of Slane, became Lord Baron of Slane. He died in Italy in 1661, unmarried, and was succeeded by his brother.

[63] XXI. Randall Fleming, the twenty-first Baron or lord of the manor, or barony, of Slane. An inquisition taken at Navan, 29 Char. II. 1677, finds that Randall, Lord Slane, had been restored to his estates,—and had then three sons, Christopher, seven years five months and seventeen days old,—Henry, six years nine months and six days old,—and Randall, three years ten months and three days old. Lord Randall married, first—Elinor, daughter of Sir Richard Barnwall of Crickstown, Bart., by whom he had an only daughter, Mary, aged, at her father's death, eleven years six months and twenty days, who was first married to Richard Fleming, son of Sir John Fleming of Staholmock, Knt., by whom she had an only son, James, who died young and unmarried. She married, secondly, Oliver O'Gara, Esq., by whom she had no issue. Said Randall, Lord Slane, married secondly, (5th Sept. 1673,) Lady Penelope Moore, daughter of Henry, first Earl of Drogheda, by whom he had three sons, as above—Christopher—Henry—and Randall, and a daughter—Alice : the two youngest sons died without issue. Lord Randall made his will 18th Feb. 1674, and dying 22d Oct. 1676, was succeeded by his eldest son.

XXII. Christopher Fleming, twenty-second Baron, or lord of the manor, or barony, of Slane, sat in King James the Second's pretended parliament in 1689, but being

afterwards outlawed and attainted for high treason, was deprived of all his estates: he was, by an English Act of Parliament, restored in blood, but not to his estates. Queen Anne issued a Queen's letter, in the year 1712, to create him Viscount Longford, of the kingdom of Ireland: but no patent was issued. [64] He had a pension of £500 per annum, on the Irish establishment, 1707. The 19th Sept. 1684, he married Anne, daughter of Sir Patrick Trant, Bart., by whom he had an only daughter, Hellen. He died intestate, and administration of his effects was granted 13th June, 1728. On his death (the manor or barony of Slane having been forfeited and sold, the palatine barony became annihilated) the dignity of the peerage (created by the summons of Thomas, Lord Baron of Slane, in 1585, which became in abeyance on his death between his two daughters, Catherine and Elinor, and which abeyance was terminated in the summons and sitting of Christopher, Lord Slane, in 1613 and 1615) vested in Hellen, his only daughter, who died unmarried at Paris, in 1748, whereupon the peerage aforesaid went to her aunt, Alice, the only daughter of Randall, Lord Slane, by his second wife, who became Baroness of Slane in her own right, on the death of her niece Hellen, but did not assume the title: she married Sir Gregory Byrne, of Tymoge, in the Queen's County, Bart., by whom she had several children, viz. Charles, the eldest son, died in 1752, his mother being then alive, leaving four sons, Dudley, John, Caesar, and James, who all in succession became Barons of Slane, but did not assume the title; and four daughters, Mary, Anne, Margaret, and Frances. Dudley died unmarried in 1756, John and Caesar died unmarried in Germany, and James was drowned in the river Liffey, in 1777, unmarried. The daughters also all died unmarried. Henry Byrne, Esq., the second son of Sir Gregory Byrne, married Catherine, daughter and coheir of James Eustace, of Yeomanstown, in Kildare, Esq., [65] and had an only daughter, Catherine-Xaveria, who on the death of James Byrne, in 1777, became Baroness of Slane. She married, in 1762, George Bryan, of London, Esq. second son of Pierce Bryan, of Jenkinstown, in the county of Kilkenny, Esq., by whom she had George Bryan, of Jenkinstown, Esq. her eldest surviving son and heir, and also heir of Alice, Lady Byrne, Baroness of Slane, and also of the said Randall, Lord Slane, William, Lord Slane, and of Christopher, Lord Slane; who either was created a peer by writ of summons and sitting in parliament in the years 1613 and 1615, or, the abeyance of the peerage, created by the summons and sitting of Thomas, Lord Slane, in 1585, between Catherine and Elinor, the two daughters of the said Thomas, was terminated, in his favour, by the said summons and sitting of said Lord Christopher, in 1613 and 1615. Catherine-Xaveria died 19th February, 1779, and was succeeded by her eldest son Eustace, who died unmarried in 1786, and was succeeded by his next brother, George Bryan, Esq., who claims to be Lord Baron of Slane, on three grounds: first, as heir of Christopher, son and heir of Elinor, eldest daughter and co-heir of Thomas, Lord Slane, summoned to parliament in 1585, the abeyance of which title was terminated by the summons and sitting of said Christopher in the parliament of 1613; or, secondly, as heir of the said Christopher, supposing such summons not a termination of the abeyance, who was summoned and sat in parliament in 1613 and 1615, and so became a new peer; or, thirdly, as heir to William, Lord Slane, second son of said Christopher, who was summoned to and sat in [66] parliament in 1634, his eldest brother Thomas, a Roman Catholic priest, being then alive.

This case was signed by Mr. Crampton.

A supplemental and explanatory case was shortly afterwards printed and presented, stating as follows: Although diligent search has been made, no patent is to be found on record, of the creation of any person to be Baron of Slane; but, by a Parliament Pawn now remaining in the Rolls' Office of the Chancery of Ireland, it appears that Thomas Fleming (Palatine Baron, or Lord of the manor, or barony, of Slane) was summoned to the Parliament of the 27th Elizabeth, 1585 (Parliament Pawn, 1585); and by other documents it appears he sat therein: * and thus a barony in fee was created in him. He married Catherine, daughter of Jenico, Viscount Gormanstown, by whom he had two daughters, his co-heirs,—Elinor, who became the wife of her cousin, William Fleming, heir male to her father; and Catherine, who became the wife of Pierce (or Peter) Butler, of the Old Abbey, in the county of Kilkenny, Esq., ancestor to the Lords Viscounts Galmoy. Lord Thomas died 9th Novem-

* Book in the Office of Ulster King of Arms, called "Cases of Precedence."

ber, 1597, when the peerage created by his summons and sitting in Parliament, went into abeyance between his two daughters, Elinor and Catherine. But the manor, or palatine barony of Slane, went to the heir male, William Fleming, of Derpatrick, son of George, son of William, son of Thomas, brother of Sir George Fleming, father of James, father of Thomas [67] Lord Slane, on whom it was settled by a deed made in 1568.*

William Fleming, of Derpatrick, succeeded his cousin in the manor or barony of Slane, of which he had livery, 3 James I. 1605. He never was summoned to or sat in Parliament, but was called Baron of Slane, and Lord of Slane, as are the heirs of the Husseys, Barons of Galtrim, and of the Nangles, Barons of Navan, to this day. He married Elinor, daughter and co-heir of Thomas, Lord Fleming of Slane, by whom he had three sons, first, Christopher, his heir, second, George Fleming, of Stephenstown, and third, James Fleming, of Staholmock and Derpatrick. He died 10th James I. 1612, and was succeeded by his eldest son, Christopher.†

Christopher Fleming, eldest son of William Fleming, became the eighteenth Baron, or Lord of the manor, or barony, of Slane; he had livery of his estate the 24th November, 10th James I., and was summoned to Parliament the 11th and 15th years of King James the First, and it appears he sat in those parliaments.‡ He thereby acquired a [68] peerage descendible to his heirs general, or it should rather be considered as operating as a termination of the abeyance of the peerage created in his mother's father, Thomas Lord Fleming, Baron of Slane, which was then in abeyance between his mother and Catherine Butler, mother of Edward Butler, afterwards created Lord Viscount Galmoy. The Crown determines an abeyance by patent, only in case of the favoured coheir being already a peer of higher dignity than the barony in abeyance, or in the case of a female, who cannot be summoned to parliament, and whose right is therefore recognised by patent.

By deed (recited in an inquisition taken at Ardee, 1 Charles I. 1625) dated 29th June, 1624, this Lord Christopher settled his estates first on himself for life, then on his (second) son William, and his heirs male, remainder to his younger sons, John, Patrick, James, and Laurence, in tail male, remainder to his nephew George, of Stephenstown, son of George, remainder to his brother James Fleming, of Derpatrick and Staholmock, remainder to Edward Fleming, of Siddon, in the county of Meath, with divers remainders over.

This Lord Christopher Fleming married Elinor, daughter of Sir Patrick Barnwell, of Turvey, Knt. by whom he had six sons; first, Thomas, his heir—second, William—third, John—fourth, Patrick—fifth, James—and sixth, Laurence. The four last died without issue. His Lordship died 9th July, 1625.

Thomas, Lord Baron of Slane, the eldest son, [69] having embraced the profession of a friar, renounced all his rights to his next brother, William. He was excluded from the estates by his father's settlement of 1625, was a turbulent actor in the troubles of 1641, and the great rebellion which followed, and died without issue.

One of those strange anomalies occurred in the case of this title, which exhibits the strongest evidence that the restraints of law influenced the sovereigns of those times very little in their acts. A dispensing power was here exerted, whereby the king wished to transfer the rights of the peerage from the elder brother to the younger, and even made the transfer a contingency, depending on the will of a subject: William, and his heirs male, were directed to be Lords of Slane, during his brother's

* The foregoing descent is proved by the recitals in an inquisition of the 40th Elizabeth, 1597, taken at Ratoath, which states—"that James Fleming, of Stephenstown, died, and was succeeded by his son Thomas, who died without issue male, 9th Nov. 1597, and was succeeded by his cousin, William Fleming, of Derpatrick; that Thomas Lord Slane left two daughters his co-heirs, Elinor, wife of her cousin, William Fleming, and Catherine, wife of Pierce Butler, of Kilkenny."

† Book of Funeral Entries of the Nobility and Gentry of Ireland, from 1604 to 1622, in the office of Ulster King of Arms.

‡ Cases of Precedence; also the return to a commission, dated 27th August, 11 Jac. I., to inquire into certain disorders in Ireland; and, among others, why certain Peers left their house, and ceased their attendance; from the Rolls Office of the Chancery of Ireland, by which it appears that Lord Slane sat in that Parliament.

life-time, under a king's letter, with a *salvo jure*, that if the said Thomas renounced his profession of a friar, he should be at liberty to reclaim the honour of the peerage, whilst his brother should descend to the rank of a commoner ; but this mandate of the King was not acquiesced in by the House of Lords.

William Fleming, under his father's settlement, and by his brother's renunciation, became nineteenth Baron, or Lord of the manor, or barony, of Slane; as his brother Thomas never possessed the manor or palatine barony, although he was found by inquisition to be, as he unquestionably was, a Baron of Parliament, and was entitled to a writ as such.

This William Fleming, as before stated, having obtained a letter, under the signet and sign manual of King Charles the First, commanding that he and the heirs male of his body, should be Lords Barons of Slane, during the life of his elder brother [70] Thomas, provided, however, that if the said Thomas abjured the profession of a friar, and claimed his right, this letter should not be prejudicial to him ; the Lord Deputy took thereon the advice of the House of Lords, who recommended and resolved, that William and his heirs should be called to Parliament by writ; and accordingly a writ issued to call William Fleming to Parliament, with the same precedence his father had, which appears to have been following the practice which had obtained on former occasions; for when David Fleming was called to Parliament, in the reign of King Edward the Fourth, it appears he obtained the precedence of the old peerage created in his ancestors, Baldwyn, or Simon, and took his place after Lord Gormanstown, and so it appears that on all the subsequent creations the new peers obtained the old precedency. From the frequent occurrence of creations, even by patent, giving precedence over old peers, it is evident the Crown, in early times, conceived it possessed the power of giving such precedence ; a right which, however, has long since ceased to be asserted or admitted as law. Under this writ, William Fleming, as Lord Baron of Slane, being introduced, took his seat in Parliament the next day, the 14th July, 1634, as a new peer, between Lords Howth and Dunsany. He married Lady Ann Macdonnell, daughter of Randall, Earl of Antrim, by whom he had four sons; first, Charles, his heir—second, Randall, heir to his brother—third, Michael, who died unmarried, whose will is dated 24th April, 1669, and proved in Dublin, and—fourth, Thomas of Gillanstown, in the county of Meath, who left an only son, William, who, on the death of Christopher [71] Lord Slane, son of Randall, assumed the title of Lord Baron of Slane, as heir male, under, it is presumed, the import of King Charles's letter, but that letter, if it had been acted on, only said that William and his heirs male should be Lords Barons of Slane during the lifetime of Thomas, his elder brother, who survived his brother William, Lord Slane. William, Lord Slane, was, after his death, outlawed for high treason, (18 Charles I. 1642,) but was afterwards declared innocent. He died in 1641, and was succeeded by his eldest son :

Charles Fleming, the twentieth Baron or Lord of the manor or barony of Slane, became Lord Baron of Slane. He died in Italy, in 1661, unmarried, and was succeeded by his brother :

Randall Fleming, the twenty-first Baron or Lord of the manor, or barony of Slane. An Inquisition taken at Navan, 29th Charles II. 1676, finds, that Randall, Lord Slane, had been restored to his estates, and had then three sons, Christopher, seven years five months and seventeen days old,—Henry, six years nine months and six days old,—and Randall, three years ten months and three days old. Lord Randall, married first, Elinor, daughter of Sir Richard Barnwall, of Crickstown, Bart., by whom he had an only daughter, Mary, aged at her father's death, eleven years six months and twenty days, who was first married to Richard Fleming, son of Sir John Fleming of Staholmock, Knt., by whom she had an only son, James, who died young and unmarried. She married, secondly, Oliver O'Gara, Esq., by whom she had no issue. Said Randall, Lord Slane, married secondly, (5th September, 1673,) Lady Penelope Moore, daughter of Henry first Earl of Drogheda, by whom he had [72] three sons as above—Christopher—Henry—and Randall, and a daughter—Alice: the two youngest sons died without issue. Lord Randall made his will 18th Feb. 1674, and dying 22d Oct. 1676, was succeeded by his eldest son.

Christopher Fleming, twenty-second Baron, or Lord of the manor, or barony, of Slane, sat in King James the Second's pretended Parliament in 1689, but being

afterwards outlawed and attainted for high treason, was deprived of all his estates; he was, by an English Act of Parliament, restored in blood, but not to his estates. Queen Anne issued a Queen's letter, in the year 1712, to create him Viscount Longford, of the kingdom of Ireland; but no patent was issued. He had a pension of £500 per annum, on the Irish establishment, 1707. The 19th September, 1684, he married Anne, daughter of Sir Patrick Trant, Bart., by whom he had an only daughter, Helen. He died intestate; and administration of his effects was granted 13th June, 1728. On his death (the manor or barony of Slane having been forfeited and sold, the Palatine Barony became annihilated) the dignity of the Peerage (created by the summons of Thomas Lord Baron of Slane, in 1585, which became in abeyance on his death, between his two daughters, Elinor and Catherine, and which abeyance was terminated in the summons and sitting of Christopher Lord Slane, in 1613 and 1615,) vested in Helen, his only daughter, who died unmarried at Paris, in 1748, whereupon the peerage aforesaid went to her aunt, Alice, the only daughter of Randall, Lord Slane, by his second wife, who became Baroness of Slane in her own right, on the death of her niece Helen, but did not assume the title; she married Sir [73] Gregory Byrne, of Tymoge, in the Queen's County, Bart., by whom she had several children, viz. Charles, the eldest son, died in 1752, his mother being then alive, leaving four sons, Dudley, John, Caesar, and James, who all in succession became barons of Slane, but did not assume the title; and four daughters, Mary, Anne, Margaret, and Frances. Dudley died unmarried in 1756, John and Caesar died unmarried in Germany, and James was drowned in the River Liffey, in 1777, unmarried. The daughters also all died unmarried.* Henry Byrne, Esq., the second son of Sir Gregory Bryne, married Catherine, daughter and co-heir of James Eustace, of Yeomanstown, in Kildare, Esq., and had an only daughter, Catherine-Xaveria, who, on the death of James Byrne, in 1777, became Baroness of Slane.† She married, in 1762, George Bryan, of London, Esq., second son of Pierce Bryan, of Jenkinstown, in the county of Kilkenny, Esq. (Parish Register of St. Clement's Danes), by whom she had George Bryan, now of Jenkinstown, Esq., her eldest surviving son and heir, and also heir of Alice Lady Byrne, Baroness of Slane, and also of the said Randall, Lord Slane, William, Lord Slane, and of Christopher, Lord Slane, who either was created a peer by writ of summons and sitting in Parliament, in the years 1613 and 1615; or the abeyance of the peerage created by the summons and sitting of Thomas, Lord Slane, in 1585, between Elinor and Catherine, the two daugh-[74]-ters of said Thomas, was terminated in his favour by the said summons and sitting of said Lord Christopher in 1613 and 1615. Catherine-Xaveria died 19th Feb. 1779 (entries in the family missal), and was succeeded by her eldest son Eustace, who died unmarried in 1786, and was succeeded by his next brother, George Bryan, Esq., who claims to be Lord Baron of Slane, on three grounds; first, as heir of Christopher, son and heir of Elinor, eldest daughter and co-heir of Thomas, Lord Slane, summoned to Parliament in 1585, the abeyance of which title was terminated by the summons and sitting of said Christopher in the Parliament of 1613; or, secondly, as heir of the said Christopher, supposing such summons not a termination of the abeyance, who was summoned and sat in Parliament in 1613 and 1615, and so became a new peer; or, thirdly, as heir to William, Lord Slane, second son of said Christopher, who was summoned to and sat in Parliament in 1634, his eldest brother Thomas, a Roman Catholic priest, being then alive.

This case was also signed by Mr. Crampton.

In 1831, Mr. Fleming proceeded on his petition, and printed and presented to the House the following case and argument, claiming the Barony of Slane, as heir male.

The case, which Mr. George Bryan has submitted to the house of peers, is founded upon the allegation, that the barony of Slane, which has hitherto been considered as ONE ancient Irish barony, is, in reality, composed of six distinct peerages in fee—That these peerages, although alleged to have been created at six different [75] periods, from 1309 to 1634, in the family of Fleming, are all now co-existing in the respective heirs general of the six individuals so ennobled, and are all entitled to

* Bill filed in Chancery of Ireland and Answer thereto, 4th Jan. 1774. Paper Case referring to the above suit, found in the possession of James Butler, Esq.

† Pedigree found among the family papers of claimant, in the hand-writing of his father.

precisely the same place, and precedency: of which peerages Mr. Bryan claims to be entitled in his own person, to a share of the fourth, and the whole of the fifth and sixth.

These creations are stated by the case to have taken place as follows:

1st, The peerage of Lord le Fleming, 1309, 3rd Edw. II. 2nd, Lord Fleming, 1462, 2nd Edw. IV. 3rd, Baron of Slane, Edw. IV. 4th, Lord Baron of Slane, 1585, 27th Eliz. 5th, Lord Baron of Slane, 1613, 11th Jas. I. 6th, Lord Baron of Slane, 1634, 10th Chas. I.

In opposition to this statement, the following allegations are humbly submitted:

1st. That in all and each of these instances of supposed creation of peerage, the individuals so alleged to have been ennobled, were previously peers of the realm, and Lords of Parliament by inheritance.

2d. That if these individuals had not been peers by inheritance, the immediate agency of an adequate legal and constitutional power so to ennoble them, has in no one instance been proved to have intervened in these alleged creations of peerage.

3d. That even supposing the power of ennobling commoners without the specific sanction of the royal authority, and of creating peerages by writ of summons to the parliaments of Ireland, to have legally, and constitutionally vested in the option and pleasure of the successive Lords Lieutenant, and Lords Justices of Ireland, and even of [76] their deputies, who were often themselves commoners, the proofs usually deemed necessary in England, where peerages by writ actually exist, to substantiate such creations by royal writ of summons to, and sitting in parliament in virtue thereof, have not been produced by Mr. Bryan, in any one instance of these six alleged creations.

4th. That as in every one of these supposed creations in fee, each alleged new peer is shewn by Mr. Bryan himself, in his case, to have been the male heir, not only of each preceding Lord, but also of Archenbald le Fleming, the founder of the family of Fleming in Ireland, in the reign of Henry II.; and as each took his seat accordingly, without question or dispute, amongst the most ancient barons of Ireland, the only legal and constitutional inference is, that they all succeeded in such character of male heir, as of right, to the rank and precedency of their ancestors.

5th. That on the successive claims by all these male heirs to the rank and place in parliament, held by their predecessors, in no one instance did the female heirs of such respective predecessors, make any objection to such claim, or prefer any claim, on their part to the peerage.

6th. That the calling into actual co-existence so many baronies in fee, of the creation and existence of which, neither the crown, the legislature of Ireland, nor the parties concerned, appear hitherto to have entertained the least suspicion, and to all of which have been awarded precisely the same rank and precedency in parliament, would occasion considerable difficulty as to the future allocation of the peers of Ireland, not only with regard to the five or six peerages thus made [77] to branch out from the barony of Slane, but which would extend to the numerous peerages into which all the other ancient baronies of Ireland would be found to be similarly subdivided.

First alleged peerage.

The only ground which the case of Mr. Bryan advances to prove that the dignity of Baron of Slane was not a Peerage of Parliament, but a palatine honor, is that the manor of Slane was, in the reign of King Edward the Third, held of the heirs of de Lacy Lord of Meath, by feudal service, although it is fully admitted, that Baldwyn and Simon le Fleming, Barons of Slane, who are proved so to have held it, were Peers of Parliament.

This doctrine, which would, contrary to all law and precedent, prove that the crown could not confer the dignity of the Peerage in Ireland upon whom it pleased, is contradicted by Mr. Bryan's own case; for if King Edward the Second could ennoble Baldwyn le Fleming, it must be admitted that the former kings had the same power of elevating Baldwyn's ancestors to the rank of peers.

No evidence is produced in Mr. Bryan's case, to shew that de Lacy ever granted the manor of Slane to Fleming. It appears from Maurice Regan, a contemporary historian, that Crenoda was conferred by de Lacy upon Richard Fleming, to hold by twenty knights' fees; but Richard was not the ancestor of the barons of Slane, and

Slane was never held by knights' fees, but by the payment of one penny a year for all manner of service.

Archenbald le Fleming, of Bratton, in Devonshire, was one of the leaders under Henry II., in [78] the invasion of Ireland. Besides his manors of Slane and Newcastle, on the river Boyne, he and his son were possessed of the extensive manors of Astmaynbeg, Astmayveynmore, and Newcastle de Iskertenen, in Tipperary, which were held of the crown in capite. (Plea Rolls, 28th Edward I., 1st, 2nd, and 5th Edward II.) Archenbald was the first witness to the charter of Philip Telynge to his burgesses of Syddan, which is exemplified in the statute 15th and 16th Edward IV., cap. 51, and the light in which he so added his confirmatory signature to the instrument, is sufficiently explained by the act, which directs the portreve of Syddan, to render his accounts annually to the bishop of Meath, the abbot of St. Thomas the Martyr, (rector of Syddan,) and "le Baron de Slane, Chief Seigneur del Baronie," all for the time being.

The Plea Rolls, 1st and 2nd Edward II., prove that he was the father of Stephen le Fleming, who, in 1185, with nine principal attendants, and fifty horses, accompanied Prince John, then appointed Lord of Ireland, to take possession of his government. The sheriff of Devonshire charges 66s. 8d. in his accounts for his expenses. (Pipe Roll, L. 31 Henry II.) In 1199, he gave the king one hundred shillings for a writ of mort d' ancestor, for thirty carrucates of land, which he sought against Adam Rudypac, and for ten carrucates against Reginald le Poer. (Oblata Roll, T. L. 1 John.) The suit against the former related to lands in Meath, as from the Plea Roll, 6th Edward I., it appears that the estates of Rudypac were on the Boyne. That against Poer was for lands in Tipperary. In both cases the king was the lord to whom the fine was paid.

[79] Stephen attended king Henry III. in his first expedition into Gascony, and during his absence, Philip de Wignoria seised his possessions in Tipperary. (Plea Roll, 1 Edward II.) In the two following reigns, the heirs of Stephen took proceedings at law for their recovery. Baldwyn, his great grandson, in consideration of a sum of money, relinquished to Philip de Prendergast by his charter, commencing with these words, "Baldewynus le Fleming, filius Ricardi, Dominus de Slane," his rights to Newcastle de Eskertenen. (Memorandum Roll, 4 Edward II.) The other estates were recovered; but owing to the English power becoming circumscribed to the districts within the pale, they were lost to his descendants.

Stephen was succeeded by his son Baldwyn. (Plea Roll, 1 Edward II.) In 28th Henry III., the king summoned twenty-one Irish kings and princes, and ten of his principal Anglo-Irish magnates, or peers, amongst whom is Baldwyn Fleming, to attend him in his wars against the King of Scotland. Having made peace, he wrote letters of thanks to each of them, and requested to have their services in the ensuing summer; after which, they should return to Ireland with manifold honors and suitable rewards. This writ establishes that in the reign of Henry III., the head of the family of Fleming was considered a magnate of Ireland, and classed with the other great barons of that kingdom. (Close Roll, T. L. 28 Henry III., m. 7. d.) Baldwyn was succeeded by his son Richard. (Plea Roll, 1st Edward II.)

From the succession of Richard to the peerage, the descent of the dignity of Baron of Slane, can be clearly traced by the public records of Ireland, [80] which, with some exceptions, are extant from the reign of Edward I.

It is objected, in Mr. Bryan's case, that although Richard is officially styled Baron of Slane, yet that he was not a Peer of Parliament. The only ground for this objection is, that in the list of a Parliament, stated by Sir Richard Cox to have been held in Ireland in 1295, his name does not appear. The original roll, from which the list was taken, is extant in the Tower of London. (Close Roll, 2 Edward I.) The writ is not a summons to parliament, but a letter of credence for John Wogan, the justice, directed to several magnates of Ireland.

Richard Lord Slane was from the 22nd Edward I., to the 29th of the same reign, in which year he died, constantly engaged as a tenant of the crown for his manors in Devon in the wars which the King waged against Scotland and Wales. (Close Rolls 25th and 29th Edward I. Welsh Roll 22nd same reign.) The King most certainly would not have given the Lord Justice of Ireland a letter of credence to a nobleman employed in his service in another country. It may also be remarked, that Richard Lord Slane is not the only great Baron of Ireland whose name does not appear in the

list. Lord Courcy, of Kinsale, is not named in it, although his heir male and successor, was, after a long and solemn investigation, adjudged precedence above the Lord of Kerry, the name of whose ancestor, Maurice Fitz-Thomas, appears in the writ.

But if Lord Slane were not absent from Ireland, and if the names of other great Barons were not omitted, it is submitted that the omission of his name in such a writ, could be no evidence against [81] his Peerage; the document neither purports to be addressed to, nor to name, all the magnates of Ireland; it, and writs of a similar nature, were addressed only to those, whose services the Crown at the time required. Even in the Parliamentary writs of summons of the reigns of Edward III. and Richard II., when the Peerage is admitted to have been in existence, the name of the then Baron of Slane does not once occur.

The construction which Mr. Bryan's case would put upon the style of "Baron of Slane" in the Fleming family, is not only unsupported by evidence, but absolutely contradicted by the documents therein cited. In two entries on the Pipe and Memorandum Rolls of 6th Edward I., Richard is styled "Ricardus le Fleming Baro de Slane." In a charter enrolled on the Memorandum Roll of the fourth year of the following reign, (which is cited, but mistranslated, in Mr. Bryan's case, page 7.) his son and successor, styled himself "Baldewynus le Fleming, filius Ricardi, Dominus de Slane;" in another deed dated two years subsequently, he calls himself "Baldewynus le Fleming, Baro de Slane," (Mem. R. 6 Edw. II.) In the Pipe Roll of the following year, he is styled "Baldewynus le Fleming Dominus de Slane." It is proved by the statute, 2 Edward IV. cap. 15. that Baldwyn's son, grandson, and great-grandson, sat as peers of parliament solely by the title, style, and dignity of Baron of Slane. The act 38 Henry VI. cap. 30. states that the ancestors of Lord Gormanston, at whose prayer both these statutes were passed, had from the time of "Richard jaditz Roy d'Engleterre" precedence in parliament of each Baron of Slane, and the statute 2 Edward IV. [82] (cap. 15.) enacts that Lord Gormanston should have precedence above every Baron of Slane that ever should be. Finally there is not a single record in existence, in which any other title of honour, save that of Slane, is applied to the head of the family.

Richard Lord Slane, having been killed in the Scotch wars, in 29 Edward I., was succeeded by his son Baldwyn, the fifth Baron of Slane and Peer of Ireland, in succession. It is in the person of this nobleman, and on the pretence of a writ of summons, directed to him in the third year of Edward II., that Mr. Bryan would found his first peerage in fee. This writ is the earliest summons to the parliament of Ireland extant on the rolls; and even had it been the law or custom of Ireland, to create peers by writ, which for reasons to be hereafter stated, it is submitted it never was, this summons could not have had a creative effect, as no evidence can be adduced to prove that the individual summoned, was not previously a peer of the realm.

The Roll itself contains evidence which clearly disproves the conclusions attempted to be drawn from the writ, by Mr. Bryan's case. After reciting a copy of the summons directed to the Earl of Ulster;—in allusion to the persons summoned, it states;—that similar writs were directed to divers prelates and other peers and men in Ireland. In continuation, it says, that at the appointed day, all those who were summoned appeared before the Justice and others of the King's council; when a petition on the part of the King was read, praying the prelates, earls, and barons, and other good men of the community of the land, who came by [83] summons ("prelates, countes, e barons e autres bones genz de la communiaute de la tre q s [ ] venuz p somance)" to watch over the welfare of Ireland, etc. This decisively proves that besides the earls and barons, various other persons were summoned to, and sat in, this parliament; and that these individuals were not peers, even whilst they sat in parliament, in virtue of their writs of summons. It consequently follows that this writ of summons could not have created a peerage.

It is therefore confidently submitted, that Baldwyn and his successors, whose peerage, in consequence of the existence of official records, cannot be denied, must have derived their dignity by some other means than the summons of Edward II., and that, as he inherited the dignity of Baron of Slane from his ancestors, and transmitted it to his posterity, he must be ranked amongst those Barons who in their capacity of peers of the realm, with the earls, and good gentlemen who were summoned, gave their advice to the King.

It is rather curious, that Mr. Bryan's case (page 10.) should, in opposition to the before-mentioned document, state "that no evidence had been discover'd to shew that Baldwyn attended this parliament, and it is probable that he did not."

Baldwyn, unlike his father, resided principally in Ireland, and in consequence, there were six writs of credence and military summons, directed to him, with the other magnates of Ireland, during the reign of Edward II.

It is rather a proof of conscious weakness that Mr. Bryan should base his claim upon an historical suppression of the utmost importance to his case.

In consequence of the notoriety of the fact of [84] the continued male descent of all the existing ancient baronies of Ireland, from the reign of King Henry VII. to the present time, it became necessary to shew that a class of peerages in fee, was anciently introduced into Ireland, and Edmond Spenser was fixed upon as the highest and only authority for this historical event. "We are indebted," says the case, (page 8.) "to that acute writer, for the only light we possess as to the cause of this extraordinary increase in the number of the barons of Ireland, and the introduction of peerages by writ." It then quotes, amongst others, the following words from Spenser, in support of this position: "King Edward III. was advised to direct out his writs to certaine gentlemen of the best ability and trust, entitling them barons, in the next parliament; by which means, he had so many barons in his parliament, as were able to weigh down the clergy and their friends;" but it suppresses the conclusion of Spenser's sentence, from which it appears that the dignities accruing from these writs, were not peerages in fee, or, indeed, peerages at all; "the which barons, they say, were not afterwards Lords, but only Baronets, as sundry of them doe yet retayne the name." Thus Spenser, their own and sole authority, contradicts the only fact which he is produced to prove.

In conclusion, it may be stated, that even upon the principles laid down in Mr. Bryan's case, it can be clearly proved that the title of Baron of Slane was not a palatine honor. It is admitted throughout his case, that a palatine honor can only exist by the seisin of the lands from which its name is taken, and that it became annihilated [85] by the loss of those lands. If, therefore, it can be proved that a descendant of the family, although in possession of the manor, was not Baron of Slane; and that another descendant of the family was Baron of Slane, although not in the possession of the manor; it follows upon Mr. Bryan's own shewing that the title of Baron of Slane could not have been a palatine honor. By the inquisition taken at Athirdee in 1625, (given in evidence to the House, by Mr. Bryan,) it was found that Christopher Lord Slane was succeeded by his eldest son Thomas Fleming, then Lord Baron of Slane; that Christopher had, by a deed of settlement, (recited in the inquisition) disinherited his said eldest son, and settled all his estates, including the manor of Slane, upon William Fleming, his second son, upon whom they devolved accordingly. William, although in possession of the manor of Slane, never was recognised by, nor assumed any title of honor, until 1629, when, in consequence of his elder brother having become a fri.. .. .. King granted him the anticipatory enjoyment of the "honor and title of Baron of Slane." Thus, the seisin of the manor of Slane did not give to its possessor the title of Baron of Slane. The Act 37 Henry VI., cap. 7. recognises the then heir male of the family who had succeeded to the exclusion of female heirs, as "Davy (David) Flemyng, Baron de Slane," although it proves that the King was then not only seised of, but that he claimed the manor of Slane; it is also proved by another statute, (2 Edward IV. cap. 15.) that David, although a peer of parliament absented himself from the parliaments and great councils. Thus, the heir male of the family, although he had not seisin of [86] the manor of Slane, and although he could not have been created a peer by writ of summons, as he had "absented himself from the parliaments and great councils," was recognised as Baron of Slane, and in that capacity, as a peer of parliament. It may also be remarked, that the Act of 7 Anne, cap. 53. which confirmed the forfeiture of the manor of Slane, as well as of the other estates of Christopher, the then Baron of Slane, restored him "to his blood and title of honor only."

It is perhaps unnecessary to notice the long statements of the descent of the Genevylle family in Mr. Bryan's case, as it is not alleged that any peerage was derived through them. It may, however, be stated that the marriage between Baldwin, Baron of Slane, and Matilda de Genevylle did not take place until the 4th

of Edward II., (Harleian MSS., No. 1425.) the year after the pretended creation of the peerage by writ of summons; and that according to their own pedigree she was not a co-heir of the family of Genevylle.

The title descended from Baldwyn, to his son Symon, from Symon to his son Thomas, and from Thomas to his son Christopher, all of whom, it appears by the statute 2 Edward IV., sat in parliament as Barons of Slane. The case of Mr. Bryan, in opposition to this act, and every other authority, designates these noblemen by a title never before heard of, either in the annals, the records, or the parliaments of Ireland—that of Lord le Fleming.

Christopher, Baron of Slane, died 26 Henry VI. He had two sons, John and David. John died in his father's lifetime, leaving issue, Christopher, successor to his grandfather, and two daughters, [87] Anne and Amia. (Inquisitions, T. L. 26 Hen. VI. and 11 Edward IV.) Christopher, the grandson, sat in parliament, 29 Henry VI., and died without issue the 36th year of the same reign. It appears from the act 37 Henry VI., cap. 16., (statute roll of that year) that it was found by two inquisitions, (the one taken before the barons of the Exchequer in Dublin, and the other in the county of Louth,) that Christopher, late Baron of Slane, died without issue, and that Anne and Amia were his sisters and heirs. In that capacity, the statute confirmed to them and their husbands a certain head-rent, payable out of the town of Dundalk, of which their brother was in his lifetime seised.

Second alleged peerage: Christopher, Baron of Slane, was succeeded in his peerage, to the exclusion of his sisters, by his uncle and heir male David Baron of Slane, who is recognised by that title in a statute entered on the very same roll, with that in favour of his nieces (Cap. 7.) The act expressly states, that the crown under an alleged right, not only claimed, but actually then had possession of the manor of Slane. This statute, and that in favour of the heirs general before mentioned, would of themselves, it is submitted, establish that the barony of Slane, was neither a peerage in fee nor a palatine honor. Had it been the former, it would have become abeyant between the heirs general: had it been the latter, it would have been annihilated by the non-possession of the lands.

Yet it is upon this hereditary succession of David, Baron of Slane, and in contradiction to these statutes and various other records, that Mr. Bryan's case, creates its second title, its first abey-[88]-ance, and its first new peerage. The manner in which these three points are effected must be noticed.

The case states, (page 8,) that "Sir David Fleming, eleventh palatine baron, or lord of the manor, or barony of Slane, was summoned to parliament and sat therein, 2 Edward IV., by the title of Lord David Fleming, Baron of Slane; he is so described in the act of parliament passed to decide the precedence between him and Lord Gormanston. It appears that he was allowed, probably by the royal favour of his cousin, King Edward IV., the precedence of the original barony, then in abeyance between his nieces. An act was passed that he should be placed after Lord Gormanston, whose grandfather, Sir Christopher Preston, sat above Lord Thomas Fleming, Baron of Slane, and his grandfather sat above Lord Simon Fleming, Baron of Slane."

A reference to the act itself will shew, that Lord David, so far from being created a new peer in fee by sitting in this parliament, absolutely "absented himself from the parliaments and great councils,"—and that he was nevertheless recognised as now (ore) Baron of Slane, and a peer of parliament by descent: and that so far from having had a new title conferred upon him, he bore precisely the same title, dignity, and rank as his predecessors, Thomas Fleming, Baron of Slane, and Simon Fleming, Baron of Slane, who are the same individual peers whom Mr. Bryan's case, in the process of subdividing the peerage and varying the titles, judged it expedient in the history of its first barony, to designate as "Sir Thomas Fleming, [89] Knight, third Lord le Fleming," and "Sir Simon Fleming, Knight, Lord le Fleming."

From the statute of the 38 Henry VI. we find that the Prestons, Lords of Gormanston, claimed a continued precedency of the Barons of Slane, from the time of King Richard I., or beyond the memory of man, in the exercise of their functions of lords of parliament; and that the parliament sanctioned the right which Lord Gormanston claimed upon that ground. The "Richard jaditz, Roi d'Engleterre," named in the act, can, as the words themselves imply, refer only to Richard I., as

Simon Lord Slane, whose place in parliament is cited in the statute 2 Edward IV., as one of the proofs of this prescriptive precedency, died seven years before the accession of Richard II.

The award to Lord David, by the parliament, of the place next in rank to Lord Gormanston, was clearly in reference to a claim of right advanced by him, as derived from his predecessors, and not owing, as the case most gratuitously asserts, to the favour of Edward IV. For, on comparing the two acts upon the subject, 38 Henry VI. and 2 Edward IV. it evidently appears, that David, Lord Slane, claimed, as his right, the same place that had been assigned to his immediate predecessor, Lord Christopher, namely, that above Lord Gormanston; but that upon Lord Gormanston proving, to the satisfaction of the parliament, that such place had been unjustly awarded to Lord Slane by the undue partiality of the Earl of Ormond, the then lord justice, for that his ancestors had, from time immemorial, been allowed precedence of the successive barons of Slane; and upon his proving that precedence to have been so en-[90]-joyed for above a century back, the parliament awarded to Lord David, as his right, only the precedence that had been enjoyed by his more remote predecessors, namely, the place next below Lord Gormanston. But it appears from the sequel that this newly created peer of the case, far from imagining that he owed either his peerage or his precedency to "favour," was so unreasonable as not to be satisfied with the place adjudged to him, high as it was, amongst the ancient peers of Ireland.

Third alleged peerage: David, Baron of Slane, died leaving a son, Thomas, his successor, and three daughters—Anne, Margaret, and Elizabeth. Thomas died during his minority, and was succeeded in the peerage by his cousin James, grandson and next surviving heir male of Thomas Fleming, Baron of Slane, mentioned in the act, 2 Edward IV. Thomas, Baron of Slane, the son of David, died 8th December, 11 Edward IV., and an act was passed immediately after his death, 11-12 Edward IV. (cap. 62.), stating that James, Baron of Slane, had some time before gone to England, on business specially concerning his inheritance in that kingdom, and granting him permission to remain there for one year: a subsequent statute, 12-13 Edward IV., cap. 5., before the expiration of the year, and consequently before he could have sat in parliament, declares him to be "un seigneur et baron del parliament." In two acts entered on the last-mentioned roll, cap. 18. and 19., James, Baron of Slane, is declared to be "cousin and heire masle" of Thomas, late Baron of Slane.

Mr. Bryan's case, in opposition to these enactments, all of which it cites, creates, upon the suc-[91]-cession of James to his hereditary dignity, a second abeyance, a third title, and a third peerage: and it asserts that James, who, as heir male of the family, inherited, and transmitted to his successors the ancient parliamentary dignity of Slane, was created a peer by writ of summons to, and sitting in, parliament in the reign of Edward IV., although it does not offer any proof to the House as to what parliament he was summoned to, or in what parliament he sat during that reign.

James, Baron of Slane, was succeeded by his son Christopher, Baron of Slane, who died in 1518, leaving an only son James, his successor, and two daughters, Ellinor and Catherine. (Inquisition, 9 Henry VIII.) James, by the style of "Dominus Baro de Slane," is ranked next after Lord Birmingham of Athenry, the premier Baron of Ireland, in the list of the peers who were present in the parliament of 1541, which made Henry VIII. King of Ireland. (State Paper Office, London). By a deed, dated 32 Henry VIII., James settled certain lands, in default of issue male to himself, upon his sister Catherine. He died without issue, when she succeeded to the estate so limited, which she transmitted to her posterity. (Bill and answer in Chancery, 1577, and Inquisition, 40 Elizabeth.)

Fourth alleged peerage: James, Baron of Slane, was succeeded in his peerage by his cousin Thomas, the great grandson and then heir male of James, the twelfth Lord Slane. In 1556 he, as "Thomas Fleming, Lord Baron of Slane," prayed the Lord Chancellor that an inquisition might issue, to find what lands had descended to him from his ancestor (predecessor) Sir James Fleming, Knight, late Baron of Slane, which was, at the re-[92]-commendation of the justices, issued accordingly. (Chancery Pleadings). In the next year the Queen in a grant of livery styled him "Thomas Fleming, Baron of Slane, cousin and heir of James Fleming, Knight,

late Baron of Slane, deceased." (Fiant, 20 Elizabeth, No. 2748). In a royal commission, dated 26th December in the same year, (Patent Roll,) all the peers of the pale and the great officers of state are appointed conservators of the peace in various counties. Among the former is "Thomas, Lord Baron of Slane," who is named immediately after the viscounts, and at the head of the barons so commissioned.

Contrary to all these evidences, Mr. Bryan's case, on the death of James, the fourteenth Baron of Slane, creates a third abeyance, a fourth new title, and a fourth peerage; and in opposition to the Queen and the highest legal authorities, states that Thomas continued a commoner until he was summoned to Parliament eight years after the date of the aforesaid letters patent. In the list of the very Parliament (the first held after his succession), by his summons to which, Mr. Bryan's case asserts that he was created a new peer, he is ranked as the third Baron of Ireland.

Speaking of the descent of Thomas Lord Slane, and of the pedigree and succession of his cousin and successor, the case of Mr. Bryan, (page 18.) says, "the foregoing descent is proved by the recitals of an inquisition of the 40th Elizabeth, 1597, taken at Ratoath, before alluded to, which states—'that James Fleming, of Stephenstoun, died, and was succeeded by his son Thomas, who died without issue male, 9th November, 1597, and was succeeded by his cousin, William [93] Fleming of Derpatrick.'" In the original inquisition, of which the above pretends to be a recital, the death of James Fleming, of Stephenstown, is not mentioned, nor is it stated that Thomas succeeded any person, save James Baron of Slane. The following is the passage of the inquisition which notices the death of Thomas, and succession of William: "The jury also say upon their oaths that the aforesaid Thomas Lord Baron of Slane, died on the 9th of November, A.D. 1597, without heirs male of his body, and that all and singular the lands, tenements, and hereditaments of which he was seized in virtue of the aforesaid charter, descended in remainder to William, now Lord Baron of Slane."

Fifth alleged peerage:

Thomas, Baron of Slane, died leaving two daughters, his co-heirs, and was succeeded in his peerage, by his cousin William, the great-great-grandson, and then heir male of James, the twelfth Lord Slane, as is proved by the aforesaid recital from the Inquisition 40 Elizabeth.

Mr. Bryan's case is obliged, in consequence, to assert a fourth abeyance, but it declines to create a new peerage or a fresh title, until it arrives at the succession of William's son Christopher. It became therefore necessary to shew that William was not a peer, and the following is the method by which it is attempted to accomplish this object—(p. 18.) "William Fleming, of Derpatrick, (the 17th baron, or lord of the manor, or barony of Slane,) succeeded his cousin in the manor, or barony of Slane, of which he had livery, 3 James I., 1605. He never was summoned to, or sat in, Parliament, but was called Baron of Slane, and Lord of Slane, as are the heirs of the Husseys Barons of Gal-[94]-trim, and of the Nangles Barons of Navan to this day."

In no one instance did the Crown ever recognize the Husseys or Nangles as peers, never were the privileges of the peerage conceded to them, never did they assume, and never were they styled by, the title of, lord, or lord baron. They are the very persons to whom Spenser alludes, (see page 84.) when he says, "they were not afterwards lords, but only baronets, and sundry of them do yet retain the name." Campion, Stanyhurst, and Camden, who all wrote their respective accounts of Ireland, about this time, gave lists of these "baronets" or titular barons, as also of the lords of Parliament. Classed among the former, are the Husseys and the Nangles, but the Baron of Slane is placed high among the latter, with his proper rank and precedence.

The succession of William to the peerage, is, however, placed beyond doubt. Independently of the recital from the inquisition before quoted, King James, in a grant of livery dated in the third year of his reign, (Patent Roll of that year) styles him "our well beloved and very noble (proenobilem) subject, William Fleming, Lord Baron of Slane, cousin of Thomas Fleming, Knight, late Lord Baron of Slane, deceased." In 1607, a bill was filed against him by a person of the name of Evers: as he then resided at the Castle of Slane, a commission was issued from the Court of Chancery directing the rector of Slane to take the answer, "proenobilis viri Willelmi Domini Baronis de Slane, super honorem suum." The answer so taken upon honor is returned as that of "the Right Honourable William Lord Baron of Slane." It

is unnecessary to remark, that to make answer to [95] bills in Chancery upon honor is the exclusive privilege of the peerage.

In the report of Sir James Scarlett, upon Mr. Bryan's claim, appears the following passage—(case, page 33.) "it was stated to me that there was no Parliament held in Ireland in the interval between the year 1597, when Thomas Lord Slane died, as above stated, and the year 1612, when this William died." It is submitted that the non-assembling of the Parliament during William's enjoyment of the peerage, which, independently of the admission, can be clearly proved, is a sufficient reason for his not having sat in that assembly, and therefore is not a conclusive proof, as the case assumes, that he was not a peer.

William Baron of Slane was succeeded by his son Christopher, as appears from a grant of livery, wherein the King styles him "Christopher Lord Baron of Slane, son and heir of William Lord Baron of Slane, late deceased." (Patent Roll, 10 James I.)

To prove, in opposition to this record, that Christopher succeeded his mother instead of his father, the following entry, from the "funeral entries of the nobility and gentry of Ireland," was produced by Mr. Bryan's agent to the attorney-general, Sir James Scarlett, (case, page 34.) "Ellinor, daughter of Sir Thomas Fleming, Knight, Lord Baron of Slane, died ye 24th of Januarie, 1616; she was wife to William Fleming, Lord Baron of Slane, and mother, by him, to Christopher Fleming, Lord Baron of Slane."

This document in fact contradicts the very assertion, which it is here alleged to have proved. In addition to it, the evidence of Lady Slane herself [96] is upon record. In 1612, a bill was filed by Walter Stanley against her and her son Christopher Lord Slane, in which the following passage occurs: "And your suppliant having desired the Right Honourable the now Lord Baron of Slane, and Ellinor Lady Dowager of Slane, executors of the last will and testament of the said William, late Lord Baron of Slane, to defend the cause." The answer of Christopher is put in, as that of "Christopher, Lord Baron of Slane," and in it, he states that he is not the executor of William, late Lord Baron of Slane: that of Ellinor is put in as "the answer of Elynor, Lady Dowager of Slane," in it she says "that the said William, late Lord Baron of Slane, did dispose of the wardship," etc.

These documents are perhaps superflous, as Mr. Bryan, in his case, and Sir James Scarlett, in his report, not only admit, but adduce evidence to prove, that Christopher sat, as Lord Baron of Slane, in Parliament, in 1613, three years before his mother's death (Mr. Bryan's case, page 34.) They indeed confess that they are at a loss to decide, whether that sitting is to be considered as a new creation of a fifth peerage in fee, or as the descent of the pretended fourth peerage in fee, from Thomas to Christopher through his mother, who was then living, and asserted herself to be merely "Elynor Dowager Lady Slane," as the widow of William, Lord Baron of Slane.

No evidence is produced in support of the hypothesis, which the report considers as the only alternative, namely, that if Christopher did not succeed his mother, he was created a new peer in fee, by enjoying exactly the same title, place and precedency in the Parliament of 1613, which his ancestors [97] held in the former parliaments of Ireland. The King, as has been shewn by the recitals from the grant of livery, recognised his succession to the peerage a year before any parliament had been held, since that of 27 Elizabeth. In 1615, his Majesty appointed him one of the commissioners under the Great Seal for dissolving the then parliament. The temporal peers so commissioned were Donogh Earl of Thomond; Jenico Viscount Gormanston; Christopher Lord Baron of Slane; Richard Lord Baron of Delvin; Luke Lord Baron of Killeen; Christopher Lord Baron of Howth; Robert Lord Baron of Trimleston; and Matthew Lord Baron of Louth. In this commission it is worthy of remark that Lord Slane is placed in the exact relative position amongst the most ancient barons which had been adjudged to his predecessor, David Lord Slane, by the parliament, 2 Edward IV. (Commons' Journals of Ireland, vol. i.) In addition to the opinion of the crown and the parliament, Lord Slane's own belief that he had succeeded to the peerage of his ancestors, can be adduced. In his answer to a bill filed against him in 1618, when speaking of certain lands, he says, "that the same is the ancient inheritance of him and his ancestors lords of Slane, for many hundred years." (Chancery Pleadings.)

The remarks upon the pretended sixth peerage of Mr. Bryan's case, will fall more appropriately under the next head, as both a royal act, and satisfactory proof of a sitting in parliament, are accidentally introduced into the discussion.

The whole history of these creations by writs of summons to the Irish parliaments becomes still more questionable, when we examine the grounds [98] upon which they are gratuitously assumed. Mr. Bryan's case supposes, as an undoubted fact, that those who summoned the Irish parliaments possessed the power of creating peers at will. In this assumption the case errs against every principle both of history and constitutional law.

The most cursory perusal of any history of Ireland will afford sufficient evidence of the fact, that the parliaments of Ireland were summoned, and held, by the lords lieutenant and lords justices, and by their deputies, at their own option and pleasure, most generally without the intervention of, or any communication with, the King. Many authorities, historical, antiquarian, and legal, might be cited in proof of this fact; but it is apprehended that the authority of an Irish historian, together with that of an English lawyer, will be deemed sufficient. "The preamble," says Dr. Leland, "of an Irish act, 29th Henry VI. 'declares that the custom of Ireland is and hath been time out of memory, that no lieutenant, deputy, justice, or other governor, shall appoint, support, or hold any parliament more than once a year.' This preamble shews that the appointment of these parliaments was from time immemorial by the chief governor; nor can we controvert the recital of another Irish act, 11th Elizabeth. sess. 3. cap. 8. 'That before the statute of Poyning's, liberty was given to the governors to call parliaments at their pleasure.' Whether this was an incautious deviation from ancient usage, or whether the liberty was originally intrusted to the discretion of governors, seems not necessary to determine. It was exercised in the reign of Edward I., frequently in the [99] reigns of Henry VI. and Edward IV., and bills were passed or rejected by assent or dissent of the lords deputies, delivered in the royal style, without any previous communications with the King." (History of Ireland, vol. ii. Appendix.) That this was not an incautious deviation from ancient usage appears from the statute 2 Richard III. (cap. 8.) which, speaking of the election of a governor of Ireland, enacts that it shall be made "according to the tenor, usage, and execution of the said statute of Henry fitz Empress, with the assent of the nobles of this land, as is specified in the same statute, upon every such avoidance to choose a noble lord to be governor and have the government, as justice of Ireland, according to the ancient usage, used and executed from that time, and that it shall be lawful for such governor, so chosen, to hold parliaments and great councils, and what they shall do therein shall be as good and effectual in law, as if done by any other governor, in times past, provided that such election be made by the lords spiritual and temporal and the nobles of the land."

Sir William Blackstone says, (Commentaries, vol. i. p. 102.) "the original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding parliaments at his pleasure, which enacted such laws as they thought proper."

To maintain that the individuals who, at their pleasure, summoned those parliaments, could ennoble commoners, by issuing writs to them in "the royal style," and could thus create as many peerages as they pleased, would, in the first place, be contrary to a fundamental maxim of consti-[100]-tutional law, which decides that no subject can ennoble a commoner, or create a peerage. Madox, in his Baronia Anglica (book i. cap. 1.) lays down as a fundamental principle of the Constitution, that "no man or number of men, without the King can, or ever could, make an earl or baron. To grant a baronial title is an act of regality inseparable from the crown, and incommunicable to subjects; that is, it was never yet communicated."

It would, in the second place, be contrary to every principle of policy and common sense, to suppose that a privilege so peculiarly regal was vested in men, the great majority of whom were themselves Irish peers, or English commoners. If the power of creating peers had been intrusted to the successive deputies who summoned and held parliaments, when and where they pleased in Ireland, from the reign of Henry II. to that of Henry VII., the temporal peers of Ireland would not have been reduced to the number of fifteen, which were all that the latter monarch found in existence on his accession.

Although Mr. Bryan creates his first five peerages without the intervention of any

king, yet when in the fabrication of his sixth peerage, it becomes impossible to conceal the existence of the King's letter of the 30th of October, 1629: it is produced only for the purpose of treating the royal authority and signature with contempt. The King, (whether in strict accordance, or not, with the modern usages of the peerage, has no reference to the present question,) at the request of the elder brother, the rightful baron of Slane grants to the younger brother, during the legal incapacity of the elder, the conditional enjoyment of the ancient barony of [101] Slane, with the rank and privileges rightfully attached to it. The letter had merely an anticipatory effect, as to his succession to the peerage, and a declaratory effect, as to the past and future descent of the barony of Slane to the heirs male, but expressly denies the idea of a new creation. The case disclaims the royal authority, nullifies the King's letter, and creates a new peerage by the sole authority of the Lord Deputy; which peerage it claims for Mr. Bryan, in defiance equally of the royal will, as expressed in the King's letter, and of ancient usage; both of which had limited the barony of Slane to the male heirs.

The proof which it adduces of this being a new creation, namely, that William Lord Slane was introduced between two peers, evinces ignorance, or misrepresentation, of the usages of the Irish House of Peers. A reference to the Lords' Journals will shew that, at the opening of the parliament on the preceding day, every hereditary peer who had not previously sat had been introduced with the same form; and as no parliament had been assembled for nineteen years, it was found that only three of the peers were entitled to be exempted from that ceremony.

It is evident from the whole proceedings, even as stated in the Attorney General's report (pp. 34, 35, 36, and 37), that neither the House of Peers nor the Lord Deputy treated the royal authority with the contempt which the report would insinuate, or attempted to usurp the power of creating peerages, which the report throughout assumes that they possessed. On the contrary, in perfect accordance with and obedience to the King's letter, they acceded to the claim which William Lord Slane [102] preferred through his counsel: "that his lordship might take his place in this high and honourable assembly of parliament as his said father and his ancestors, lords of Slane, have heretofore done." But before issuing the writ to him, as heir to his father, and assigning to him the place and precedency, as Lord of Slane, which he claimed, the legal precaution was taken of presuming the death of the elder brother, although he was well known to be still living.

Thus the disregard of the royal authority and the dereliction of the principle that the King is the sole fountain of honour, which, according to Mr. Bryan's case, pervaded the whole system of the government and peerage of Ireland, had in reality no existence.

And it deserves remark that, throughout the whole of the case and report, royal agency is never introduced or referred to, except for the purpose of charging it with some illegal, unjust, or arbitrary act, such as an illegal use of "the dispensing power" in the distribution of peerages, continued unjust neglect of the rights of heirs general, or an arbitrary invasion of the privileges of the peerage, by depriving the great majority of the peers of the right of precedency arising from seniority of creation—a right which at all periods has been upheld by the peers of Ireland with the most jealous vigilance.

The third point has been incidentally shewn in the observations upon the first.—It may here, however, be generally remarked, that supposing such writs to have had the effect attributed to them, the only writ of summons produced in Mr. Bryan's case, for six peerages, is that of Baldwin le Fleming, Lord Slane, its supposed first peer, to the parlia-[103]-ment of the 3 Edw. II., which, as has been already shewn, was directed to commoners as well as peers, without having a creative effect, and the case itself states that "no evidence has been discovered to shew that Baldwyn attended this parliament, and it is probable that he did not." (P. 10.) The parliament pawn of 1585 is not a writ of summons, but a list of the peers of parliament. No evidence is offered of any sitting in the three first peerages.—The secondary evidence for the fourth and fifth is derived from a document in the keeping of Mr. Bryan's peerage agent, Sir William Betham. To the summons and sitting of the sixth is conceded their due weight.

The fourth point includes three considerations: The conduct of the heirs male of

the family of Fleming from the earliest periods of record down to the present time—that of the heirs general, at four successive periods, in which they occurred,—and lastly, that of the crown and legislature in each case.

At what precise period, and in what particular form of creation, the ancient baronies of Ireland originated, would now be a question of as difficult solution as that of the origin of similar peerages in Scotland. Speaking of the latter, the Lords of Session in their report in 1739, to the House of Peers, upon the Peerage of Lord Fraser of Lovat, declare them to have been created by some "method that cannot now, in matters so ancient, be with any certainty discovered. For a great many noble families appear, from the rolls of parliament, to have sat and voted in parliament as lords of parliament, though no constitution of the peerage, or title of honour, under which they [104] sat, can be now found in the records." Under these circumstances they had adjudged that peerage to descend, according to ancient usage, to the male heir. (Book of Sederunt, folio 347.)

From the claim advanced by Lord Gormanston in the parliament 38 Henry VI., and sanctioned by the act of that parliament; from that of Lord Kerry, sanctioned by the Lords Commissioners in 1615; and from the unanimous judgment of the House of Peers of Ireland in 1721, in favour of Gerald Lord Kinsale, who claimed the dignity of a peer of the realm and lord of parliament, as a prescriptive right which had vested in his ancestors, "time out of mind," the ancient baronies of Ireland may justly be considered as having existed from the time of Richard I., the period of prescription. The representatives of the family of Fleming, from their ancient and noble descent, and extensive possessions in both kingdoms, would naturally, soon after the invasion of Ireland, be considered by the crown amongst its nobles, or be speedily elevated to that rank. And, whether according to the terms prescribed in that creation, or in conformity with the usage which prevailed amongst the other coeval barons of Ireland, whose peerages of equally unascertained origin have descended to the present time exclusively in the line of their male heirs, the male descendants and representatives of Archenbald le Fleming, who settled in Ireland in the reign of King Henry II., have equally with the male heirs of the families of Birmingham, Courcy, Fitzmaurice, and Preston, always succeeded as a matter of right to the prescriptive enjoyment of the rank and dignity of peers of the realm and lords of parliament. Nor [105] does it appear that any opposition was ever made to such prescriptive right, either by the legislature or by the successive heirs general of the family of Fleming.

It has been shewn above, that the respective heirs male of Christopher the ninth lord, of Thomas the eleventh lord, of James the fourteenth lord, and of Thomas the fifteenth lord, all succeeded immediately upon the demise of their predecessors, without hesitation, without opposition, and without acknowledgment of any favour conferred, to all the honours and privileges prescriptively annexed to the ancient peerage of Slane. In the case of the succession of David the tenth lord, as next heir male, the parliament did not allow him the place which he claimed above Lord Gormanston, because the latter proved that such precedency was not his right; but it adjudged to him the next place, namely, that which his ancestors, from time out of mind, had enjoyed. In the instance of the succession of James the twelfth lord, he was immediately after the death of his predecessor Thomas, although absent in England, recognised as a peer of parliament, and appointed sheriff of Meath by statute. Immediately on the death of James the fourteenth lord, without issue, but leaving two sisters his co-heirs, a royal commission was issued, in which Thomas the fifteenth lord, and next heir male, by the style and title of Thomas Lord Baron of Slane, is named next after the Viscount Baltinglas, and above all the other ancient barons of the pale. This is the Thomas from whose pretended creation in fee by writ of summons to the parliament of 1585, eight years subsequent to the date of this commission, [106] Mr. Bryan's claim to the peerage originates. In a royal commission to dissolve the parliament of 1615. Christopher the seventeenth lord Slane, another of Mr. Bryan's new peers, is named in the same place.

In no one of these instances is the least intimation given that such precedency was allowed as a favour; on the contrary, every authority, both parliamentary and historical, concur in proving that such rank and precedence were uniformly claimed by the male heirs of the family of Fleming, and allowed as a right inherited from their ancestors, the successive barons of Slane. So pertinaciously, indeed, did they

assert those rights, that in 1462, David Lord Slane would not acquiesce in the decision of the parliament, and, as is proved by the act 2 Edward IV., refused to take the seat adjudged to him. Nor does it appear that he, or James the twelfth lord, the male heir and successor of his son Thomas, the eleventh lord, who died in his minority, ever bowed to that decision, or took their seats in parliament, until Edward IV. removed the cause of dissension, by creating Lord Gormanston a viscount by patent. With similar feelings, Christopher the seventeenth lord Slane, the supposed new baron of the fifth creation of the case and report, so far from evincing gratitude to the Lord Deputy for the peerage, which Mr. Bryan alleges, had been conferred upon him by that officer of the Crown, and for the act of gross injustice, towards the great majority of the peers of Ireland, that had been committed in his favour, by giving him a place amongst the ancient barons, to which, as a new peer, he could have no rightful claim, (and to which, if the supposed new barony [107] of 1585 was then in abeyance between his aunt and his mother, which is the other alternative of the Attorney General's report, he had no claim at all,) refused in the parliament of 1613, to sit below the Lord of Kerry, the third baron of Ireland. The decision upon this dispute is to be found in the book of cases of precedency, already produced before the house by Mr. Bryan. The Attorney General in his report is at a loss to decide whether his sitting upon this occasion created a new peerage in him, or was a termination of the abeyance between his aunt and his mother, who were both still living. In either case there was not a peer named in the commission for the dissolution of this parliament, formerly referred to, who would not have been entitled to a precedency far above him.

The other two considerations may be briefly stated. It appears extraordinary that, during a space of 371 years, namely, from the commencement of the supposed abeyance between the two co-heirs of Christopher Lord Slane in 1457, to the period of Mr. Bryan's claim in 1828, all the various co-heirs of the respective Lords Slane, who were mostly married to men of rank, influence, and wealth, should have remained so ignorant of the important rights and privileges which they carried with them into the respective families into which they married, and that their husbands and descendants should have acquiesced so quietly in the successive extravagant pretensions of the respective new barons of Slane, to the rank and privileges of the ancient barony, which were always so liberally but so unjustly awarded to them, and which could be rightfully claimed only by such respective heirs general.

[108] But it is still more extraordinary that the Crown, the various lords deputy, and the successive legislatures, who must have been perfectly aware of the principles by which baronies in fee are regulated, should have countenanced and been parties to such a continued series of flagrant acts of injustice and oppression.

This course was repeated by the government in the last case of default of male issue in the barons of Slane, which occurred in the instance of Christopher Fleming, twenty-second baron of Slane, who, having taken part with King James II., was outlawed, and forfeited his honours and estates; but by act of parliament, 8 Anne, (cap. 53.) was restored in blood and to the ancient barony of Slane, although not to his estates: and was afterwards advanced to the dignity of Viscount Longford. He died on the 24th of July, 1726, leaving an only child, Helen. But although it is the law of the descent of a barony in fee, that when there is only one female heir, it is vested of right in such heir, and consequently after the death of the father of the said Helen, who had been restored to "his blood and title of honour only;" if the barony of Slane had been a barony in fee, she was of right Baroness of Slane; yet the government never considered her as entitled either to the ancient barony of Slane, nor to any of the baronies which, according to Mr. Bryan, have more recently emanated from it: on the contrary, the pension of £50 a year, which was granted to her, was, until her death in 1748, paid to her simply as "Helen Fleming, daughter of the late Lord Viscount Longford." (State Papers, Dublin Castle.)

The consequences which would inevitably ensue [109] from the adoption of the principle upon which Mr. Bryan's claim is founded, are too manifest to require much illustration. If it be once established that the usage which has prevailed in Ireland for so many centuries, namely, that of determining the descent of its ancient baronies exclusively to the male heirs of their original possessors, is now to be superseded by the usage of England, which arose from circumstances totally dissimilar if it be decided that the writs of summons issued for 500 years past to the parliaments

of Ireland, which were assembled at the option of subjects not authorised to create peerages, ennobled the individuals so summoned, and created peerages in fee descendible to right heirs—and this can not be refused if Mr. Bryan's claim be allowed; that decision will be equivalent to the immediate and simultaneous creation of at least 200 peerages, of the existence of which, neither the legislatures of past times nor the parties concerned have been hitherto at all aware.

But without recurring to those who would be entitled to claim peerages in virtue of such creations previously to the accession of King Henry VII., endless confusion would arise in the present peerage of Ireland. The Baron of Trimleston would take precedency of all the hitherto supposed ancient barons, who now rank above him; for they would in such case descend amongst the junior barons, and be entitled to rank only according to the dates of the summons and sitting of the last heir male who succeeded in preference to the heirs general; but Lord Trimleston, so far from gaining precedency by the change, would be placed considerably below his present place; as a **[110]** whole multitude of individuals who are now supposed to be commoners, but who are the right heirs of the various peers who were so summoned before the date of his patent, would take precedency of his Lordship. One instance will be sufficient to illustrate the point.—De Courcy, Lord Kinsale, would descend from his present elevated position in the baronage, and be ranked only according to the date of the summons to his grandfather who has hitherto been supposed to have succeeded to that ancient barony as heir male, in 1762; whilst the various right heirs of previous lords of Kinsale would be placed, some above, and others below Lord Trimleston; unless all the heirs general claimed the same precedency which was allowed to their respective ancestors, in which case it might be found difficult to reconcile their various pretensions.

Another inevitable consequence of allowing Mr. Bryan's claim, would be to deprive the Duke of Leinster, the Marquesses of Lansdowne, Westmeath, and Ormonde, the Earls of Fingall and Howth, and Lord Kinsale, of their splendid ancient baronies, which they now enjoy solely as the male heirs of their predecessors; as not one of their lordships is the heir general of the person in whom their respective dignities vested in the reign of Henry VII.

It is alleged in the case and report, that Alice Lady Byrne, was the sole heiress of Helen Fleming, the only child of Christopher Viscount Longford, and twenty-second baron of Slane; but it appears from the Abbé Mc Geoghegan, who was cotemporary with, and seems to have been personally cognisant of the facts which he states that Mary **[111]** Fleming, the elder sister of Alice, did not die without issue. That historian says "Oliver O'Gara was descended from the ancient house of the O'Garas of Coolavin, in the county of Sligo, in Ireland. The revolution in that kingdom having compelled him to follow the fortunes of his king into France, he married Mary Fleming, daughter of the Lord Baron of Slane, the eighteenth peer of Ireland of his family. O'Gara had four sons by this marriage. The three eldest having entered into the service of Spain, the first died there with the rank of brigadier-general; the second is colonel of the regiment of Hibernia, and the third lieutenant-colonel of the regiment of Irlandia. His conduct at the battle of Veletti attracted on him the notice of his Catholic Majesty, who rewarded him with a commandery of the order of Calatrava. The fourth son of Oliver O'Gara having attached himself to the service of Leopold Duke of Lorraine, that prince honoured him with the charge of master of the horse to his two sons, of whom the eldest, when he became emperor, raised him to the rank of one of his privy councillors, and appointed him controller of the household of the princess, his sister." (Histoire de l'Irelande par M. l'Abbé Mac Geoghegan, vol. iii. p. 751, note.)

Mr. Bryan in his petition (page 25.) admitted the existence of the youngest of these sons, Charles; but upon discovering that the mother's will did not mention any children, he was omitted in the case and report.

Now that a poor widow who had four sons enjoying high rank and emoluments in foreign services, should have deemed it unnecessary to divide **[112]** the few pounds of which she died possessed, amongst them, and should have preferred bestowing that small pittance upon those who had attended her declining years and death bed, may appear not a sufficient proof of the non-existence of four persons whose lives and fortunes are so circumstantially detailed by a cotemporary historian of approved veracity.

But without entering further into the circumstances of Mr. Bryan's pedigree, the present petitioner humbly contends, that even admitting that Mr. Bryan has proved himself to be the heir of Helen Fleming, the only child of Christopher Lord Slane, and Viscount Longford, that lady could inherit or convey to her heirs only that which her father himself was entitled to. Now Christopher Lord Slane evidently possessed the ancient barony of Slane, such as he inherited it from his ancestors, (for it is not pretended that any new barony was created in his person) and such as it had been enjoyed by his predecessors, with the same rights, privileges, precedency, and limitations, with which it had been awarded to them by the parliament of 1462 and by the King's letter of 1629.

He so inherited it as a barony in fee, or as a barony in tail male. If he enjoyed it as a barony in fee, he succeeded to it without right, and consequently could convey no right in it to his daughter; for the right to the barony of Slane would in that case have vested in the descendants of the previous heirs general.

If he succeeded to it as a barony in tail male, (as it is humbly submitted has been shewn) the **[113]** said Helen has evidently no right to it, and consequently could impart no right to her heirs.

Whatever, therefore, be the nature of the barony of Slane, whether it be a barony in fee, or a barony in tail male, it is humbly submitted that Mr. Bryan can have no just pretensions to it.

As a reply to the arguments and case of Mr. Fleming, an additional case was presented to the House on behalf of Mr. Bryan. The argument was as follows:—

The House is now called upon to determine, for the first time, whether the ancient baronies of Ireland are governed by the same principles of law as the ancient baronies by writ in England: or whether (notwithstanding that all dignities of Ireland were derived from the same fountain of honour as those of England, and that the common law in both countries is the same) there be, as Mr. Fleming alleges, a peculiar law that regulates the descent of Irish baronies.

As the common law of Ireland is, and always has been, the same as the common law of England,* **[114]** and as there is no statute controlling the creations or descents

* Matthew Paris states, that "Henry the Second granted the laws of England to the people of Ireland, which were joyfully received by them all, and confirmed by the king, he having first received their oaths for the observance of them."

The probability of Henry the Second having, by statute, established the Courts of English law in Ireland, whilst he was in that country, appears by the following copy of a writ of the 6th of John (on the patent roll in the Tower):—

"Rex Justiciario, Baronibus, Militibus, et omnibus fidelibus Hibernie, etc. salutem. Sciatis quod dedimus potestatem Justiciario nostro Hibernie, quod brevia sua current per totam terram nostram et potestatem nostram Hibernie, scilicet, breve de recto, de feodo dimidio militis, et infra, et de morte antecessoris, similiter de feodo dim. mil. et infra, et erit terminus de morte antecessoris post transfretationem Henrici regis, patris nostri de Hibernia in Angliam. Et breve de nova disseisina cujus erit terminus post primam coronationem nostram apud Cantuariam. Et breve de fugitivis et nativis inde erit terminus post captionem Dublin, et breve de divisis faciendis inter duas villas, exceptis baronibus. Et ideo vobis mandamus, et firmiter precipimus, quod haec ita fieri et firmiter teneri per totam potestatem nostram Hiberniae faciatis. Teste meipso apud Westm. 11 die Novembris."

The great charter of liberties of John was transmitted to Ireland in the 12th Hen. III. 1227, and the Lord Justiciary was then commanded to call before him the Archbishops, Bishops, Earls, Barons, Knights, and Freeholders, etc., and to command them to hold, observe, and put in force the said laws and customs of England, and also to cause proclamation to be made in every county of Ireland that the said laws and customs should be observed and obeyed. The writ for that purpose is as follows:

"Rex dilecto et fideli suo Richardo de Burgo, Justiciario suo Hibernie, salutem. Mandamus vobis firmiter precipientes, quatenus certo die et loco, faciatis venire coram vobis archiepiscopos, episcopos, abbates, priores, comites, et barones, milites, et libere tenentes et ballivos singulorum comitatuum, et coram eis publice legi faciatis Cartam domini Johannis Regis, patris nostri, cui sigillum suum appensum est, quam fieri fecit et jurari a Magnatibus Hibernie de legibus et consuetudinibus Anglie observandis in Hibernia. Et precipiatis eis ex parte nostra quod leges illas et con-

of peerages of Ireland, those dignities [115] must be presumed to have been created by the same means, and be subject to precisely the same [116] rules, as to enjoyment and descent, as peerages of England. The only modes recognised by law by which English peerages have ever originated or been created, are, at an early period, by tenure and by charters; and, subsequently to the reign of Henry the Third, by writ, and by patent, or charter.

Upon the question of tenure, very little need be said. Neither of the claims before the House is founded upon the barony of Slane being a barony by tenure: and although Mr. Fleming has put in evidence, with the view of proving that the tenants of the lordship of Slane were barons of the realm at a period when that dignity could only have existed by tenure, it does not appear how this (supposing it were established) could benefit his case.

The tenure of the manor of Slane never could have rendered its possessor a baron of the realm, [117] since it was not held in capite of the Crown, but was a subinfeudation of the palatine lord of the county of Meath; and the heirs male of the Fleming family were summoned to parliament as peers when they were not seised of that manor. But, allowing that the lordship of Slane did render its possessor a baron of the realm at an early period (a point which is by no means conceded), it does not appear in what way that circumstance bears upon Mr. Fleming's claim. If, as it is alleged, the barony of Slane was originally a territorial honour, and the writs subsequently addressed to the Fleming family did not create an hereditary dignity, the inference is unavoidable that it must still be a barony by tenure, in which case the title belongs neither to the heir male of the family nor to the heir general; but was extinguished on the escheat of the land to the Crown, by the attainder of Christopher Lord Slane.

Had Mr. Fleming's claim been founded on tenure, it would have been intelligible, and might easily be answered; but he repudiates tenure, he repudiates a patent, and he repudiates writs and sittings in parliament, as the modes by which the barony was created, and rests his pretensions on a species of creation under which no dignity has ever hitherto been claimed either in England or Ireland — that of "prescription:" he points out what is the course of descent of baronies by "prescription," and says that they are inheritable by male heirs alone, founding this peculiar mode of descent upon an assumed analogy to the descent of "feudal baronies."

Neither "feudal baronies," nor any other honours in England or Ireland, were ever confined [118] to heirs male, until more than 100 years after the period to which he assigns the creation of the barony of Slane; all the lands in Ireland, as well

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suetudines in carta predicta contentas de cetero firmiter teneant et observant. Et hoc idem per singulos comitatus Hibernie clamari faciatis et teneri, prohibentes firmiter ex parte nostra et super forisfacturam nostram ne quis contra hoc mandatum nostrum venire presumat; eo excepto quod nec de morte nec de catallis Hibernensium occisorum nihil statuatur, ex parte nostra, citra quindecim dies, a die Sancti Michaelis, anno regni nostro 12° super quo respectum dedimus magnatibus nostris Hibernie, usque ad terminum predictum. Teste meipso apud Westm. 8 die Maii, anno regni nostri 12°."

In the same year, the King, according to Matthew Paris, appointed Sheriffs and other ministers to govern the people of Ireland according to the law of England, and to that end, "Ipse duxit secum viros discretos et lege peritos, quorum communi consilio statuit et precepit leges Anglicanas teneri in Hibernia," etc.

In the 30th Henry III. 1245, the following writ was issued to the Lord Justiciary of Ireland, confirming former Writs on this subject, and directing that all the writs current in England should likewise be made current in Ireland, under the King's new seal:—

"De Legibus Anglicanis in Hibernia tenendis.

"Rex, etc. Quia pro communi utilitate terrae Hiberniae, et unitate terrarum Regis, Rex vult, et de communi consilio Regis provisum est, quod omnes leges et consuetudines quae in regno Angliae tenentur in Hibernia teneantur, et eadem terra eisdem legibus subjaceat ac per easdem regatur, sicut dominus Johannes Rex, cum ultimo esset in Hibernia, statuit et fieri mandavit. Quia etiam Rex vult quod omnia brevia de communi jure, quae currunt in Anglia, similiter currant in Hibernia, sub novo sigillo Regis mandatum est Archiepiscopis, etc. quod pro pace et tranquil-

as in England, the tenure of which rendered their possessors barons, in or before the reign of King John, were held under charters to the grantees and their heirs; and female heirs general, and their descendants, inherited the lands, notwithstanding the existence of heirs male of the original grantees. Among the many persons who, in the reign of King John, were undoubtedly barons by tenure, were Fitz-Walter, Roos, and Say; and in the character of barons, or "magnates," of England, they were appointed to enforce the observance of Magna Charta: but their baronies have not descended to their heirs male, or been considered to have existed as hereditary dignities, independently of the writs of summons addressed to the subsequent barons Fitz-Walter, Roos, or Say, because their ancestors were "magnates," before the time of legal memory. On the contrary, each of these honours has been adjudged to have been created by the first writ of summons on record; and each of them, too, has been inherited by, and adjudged to, female heirs general. That baronies existed by tenure beyond the time of legal memory is proved by these cases to have occurred in England as well as in Ireland; and these precedents show the manner in which the common law has regulated the descent of such honours. Upon what principle can it be argued, that in Ireland, where honours are derived from the same source as in England, and where the law is identical with that of England, a totally different practice must be considered to prevail? As, however, it is contended that the barony [119] of Slane, together with a few other ancient baronies of Ireland, descended to heirs male, by virtue of a peculiar custom in that country, which favoured male heirs; or, according to some writers, in consequence of an adherence to the feudal system, the barony of Slane "being," it is said, "a barony by tenure," it is material to investigate the evidence upon which these theories are founded: for, if it can be proved that "feudal baronies" in Ireland were never granted to heirs male, and that in all the early grants of earldoms, either in England or Ireland, the heirs general, and not the heirs male, of the grantees were to succeed, it is impossible to believe that a principle, totally at variance with the general usage, could ever have prevailed in the case of the barony of Slane, or of the few other baronies which are alluded to in Mr. Fleming's case.

In every instance which has been discovered of grants of what are considered "feudal baronies" in Ireland, the habendum was uniformly to the grantee and his heirs. The first earldom granted in Ireland was that of Ulster to John de Courcy,

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litate ejusdem terrae, per easdem leges eos regi et deduci permittant, et eos in omnibus insequantur. In cujus, etc. Teste Rege, apud Wodestock, 9 die Septembris."

Prince Edward having issued a writ against the Bishop of Lismore, which was contrary to law, it was superseded in its effect by the following:

"Rex Thesaurario et Baronibus de Scaccario, Dubliñ. salutem. Quia de assensu et voluntate praelatorum et magnatum terrae Hiberniae, dudum fuit provisum et concessum, quod eisdem legibus tenerentur in terra illa quibus homines regni nostri utuntur in regno nostro Angliae, quod eadem brevia, quoad terras et tenementa recuperanda, teneant in terra illa, quae tenentur in regno predicto sicut justa. Et dicta provisio et concessio omnibus retroactis temporibus fuerunt obtenta et approbata, miramur quam plurimum quod (sicut ex insinuatione venerabilis patris Thomae Lismorensis episcopi accepimus) emanare permisistis ex cancellaria Edwardi filii nostri in Hibernia, contra consuetudinem obtentam et formam brevium in regno nostro usitatam," etc. breve infra scriptum, etc.

The following is a decision of the Court of King's Bench in England, extracted from the Placita Roll of the thirteenth year of King Edward the First, anno 1284, preserved in the Chapter House at Westminster:

"Trinitat. anno decimo tertio. Majus Record.

"Placitum tangeñ. custod. terrarum et corporum eorum qui sunt infra etatem in quo continetur in fine ejusdem:—Et cum una et eadem lex esse debeat tam in regno Angliae quam Hiberniae, ideo consideratum est," etc.—Rot. 70.

In the 6th Richard II. the Commons stated, in a petition to the King, that "Vos ligees d'Ireland sont reulez et gouvernez par les loyes, estatutz, et ordinances faitez en Engleterre, auxi avant come ceux d'Engleterre."

Lord Coke, speaking "of the kingdom of Ireland," in the Fourth Institute, says,

"We shall not need undertake another work to write of the Courts of Justice there, for they have the same which we have in England, and the same law."

the charter of which is not extant; but when King John conferred that earldom upon Hugh de Lacy in the sixth year of his reign, on the forfeiture of it by De Courcy, it was granted to him "et haeredibus suis;" and as he was to hold it as John de Courcy had done, it may be inferred that it had also been granted to De Courcy and "his heirs." The next earldom granted in Ireland was that of Carrick to Edmund le Botiller, in the 9 Edw. II. 1315, the limitation of which was to him and his heirs for ever. In England precisely the same custom prevailed; for of the numerous grants of [120] earldoms, from the time of the conquest until the reign of Edward the Second, not one was limited to "heirs male," but uniformly to the grantee's "heirs," or the "heirs of his body," or his heirs by a particular wife. If, then, as is manifest, the Crown, in conferring the higher and infinitely more important dignity of an earl, to which official duties were attached, evinced no consideration for male heirs: if in granting what are termed "feudal baronies," no reservation was made that the lands should be inherited exclusively by males; if, as was the case in numerous instances in England, earldoms as well as baronies were inherited by female heirs general, who transmitted the right to those honours to their descendants; if from the time when writs of summons to English parliaments are preserved, those writs have been deemed to have created baronies to the person first summoned, and the heirs of his body,—can it be reasonably contended, that in the instance of the barony of Slane the general principle was deviated from; and that, although the heirs, and not the heirs male, of every grantee upon record (whether of earldoms or of "feudal baronies," in England and Ireland), were the objects of the bounty of the Crown, until after the 10 Edw. II., yet that the barony of Slane must be supposed, by some visionary exercise of the royal prerogative, or by some imaginary custom, to have been created in an unprecedented manner, and with an unprecedented limitation?

The first time male heirs were ever mentioned in the creation of any dignity, was in the instance of the earldom of Kildare, in May, 9 Edw. II., 1316, when John Fitz-Thomas was created Earl of Kil-[121]-dare, to hold to him and the heirs male of his body: the next instance was that of the earldom of Louth, in the 12 Edw. II.; and the third, that of the earldom of Carlisle, in the 15 Edw. II. No grant with such a limitation again occurred until the 2d November, 2 Edw. III., 1328, when Edmund le Botiller was created Earl of Ormond, to hold to him and the heirs male of his body; and in the 3 Edw. III., 1329, the Earl of Desmond was created, with the same remainder: but the next English dignity, which was limited to heirs male of the grantee's body, was in the 36 Edw. III., 1362. Thus, until the middle of the reign of King Edward the Second, there is no example of the creation of any dignity whatever, or of the grant of any lands to which the dignity of "peer" was attached, either in Ireland or England, to male heirs: but Mr. Fleming refers the creation of the barony of Slane to a period long before this time.

The first creation of a baron by patent in England was in the 11th Rich. II. 1387, and the next in the 11th Hen. VI. 1433, forty-six years afterwards, both of which dignities were limited to heirs male of the body. Before the 11th Rich. II., as well as between that year and the 11th Hen. VI., numerous baronies were created by the writ addressed to the first baron, and were inherited by the heirs of his body.

No creation of a Baron of Ireland by patent is on record until the 2nd Edward IV. 1462, when Sir Robert Barnwall was created Baron of Trimleston, by a patent under the great seal of England, "ad essendum unum Baronum Parliamenti nostri infra terram nostram predictam," and to hold to [122] him and the heirs male of his body. Unless therefore a writ of summons to, and sitting in the Parliament of Ireland, created an hereditary dignity, one of these two inferences is inevitable, neither of which can be reconciled with historical facts,—namely, that until the year 1462 there were no hereditary Parliamentary Baronies in Ireland; or that those baronies *

* *Remarks on the Baronies of Ireland which are cited in Mr. Fleming's case, as proof that the ancient Irish Baronies were inheritable by "heirs male" to the exclusion of "heirs general."*

1. —THE BARONY OF ATHENRY.

As a claim to this dignity is now pending before the House of Lords, it would not be proper to offer many observations respecting it.

According to the Claimant's printed case, the heir male succeeded to the barony

alone were hereditary whose [123] creations, like that of Slane (if Mr. Fleming's theory be correct), arose from some unknown [124] source; and which, in defiance on three occasions, to the exclusion of the heirs general. Of these instances the earliest took place before any writ of summons to the parliament of Ireland is preserved; and the proof adduced of Peter de Birmingham, who died in 1307, having been a peer, is by no means conclusive.* In neither of the other cases, in which it is alleged that there was an heir general of a Lord Athenry, does Mr. Fleming prove the fact by evidence.† In the reign of Queen Elizabeth, Richard Birmingham is stated in Mr. Birmingham's case to have succeeded as cousin and heir male of a John Lord Athenry, to the exclusion of the daughter and heiress of the said Lord Athenry; but from a passage in the printed case, a doubt seems to arise whether the ancient dignity was not surrendered by some act of the said Richard, and whether he was not created to a new dignity, with remainder to the heirs male of his body; for it is said,—"That Queen Elizabeth was well aware of the original limitation of the dignity which, in consequence of the subsequent loss of documents, can now be proved only by the

* Mr. Birmingham's case, p. 5.—It is particularly to be observed, that contemporary with Peter de Birmingham, of Athenry, was a Peter de Birmingham, of Totmoye, a person of equal importance with the other; hence he might have been the individual alluded to as having been fined for non-attendance in parliament in 1282.

† For example: to show that John Birmingham, eldest son of the Thomas Lord Athenry who died in 1488, died before his father, leaving a daughter, Elizabeth, his heir, who married Piers Butler, ancestor of the Lords Cahir and Earls of Glengall, the following evidence is adduced:—

1st. That the Lords Cahir, now Earls of Glengall, "claim to be heirs general of the Lord Athenry, through that marriage."

2dly. That Lord Cahir "was allowed by Ulster King of Arms, in 1583, to quarter the arms of the Lord Athenry."

3dly. That two manors which were in the possession of a Lord Athenry, in the 3d Henry IV. 1401-2, were found, "after the year 1500 to have passed away from the family of Birmingham, and to be vested in the Lords Cahir" [Printed Case, p. 7.], each of which circumstances, it must be obvious, might have happened from other causes than the marriage of the Lords Cahir's ancestor with the heir general of a baron of Athenry.

The second alleged instance of the heir male succeeding to the barony of Athenry, instead of the heir general, is that of John Lord Birmingham in the reign of Henry VIII. who, it is said, left a daughter and sole heir named Anne, who married William Legge, ancestor by her of the Earls of Dartmouth.

The only proofs of this statement, as adduced by Mr. Birmingham, are a pedigree of the Earls of Dartmouth in the hand-writing of the first Lord Dartmouth; and secondly, a monumental inscription, in which that lady is called "Ann Birmingham, of the truly noble and ancient family of the Birminghams of Athenree, in the kingdom of Ireland." [Printed case, pp. 7, 8.]

Upon the pedigree in the hand-writing of Lord Dartmouth, which is called an "authentic document," and which appears to be the only authority for stating that Miles Lord Athenry "was succeeded in the dignity by his son John, who must therefore have been the peer who attended the Parliament of 1541" [printed case, p. 8.], it is sufficient to observe, that Lord Dartmouth, the compiler of the said, "authentic document," lived in the reign of Queen Anne, more than one hundred years after the alliance in question took place, and that, in fact, his Lordship made no such statement.

The monumental inscription certainly states that Anne Birmingham was a member of the noble family of the Birminghams of Athenry, but it does not assert that she was the heiress of a Lord Athenry; and the absence of such a statement tends to negative the presumption that she was so. It is, however, to be observed, that in the history of the Legge Family, in Collins's Peerage, that alliance is thus noticed:—"William Legge, the second son of Thomas, went into Ireland, where he married Anne, only daughter of John, son of Miles Lord Birmingham of Athenree, and had issue by her, Edward his son and heir, and dying aged 92, was buried at Cassils in Ireland;" in neither of which works is it pretended that the said John Birmingham ever succeeded to the Baron of Athenry, or that he was the eldest son and heir, or the only son of his father Miles Lord Athenry, or that the said Ann was herself an heiress.

of the common law, and of the general principle that regulated [125] the descent of all other dignities whether by patent or by writ in Ireland or in England, could only be enjoyed by males.

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continued usage and enjoyment, is evident from the letters patent which she granted to him in the tenth year of her reign; and which, at his request, were enrolled in the Exchequer, 'in haec verba,' by order of the Barons of the Exchequer. In these she directed her Deputy and Chancellor to receive the submission of the Lord Bremingham, of Anry, in Connaught, and the surrender and resignation of his name of Lord Bremingham, and of all his manors, castells, lordshippes, lands, tenements, seignories, rules, hereditaments, comodities, and profitts, with all and singular the appurtenances; to be regranted to the said Lord Bremingham and the heirs male of his body lawfully begotten and to be begotten." From the said Richard Lord Athenry, the barony descended to the heirs of his body, Thomas Lord Athenry, who was created Earl of Louth, and died without issue male in 1799, leaving three daughters his coheirs. The question now is, whether the ancient barony of Athenry is in abeyance between those coheirs, or devolved on the heir male of the last Lord.

That in the opinion of the law officers of the Crown in Ireland, the heirs general are entitled, upon the principle that the barony is a dignity in fee tail, is manifested by the following extract from the report of the Attorney and Solicitor General of Ireland, on the petition of Thomas Birmingham Dale Henry Sewell, Esquire, son of one of the eldest of the coheirs, in the year 1800:—

"Upon consideration of all the evidence, we are humbly of opinion that the Memorialist has fully proved the several allegations on which he professes to found his hopes and expectations, and that the barony of Athenry appearing to be the most ancient on the list of Barons, and being of so great antiquity, and consequently a Barony in fee, is now, as stated in the petition, in abeyance between the said Lady Elizabeth, the mother of the petitioner, the said Lady St Lawrence, and the said Lady Wallscourt, and that it belongs now to his Majesty alone to determine whether the said barony shall continue in abeyance, or be vested in any of the said coheiresses, and whether his Majesty shall vouchsafe to bestow his consideration and favour on the petitioner, as the son of the eldest daughter of the last Lord Athenry, and his only male descendant."

Hence the case of the barony of Athenry, so far from establishing any thing against Mr. Bryan's claim, tends materially to support it; because there is no proof that the heirs general of that dignity were ever excluded; and, still more, because the right of the heirs general of the last Baron Athenry has been admitted by the law advisers of the crown; who state as the grounds for their opinion, that as the barony was one of "great antiquity," it was "consequently a barony in fee."

2.—THE BARONY OF OFFALEY.

This barony or lordship came into the family of Fitz-Gerald early in the thirteenth century, by the marriage of Maurice Fitz-Gerald with Agnes de Valence, daughter and coheir of William de Valence, Earl of Pembroke, by his wife Joan, daughter and sole heir of Warren de Montchensy, by Lady Joane Marshall, daughter of William Marshall, Earl of Pembroke, by Isabella, daughter and heir of Richard de Clare, Earl of Pembroke, commonly called Strongbow, Lord of the Palatine of Leinster. The said Joan Marshall became one of the coheirs of her brother Anselm, Earl of Pembroke and Lord of Leinster, and brought to her husband, as her share of the lordship of Leinster, the county of Wexford, and the Baronies of Offaley and Geshil. She left issue by William de Valence three coheirs: Agnes, who received as her share Offaley and Geshil; Isabella, who had Wexford, and was wife of John Lord Hastings; and Joane, who married John Comyn, Lord of Badenoch, and had the lordship of Gainsborough, in England. Agnes was living a widow in 1288, and presented a clerk to the church of Geshil in that year. Her son Thomas was the first Lord of Offaley of the Fitz-Gerald family: and his son John Fitz-Thomas was created Earl of Kildare by patent, dated 14th May, 1316, with remainder to the heirs male of his body. His descendant, Richard the fifth Earl, left an heir general, of whom there are descendants. Gerald, the twelfth Earl, and his son Thomas, the thirteenth Earl, were both attainted by Act of Parliament, and the latter was executed for rebellion in 1536, when the titles of Earl of Kildare and Baron of

[126] Whether the Barony of Slane was or was not originally a barony by tenure, it cannot be con-[127]-sidered a territorial honour, subsequently to the period when writs of summons are on record; or [128] rather, perhaps, when a sitting in Parliament

Offaley became forfeited to the Crown. Gerald Earl of Kildare, brother of Thomas the thirteenth Earl, was restored in blood only, and created *de novo* Earl of Kildare and Baron of Offaley, by patent, dated at St. James's, on the 13th May, 1554: with remainder to the heirs male of his body. His eldest son, Gerald Lord Offaley (dying before his father), left an only daughter and heir, Lettice, who became the wife of Sir Robert Digby, Knt. This lady claimed the barony of Offaley as heir general, and after much dispute King James the First created her Baroness of Offaley, during her life, by patent dated 26th June, 1620. It is evident, however, that Lady Offaley had no legal claims to the dignity; because the only barony of which her father was seized was under the patent of 1554, which was limited to heirs male of the body of her ancestor, Thomas, Earl of Kildare.

There is no record of any person having ever been summoned to Parliament as "Baron of Offaley;" and the creation of Lettice, as Baroness of Offaley for life, affords another instance of the Crown creating persons to dignities of the same name, because the Barony of Offaley, created by the patent of 1554, was then vested in the Earl of Kildare, as heir male of the body of the grantee.

3.—THE BARONY OF KINSALE.

Mr. Fleming states, that in four instances the heir male of the family of De Courcy was allowed the barony of Kinsale instead of the heir general.

First in 1599, on the death of Gerald Lord Kinsale, who left a daughter and heiress named Mary, who was twice married. It is not, however, stated, much less proved, that she survived her father "who died in a very advanced age," (Lodge's Peerage of Ireland) or that she had issue; but assuming that she did leave children, the rights of her heirs were not affected by the succession of the heir male to the title; and so far from the right of the said heir male being, as Mr. Fleming would infer, clear and unquestionable, serious doubts were then entertained with respect to his pretensions.

Sir Richard Cox, Lord Chancellor of Ireland in the reign of Queen Anne, whose high official situation afforded him access to all public muniments, states in his History of Ireland, that in the reign of James the First an objection was raised to De Courcy sitting in Parliament, on the ground that the barony of Kinsale originated in a writ of Summons, and that he was not the heir general of the family. His words are:

"There had not been a Parliament in Ireland for twenty-seven years since the 27th Elizabeth, so that it was high time to call one now; and the ministers of state were at work to manage that matter to the advantage of the English Protestant interest in that kingdom, which they saw would be opposed with might and main by all those of the Popish party; and therefore they proposed that an order should be issued for every Parliament man to take the oath of supremacy, and that the Lords should declare their suffrages openly, content or not content, as in England, and not rise and whisper in the Lord Chancellor's ear, as was the custom in Ireland; and that the King should find some pretence to send for some few of those noblemen that would most briskly oppose his interest as Henry VIII. had formerly done; and particularly that the Lord Courcy might not be suffered to sit in the House, because his ancestors were called by Writ, and so his honour being in fee simple did descend to daughters, who were heirs general of his family." (History of Ireland, vol. ii. p. 18.)

What was done on the subject does not now appear. The dignity of which Lord Kinsale was possessed descended to the heir of his body Gerald Lord Kinsale, who died in 1642, and it is said, left a daughter and heiress, who married Patrick, son of Sir Thomas Gough; but the title devolved on his brother. If she or her children were then living, which is very doubtful, they may have acquiesced in the succession of the heir male from ignorance of her right, from want of influence or money to prosecute her claim, or from various other causes; but it is to be observed, that, if issue were then in existence of Mary the daughter of Gerald Lord Kinsale, who died in 1599, the said Mrs. Gough's pretensions were only to a dignity created by the writ to her grandfather.

ment of a Lord Slane can be proved. Neither the law [129] of England, nor the law of Ireland, ever favoured heirs male to the exclusion of heirs general, in the [130] inheritance of honours: for in ancient times honours were always granted to heirs, and never to heirs [131] male; and heirs male have never been legally admitted

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The third instance is said to have occurred on the decease of Almaricus Lord Kinsale in 1719, who, according to some statements, left a sister Ellen, the wife of Sir John Magrath, when Gerald de Courcy, the next heir male, became Lord Kinsale; but there is reason to believe, that the heir of the said Almaricus Lord Kinsale was his cousin and heir male, Gerald de Courcy, because in the notice of the Petition of the said Gerald on the Lords' Journals of Ireland, claiming the dignity, he is called "cousin-german and heir" (Lords' Journals, vol. ii. p. 696), instead of heir male.

The last instance occurred on the decease of the said Gerald Lord Kinsale in 1760, leaving four daughters his coheirs, when his cousin and heir male John de Courcy claimed and was allowed the Barony. The proceedings on that occasion prove, however, that the admission of the claim of the heir male arose from a misconception as to the nature of the dignity, which error appears to have long prevailed, and explains why the heirs general in 1569 and 1642 were passed over.

An idea undoubtedly prevailed, that the Barony of Kinsale was created by patent to William de Courcy, and the heirs male of his body, in the twentieth year of the reign of Richard the Second. Lodge, in his account of the family, says, "by the letters patent of that King, he received a confirmation of the honours and titles of Baron of Kinsale and Ringronet" (Lodge's Peerage of Ireland, ed. 1754, vol. iv. p. 55); and the ancient pedigree, which is alluded to in the Report of the Law Officers of the Crown in Ireland in 1761, expressly refers to the enrolment of a patent of the 20th Richard II. That pedigree seems to have been the only evidence upon which the Attorney and Solicitor General of Ireland made their report in favour of the heir male, and it is not too much to infer, that the same document was used on former occasions, and with the same effect. The Report of the Attorney and Solicitor General of Ireland on the claim of John de Courcy in 1761 was as follows, and it affords a striking example of the loose manner in which claims to honours have sometimes been investigated:

"In obedience to an order of reference bearing date the 6th day of March 1760, made by his Grace the Duke of Bedford, late Lord Lieutenant of Ireland, on the Petition of John de Courcy, claiming the honour of Baron of Kingsale and Baron Courcy of Ringrone.

"We have considered the said petition, and examined the evidence produced by the petitioner to support his claim, which appears to us as is hereinafter stated, viz.: the petitioner not being possessed of the patent, produced to us an attested copy of an entry in the Office of Arms in Ireland of a pedigree of the family of De Courcy, which is herein-mentioned to have been copied from a manuscript of the late Earl of Totness, and which we have annexed to this our Report. This pedigree refers to the enrolment of a patent made in the 20th of Richard the Second to William Courcy, and deduces the dignity of Lord Kingsale from the said William, through a long line of the family of De Courcy to John de Courcy, who is therein mentioned to have been living in the year 1615, and to have had four sons; to wit, Gerald, Patrick, Edmund, and David. And we must beg leave to observe, that by the said pedigree Gerald Lord Courcy, the immediate predecessor of the said John, is mentioned to have died in the year 1599 without issue male, leaving one daughter, Mary, married to Donought Driscoll, on whose death the honour descended to the said John, his cousin. On consideration of the several pedigrees, certificates, and affidavits above mentioned, etc. we conceive it clearly appears that the baronies of Kingsale and Ringrone are antient baronies vested in the family of De Courcy, and have always descended in the male line of that family; that the said baronies, some time before the year 1627, became vested in John De Courcy, who left issue four sons, Gerald, Patrick, Edmund, and David; and that the issue male of Gerald, Patrick, and Edmund, the three eldest sons of the said John, is now extinct. And we are humbly of opinion that the petitioner has laid before us sufficient evidence to prove that he is heir male of the body of David, the fourth son of the said John Lord Courcy, Baron of Kingsale and Ringrone, and consequently is entitled to the honours of Lord Courcy and also of Baron of Kingsale and Baron of Ringrone, and to a writ of

to the succession of baronies, excepting [132] under an express patent or charter creating the dignity.

[133] With respect to a patent, in relation to the barony of Slane, it is not pretended that such an instrument exists: the same rule of law must therefore come into

summons to call him to parliament as a peer of this realm; all which is humbly submitted to your Excellencies as our report this 27th day of August, 1761.

" PHILIP TISDALL, JOHN GORE."

Upon inquiry it turns out that no patent of a creation or confirmation of the barony of Kingsale in the 20th Richard II. is on record, and that the only patent of that year to William de Courcy was a licence to import certain wines.

The report of the Law Officers in 1761, so far from supporting the opinion that the ancient Baronies of Ireland, which did not originate in a patent, are inheritable by heirs male only, admits of an immediately opposite inference. The existence of a patent was in that case presumed; and the report being founded upon the impression that the dignity was created by a patent of the 20th Richard II. to William de Courcy, and the heirs male of his body, the only question was, whether the claimant was the heir male of the supposed grantee.

The descent of the barony of Kingsale to heirs male was therefore the effect of error,—of long standing, no doubt; but still of a total misconception of the origin of the dignity, and that case is consequently not entitled to the slightest weight as a precedent in the question now before the House, as to the effect of a writ of summons to, and sitting in, the Parliament of Ireland, in the absence of a patent of creation.

4.—THE BARONY OF KERRY.

The heir male of the first Baron of Kerry was also his heir general until the death of Francis Thomas Fitz-Maurice, Baron and third Earl of Kerry, in 1818. His sister and heiress, Lady Anna Maria, who married Maurice Fitz-Gerald, Knight of Kerry, died without issue, when her cousin Henry, present Marquess of Lansdowne, grandson and heir of John Earl of Shelburne, second son of Thomas, Baron and first Earl of Kerry, became heir general of his family.

Mr. Fleming infers, that Lady Anna Fitz-Gerald, the sister of Francis third Earl of Kerry, did not succeed to the barony, but that it devolved on the heir male. This, however, is a gratuitous assumption. Lady Anna Fitz-Gerald was nearly eighty when the right to the Barony devolved on her, and had no children; and that no claim should under such circumstances have been made, is not surprising. This case does not therefore afford the slightest support to Mr. Fleming's argument.

5.—THE BARONY OF DELVIN.

The barony of Delvin originated in a writ of summons to the family of Fitz-John, and passed with the heiress of that house to the Nugents. Mr. Fleming says:

" Thomas Nugent, the fourth Earl of Westmeath and thirteenth Baron of Delvin, died in 1752, leaving issue two daughters, Mary, married to Francis Lord Athenry, and Catherine, married to Andrew Nugent, Esquire, and was succeeded by his brother, John fifth Earl of Westmeath and fourteenth Baron of Delvin."

That this statement is wholly unfounded in fact, appears from the annexed extracts from the reports of the Law Officers of the Crown in Ireland, on the respective petitions of Governor Nugent, one of the coheirs, in 1800, and of Andrew Nugent, Esquire, in 1814.

" Upon consideration of the whole of the evidence, we are of opinion, that the petitioner has proved all the material allegations of his petition; that the said barony of Delvin is an ancient barony in fee, and has already been inherited as such by a female; that the said barony is now in abeyance between the petitioner, as the sole heir of Lady Catherine Nugent, and the co-heiresses of Lady Mary Nugent, namely, Lady Elizabeth Duffield, the four daughters of Lady St. Lawrence, and Lady Wallscourt; and that it depends wholly upon His Majesty's royal pleasure whether the said barony shall remain in abeyance, or shall vest in any of the said persons, and whether His Majesty shall, according to the prayer of the petition, and for the reason therein mentioned, or any other, grant the petitioner a writ of summons to sit in parliament in the ancient place of the Barons of Delvin, his ancestors. " JOHN TOLER, JOHN STUART, ST. GEORGE DALY.

" November 3d, 1800."

operation as if it were an English barony; and in the absence of a patent it must be held to have been created by writ, that being the only other mode known to the law by which a barony can be called into existence.

To controvert this proposition, founded as it is [134] upon the highest legal authority; upon the repeated decisions of the House of Lords of England, as well as upon the decision of the House of Lords of Ireland: * and upon the identity of the

Extract from the Report of the Attorney and Solicitor General of Ireland on the Petition of Andrew Nugent, Esquire, in 1814.

"In obedience to your Excellency's order of reference, bearing date at Dublin Castle the 24th day of January, 1814, whereby the petition of Andrew Nugent, of Portaferry, in the county of Down, Esquire, claiming to be one of the co-heirs of Thomas Nugent, fourth Earl of Westmeath and Baron of Delvin, at whose death the said barony of Delvin is stated to have become in abeyance, was referred to us; and your Excellency was pleased to direct us to report our opinion as to what might be proper to be done thereon. Upon the whole of the case, we are of opinion that a barony in fee has been fully proved to have existed in the person of Thomas fourth Earl of Westmeath, Baron of Delvin; and further, we are of opinion that Andrew Nugent, Esquire, the petitioner, has proved himself to be one of the co-heirs of the said Earl Thomas, and has, to our satisfaction, fully made out the statement of his petition. "WILLIAM SAURIN, CHARLES BUSHE."

These reports are most important to Mr. Bryan's claim, as they contain the opinion of the highest law authorities in Ireland, that a writ of summons to the parliament of Ireland created a barony in fee tail.

6.—BARONY OF KILLEEN.

Mr. Fleming's statement, that

"Justin Plunkett, the fifth Earl of Fingal and fourteenth Baron Killeen, died in 1734, leaving his three sisters, namely, Margaret, the wife of John Nugent, Esquire, Amelia, the wife of Robert Earl Nugent, and Mary, the wife of Maurice O'Connor, Esquire, his heirs, and was succeeded by his cousin, Robert, the sixth Earl of Fingal and fifteenth Baron Killeen,"

Is answered by the following report of the Attorney and Solicitor General of Ireland on the petition of one of the co-heirs in March, 1813:

"In obedience to your Grace's order of reference, bearing date at Dublin Castle the 15th day of November, 1811, whereby the memorial of Maurice O'Connor, of Mount Pleasant in the King's County, Esquire, claiming the title and honours of Baron of Killeen, was referred to us, etc.: Upon the whole of the case it appears to us that a barony in fee was created by the writ to and sitting in parliament of Richard Tuit, and that the same was enjoyed and exercised by his heirs and by Christopher Plunket as such, and after his death became in abeyance among his three daughters: but it having appeared to us that James Plunket, the brother of the said Christopher, and his heirs male, sat in parliament as Barons of Killeen, and that the memorialist is the heir general of the said James, we humbly conceive that the question thereupon arising, whether the said James and his heirs were not thereby ennobled, and did not thereby acquire a barony in fee, is fit and proper to be submitted to the consideration and decision of the House of Lords.

"March 13th, 1813." "WILLIAM SAURIN, CHARLES BUSHE.

7.—BARONY OF HOWTH.

It is said, in Mr. Fleming's case, that

"Edward St. Lawrence, the eighteenth Baron of Howth, died in 1549, leaving issue two daughters: Anne, married to Bartholomew Dillon, Esquire, and Allison, married to John Golding, Esquire; and was succeeded by his brother Sir Richard, the nineteenth Lord Howth."

This statement is easily answered. The dignity of which Edward Lord Howth died seised, having fallen into abeyance between his said daughters and co-heirs, no claim to the barony as a matter of right could be made; and the Crown, instead of terminating the abeyance, created a new dignity in the heir male, who inherited the lands.

There are many similar instances in the Peerage of England. See page 182 *& seq.*

* The case of the barony of Le Poer, (10 Bli. N. S.) 178.

common law of Ireland and England. The principal fact upon which Mr. Fleming relies as evidence is, that the barony of Slane was an ancient barony, limited in its descent to heirs male; and that on five occasions, when a Lord Slane left more than one heir general, the next heir male was summoned to parliament, and allowed a higher precedency than could be derived from the date of the first writ addressed to him. It is not denied that the heirs male were summoned to parliament as Barons of Slane on these occasions; and it is conceded that they were allowed a higher precedency than belonged to them, if, as Mr. Bryan contends, they were respectively created to distinct baronies of Slane. The fallacy of deducing from these circumstances the inference that the heirs general were not entitled to the dignities created to their immediate ancestors, or that the allowance of precedency is conclusive against a claim by heirs general, is, however, apparent from the following facts:

The first writ of summons to a parliament of Ireland on record, to a person of the name of Fleming, is that of the 3d Edward II. 1309, which was addressed to Baldwin le Fleming, who was summoned to a parliament at Kilkenny in that year, by the designation of "Baldwin le Fleming;" but no proof exists that he sat in parliament. He was succeeded by his son, Sir Simon le Fleming, who was summoned to and sat in Parliament; and **[135]** on his death in 1370, his son Thomas le Fleming, then a minor, became the third baron. Dying in the 13th Hen. VI. 1434, he was succeeded by his son and heir Christopher Fleming, the fourth baron, who sat in parliament, and died in the 26th Hen. VI. 1447, leaving his grandson and heir, Christopher Fleming, the fifth baron. In November 29th Hen. VI. 1450, a question arose in the great council held at Dublin between this baron and Sir Robert Preston, Lord of Gormanston, as to precedency, which was determined in favour of Lord Slane by James Earl of Ormond, then Lord Deputy of Ireland; but in the 38th Hen. VI. (Statutes of Ireland, 38 H. VI. c. 30. Printed Evidence, No. IV. p. 26) Lord Gormanston agitated the question in parliament, and obtained an act, which recited that "Whereas he and his ancestors in the time of Richard, late King of England,* had been Lords **[136]** of Gormanston and barons of the parliaments of the said land, and had their places in the parliaments and great councils therein held, with the precedence thereunto appertaining, above any Baron of Slane, until the time of the great council held at Dublin on Friday next before the feast of St. Andrew the Apostle, in the 29th year of the reign of King Henry the Sixth, before James Botiller, late Earl of Ormond, then deputy to the high and mighty Prince Richard Duke of York, then Lieutenant of the land of Ireland; and the said Earl intending the dishonour and rebuke of the said Sir Robert on that occasion, imperiously commanded, without proper deliberation, the said Sir Robert, under heavy pains and penalties, and under perilous and evil threats, to take his place and seat in the said council below Christopher then Baron of Slane, without any examination or investigation of the demand of the said Sir Robert to pre-eminence, which he claimed; publicly praying and requiring the said Earl in no wise to proceed in such judgment, to the injury and prejudice of his said title, against law and right. To which the said Earl, not paying any attention to any thing besides the unbounded execution of his said malice at that time, oftentimes commanded the said **[137]** Robert to obey his mandate to sit in the said place, in such terrible manner and form as caused him from fear and compulsion alone to obey by so doing, he first protesting that he neither did nor would take that place or seat in derogation of his title which of right he had to sit above the said Baron in the said parliaments and councils, he not denying that he there sat; but it was solely from fear of the said Earl, and to avoid the jeopardies and inconveniences of the execution of his said threats; and he now prays, that notwithstanding that he so took his seat at that time for that cause, it ought not to be taken as an example

* "Richard jaditz Roi d' Engleterre." As an argument is built upon the error that the barony of Gormanston and the barony of Slane existed "in the time of Richard the First, or beyond legal memory," the following facts are stated, to show the impossibility of the hypothesis that King Richard the First was the monarch alluded to. The act of the 2d Edw. IV. does not trace the creation of the barony of Slane beyond Simon Fleming, Baron of Slane, who died in 1370, or that of Gormanston beyond Robert Preston, who was Chief Justice of the Common Pleas in Ireland and Lord of Gormanston in the latter part of the reign of Edward the Third.

or precedent to the injury or prejudice of himself or his heirs hereafter, and that it be so enacted in the said council. Upon consideration of the premises it is enacted and ordained in the said parliament, and by the authority of the same, that the said Sir Robert shall have his place in all parliaments and great councils to be holden in the said land, as his father and grandfather had heretofore: and that the sitting of the said Sir Robert in the said council by the said compulsive commandment of the said Earl's ill-will, against equity or justice, shall not be taken for a precedent or matter of record against him or his heirs hereafter."

In the 38th Hen. VI., Christopher Lord Slane had been dead two years. The dignity of which he was possessed is presumed to have been in abeyance; and, so far as can be inferred from the words of the statute above cited, Lord Gormanston's pretensions were undisputed. If, however, a note in a manuscript in the handwriting of the celebrated Camden, then Clarenceux King of Arms, in the [138] British Museum, may be relied upon (and the fact that many records which were accessible in the reign of James the First have since perished entitles the statement to attention), a special reservation was made by parliament in the 38th Hen. VI. of the rights of one of the heirs general of the said Christopher Lord Slane: for Camden states, "We find that in the time of King Henry the Sixth the Baron of Slane had place assigned him in parliament, with reservation it should not prejudice Walter Dillon or Thomas Fleming in England." *

and in that of Richard the Second; nor is it possible that he could have been Lord of Gormanston before the 37th Edw. III., as he purchased the said manor in that year of Almaric de St. Amand. A reference could not be made to sittings in the Parliament of Ireland, in the time of Richard the First; for Richard never was King or Lord of Ireland, and the English laws were not generally established there until the 6th of John. Moreover, the whole language of the statute clearly proves that Richard the Second was intended; and by "jaditz," the King Richard who lived more than two centuries and a half before, instead of the sovereign who died only sixty years preceding, could not be referred to. In the statute of the 2d Edw. IV., Henry the Sixth is called "Jaditz Roy d'Engleterre." Printed Evidence, No. IV. p. 28.

* *Copies of Papers relative to the Barony of Slane, in the British Museum.*

"A baron by writt or created by lres patent, if he fail in lyneall heires males, & have coheires, the dignitie is determined in those coheires untill the King please to recreat the heire or husband of one of the daughters (the other having no issue); neither is the elder of more power here then the yongest; but as the King pleaseth or liketh yt pson he createth, wch must be sued also by special petic̃on to his Matie. The Baron of Slane, viz. John Fleming, had no heires males, but coheires: th' one, viz. Anne, married Walter Dillon th' other, viz. Amy, married John Bealewe, both having severall issue now living; and lately, Thomas Fleming had no issue masle, but had 2 daughters, Elynor, maried to Will. Fleming, this Baron's father, by wch he claymeth,—Katherine, maried Pierce Butler, by whome she hath issue living; soe as, by thease two severall coheires, the dignitye (if it had been) of the Barone of Slaine is wholy, by all lawe and custome, extinct."

11th November, 1614.

"The King awarded comission, under the Broad Seale of England, to the Lo. Deputie & Counsell of Ireland, to settle and determine controversies of this nature [precedency] the last Parliamẽt; who by vertue therof called the Lordes of Kierry and Slane before them, and having maturely heard & examined the Allegac̃ons of both sydes the 11th of Novemb. 1614, did order that the Lo. Kierry should hold his precedency of the Ba. of Slaine untill he shewed better matter, and further day was given him therunto."

18th November, 1614.

The cause again heard, and confirmed in favour of Lord Kerry.

[Cottonian MS. in the British Museum. Titus, C. x. fo. 64. b.]

By vertue of that auctheritie wch his Ma'tie hath given unto us as Commissioners for th' office of Earle Marshall, we have taken into or consideration the tytle of precedency in controversie betwixt the Lord Barron of Keyry, commonly called the Lo. of Licks-

[139] On the death of the said Christopher Lord Slane without issue in the 36th Hen. VI. 1457, the [140] barony of which he was seised fell into abeyance between his sisters and co-heirs, namely, Anne the [141] wife of Walter Dillon, Esquire, and Amia the wife of John Bellew, both of whom left descendants. It is therefore evident that no claim to the dignity as a matter of right could be urged by either of these co-heirs; and consequently the non-claim to the first parliamentary barony in the Fleming family does not justify the inference which has been drawn from it, that the title devolved on the heir male. It appears, moreover, from the record cited by Camden, that so far from the heirs general having no right to the barony, the interests therein of one of them were specially recognized and protected.

By virtue of an entail, the manor, or, as (in common with numerous other lands, both in England and in Ireland) it was termed, the barony of Slane, devolved on the heir male, David Fleming, who was the cousin of the last baron. This individual was summoned to parliament as Baron of Slane, in or before the 2d Edw. IV. 1463, in which year Robert Lord Gormanston revived the question of his right to precedency above the [142] Lords of Slane. The proceedings on the subject are of the utmost importance, because they prove that the barony of Slane, which was vested in David Lord Slane, was limited to his heirs, and not to his heirs male; and because they establish that writs of summons to the parliaments of Ireland were then deemed to create hereditary baronies to the heirs of the person so summoned.

The statute of the 2d. Edw. IV. cap. 15. recites, at the petition of Robert Preston, Knight, Lord of Gormanston, "that lately in a parliament held at Drogheda, and

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nawe and the Lo. Baron of Slane; and having heard the severall allegations, as well on the one side as th' other, w^th^ th' answers and replies of their learned Councell, fully and at large, we are of opinyon (for anythinge yet appearing unto us) that the clayme made by the said Lo. of Keyry is just and woll grounded; and that the said Lo. of Keyry, and his heires L'ds of Keyry, ought and are to have place and p'cedence above the said Barron of Slane, and his heires as Barons of Slane, at all Sessiones of Parliam^t^., and other assemblies and meetinges publique and privat wheresoever, and consequently of all other noblemen that are in ranck inferior, and have given place to the said Lo. Baron of Slane. And accordingly do so order the same, untill the said Baron or Barons of Slane do produce better matter to the contrary before us his Ma^ties^ Commissioners here; w^ch^ wee have thought good to signifie unto yo^r^ Lo'ps and the rest of his Ma'ties Councell here, that as occasion shal be offered, you may in the meane tyme allowe the said Lo. of Keyry, such place as by us is here assigned unto him. And so we bid yo^r^ Lo̅ps, &c.

(Signed by) Lo. Thresurer,
Lo. Privie Seale,
Lo. Steward,
Lo. Admirall,
17° Januarii, 1615. Lo. Chamberlayne.

(Addressed)
"To our good Lo^ds^ the Lds Justices and the rest of his Ma^ties^ Councell of Ireland."

(Indorsed)
"The L^d^s Commissio̅rs Marshalle l̅re for the Lo. of Keyry against Slane."
"For M^r^. Clarenceux."

On the opposite side to fo. 10. is a memorandum respecting the inquiry of precedence, thus

"For precedence of the Lo. of Kerry before the Baron of Slane there are extant a Parliament Rolle, in the time of Qu. Mary, in the hands of Ulster, now King of Armes in Ireland; a Certificat of Ulster to the Earle of Sussex, Lo. Lieutenant of Ireland, 1563; and Mr. Stainhurst, a learned antiquarie of that nation, approveth the same in his description of Ireland."

[Cottonian MS. Faustina, C. viii. fo. 9. b.]

[*The following Statement is in the hand-writing of Camden, Clarenceux King of Arms.*]

"The pedegree of the Baron of Slane, delivered by Mr. Christopher Darcy, seemeth

afterwards adjourned to Dublin, and there finished before the most high and mighty Prince Richard Duke of York, then being Lieutenant of Ireland, on Friday next after the feast of St. Blase the Bishop, in the 38th year of the reign of King Henry the Sixth, late King of England, at the supplication of the said Sir Robert, it was ordained by the authority of the same parliament, that he and his heirs should have and enjoy such place of sitting in parliaments and great councils as his father and grandfather had and enjoyed. And for that it is well known to divers persons of honour in this land, whose names were contained in a schedule annexed to a bill by the said Sir Robert brought into the said parliament, and thereinafter written, that Christopher Preston, Knight, father of the said Sir Robert, sat in parliaments and great councils above Sir Christopher Fleming, Baron of Slane; and Sir Christopher Preston, grandfather of the said Robert, sat above Sir Thomas Fleming, then Baron of Slane; and Sir Robert Preston, great grandfather of the said Robert, sat above Sir Simon Fleming, then Baron of [143] Slane; and also that Sir David Fleming, Knight, now Baron of Slane, absents himself from parliaments and great councils, with the intent that the aforesaid persons, who should come and know the seat of their ancestors, should die before the matter aforesaid was duly examined, according to the tenor of the aforesaid act: upon consideration of the premises, and the persons aforesaid having been examined as to the facts, it was found by examination that this Act containeth the truth. It is ordained, established, and adjudged, by the authority of the said parliament, that the said Sir Robert and his heirs, as Lords of Kelles in Ossory, should have their places in parliaments and grand councils, to sit above David Fleming, now Baron of Slane, and his heirs, and all other Barons of Slane who shall be hereafter."*

There is in this statute an express recognition, amounting almost to a legislative enactment, that the barony of Slane, of which David Lord Slane was possessed, was limited to his heirs, which statement was strictly accordant with the principle that then and always regulated the descent of baronies by writ in England. The state of the English peerage at the time when the statute of the 2d Edw. IV. passed, tends still further to prove that baronies which were not created by patent were inheritable by heirs general. In that year thirty-[144]-seven barons were summoned to parliament. Of these five were created by

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to us, as he himself acknowledgeth, to be conjecturall, and is imperfect, by the omission of the heires generall in the right line, not only in former tyme, when one of the heires general was maried to Dillon, and another to Belleaw, in the county of Devon, but also in late tymes.

"That the name of Fleming, or Flandrensis, is ancient in Ireland, we acknowledge; for we finde that at the conquest thereof Hugh Lacy erected a Castle upon the river of Barrow for Thomas Fleming; and whereas K. Henry the 2. gave the countrie of Meth to Hugh Lacy, the sayd Hugh infeofed divers that followed him with Baronies, and among other, R. Fleming with the Barony of Slane.

"We are herunto probably induced by the tenure of that Barony. For whereas parte of the inheritance of Lacy, in Meth, descended to the Verdons, and from them by foure co heires to Furnivall, Burghersh, Crophull, and Ferrers of Groby; Simon Fleming, Baron of Slane, held his Baronie of Slane of Sir Bartholomew de Burghersh, as appeareth by inquisition after the death of the sayd Sir Simon Fleming, the 45th yeare of K. Edward the Third. Soe that he seemeth to be a feudall Baron, and not a Lord of Parliament.

"At what tyme the Baron of Slane was sõmoned to Parlament Mr. Darcy doth not specific. This we finde:—first, that in the tyme of K. Henry the 6. the Baron of Slane had place assigned him in Parliament, with a reservacõn it should not prejudice Walter Dillon and Thomas Fleming in England;—secondly, that in the time of K. Henry the 7th he was ranked in a procession at Greenwich: he had place next after the Lord Delvin, and before the Lord Killin, as appeareth by the Booke of Houth."

[Cottonian MS. British Museum. Faustina, C. VIII. fo. 11.]

* Then follow the names of "Sir Thomas Bath, Lord of Louth; Thomas Plunket, Knight. Christopher Plunket, Knight: Robert Dovedale, Knight: Nicholas Strangways, Esquire: John Capron: Nicholas Hardeman, Esquire: and divers others," who appear to have given evidence on the subject.

patent, and one (Vesey) by writ,* with remainder to heirs male of the body: the remaining thirty-one were baronies by writ; of which number five † had been inherited through females; and no less than five barons ‡ were summoned to that parliament in right of their wives, who were heirs general of barons created by writs of summons.

If, as Mr. Fleming contends, baronies existed in Ireland, which were confined in their descent to heirs male at the period to which he attributes the creation of the barony of Slane, it is incumbent upon him to state specifically by what means they were created. That such a custom was then unknown in, and that it was in direct opposition to the usage of this country, has been proved: and that the barony of Slane, and others to which allusion is made, could not have been created by patent, is beyond a doubt, because no patent of creation of a baron before the 11th Ric. II. is extant in either kingdom. To the assertions that **[145]** there is something peculiar in the creation of the barony of Slane, which takes it out of the ordinary rules respecting the descent of honours; that it existed independently both of a patent and of writs of summons; and that, although no man knows precisely when, or how, it was created, yet that, in opposition to the laws which govern the descent of all other dignities, it is inheritable by heirs male to the exclusion of heirs general, there is this conclusive answer; namely, that in the instance of the first heir male, who was summoned to parliament as Baron of Slane whilst there were heirs general of previous Barons, there is an express statute of the Irish parliament (Stat. 2 Edw. IV. cap. 15.) which declares that the dignity of which he was possessed was vested in him and his heirs. By what means a dignity to which it is pretended a person succeeded as heir male, and which it is said was confined in its descent to heirs male, could be vested in him and his heirs, Mr. Fleming has not pointed out; and it also remains for him to shew how David Lord Slane could have been possessed of the barony in the 2d Edw. IV. to him and his heirs, unless it were created by the writs of summons which were addressed to him, and a sitting in parliament under those writs.

It is material to inquire what was the nature of the barony of Gormanston, the possessor of which twice contested the right of precedency with the Barons of Slane. That it was not created by patent is unquestionable, because, in that case, there could have been no difficulty in settling the precedency, from the date of the patent; and because the earliest patent of the creation of a **[146]** barony of Ireland was in the 2d Edw. IV. 1462: nor can it be said that it was a feudal, or even an ancient dignity, because the title was unknown until the reign of Richard the Second; and still more, because it was decided that the barony of Gormanston did not confer a high precedency. The conclusion seems therefore irresistible, that it was created by writ; and as it cannot be denied that the heirs (who were also the heirs male) of the first Baron of Gormanston succeeded to the dignity, there is proof, to which no suspicion can be attached, that a writ to and a sitting in the parliament of Ireland, in the reign of Richard the Second, did create an hereditary barony.

The first person summoned to parliament by the title of "Gormanston," was Christopher Preston, in the reign of Richard the Second. He was the son of Sir Robert Preston, Chief Justice of the Common Pleas in Ireland (who was summoned *ex officio* in the reigns of King Edward the Third and Richard the Second, but appears latterly to have sat in the precedency of the barony of Kells in Ossory, in right of his wife), by Margaret, daughter and eventually sole heiress of Walter de Birmingham, who was summoned to parliament as Lord of Kells in Ossory, in the middle of the reign of King Edward the Third. The barony of Kells, on the death of Margaret, wife of Sir Robert Preston, descended to their son, Christopher Preston,

* Appendix to the First Report of the Lords' Committee on the Dignity of a Peer of the Realm.

† Audley, Cobham, Dudley, Dacre, and Say and Sele.

‡ Fitz-Warine, Ferrers of Chartley, Scales, Cromwell, and Willoughby of Eresby. The twenty-one other baronies by writ, in the 2d Edw. IV., were then possessed by heirs male, who were also the heirs general of the persons first summoned; but many of the said twenty-one baronies have since descended to heirs female, and five of them, namely, Clinton, Hastings, Zouch, Grey of Ruthyn, and Herbert, exist at the present moment, in the persons of heirs general; the remainder being in abeyance or in the Crown under attainder, excepting the barony of Scrope of Bolton, which is vested in a sole heir general, but who has not preferred his claim to the dignity.

who was summoned to and sat in parliament as Lord Gormanston, but apparently in the precedency of the barony of Kells.* He was [147] succeeded by his son Christopher Preston; and he by his son Robert Preston, who was summoned to and sat in parliament, in the reign of Henry the Sixth. It is evident, from the statutes of the 38th Hen. VI. and 2d Edw. IV., that the Lords Gormanston always enjoyed a higher precedency than the Lords Slane; not, however, by virtue of the barony of Gormanston, but, as the stat. 2 Edw. IV. expressly asserts, "as Lords of Kells in Ossory." This recognition that the barony of Kells in Ossory was vested in the Lords of Gormanston; that it was a barony which conferred a seat in parliament; and that it was of greater ancienty than the barony of Gormanston; satisfactorily proves what the parliament of Ireland then deemed to be the effect of the writ to Walter de Birmingham, by the title of Lord of Kells. That the Lords of Gormanston could not have been Barons of Kells in Ossory by any other means than by descent, is beyond dispute. Walter de Birmingham had a grant of the manor or lordship of Kells for life only, and after his death it was granted to the Earl of Ormond; so that it was not inherited by the descendants of the said Walter de Birmingham. At the time, therefore, when the parliament of Ireland recognized, by an express statute, that Lord Gormanston was Lord of Kells, and as Lord of Kells admitted his right of precedency over the Lords of Slane, he was not possessed of the territorial lordship of Kells, nor had he, or any other person, ever been created Baron of Kells by patent: hence the stat. 2 Edw. IV. affords evidence of the most conclusive nature, that the effect of a writ of summons as a baron to the parliament of Ireland was the same as the effect of a writ to the [148] parliament of England, and created a barony to the heirs general of the body of the person so summoned.

In another point of view, the precedency allowed by the stat. 2 Edw. IV. to Lord Gormanston over Lord Slane is extremely material, if, as Mr. Fleming contends, precedency was in early times an infallible rule by which to judge of the date of the creation of a dignity. It is certain that the barony of Kells, as a parliamentary barony, was not created before the writ of summons to Walter de Birmingham, in the reign of Edward the Third; and by allowing the inheritor of that barony precedency over the Lord of Slane, it is obvious that the parliament of the 2d Edw. IV. considered that the barony of Slane was not created until after the creation of the barony of Kells. Nor is it difficult to reconcile this with the fact that a writ issued to Baldwin le Fleming in the 3d Edw. II., and that Walter de Birmingham was not summoned until the reign of King Edward the Third, because there is no evidence to shew that subsequent writs were addressed to the said Baldwin le Fleming, or that he ever sat in parliament under the only writ which is recorded to have been addressed to him. On discussing the question in the 2d Edw. IV. it is manifest, from the words of the statute, that evidence was examined on the subject, and that the House of Lords attached more importance to the sittings of the Lords of Slane and the Lords of Gormanston, than to the dates of the first writs addressed to them: in other words, it considered that the first proof of sitting in parliament was evidence of the date of the creation. The proof of sitting of a Lord of Slane was not traced farther [149] than to Simon le Fleming, who died in 1370. Of Baldwin le Fleming, who was summoned in the 3d Edw. II. (the father of the said Simon), no notice whatever is taken; and the only conclusion which can be drawn from the omission is, that proof of his having sat in parliament was not extant. If then the date of the creation of the barony of Slane be brought so long within the time of legal memory as the middle of the reign of King Edward the Third, the argument founded upon its being a barony by "prescription" (little as that argument, under any circumstances, is worth), must fall to the ground.

The barony of Slane, like the barony of Kells, originated in a writ of summons to and a sitting in parliament; and whatever was the effect of such writ and sitting in the instance of the barony of Kells, the same must be held to be the effect in the case of the barony of Slane. The statute of the 2d Edw. IV. shews that the barony of Kells descended to Lord Gormanston, as heir general, through an heir female, and that the Irish parliament solemnly recognized it to be vested in Lord Gormanston.

* Similar circumstances occurred in the peerage of England. The Lords Willoughby de Eresby, though summoned by the title of "Willoughby," have always enjoyed the precedency of the barony of Beke; and other instances might be cited.

Can it then be pretended, in the absence of a patent, that the barony of Slane was of a distinct nature from the barony of Kells; and that though created about the same time, and by precisely the same means, yet that it was descendible to a distinct class of heirs?

The grounds upon which Mr. Fleming's argument rests, that the barony of Slane was confined in its descent to heirs male, may be briefly stated to be:

I. That the ancestors of Baldwin le Fleming, [150] who was summoned in the 3d Edw. II., were frequently styled "Domini de Slane," or "Barones de Slane;" that in the reign of Henry the Third, the head of the family ranked among the "magnates" of Ireland; and it seems to be insinuated that before the reign of Edward the Second, the tenure of the lordship or barony of Slane, conferred the dignity of peers of Ireland upon its possessors.

Excepting with the view of shewing that the barony of Slane existed as a parliamentary dignity before any writs of summons are extant, it is difficult to comprehend in what way these statements can benefit Mr. Fleming's case. He does not found his claim on the barony of Slane being a barony by tenure, because he is not possessed of the lordship of Slane; and even if the tenants of that manor were, as he contends, "magnates" of Ireland antecedent to the reign of King Edward the First, that circumstance by no means proves that the dignity of which Mr. Fleming supposes them to have been possessed would be confined in its descent to heirs male; because all dignities, until the reign of Edward the Second, were granted to heirs general; and every precedent upon record establishes, that such dignities have uniformly descended to heirs general.

An error of a fatal nature, with respect to the deductions which are drawn from it, prevails throughout Mr. Fleming's case. It is said, that because the terms "Dominus de Slane," and "Baro de Slane," were applied to various persons, who succeeded as heirs male to the lordship of Slane, they were peers of parliament. That the words "Lord" and "Baron" were frequently used in [151] England, but more especially in Ireland, to designate the possessor of certain lands, called lordships or baronies, is a fact generally known; but it has never been pretended that they were peers of the realm. In England, the owners of the manors of Burford, Skirpenbek, Hilton, Shipbroke, Kinderton, and some others, were always styled "Barons of Burford," "Barons of Skirpenbek," "Barons of Hilton," "Barons of Kinderton," and "Barons of Shipbroke;" whilst in Ireland there have been the "Barons of Galtrim," the "Barons of Birr," the "Barons of Skrine," the "Barons of Navan," the "Barons of Castle Knocke," the "Barons of Auverke," the "Barons of Bargie," the "Barons of Burnchurch," the "Barons of Brownesford," the "Barons of Loughmoe," the "Barons of Balynoa," the "Barons of Courtown," and numerous others; but the expression imported nothing more than that they were lords of those particular lordships, or palatine baronies. The word "Dominus" often bore the same meaning, but it was sometimes used with much greater latitude; hence no reliance whatever can be placed on those expressions, as indicating the possession of a peerage in either country.

II. Mr. Fleming's next position is, that because David Fleming, who was summoned to parliament between the 36th Hen. VI. and 3d Edw. IV., was, according to the stat. 2d Edw. IV., allowed a higher precedency than could belong to a creation in or subsequent to the reign of Henry the Sixth, it is evident that he succeeded to an ancient dignity, instead of having been created to a new barony; and this fact, he says, is further proved, because the stat. 2d Edw. IV. shews that the said David [152] could not have been created *de novo* by writ, inasmuch as he is therein stated to have absented himself from parliaments and great councils, to prevent evidence being given upon the question between him and Lord Gormanston for precedency.

Weight is attached to the circumstance of the persons who were summoned to parliament, as Barons of Slane, having a higher precedency than could belong to a creation by the first writ respectively addressed to them; but the circumstance does not justify the inference drawn from it, and precisely the same thing has often occurred in the parliaments of England, without affecting the rights of the heirs general of the original baronies (see p. 182, *et seq.*). To the objection, that David Lord Slane could not have been created by writ, because to prove such a creation a sitting must be shewn, and the statute of 2d Edw. IV. stated that "he absented himself from parliaments and great councils," it is sufficient to reply, that that statute, by accusing

him of having "absented himself," proves that a writ of summons had issued to him, because such a charge could not be made, unless he had been commanded to attend; and that fact fully accounts for his being styled "Lord Slane" in the said act. Whether he did or did not sit in parliament, may be material in the event of a claim by the heir general of his body; but it has nothing whatever to do with Mr. Bryan's case: on the contrary, he contends that the said David Lord Slane had no hereditary right to be summoned; but that, if summoned, the writ created him to a new and distinct barony of Slane. It must, however, be remarked, that the words of the stat. 2d Edw. IV. [153] do not admit of the construction which Mr. Fleming has given to them; for the statement, that David Fleming "had absented himself from parliaments and great councils," clearly refers to the 2d Edw. IV., the immediate period when Lord Gormanston revived the question about his precedency; but all which it is essential for Mr. Bryan to establish is, that if, as appears to be the case, the said David was summoned to parliament, he was not entitled *de jure* to the writ as heir male of the preceding Barons of Slane.

III. Mr. Fleming insists that if the persons who were summoned to parliament as Barons of Slane, on succeeding as heirs male, "were not peers by inheritance, the immediate agency of an adequate legal and constitutional power so to ennoble them, has in no one instance been proved to have intervened in these alleged creations of peerage; and that even supposing the power of ennobling commoners without the specific sanction of the royal authority, and of creating peerages by writ of summons to the parliaments of Ireland, to have legally and constitutionally vested in the option and pleasure of the successive lords lieutenant and lords justices of Ireland, and even of their deputies, who were often themselves commoners, the proofs usually deemed necessary in England, where peerages by writ actually exist, to substantiate such creations by royal writ of summons to and sitting in parliament in virtue thereof, have not been produced by Mr. Bryan, in any one instance of these six alleged creations."

The distinction here drawn between the writ of the king to an English parliament, and the writ of [154] the lords lieutenant of Ireland in the king's name to an Irish parliament, is only entitled to attention from its novelty. It is well known that the lords lieutenant, or lords deputy of Ireland, were always instructed by the crown respecting the summoning of parliaments, the creation of peers, and the appointments of high officers of state in that kingdom; and whatever took place on either of these subjects must be considered as the act, not of the lord lieutenant, but of the king, in whose name the writs of summons and the patents of creation and appointments issued. Every creation of peerage, whether by writ or by patent, must therefore be presumed to have occurred by virtue of the necessary authority, of which the act itself is sufficient legal evidence; and it is no more necessary to produce proof of power having been expressly given to a lord lieutenant of Ireland to create a peer by writ of summons, in the fourteenth, fifteenth, sixteenth, or seventeenth century, than it is necessary to produce the writ of Privy Seal in order to establish the validity of a patent of an Irish Peerage at the present day. The patent itself is legal evidence of the creation in the one case; and the issuing of the writ, followed by a sitting in parliament, is evidence of the creation in the other. It is also to be observed, that writs of summons to the parliaments of Ireland, like writs to a parliament of England, issued in the king's name, and were nearly verbatim the same. To deny to the former the effect which the law attaches to the latter, would be inconsistent with legal principles; and be tantamount to asserting that the prerogative of the Crown in Ireland was inferior to, and distinct from, the prerogative of the Crown in England.

[155] Mr. Fleming's assertion that the proofs "usually deemed necessary in England, where peerages by writ actually exist, to substantiate such creations by royal writ of summons to and sitting in Parliament in virtue thereof, have not been produced by Mr. Bryan, in any one instance of these six alleged creations," is met by producing the statute of the 2d Edw. IV., which proves the sitting of the two Lords Slane, namely, of Simon Fleming in the reign of Edward the Third, and of Christopher Fleming in the reign of Henry the Sixth. The fact, that no writs of summons to the Parliaments of Ireland are extant, excepting for a few years, which are not embraced by the period in question, explains why the writs to those persons cannot be produced: but is it to be inferred that they could possibly have been pre-

sent as peers of parliament without having been duly summoned? or that where a sitting can be shewn long before the time when the first patent of the creation of a barony was granted, the production of a writ is necessary to prove that the barony was neither created by patent, nor by that vague and unintelligible agency upon which he relies? Whether a right to an early barony, as a barony by writ, for which sittings can be shewn, but for which no writs of summons are extant, could be established, is a question which Mr. Bryan has no interest in raising. His claim is to a barony for which proofs of the issue of writs, and of sitting, can be produced; and it would rather strengthen than weaken his case if it could be proved that there never was any parliamentary barony of Slane until the issue of the writs upon which his claim is founded.

[156] David Lord Slane died in the 3d Edw. IV. 1463, leaving his only son Thomas his heir, then seven years of age, who died in his minority, in the 11th Edw. IV. 1471, unmarried, when his three sisters became his co-heirs, between whom the barony of Slane, which the statute 2d Edw. IV. expressly recognized to be vested in David Fleming and "his heirs," fell into abeyance; and it still continues in that state among their descendants. On this second instance of a barony of Slane terminating in heirs general, it is important to observe that a claim as a matter of right could never be made to the dignity; and consequently that the non-claim is no proof that the right was not inherited by those co-heirs.

Sir James Fleming, next heir male of David Lord Slane (namely, son and heir of William Fleming, brother of Christopher fourth Lord Slane, who died in the 26th Hen. VI.), succeeded to the lordship of Slane. He was styled a Lord of Parliament in the 12th and 13th Edw. IV. (Printed Evidence, No. IV. pages 29 and 30); but writs of summons for that period are not extant. Dying in the 7th Hen. VII. he was succeeded by his son and heir Christopher, who sat in parliament as Lord Slane in the 9th Hen. VII. and died in the 9th Hen. VIII. 1517, when he was succeeded by his son James Fleming, who sat in parliament in the reign of Henry the Eighth and in the 2d Eliz. 1560. He died in the 20th Eliz. 1578, without issue, leaving his two sisters his co-heirs, between whom the barony, created to their grandfather, fell into abeyance; and as it is still in abeyance between their heirs, no claim, as a matter of right, could ever have been made to the dignity.

[157] Mr. Fleming observes, that James Lord Slane (the heir male of Thomas Lord Slane, who died in his minority, in December, 11 Edw. IV., 1471,) immediately after the death of the said Thomas Lord Slane, received permission to remain one year in England, for the purpose of obtaining livery of his lands there (Printed Evidence, No. IV. pages 29 and 30); and that as the stat. 12 and 13 Edw. IV. cap. 5., which recognizes him as a lord of parliament, was passed before the expiration of the year, he could not have acquired the rank of a peer by a sitting in parliament under a writ of summons. Mr. Bryan repeats that it is no part of his case to shew that the said James Fleming ever was a peer; but, as Mr. Fleming infers from the recognition in the stat. 12 and 13 Edw. IV. that James Fleming was considered to have succeeded to the original dignity, and not to have been created to a new barony by writ, it is incumbent upon Mr. Bryan to prove that the deduction drawn from the circumstances alluded to is unfounded. Mr. Fleming assumes that in the reign of Edward the Fourth, a proof of sitting was necessary to entitle a person who was summoned to parliament to be styled a baron of parliament, a presumption which is wholly unsupported by facts. If a writ issued to James Fleming, commanding him to attend the parliament by which the statute in question was enacted, can any reasonable person doubt that he would be styled a baron of that parliament, even supposing that he had not sat under the writ? But it does not follow that, because James Fleming was permitted to go to England for a year, he must have continued out of Ireland during the whole of that time. The licence named **[158]** the longest period for which he could be absent, but it does not prohibit his return whenever he thought proper. Moreover, one year was the usual period for which licences of absence from the kingdom, letters of protection, and other special exemptions from duties, or from the operation of the law, were granted; and, as can be shewn by numerous instances, they are by no means conclusive evidence that the individuals so favoured availed themselves to the full extent of the indulgence. There is therefore nothing to justify the opinion that James Lord Slane was not summoned to and sat in the parliament of the 12 and 13 Edw. IV.

It is argued for Mr. Fleming that, although Mr. Bryan contends that James Lord

Slane " was created a peer by writ of summons to and sitting in parliament in the reign of Edward the Fourth, he does not offer any proof to the House as to what parliament he was summoned, or in what parliament he sat during that reign."

To this objection the answer is conclusive. There are no writs of summons to nor any actual proof of the sitting in the parliament of Ireland of peers for the reign of Edward the Fourth, excepting the statutes which have been referred to; and even if there were, Mr. Bryan has no motive for producing them. As the statute of the 12 and 13 Edw. IV. calls James Fleming a lord of parliament, it must be presumed that he was summoned to that assembly; but if the recognition arose from hereditary right alone, it is for Mr. Fleming to produce a patent, or some other proof of the way in which that hereditary right was created. Having shewn that the original barony was not created by any instrument which limited its descent to **[159]** heirs male, Mr. Bryan of course attributes its origin to the only other mode of creation known to the law; and finding that certain persons were recognized by the Irish parliament as Barons of Slane who could not possibly have succeeded to the original barony under the operation of the law on the subject of baronies by writ, he followed the two precedents established by the English House of Lords, and presumed that each of those persons was created to a new and distinct dignity. The onus of proving the contrary rests with Mr. Fleming; and Mr. Bryan need only add, that, as he claims nothing through the James Fleming who is presumed to have been summoned to parliament in the reign of Edward the Fourth, he has no other interest in the question, whether he was or was not a peer, than to convince the House that if he were a baron of parliament he could not have become so by hereditary right.

Soon after the barony of Slane, which was created to the said James Lord Slane, fell into abeyance in the year 1577, the Crown was pleased to summon Thomas Fleming, of Stephenstown, the heir male of the last baron, to parliament, who succeeded to the lordship of Slane, under the entail; but the earliest proof of his having been so summoned is a document called a parliamentary pawn.* of the 27 Eliz. 1585.

[160] Thomas Lord Fleming died in November 1597, leaving two daughters his co-heirs; namely, Eleanor, who married her cousin William Fleming, of Derpatrick, who, as heir male of the Fleming family, succeeded to the manor of Slane; and Catherine the wife of Pierce Butler, of Old Abbey in Kilkenny; between which co-heirs the barony created to their father fell into abeyance, and remains vested in their descendants.

Mr. Fleming contends that the above-mentioned William Fleming (husband of Eleanor, the daughter and co-heir of the last Baron Slane) succeeded to the dignity as heir male; and adduces in proof of his being a peer of the realm,—

I. The inquisition on the death of Thomas Lord Slane in 1597, in which the said William Fleming is called " William now Lord Baron of Slane."

II. His being described as the king's " very noble subject William Fleming, Lord Baron of Slane," in the grant of the livery of his lands by King James the First.

III. His answer to a bill in Chancery, which he was permitted to make " upon honour," and in which he is styled by that title.

[161] To these facts Mr. Bryan replies:

First. That a man being described by a title of peerage in documents issued by the Crown, or his being so considered by a jury and in proceedings in Chancery, are not evidence of his legal right to the dignity so ascribed to him. There are many pre-

* " The parliamentary pawns are sometimes copies, sometimes abstracts, of the writs and precepts that issue for summoning the peers to parliament (similar to the entries on the Close Rolls), with schedules, containing the names and titles at length of the several persons to whom such or similar writs were sent. When the parliament meets, the parliament pawn is completed; and after that period all writs of summons are issued from the Crown-Office in Chancery.

" It became the practice about the time of Henry the Eighth, when a parliament was to be called, for the Clerks of the Petty Bag-Office in Chancery, in pursuance of a warrant from the Lord Chancellor, to prepare these abstracts and schedules, with the help of the Masters in Chancery and the Heralds; and being fairly engrossed on parchment, they were lodged in the Petty Bag-Office, under the name of 'Parliament Pawns.' "—Grimaldi's " Origines Genealogicae," p. 201.; from the Reports on Public Records; and the Minutes of Evidence on the Howard de Walden Peerage.

oedents of titles being attributed to persons not merely by themselves, but in the most solemn instruments from the Crown, to which they had no just right or pretensions.* Great laxity prevailed on this subject long after the reign of James the First; and if the heirs of individuals, to whom titles of dignities have been improperly applied by the Crown, are therefore to be considered [162] entitled to those dignities, a new principle respecting honours must be introduced. The circumstance of a title being attributed to a person in an *inquisitio post mortem* is deserving of very little weight.† It formed no part of the duty of the jury to inquire to whom the dignity belonged, but to ascertain who was the next heir to certain lands; hence any description of the heir beyond what was sufficient to identify him as the next heir of entail, was foreign to their inquiry, and cannot be considered evidence of a fact which it was not their province to investigate. Recent instances of the finding of juries on the subject of titles of honour in Scotland, shew that it would be dangerous to attach much importance to such returns; and it is not likely that a jury in a country town in Ireland, in the reign of King James the First, were more careful in the investigation of evidence on a point which was not necessarily brought before them. Upon proceedings in Chancery it is unnecessary to make any particular observation, because it must be evident that the assumption or admission of a title of peerage in a bill in Chancery is no proof of the right of the party to whom it is attributed.

As to the statement that William Fleming was styled "Lord of Slane," the circumstance may have arisen from his having possessed the lordship of Slane; or it is not impossible, though no record is extant to prove it, that he was summoned to [163] parliament either in a new barony, or in the barony created to Thomas the preceding Lord Slane, whose daughter and co-heir he had married, the abeyance being terminated in her favour, and he having been summoned in her right. Be this as it may, it is certain that there is no legal evidence of William Fleming having ever been summoned to or sat in parliament; and to whatever credit the records cited in Mr. Fleming's case may be thought entitled, as proof that William Fleming was a peer, they do not establish that he succeeded to the dignity by hereditary right as heir male.

William Fleming died in 1612, leaving a son, Christopher Fleming, of full age. He was summoned to and sat in parliament as early as May 1613; and it is under the writs to and sitting in parliament of the said Christopher Fleming, and of his son William Fleming‡, that Mr. Bryan claims the barony of Slane, he being heir general of the bodies of the said Christopher and William Lords Slane.

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* Of the numerous examples that might be adduced in which the Crown attributed dignities improperly to individuals, a few only will be mentioned. In the 15th Hen. VIII. Sir Arthur Plantagenet was created Viscount L'Isle; and in the patent it is said that Sir Charles Brandon had in the 5th Hen. VIII. been created Viscount L'Isle, to him and his heirs male of the body of Elizabeth Grey, "*ad tunc Vicecomitisse Lysle*," whom he intended to marry. That lady had not, however, the slightest pretensions to the title, the dignity of Viscount L'Isle having been limited to the heirs male of the body of Sir Edward Grey, her grandfather.

Edward Somerset, son and heir apparent of Henry first Marquis of Worcester, is repeatedly styled Earl of Glamorgan and Baron Beaufort of Caldecote Castle, in commissions and other instruments by Charles the First: in one of which he is addressed as "Lord Herbert, Baron Beaufort of Caldecote, Grismond, Chepstow, Ragland and Gower, Earl of Glamorgan," but there are strong reasons for believing that he was never legally created to either of those dignities.

In the year 1784 George Townshend, Baron Ferrars of Chartley and Baron Compton, was created Earl of Leicester by a patent, in which he is styled "Baron de Ferrars of Chartley, Baron Bourchier, Lovaine, Bassett, and Compton;" but he was only a co-heir of the barony of Bourchier: there never was a parliamentary barony of Lovaine, and the barony of Bassett was then vested in other families.

† Many errors committed by juries on the subject of dignities might be stated. In an inquisition taken in the 2d and 3d Phil. and Mary, on the demise of Thomas Lord Berkeley, he is styled "Dominus de Berkeley, Mowbray et Segrave," though he was only a co-heir of the baronies of Mowbray and Segrave; and in 1639 the abeyance of the barony of Mowbray was determined in favour of Henry Howard, the descendant of the other co-heir.

‡ Printed Evidence, No. I. pp. 5. 8. to 12; No. II. pp. 1, 2, 3; and No. I. pp. 20, 21,

Mr. Fleming contends that the said Christopher Fleming was neither created to a new barony nor summoned in right of his mother, the co-heir of Thomas Lord Slane, who died in 1597; but succeeded as heir male of all the former barons, and inherited the original barony of Slane. That this was not the fact, and that a discussion took place with respect to the dignity of which the said Christopher Fleming was possessed, is placed beyond dispute by some contemporary papers in the British Museum. It appears that in 1614 a dispute arose between this Lord Slane and the Lord [164] of Kerry for precedency, which caused the origin of the barony of Slane to be investigated; and an opinion is extant, stating that the barony of Slane is a barony by writ, and that "Thomas Fleming hath no issue male, but had two daughters; Eleanor, married to William Fleming, this baron's father, by which he claimeth; Katherine, married to Pierce Butler, by whom she hath issue living; so as by these two several co-heirs the dignity (if any had been) of the Baron of Slane is wholly, by all law and custom, extinct" (Cotton, MS. Titus C. x. fo. 64 b.).

The opinion there given, that when a barony by writ fell into abeyance it became extinct, has long since been exploded; but it was commonly entertained in the reign of James the First, and the point does not appear to have been finally settled until the case of the barony of Willoughby de Broke, in the year 1694 (Cruise on Dignities, p. 197—206). The above passage is only cited to shew that the original barony of Slane was deemed a barony by writ; and that the hereditary pretensions of Christopher Lord Slane to a barony of Slane, were derived through his mother. If the doubt which was expressed in Camden's opinion, as to the validity of his pretensions, was held to be well founded, Christopher Fleming must have been created to a new barony, instead of having obtained a termination of the abeyance of the dignity created in the reign of Elizabeth to his maternal ancestor, Thomas Fleming. It is confidently assumed by Mr. Fleming that the abeyance of that barony was not determined in favour of Christopher Fleming, because Eleanor [165] his mother was living at the time when he was summoned to parliament; but that an abeyance was formerly considered to be determined by summoning the heir apparent of a co-heir, instead of the co-heir himself, is proved by the case of the barony of Mowbray, in April, 1639.* The point is, however, not very material to Mr. Bryan, whether the abeyance of the dignity of which Thomas Lord Slane died seised in 1597 was or was not determined, because he relies on the writs to and sitting of Christopher Fleming, and of his son William Fleming, Barons of Slane, as having created a barony of Slane to the said Christopher, and the heirs of his body, supposing that he did not succeed *jure matris* to the previous barony: but it was essential that documents should be referred to in proof that in the reign of James the First the barony of Slane was considered a barony by writ.

Christopher Lord Slane died in 1625, leaving several sons, of which Thomas was the eldest, and William the second son.

Thomas Fleming, the eldest son, being a pro-[166]-fessed friar beyond the seas, the manor of Slane was settled by his father, with the rest of the property of the family, on his second son, William Fleming.

On the 6th October, 5 Car. I. 1629, the King addressed a letter to the Chancellor and Justices of Ireland, stating that Christopher late Baron of Slane had estated his whole barony and lands upon William Fleming his second son, and the heirs male of his body, in consequence of Thomas his eldest son having become, and being then, a professed friar beyond the seas, who had relinquished all his interest in the said

* Roger de Mowbray was summoned to parliament in the 23d Edw. I., and the barony created by that writ descended to his heir, John Mowbray Duke of Norfolk, who died in 1475, leaving Ann his daughter and heiress, who died without issue, when the barony of Mowbray fell into abeyance between John Howard Duke of Norfolk, and William Marquis of Berkeley, the heirs of Margaret and Isabel, daughters of Thomas first Duke of Norfolk and sixth Baron Mowbray. It continued in abeyance between the heirs of those personages until April, 1639, when Henry Howard (son and heir apparent of Thomas Earl of Arundel, Norfolk, and Surrey, who was then the elder of the co-heirs,) was summoned as Baron Mowbray, and took his seat in the precedency of the ancient barony.

barony and lands, and in the dignity of Baron of Slane, to the said William, his brother, and his heirs; and that it was his Majesty pleasure that a patent should issue, granting to the said William Fleming, and the heirs males of his body, as an especial mark of favour, the same precedency of place, title, honour, state, and dignity, "of Baron of Slane, in as ample a manner, and with all and every rights, privileges, pre-eminences, prerogatives, immunities, and allowances belonging thereunto, as his father, or any other of his ancestors, Barons of Slane, have ever held and enjoyed: Always provided, that if at any time Thomas Fleming shall return to his country, and, quitting the habit of life he is entered into, shall claim as well the estate as the honour, which decends unto him by birth, the said William Fleming his brother shall resign, together with the inheritance fallen unto him by this means, the honour which hereby we will and command to be conferred upon him" (Printed Evidence, No. IV. page 41).

[167] By this letter the King recognised the old dignity as inalienable in Thomas Fleming but directed a new title by patent to be created to William, with the precedency of the barony, which was enjoyed by his father.

These instructions, however, appear never to have been forwarded,* and were certainly not acted upon; and on the 30th of the same month a second letter was addressed to the Chancellor and Justices of Ireland, containing in effect the same recital respecting Thomas Fleming the friar, though in different terms; but it is added, that he had humbly desired that the King would be graciously pleased to "give way that, during his life, his said brother William and the heirs male of his body might be reputed Barons of Slane;" and his Majesty declared "it to be his royal will and pleasure that the said William, and the heirs male of his body, shall be from henceforth, during the life of his said elder brother, reputed, styled, and called Barons of Slane; and further, our pleasure is, that special care be had that in all meetings, assemblies of parliament, or otherwise where the said William Fleming shall happen to be, or the heirs male of his body, in case he die in the lifetime of his eldest brother, that he or they shall have the same places and precedency which of right belonged unto his father. But with this caution, that if the said Thomas Fleming shall hereafter, quitting the habit and life which he is now entered into, return into his country, claiming the said title of [168] honour and the estates cast upon him by the law, that this declaration of our gracious pleasure towards his said brother shall be noways prejudicial unto him."

Upon the first of these letters it must be remarked, that a strong doubt may be entertained of the legality of so much of it as provided that the dignity conferred upon William Fleming should be resigned in case his elder brother Thomas returned to Ireland and abandoned his profession of a friar, because it is now held that no peer can resign his honours; and this may have been one reason why that letter was never forwarded. In the second letter, dated three weeks after the former, it is simply provided that if Thomas Fleming returned, quitted his habit of life, and claimed his estates and the title of Lord Slane, that then the grant to William "should not be prejudicial to him." This distinction between the two letters is very important, as is also the fact that the first letter directed the Chancellor and Justices to create William Fleming a Baron by patent, whereas the second letter is a mere declaration of the royal will, and was clearly intended to authorize the Chancellor and Justices to issue a writ to the said William Fleming, and to give him the precedency which his father enjoyed. The second letter admits also of other inferences, which are extremely material to Mr. Bryan's case. It proves that no patent ever issued to William Fleming; and the mere declaration of the royal will, that a dignity should be allowed to a particular person, with a certain limitation, cannot be held to have legally created that dignity. Such a document could merely have the effect of a royal war-[169]-rant, and it has been often decided that unless the royal warrant be followed by a patent no dignity is created. It is therefore contended that the letter had not the effect which was intended, and must be treated as if it had never existed, so far as regards the dignity in question; but it is evidence that no patent ever issued to William Fleming. Another inference to be drawn from that letter (and which is corroborated by various other facts, some of which are stated in this case) is, that the

* The original letter of the 6th October, 1629, is still in the State Paper Office in England.

Crown then assumed the right of granting any precedency it thought proper; whilst, by fixing the place of the new baron to that which of right belonged to his father, instead of assigning to him, as the previous letter had done, the place "which any other of his ancestors, Barons of Slane, had enjoyed," it would appear that the Crown became sensible of having committed an error on the subject, and had discovered between the dates of the two letters that Christopher Lord Slane had been created to a new barony.

The difference between stipulating that William Fleming should resign the honour in case his elder brother claimed and became eligible to enjoy it, in the letter of the 6th October, and providing, in the letter of the 30th October, that in such a contingency the grant to William Fleming should not be prejudicial to Thomas Fleming, seems to be this,—that the said Thomas Fleming should succeed to the barony which was vested in his father, with the precedency thereto belonging; and that William should retain the dignity then conferred upon him as a new grant, with the precedency of that grant.

The "King's letter," or royal warrant of the 30th October, 1629, was enrolled in the Chancery [170] of Ireland on the 6th November following; but no proceedings were adopted in consequence, and the letter did not, and could not, create a peerage. On Monday, the 14th July, 10th Car. 1, 1634, it appears from the Lords' Journals of Ireland that William Lord Slane's counsel "moved for the issuing of a writ of summons to him as son and heir unto Christopher late Lord of Slane, and that his lordship might take his place in this high and honourable assembly of parliament as his said father and his ancestors, Lords of Slane, have heretobefore done. Upon consideration whereof it is thought fit, and accordingly ordered by the lord deputy, that the said writ shall be granted unto him, and that the said William shall take his place and have precedence as Lord of Slane. But forasmuch as it appeared that the said William had an elder brother named Thomas, who, in the lifetime of his father, about fourteen years since (as was alleged), went into parts beyond the seas, from whence he is not yet returned; and it appears not that he is living, but is rather presumed to be dead: It is therefore ordered, that the awarding of the said writ, and the placing of the said lord in the room of his father, shall be with a *salvo jure* of the said Thomas, in case the said Thomas be living and return; and with this further saving, that in case the said Thomas be living, and that he or his heirs shall, at any time hereafter, return into this kingdom and reassume the title of Lord of Slane, that then and in such case the said William or his heirs shall take no advantage or benefit by the said writ, or any consequent thereof, but shall be altogether secluded from [171] any such title, place, or privilege as he may claim by pretext of that writ, as if the honour and favour now granted unto him had not been, or that no such writ had ever been awarded to him: under which conditions and salvos the said William did accept of the said favour, and fully consented it might be entered accordingly" (Lords' Journals of Ireland, Printed Evidence, No. 1. pp. 20, 21).

On the next day, July 15th, 1634, the following entry occurs on the Journals:

"Memorandum—That according to an order of the Right Honourable the Lord Deputy, made in full Parliament on Monday last, the fourteenth day of this instant month, his Majesty's writ of summons was delivered to the Right Honourable William Lord Baron of Slane, who was this day brought into this House by the Lords of Howth and Dunsany, and the said writ allowed: himself placed between the Lord of Kerry and the Lord of Howth (Idem. ibid).

This proceeding in the House of Lords of Ireland establishes that the King's letter of the 30th October, 1629, had no agency whatever in causing a writ of summons to issue to William Fleming. It was never once adverted to in the House, much less was it made the ground for summoning him; but, on the contrary, he is expressly said to have claimed as son and heir of his father. The *salvo jure* in the entry on the Lords' Journals merits attention from its being in favour of "the heirs" of Thomas, instead of the heirs male of his body; because it tends to prove that the hereditary dignity to which he was entitled by birth was inheritable [172] by heirs general; and this is further corroborated by the proviso, that in the event of Thomas's succession, neither William nor his heirs should derive any advantage from the grant.

The entry on the Lords' Journals in 1634 is also peculiarly important on other grounds. It expressly states that a writ of summons to parliament was attended

by a specific effect, which effect, it is evident from the context, was the creation of a barony; thus negativing Mr. Fleming's assumption that a writ to and sitting in an Irish parliament, did not operate as a writ to and sitting in an English parliament.

The Lords expressly provide in their resolution, that in a particular contingency "the said William, or his heirs, shall take no advantage or benefit by the said writ or any consequent thereof, but shall be altogether secluded from any such title, place, or privilege, as he may claim by pretext of that writ, as if the honour and favour now granted to him had not been, or that no such writ had ever been awarded to him."

If this expression does not mean that a writ of summons and "a consequent thereof," namely, the sitting, created a barony to the individual and his "heirs," it is impossible to attach to it any import whatever. Whether such a *salvo jure* would now be held to be legal, is immaterial to the argument; but it is certain that the House of Lords of Ireland imagined that it could so protect the rights of Thomas Fleming, and his heirs, from the effect of that which Mr. Fleming says was attended by no effect whatever, namely, summoning a person to parliament, and the "consequent thereof." It would be difficult to find in parliamentary records [173] an admission of the effect of a writ to parliament more free from obscurity, more explicit, or more decisive than this; and when it is remembered that the same principle had been repeatedly recognized and admitted in England, it must be deemed perfectly conclusive that the law of Ireland respecting dignities, like the law upon all other subjects, was, and had always been, precisely the same as the law of England.

To strengthen still more the proposition that a writ of summons to and sitting in the parliament of Ireland had the effect of creating a barony to the heirs of the body of the person so summoned and sitting, appears by a "King's letter" from King James the First to the Lord Deputy of Ireland, dated 31st March, 11 Jac. I. 1613. His Majesty states, that "being now purposed shortly to hold our parliament there, we think it fit to make choice of some few eminent persons, capable of that honour and and trust, for the nobility of their birth, their estates, and possessions in that kingdom, to be assistant in the upper house with the rest of the lords, and to have place and voice amongst them as peers and barons of that realm; wherefore we are pleased by these our letters to authorize you, upon the summons of our next parliament there, to call by our writ, in the accustomed form, our right trusty and right well-beloved cousin the Earl of Abercorn, the Lord Henry Bryan, eldest son to the Earl of Thomond, the Lord Audley, Lord Ochiltree, and the Lord Burleigh, to give their attendance in the upper house of our next parliament, and to admit them to have place and voice amongst the lords there as peers and barons of [174] that kingdom. Wherein, notwithstanding, we do not lay our commandment so strict and binding, either upon you or them, but that you may forbear to send forth our writs to call all or any of them to attend this service, if they shall desire to be forborne therein." *

* The Earl of Abercorn and the Lords Ochiltree and Burleigh were Scotch peers, possessing lands in Ireland, and Lord Audley was a peer of England. There is no evidence that any of these peers attended parliament, except the Lord Henry Bryen, whose name occurs to the complaint of the Lords to the Lord Deputy, respecting the invasion of their privileges by the Commons in 1614. The letter is as follows:—

Copy of a Writ of Privy Seal, or King's Letter, remaining of Record amongst the Rolls, in the Rolls' Office in His Majesty's High Court of Chancery in Ireland. Dated the 11th of March, 11 James I.

James Rex. By the Kinge.

Right trusty and welbeloved, wee greet you well: wee receaved lately your L'res dated the foure and twentieth of Februarie last past, wherein you ppound divers considerable matters touchinge our service there, and desire to understand our pleasure concerning them, to most p^t of w^h you shall receave our answere by our Counsell, to whome wee have fully impted our mynde therein, and for the rest, w^h are of a higher nature, and soe require our spiall and imediate warrant, to direct and authorise your pceedings in them, wee doe nowe by these our L'res signifie our exp^sse pleasure con

[175] There is in this document a clear recognition of the power of a writ of summons to create a peerage **[176]** of Ireland. Its purport was to instruct the Lord Deputy to raise certain persons to that rank, and **[177]** the mode of effecting that object is expressly stated to be, by "calling them by writ in the accustomed "form." Can it then be pretended in the face of this letter, and of the entry of the Lords' Journals of Ireland in 1634, that a difference existed in the laws of the two countries respecting baronies by writ? If no such principle was known in Ireland as that peerages could be created by writ, is it likely that King James the First would have specifically ordered divers persons to be elevated by that mode of creation, instead of by patent: or, that the House of Lords a few years afterwards would have specially provided against what it evidently knew was the usual consequence of a person being summoned to and sitting in parliament? Even if no other proof of the similarity of the law on the subject of baronies by writ in Ireland and England could be found, Mr. Bryan confidently submits that the records in question distinctly and unequivocally establish the identity of that law, at the precise period when the creation of the dignity took place of which he is the claimant; and he again adverts to the stat. of the 2d Edw. IV. as containing a recognition of the existence of the same principle of law nearly two centuries before.

The King concluded the letter of the 31st March, 1613, with the following remarkable passage: "Our pleasure is, that the Earl of Abercorn shall hold the same place and precedence of an earl in parliament as he doth at our council table,

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cerninge the same. As of late it seemed fitt unto us to erect divers townes into boroughes, scituate in the remote p̃ts of that our kingdome of Ireland, and to give them priviledge to send Burgesses to our high Court of Parliament, w^ch^ heretofore they did not, to th' end that by this indifferent course and distribuc̃on our subjects in geñall may be equallie interested in the makeing those lawes under w^ch^ they must live, and that by their accesscon the lower house of our Co̅mons may be the better strengthened with advise and counsell, to deliberate upon those weightie affaires w^ch^ shall fall in consultac̃on amongst them, soe likewise beinge now purposed shortly to hold our Parliam^t^, then wee thinke it fitt to make choise of some fewe eminent psons capable of that honor and trust, for the nobility of their berth, their estats, and possessions, in that Kingdome, to be assistant in the upper howse with the rest of the Lords, and to have place and voice amongst them as Peers and Barons of that Realme; wherefore wee are pleased by these our L'res to authorize you, uppon the so̅mons of our next P'liament there to call by our writt, in the accustomed forme, our right trustie and right welbeloved cossen the Erle of Abercorne, the Lord Henry Brian, eldest sonne to the Erle of Thomond, the Lord Awdly, Lord Ochilltree, and the Lord Burleigh, to give their attendance in the upp howse of our next P'liament and to admitt them to have place and voice amongst the Lords there as peers and Barons of that Kingdome; wherein, notwithstandinge, wee doe not lay our comandment soe strict and bindinge, either uppon you or them, but that you may forbeare to send forth our writts to call all or any of them to attend this service, if they shall desire to be forborne therein, the importance of theire own private occasions beinge best knowne unto themselves, w^ch^ may necessarilie inforce them to be absent from it. Wee understand that there may arise some question att our next P'liament, whether the Lord Barry Viscount Buttevant, and the Lord Bourke, of Castle Connell, ought to have voice and place in this uppr house as Lord of that Kingdome, in regard that it is alleged that the Lord Barry hath an elder brother yet livinge, to whome in right of his birth the honor of the house belonges, and that their is a suite yet dependinge, touchinge the right of the Barony of Castleconnell, betwixt the Lord Bourke and his elder brother's sonne, whoe challengeth the inheritance of that honor by right of descent, according to the lawes of our Realme; for as much as these questions may turne to the disturbance of those affaires w^ch^ are to be handled in P'liam^t^, wee thinke itt fitt, for p̃venc̃on of those inconveniences nowe before hand, and pvisionallie, to declare our pleasure concerning them: in regard that the Lord Barry hath beene alwaies honorablie reported of for his dutifull behaviour to our state and hath enjoyed, without contradic̃on, these many yeares the title and honour and livinge of his house, and that his brother, whoe is said to be elder is both domme and deafe, and was never yet in possession of the honor or livinge of his house, Wee are pleased to comand you, yf this

and in all other places;" which clearly demonstrates that the King exercised the power of giving any precedency he pleased; for he directed the [178] earl to be summoned as a baron, yet placed him over all viscounts and barons in parliament.

It is highly important to notice the resolution of the House of Lords of Ireland on the claim to the barony of Le Poer, in November, 1767; because the proceedings in that case were strictly analogous to those of the House of Lords of England on claims to baronies by writ, and, corroborative of the principle contended for by Mr. Bryan, that all baronies of Ireland, for which a patent cannot be produced, must be held to have been created by writ, and descend to the heirs general of the body of the person who is first recorded to have been summoned to parliament.

The family of Le Poer were of great antiquity, and possessed considerable influence in Ireland from a very early period; and they are presumed to have always ranked among the peers of that kingdom. But the first writ of summons on record to a Lord le Poer is to John le Poer, who was summoned to a parliament at Kilkenny, in the 3d Edw. II. on the same occasion as Baldwin le Flemyng. (Close Roll in the Chief Remembrancer's Office, Dublin, 3 and 4 Edw. II.) Nicholas le Poer was summoned to a parliament at Dublin in the 48th Edw. III. (Chancery Roll, Dublin, 48 Edw. III.); and was again summoned in the 1st and 4th Ric. II. (Chancery Roll, Dublin, eod. ann. vol. iv. p. 418). The heirs male of his body, who were likewise his heirs general, inherited the barony, and the dignity was vested in his descendant John Earl of Tyrone at his death in August 1704.* His lordship's only

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question concerninge the Lord Barrie's right to sitt in Parliament be stirred by any person, that you silence it by our comandm^t, and that you doe admitt him according to his degree, to have place and voice in pliam^t, not takeing knowledge of any doubt which may be moved of his legall right thereunto. Touchinge the Lord Bourke's, though wee allow him to be in possession of the Barony, in regard of his dutiful affections to our State, and are verie willinge to doe him favour, yet because wee cannot in justice admitt him to the place of a Baron of our P'liament, without a manifest p̃judice to the right of his brother's sonne, who is under age, and pursues at this tyme by the indevour of his friends to recover the Barony by the course of law, wee thinke it fitt, till this question be legallie determined, that you do forbear to call him by our writt to give his attendance in P'liament, not purposing hereby to discountenance any waies his right, but because wee would have itt free to the discussion of the lawe, which must decide it; Wee have sent by Bradly our comission unto you, giveing you power to determine all such controversies which may arise betweene any of the Lords, touchinge their place and p̃cedence in P'liament, whereby you may see howe carefull wee are to remove away all matter of contention w^ch may give you any interruption to the handlinge of those weightie affaires w^ch shall fall in consultac̃on then; and herein wee doe lett you knowe that wee doe soe much relye upon your judgment and care in guidinge occasions and governinge those busynesses w^ch shall happen to be treated of in P'liam^t, that wee are very confident the successes from thence wilbe nothinge inferior to our expectac̃on of them, and theis our L'res shall bee your sufficient warrant and discharge in this behalfe. Given under our signett, at our pallace of (Westm'), the last day of March, in the eleventh yeare of our raigne of England, Ffrance, and Ireland, and of Scotland the six-and-fortieth.

Our pleasure is that the Erle of Abercorne shall hold the same place and p̃cedence of an Erle in P'liam^t as he doth at our counsell table, and in all other places.

To our right trusty and welbeloved the Lord Chichester, our Deputye of our realme of Ireland.

M^d q^d vicesimo quarto die Maii anno d̃ni 1613, Joh^es Hamilton gen' venit in Canc' d̃ni Regis regni sui Hib'nie et petiit ut L're p̃x supscrip Irrot'larent'; ad cujus requisc̃o'n' Irrot'lantur de verbo in verbũ put superius.

J. Wogan, D^y K^r of the Rolls.

* It is said that a copy of a patent creating the barony of Le Poer to the heirs male of the grantee's body is in existence. But even if the original patent, or an enrolment of it, could be found, it does not at all alter the case with respect to the principle which the resolution of the House of Ireland in 1767 confirms; namely, that where no patent can be produced, the barony must be presumed to have been created by writ, and to descend to heirs general.

[179] child, Katherine, married Sir Marcus Beresford, who was created Baron Beresford, and afterwards Viscount and Earl of Tyrone. In November, 1767, the said Katherine, then Countess-Dowager of Tyrone, "claimed the barony of Le Poer in fee by descent from her grandfather Richard, who sat and voted in parliament, as Baron le Poer, until the 25th Car. II., when he was advanced to the title and dignity of Earl of Tyrone" (Journals of the House of Lords of Ireland, vol. iv. p. 418). Her petition was referred to the House of Lords of Ireland, and was by it referred to a committee of privileges, when counsel were heard on the part of the claimant, and the Attorney and Solicitor-General appeared on behalf of the Crown (Ibid). On the 16th of November, 1767, the committee

"Resolved, that the Right Honourable the Countess Dowager of Tyrone hath fully proved her claim to the barony of La Poer in fee, and hath a right to the said barony in fee" (Ibid. vol. iv. p. 420).

The House confirmed this report; and ordered, "That the Speaker do attend the Lord Lieutenant with the resolution whereby the Right Honourable Katherine Countess Dowager of Tyrone hath proved her title to the barony of La Poer in fee" (Ibid. p. 421). His Majesty was pleased to confirm the resolution of the House of Lords, and "to order that the said Countess-Dowager of Tyrone and her heirs be allowed to enjoy all the rights [180] and privileges belonging to the said barony of Le Poer" (Journal of the House of Lords of Ireland, vol. iv. p. 441).

This is an express judgment of the House of Lords of Ireland, that one of the most ancient baronies of that kingdom was a barony in fee tail; and that a writ to and sitting in parliament created a barony to heirs general; and Mr. Bryan may safely found his claim upon this precedent, supported as it is by the opinions of numerous and distinguished Irish lawyers, who have advised upon his case and upon other cases. In no one instance do they entertain a doubt that, in the absence of a patent, the effect of a writ to and sitting in the parliament of Ireland is to create a barony to heirs general; nor has one of them even suggested that there ever was a difference between the descent of honours in Ireland and in England. Mr. Fleming's theory, that the ancient baronies of Ireland were inheritable by heirs-male only, appears therefore to have been unknown to the law advisers of the Crown in Ireland, and to the House of Lords of that kingdom in the Le Poer case in 1767; or to the law officers in the Athenry case in 1800; or in the Delvin case in the same year, and again in 1814; or in the Killeen case in 1813; on each of which occasions the Solicitor and Attorney-General of Ireland reported that those dignities were ancient baronies in fee tail. To controvert that decision, and those opinions, Mr. Fleming has not adduced the slightest evidence, much less a precedent; and to the fact that, in a few cases, the heir male has been summoned when the dignity fell into abeyance, Mr. Bryan has already replied. Nor has Mr. Fleming cited [181] one instance in which the law officers, or House of Lords of Ireland, have denied the right of heirs general of baronies by writ, or in which they have, in the remotest degree, sanctioned the doctrine that writs to and sittings in the parliaments of Ireland had not precisely the same legal effect as in England.

William Lord Slane repeatedly sat in parliament under the writ of 1634, and may be considered to have succeeded to his father's barony. If, however, it be denied that he sat in his father's barony in consequence of the existence of his elder brother, he must be deemed to have been created by those writs and sitting to a new dignity; and as Mr. Bryan is the heir of his body, it is immaterial to him what may be the resolution of the House on the point. He submits, however, that William Lord Slane did sit in his father's barony; and that, upon numerous precedents, he may adduce the proofs of the said William Lord Slane having sat in parliament, in support of his claim to the barony created or allowed to his father Christopher Lord Slane. William Lord Slane continued in possession of the dignity until his death in 1641, when it devolved on his eldest son Charles Fleming, who dying without issue was succeeded by his brother Randall Lord Slane, of whose body Mr. Bryan has proved himself the sole heir.

Mr. Fleming is not descended from the individual whom he represents as his ancestor, and he is not the heir male of the Barons of Slane.

There are many precedents * shewing the course [182] which the House has adopted in cases precisely similar to the present, viz. where an heir male has been summoned to parliament by the name of a barony which was vested in heirs general, and allowed the precedency of the original dignity.

The barony of Strange was created by writ in the 28th Edw. I., and was vested in Ferdinand Stanley, Earl of Derby, at his death in 1594, he being the heir general of the body of John le Strange, the first Baron. The Earl of Derby left three daughters his co-heirs, between whom the dignity fell into abeyance, in which state it has ever since remained. The earldom of Derby devolved on William Stanley, the brother and heir male of the last Earl: and in the 3d Car. I. 1628, James Stanley, his son and heir apparent, was summoned to parliament as "Baron Strange," and took his seat in the precedency of the ancient barony, notwithstanding that the Countess of Castlehaven, eldest daughter of the said Ferdinand Earl of Derby, claimed the barony, and that the House ordered that the writ to James Stanley "should not be any way prejudicial to the said Countess, or any of the daughters of the said late Earl" (Lords' Journals, 7th June, 1628). In 1763, James Murray Duke of Atholl, as heir general of the said James Stanley Lord Strange, claimed the barony of Strange, which was created by the writ and sitting of James Stanley in the 3d. Car. I., which claim was allowed; and the dignity is now vested in the Duke of Atholl (Cruise on Dignities, p. 225 to 233, and Lords' Journals, vol. xxv. p. 11).

The other instance of a similar decision is in the case of the barony of Clifford. That barony was [183] created by writ of summons in the 28th Edw. I., and became vested in George Clifford Earl of Cumberland, the heir male and heir general of the first Baron. He died in 1605, leaving Anne his daughter and heiress; but in 1628, Henry Clifford, son and heir apparent of Francis Earl of Cumberland (brother of George Earl of Cumberland and Baron Clifford, who died in 1605), was summoned to parliament as Baron Clifford in the 3d Car. I. 1628, and sat in the precedency of the ancient barony. In 1691, the Earl of Thanet claimed, and was allowed, the original barony of Clifford, created by writ in the 28th Edw. I., as heir general of Anne, daughter and heiress of George Earl of Cumberland above mentioned; and in 1737, Richard Earl of Burlington claimed the barony created by the writ of summons in the 3d Car. I. 1628, to Henry Clifford, as the heir general of that person, on the grounds that Francis Clifford Earl of Cumberland, the father of the said Henry, was not seised of any barony, and that the writ and sitting of the son created a new dignity. The House of Lords resolved that the petitioner was entitled to the barony of Clifford created by the said writ (Cruise on Dignities, pp. 233, 234.; Lords' Journals, vol. xxv. pp. 112. 130), and which is now vested in the Duke of Devonshire.

It has been justly observed, that "there can scarce be a doubt but that the Crown, in the two preceding cases, issued writs of summons to the eldest sons of the Earls of Derby and Cumberland, upon the idea that the old baronies of Strange and Clifford were then vested in their respective [184] fathers; but this proving to have been a mistake, the House of Lords conceived themselves obliged to admit that the writs operated as new creations of baronies, and resolved accordingly." (Cruise on Dignities, p. 234).

An abstract of the arguments used in the claim to the barony of Strange, in 1736 (the success of which appears to have produced the claim to that of Clifford in the following year), will be found in Mr. Cruise's work "On Dignities," whence it is manifest that the principle which was recognized and admitted by the House upon those occasions is precisely that upon which Mr. Bryan rests his case; namely, "that where there is no creation by letters patent, if issue be joined in any question, whether a man be a baron or not, he need only shew that he or his ancestor, to whom he is lineal heir, was summoned and sat in parliament, which is to be proved by the records of parliament; and that there may be different titles of honour of the same name; for peerages, though called baronies, in imitation of the local

* Besides those which are cited (*post*), the papers printed for Mr. Bryan refer to the baronies of Burgherst, Dacre, Latimer, Abergavenny, Paget, and Roos. See Dugdale, Collins, Dodderidge, Lords' Journals, etc.

baronies to which they succeeded, were mere personal dignities, inherent in the blood of the person ennobled; and there was no legal objection to the king's summoning two men to parliament by the same surname" (Ibid. p. 226).

The baronies of Clifford and Strange are not, however, the only baronies of which a new creation by the same name has been granted to heirs male on succeeding to the lands, whilst the former dignity continued vested in heirs general.

Edmund Deincourt was summoned to parliament from the 27th Edw. I. to the 20th Edw. II., and [185] obtained a licence to settle his estates on his nephew and heir male. He died in 1327, leaving his grand-daughter his heir general; but, in the 6th Edw. III., his said nephew was summoned as Lord Deincourt.

In the 23d Edw. I., Thomas de Berkeley was summoned to parliament, and the dignity descended to Thomas Lord Berkeley, who died without issue male in 1416; but the lands being entailed on the heir male, his nephew James de Berkeley was summoned to parliament in the 9th Hen. V., and his heirs have been allowed the precedency of the original barony.

So lately as the reign of Elizabeth, the heir male of Thomas West, Lord la Warr, who died in 1554, was allowed the precedency of the ancient barony, although heirs general of that nobleman were then in existence; but in neither of the instances cited, can it be pretended that the rights of the heirs general are affected by the heirs male having been summoned to parliament and allowed the precedency of the original dignities; and there is no stronger reason for presuming that Irish baronies were confined to heirs male because in a few cases heirs male have been summoned on succeeding to the lands of their ancestors, than that such was the case in England because a similar circumstance has in three or four instances occurred in this country.

The cases of Berkeley and La Warr shew that in England, as well as in Ireland, the Crown has sometimes summoned an heir male when a dignity fell into abeyance; and it would seem that in former times, when a title fell into abeyance, it was [186] considered to be absolutely at the King's disposal, or at least until the abeyance determined by the extinction of all the co-heirs but one. The right of the Crown to grant a dignity of the same name to an heir male of an ancient barony by writ is indisputable; and all which is pretended by Mr. Bryan is, that the Crown did exercise this right on four or five occasions, in the instance of the family of Fleming; that on each of those occasions the dignity so conferred fell into abeyance; and that three, if not four of the said dignities, are now in abeyance. The fifth creation (if it were not a determination of the fourth abeyance) he claims on the principle of law, which has been repeatedly and uniformly acted upon by the House; from which principle of law the title of no less than ten peers to sit in the present parliament is derived, which has prevailed for ages, and which forms an integral part of the law of the land; namely, that (in the absence of a patent) a writ, and sitting in parliament, create a dignity to the person so summoned, and the heirs of his body.

The point mainly relied upon by Mr. Fleming in support of his position, that the heirs male of the Fleming family, who were summoned to parliament as Barons of Slane, succeeded to that dignity by hereditary right, is, that they respectively enjoyed a higher precedency than could be derived from the first writ addressed to them; but such inference cannot be drawn from that circumstance.

The rules by which the precedency of peers was determined, whether in the parliaments of England or Ireland, in early times, are involved in much obscurity. Ancienty was no doubt the general [187] criterion; but the Crown possessed and often exercised the right of giving whatever precedency to a peer it thought proper; and it is very difficult to state by what principle the question of ancienty was regulated. The Lords' Journals of England, in the reigns of Henry the Eighth, Edward the Sixth, Queen Mary, and Queen Elizabeth, clearly prove that the date of the first writ on record was not always the criterion; and there is reason to conclude that barons, whose dignities were created before the reign of Henry the Sixth, sat, not according to any fixed rule derived from the date of their creations, but from precedents; that to baronies of particular names a certain place in parliament was assigned; and that the person who was summoned by that name was deemed to be entitled to that place, whether he was newly created to or inherited the

dignity. That this custom prevailed in England appears from the following facts:—

Henry Pole was summoned to parliament as Lord Montagu, in the 24th and 28th Hen. VIII., and was allowed the precedency of the barony of Montagu, created by writ in the 28th Edw. I. (Lords' Journals, vol. i.), notwithstanding that the said original barony of Montagu was then in the Crown by attainder, and that his mother, through whom his pretensions to it were derived, was then living.

The barony of Stafford was created by writ in the 27th Edw. I., but was forfeited by the attainder of Edward Duke of Buckingham in 1521. In 1547, his son and heir Henry Stafford was created Baron of Stafford, to him and the heirs male of his body, [188] by act of parliament; and he took his seat as junior baron. He continued to sit according to the creation of 1547 until February, 1558, when he claimed, and was allowed, the precedency of his ancestors (Lords' Journals), notwithstanding that the barony of which they were possessed was not vested in him.

In the cases of Berkeley and La Warr, a similar usage seems to have been acted upon.

In 1604, the barony of Abergavenny was allowed to Sir Edward Neville, not as a matter of right, but of royal grace and favour; and he sat above all barons, under the idea that it was the most ancient barony. This precedency is the more remarkable, because Sir Edward Neville's descent did not afford him the slightest pretensions, even as heir male, to any barony of Abergavenny of an earlier creation that the 16th Ric. II.: and it can only be explained by presuming that there was then an idea that to certain names of dignity a definite place in parliament was attached. The subsequent Barons of Abergavenny have always enjoyed the same place in parliament; and it is not necessary to anticipate what might be the result of an investigation on the subject.

The instances of Strange and Clifford, in 1628, tend still further to confirm the same opinion; but even so lately as the year 1817, a baron (Lord Percy) sat in the House of Lords in the precedency of the 27th Edw. I. 1299, though he was only entitled to precedency from the year 1722; and this case is of itself sufficient to refute the idea that the place in which certain lords have sat in parliament affords the slightest evidence of their right [189] to the dignities to which such precedency belongs.

Henry de Percy was summoned to parliament in the 27th Edw. I. 1299; and, after various forfeitures and restorations, the barony of Percy was vested in Henry Algernon Percy, sixth Earl of Northumberland, at his death in 1537. His brother and heir Sir Thomas Percy being attainted, the dignity fell to the Crown, and has never been restored. In 1557, Sir Thomas Percy (son and heir of the said Sir Thomas) was created Baron Percy, with remainder to the heirs male of his body; failing which, to his brother Sir Henry Percy and the heirs male of his body. He was subsequently elevated to the earldom of Northumberland, with the same limitation: and dying in 1572 without issue male, his five daughters and co-heirs became heirs to the ancient barony of Percy (which was then in the Crown by attainder), and the representation of that barony is now vested in their descendants. The barony of Percy (created in 1557), and earldom of Northumberland, devolved, however according to the limitation, on Henry Percy, the Earl's brother and heir male; and in 1628, King Charles the First granted to the then Earl of Northumberland and Baron Percy, a confirmation of the barony of Percy to him and the heirs male of his body, "in such manner as any of his ancestors had enjoyed the same," which was, in truth, a grant of the ancient precedency, though the earl was not the heir to the original barony. The said barony of Percy became extinct on the failure of the heirs male of the grantees' bodies in 1670. In 1722, Algernon Seymour, son and heir of Elizabeth Duchess of Somerset, daughter and heiress of [190] Josceline last Baron Percy, under the patent of 1557, was, on the death of his mother, summoned to parliament as Baron Percy, and placed in the precedency of the ancient barony, though he was not possessed of any barony of Percy until created to a new dignity of that name by the first writ addressed to him. His son Hugh Percy (afterwards Duke of Northumberland) having been summoned to parliament in 1777, as Baron Percy, he also sat in the same precedency; and when Hugh, the present Duke of Northumberland, was called up to the House of Peers in the barony of Percy, he likewise sat in the same place, and

continued to do so until July 1817, when he succeeded his father in the dukedom of Northumberland.

These facts shew that no reliance is to be placed on precedency as evidence of right; and that the precedency allowed to the Barons of Slane cannot be deemed proof that they inherited the original barony.

That the rights of heirs general are not affected by the writs addressed to heirs male by the same title, or by the precedency which those heirs male have enjoyed, is self-evident; and appears by the judgment of the house in the cases of the baronies of Strange and Clifford and by the existence of the two baronies of Clifford at the present moment.

The inference insisted upon by Mr. Fleming, that because the Barons of Slane enjoyed so high a precedency in the Irish parliament, it must be concluded that they succeeded to the original barony of Slane, instead of being created to new and distinct dignities of the same name, has not even the merit of novelty. Precisely the same [191] argument was used in the claim to the barony of Strange in the year 1736, but without effect;* and it is difficult to understand upon what grounds it can be expected to prevail in the face of the decisions respecting the baronies of Strange and Clifford in the last century; the justice of which decisions is supported by the proofs that have just been cited of the laxity which has always prevailed on the subject of precedency, and by the well-known fact that the Sovereign often assumed the right of assigning to a peer whatever place in parliament he thought proper.

The reasoning of Mr. Fleming on the subject is fallacious; and the House will not come to a different conclusion with respect to the precedency which the Barons of Slane have enjoyed, in reference to the creation and descent of the various baronies of that name, from that which the House formed in the case of the barony of Strange in 1736, or in that of the barony of Clifford in 1737; or different from what it would give to it in the instance of the baronies of Abergavenny, Percy, La Warr, or Berkeley, should a question be agitated respecting the proper precedency of those dignities.

Much is said in Mr. Fleming's case on the "consequences" of admitting that writs to and sittings in the parliament of Ireland created baronies to heirs general: an attempt appears to be made to excite hostility to Mr. Bryan's claim, on the pretence that its success would deprive some noble lords of their "splendid ancient baronies;" but can this be put in comparison with the "inconve-[192]-niences" which would arise from a decision establishing that, with respect to the ancient peerage of Ireland, the laws of the two countries are wholly distinct; that the King's writ of summons to an Irish parliament had not the creative power it possessed in England; and that honours exist in that kingdom independent of the king's charter, and independent of the only other mode of creation known to the laws of England? It may be asked, when the question was raised, in the reign of King Charles the First, if earldoms did not attract baronies,† whether the interests of many English earls were not as much involved as those of a few peers of Ireland at this moment? The House did not then listen to such considerations, and it is impossible to believe that it will do so now. It has always acted, and will no doubt continue to act, upon fixed principles of law, and will never allow its judgment to be warped by considering what may be most "convenient," instead of endeavouring to ascertain what is legally just.

The following are the legal propositions upon which Mr. Bryan's claim is founded:

I. That the laws of Ireland are the same as the laws of England, except in cases of certain statutes.

II. That the dignity of the peerage, whether in Ireland or in England, can only be created in two ways; by patent, or by writ of summons.

III. That (in the absence of a patent) a writ of summons to and a sitting in the parliament of Ire-[193]-land, create a barony to the heirs of the body of the person first summoned; because, as the writ is issued in the King's name, it must be held to possess the same legal effect as a similar writ to the parliament of England.

IV. That the heir of the body of the person so summoned and sitting in the parli-

* Many of the arguments used on the claim to the barony of Strange in 1736, apply very strongly to Mr. Bryan's case. See Cruise on Dignities, pp. 227, 228.

† In the case of the barony of Grey de Ruthyn, see Collins's "Precedents of Baronies by Writ," pp. 195-260. The same question was raised on the claim to the barony of Fitz-Walter, in the year 1668. *Ibid.* pp. 268-290.

ment of Ireland is entitled to the barony, without reference to any other circumstance whatever, excepting the existence or non-existence of a patent.

V. That as Christopher Fleming, and his son William Fleming, were summoned to and sat in the parliaments of Ireland, as Barons of Slane, and as no patent of that dignity was granted to either of them, an hereditary barony was created by the said writs and sittings to the heirs of the bodies of the said Christopher and William Lords Slane.

VI. That Mr. Bryan being the heir general of the body of the said Christopher and William Lords Slane, he is entitled to the said barony of Slane.

The case of Mr. Bryan was argued by Sir W. Follett.

The case of Mr. Fleming, by Mr. Lynch.

On the 31st of August, 1835, the opinion of the Committee was delivered by

Lord Brougham: My Lords, this case stood over for the purpose of considering the argument and proof adduced by one of the claimants, or rather I should say by the counter-claimant, Mr. Fleming, who is let in to contest the claim on the part of Major Bryan. Mr. Fleming was admitted after the case of Major Bryan had been closed, not [194] to set up his own claim, but to resist the Major's claim, which, if it had been admitted, would have precluded him from ever arguing his case; though, if rejected, Mr. Fleming would still have to prove his own case; consequently he only appeared as it were on the same side with the counsel for the Crown, to contest the claim now before us. We expected to have heard an argument from the learned Attorney-General of Ireland; but I apprehend, by his not being here the last two days, that he is satisfied with the argument of Mr. Lynch for Mr. Fleming, and does not mean to urge anything further against the claimant's case.

A very able, certainly, and a very elaborate argument, was addressed to your Lordships by Mr. Lynch and Sir William Follett, at which my noble and learned friend (Lord Lyndhurst) was present, without whose assistance I should not have proceeded to-day, but that I know he takes entirely the same view of the subject as I do. A great portion, however, of that argument appears to me to have been unnecessary for supporting Mr. Lynch's proposition; for when he maintains that there is no such thing as a barony in fee (or fee-tail) in Ireland—no such thing as a barony conferred by writ of summons to parliament, and sitting there under the writ—this may be either true or not as a general proposition; and yet I do not see any necessity for grappling with it, or for disposing of it in order to arrive at a sound conclusion on the present case. The comparison of eleven or twelve old baronies in Ireland with as many old baronies in England, does certainly seem to shew that whereas these latter have gone from family to family, sometimes through as many as seven different changes, [195] and in all subject to at least two or three changes of family,—in Ireland, on the contrary, all those ancient baronies have gone invariably in the same family; a very strong argument no doubt to shew the difference of the two classes of baronies, because it is hardly conceivable that there should have been so many failures of heirs male in England in those families, and no such failures at all in any of the families holding the ancient baronies of Ireland. But it does appear to me, and to my noble and learned friend who assisted in hearing the case, that we need not form any opinion upon the general question for our present purpose, and in order to admit Mr. Lynch's right to call upon us to refuse the claim of Major Bryan. We are now upon this particular barony; we are upon the Slane peerage; and the circumstances which have attended its descent are such as leave no doubt whatever in my mind what the law of succession is in respect to this particular barony. The only question being upon the course of descent in this barony, if we find it clearly not such as to bring in heirs general in any one instance, but to exclude again and again the nearer female in favour of the more remote male heir, the question before us is decided, whatever may have been the case with other baronies in Ireland and England.

Now, my Lords, I never yet saw a case in which parties successfully contended for a claim of right, under a particular law of succession, maintaining that there was a certain canon regulating the descent, and in their favour, when there was clear proof of the honour in question having descended repeatedly in a different course and by a different rule. It is not merely that there were three or [196] four exceptions, and undeniable exceptions, to the canon which the present claimant must establish; but there was not a single instance in the family of his rule being followed. Who ever

heard of a person obtaining a barony by writ or by a lost patent to heirs general, when again and again deaths had happened, and instead of the descent of the honours falling upon the only daughter, or being in abeyance among several daughters, the barony went away to a remote cousin, being a male; sometimes a nephew, sometimes a more distant kinsman! Such a fact shuts out the idea that there can be a barony in fee, or in fee-tail, more correctly speaking. One cannot suppose the parties were always slumbering over their rights, more especially after the very remarkable fact which occurs in this case, that the daughter of a deceased peer being in poverty was allowed £50 a year pension, and did not take the barony, though, being in that case a peeress in her own right, she would have had considerably more than £50 a year, as is proved by the fact of the male heir who took the honour obtaining at the same time £500 a year. The lady had a strong interest in applying for the peerage, if there had been the least pretence for her claim, as she would have obtained an increase of the provision. It appears to me that until the difficulty I am now alluding to is got over, it is impossible for your Lordships to adjudge this peerage to the party claiming in such circumstances.

Although we have had, in many instances, the most satisfactory evidence of a remoter male having enjoyed the title to the exclusion of a nearer female, unquestionably there has been no sitting in parliament in many of those cases; but this is [197] accounted for by the circumstance of the family being Catholic, and the peers being successively excluded by the penal laws after the beginning of the 18th century. So that the evidence is the most satisfactory which the nature of the case will allow of; and it is further to be observed, that your Lordships' resolution that Major Bryan has not made out his claim, does not decide the question finally: it does not decide that this person is not entitled, and may not hereafter prove his title; it disposes of no general question that there are or are not baronies by writ; it only declares that Major Bryan in this stage has not proved his claim. If your Lordships were to decide that he has proved his claim, that would shut out all pretensions on the part of Mr. Fleming; and it would decide the affirmative in the general question argued by Mr. Lynch, whether or not there is such a thing as an Irish barony in fee-tail.

I have another observation to make with respect to the law of this case. It is generally held that baronies in fee-tail go to the heirs general of the body; and that where a man has a writ of summons, and sits according to the exigency of that writ, the dignity descends to the heirs of his body, female as well as male. I know of no instance of any restriction to that generality; I know of no such thing as fee-tail special in a dignity; of a dignity by a writ going to the issue of a man by a certain wife; and, from the nature of the thing, I think it could not be. I know of no instance in England of a peerage in fee going to the heir male of the body; but perhaps this is not absolutely incompatible with the nature of the writ. [198] There may possibly be a barony by summons and sitting, which should go to heirs male of the body, and not to heirs general of the body; I do not think it is wholly inconsistent with the nature of the thing. Supposing the summons were specially framed to A. B. to sit and serve in parliament; I do not see why it might not add, "and the heir male of his body"; at least it strikes me, that though this writ is personal, calling upon the party to come individually and sit, and that by the operation of the peerage law such writ, followed by sitting, carries the honour to the heir of his body, still if it should express it to be to A. B. and the heir male of his body—on the supposition that A. B. might have died before he came and sat according to the exigency of the writ,—I see nothing inconsistent in the heir male of the body sitting; I do not see any thing inconsistent in such a description carrying a barony in fee to the heir male, such heir male being designated rather by words of limitation than of purchase. I throw out this, however, as a possible supposition only: I think that there is nothing self-repugnant nor contrary to the principles of law in it, and such a supposition would reconcile the facts of this case with the course of the law. But at the same time we must admit, that such a writ to the heir male of A. B.'s body might also be said to give a peerage in fee-tail general to the person on suing this description who should first sit under it. There is no case nor any authority on this point.

My Lords, it is important that we should endeavour by all means to reconcile the apparent discrepancy between the English and the Irish law [199] of peerage. I

am very unwilling to admit the idea of there being one law for England and another for Ireland in this respect; and I listened with great attention to the argument of the late Attorney-General, the present Lord Chief Baron, to prove that the law as to honours was the same in England as in Ireland. I know there are incidents of peerage which differ it from the law of real estates; nevertheless a title of honour is a tenement, and where the feudal law prevails all dignities are in their origin real property, being held as incident to land and by the like tenure, and being as much real estates as the land itself. I should therefore be very loath to adopt the proposition that there is one rule not only as to incidents but as to the original constitution and construction of an estate in an honour, and another as to the original constitution and construction of an estate of another kind. So should I feel as loath to hold that one rule prevailed in England and another in Ireland on this matter. There is, however, a supposition involving no doubtful point, and which will equally reconcile the facts with the course of the law, and assume that law to be the same in both countries. There may be a lost patent limiting to heirs male. This is inconsistent with nothing except a statement of Lord Coke's, that there was no barony by patent earlier than the 11th Richard II.; but it is very possible Lord Coke may be mistaken in this, which is only a point of legal or rather historical antiquity. Between the two difficulties, of supposing a different law in the two countries, and supposing a creation by patent earlier than the period assigned by Lord Coke, I have no hesitation in choosing the latter as the safer: and to move your [200] Lordships to determine and report that Major Bryan has not made out his claim.

Resolved, That the claimant George Bryan, Esq., hath not made out his claim to the barony of Slane, as claimed by his petition; and that the Chairman be directed to report the same to the House.

[201]

ENGLAND.

(Court of Chancery.)

GEORGE JOY, HENRY HALL JOY, and ELIZABETH JOY,—*Appellants;* WYRLEY BIRCH, GEO. WOLLASTON, EDWARD COKE, and GRACE his wife, and FREDERICK G. SYMS,—*Respondents.*

[Mews' Dig. i. 285. S. C. 4 Cl. and F. 57. See also *Birch* v. *Joy*, 1851, 3 H. L. C. 565. Cited in *Nicholson* v. *Smith*, 1882, 22 Ch. D. 650. See 2 Wh. and T. L. C. 7th ed. 25.]

By deeds, executed in 1800, C. conveyed to J., subject to a mortgage, lands at T., to secure two annuities of £300, in consideration of two sums of £2000. The deeds contained powers to repurchase by C., upon giving twelve months' notice in writing under his hand. In 1812 C. agreed to sell to B., who agreed to purchase for £95,000 the lands at T., subject to the incumbrances; and B. entered into possession of the premises under the agreement, and paid the annuities to J.

In 1818 C. granted all his lands, etc. to J. and his heirs in trust, to sell and pay off the charges and incumbrances affecting the same. In 1824 C. agreed to give to J. a charge upon all the premises contracted to be sold to B., and the purchase-money to secure the payment of arrears of the annuities and interest thereon, and other claims of J.; and an account having been stated and settled between C. and J., by a deed executed in April, 1824, C. assigned to J. the balance due from B. in respect of the purchase-money, £95,000, and interest, under the contract, subject to previous incumbrances, to be applied in payment of the amount found due to J. upon the account. In 1825 B. filed a bill in chancery, stating the agreement for purchase, the annuity deeds containing

the power to repurchase, a treaty between him and J. for an immediate repurchase of the annuities, on failure of which, as it was alleged by the bill, he requested C., in performance of his agreement, to give J. such notice as was required by the annuity deeds, to enable C., or B. in his place, to repurchase the annuities, and that such notice was [202] accordingly reduced into writing, and delivered to J., on behalf of C., on the 16th of April, 1823; that on the day mentioned in the notice the solicitors of B. and C. went to the residence of J. for the purpose of tendering to J. £4000, with all arrears of annuities and costs, and the deeds of transfer for execution; and, upon being informed that J. was absent from home, left a notice that the money and deeds were deposited at the house of the solicitors. The bill charged that J. claimed, but was not entitled to, interest upon the arrears of the annuities, and prayed against C. a specific performance, and against J. a declaration that the annuities had ceased according to the notice, with accounts, etc.

J. by his answer admitted the annuity deeds, and the contract between C. and B., and said that a notice signed "W. C.," by his attornies E. and H., was served on him, J., but protested against the authority of E. and H. to interfere in the concerns of C., he, J., having previously received from C. an irrevocable power to act in the management and settlement of his affairs; and J. submitted that the notice was irregular and of no avail, not being in compliance with the terms of the annuity deed; and that after the notice had been given, and before the time limited therein had expired, C. had settled his accounts with J. admitting that the notice was not available, and treating the same as of no effect, and executed to J. an assignment of all the right and interest of C. in the purchase-money due from B. (under his contract with C.), for securing to J. the amount due to him on the said settlement of accounts, which was notified to B., and in consequence thereof no tender was made to J.

No witnesses were examined on behalf of B. the plaintiff in the suit; but the documents and principal facts stated in the answer of J. were proved by witnesses. The cause was heard before the Vice-Chancellor and a decree pronounced, declaring that the annuities ceased from the date of the notice, with directions consequent thereon, and this decree was affirmed by the Lord Chancellor on appeal; but upon further appeal to parliament the judgment was reversed, principally on the ground of defect in the proof of the notice, and that it contained no assignment of any place for the payment of the money, in which respect the proviso for repurchase in the grant was also defective.

By indentures of lease and release, bearing date the 5th and 6th days of March, 1800, and duly [203] made and executed by and between William Colhoun, of the first part, the Appellant George Joy, of the second part, and Michael Joy, since deceased, of the third part; the said William Colhoun, in consideration of the sum of £2000, paid to him by the Appellant George Joy, granted, released and confirmed unto the Appellant George Joy, and his heirs, the Manor or Lordship of Thorpe Hall, otherwise West Wretham, in the county of Norfolk, with the rights, members and appurtenances, and the site of the said Manor with the appurtenances: to hold the same unto the Appellant George Joy and his heirs; subject to a mortgage * to Josiah Holford for £12,000 and interest; to the intent that the Appellant George Joy, his executors, administrators and assigns, should receive out of the said premises, during the lives of William Wood and Lawrence Watson Wood, therein severally described, and the life of the survivor of them, one annuity, or clear yearly rent-charge of £300, payable quarterly as therein mentioned, together with a proportionable part thereof up to the day of the death of such survivor: and in the now stating indenture was contained a clause or proviso, whereby it was declared that if the said annuity should be in arrear fourteen days, it should be lawful for the said George Joy, his executors, administrators or assigns, to enter and distrain upon the said premises, until the said annuity and all arrears thereof, and all the costs and charges attending such entry and distress, and the damages to be sustained by reason of the non-[204]-payment of the said annuity, should be fully paid and

* It appears that some parts of the lands were subject to other charges, in respect of which John Rose Drew, etc. were probably made parties to the suit. See p. 200.

satisfied; and that in case the said annuity should be in arrear thirty days, then that it should be lawful for the said George Joy to enter upon the said premises, and receive the rents thereof, until all arrears of the said annuity, and all costs and charges attending such entry and perception of rents, and all damages which the said George Joy should have sustained by reason of the non-payment thereof, should be fully paid and satisfied; and by the same indenture the said premises were limited to the use of the said Michael Joy, his executors, administrators and assigns, for the term of ninety-nine years, upon trust, in case the said annuity should be in arrear for sixty days, that the said Michael Joy, his executors, administrators and assigns, might, by and out of the rents and profits, or by mortgage or sale, of the premises comprised in the said term, raise the arrears of the said annuity, together with all such damages, loss, costs, charges, and expences, as he the said Michael Joy, his executors, administrators or assigns, or as he the said George Joy, his executors, administrators or assigns, should sustain by reason of the non-payment, or otherwise, in execution of the trusts of the said term: and by the now stating indenture it was agreed that in case the said William Colhoun, his heirs, executors, administrators or assigns, should, at any time after the 6th day of March, 1804, be desirous of repurchasing the said annuity, and should give twelve calendar months notice thereof in writing under his or their hand or hands, that then the Appellant George Joy, his executors, administrators or assigns, on receiving all arrears of the said annuity, would accept the sum of £2000 in [205] full for the purchase thereof, and would thereupon release and surrender the several securities for the same unto the said William Colhoun, his heirs, executors, administrators or assigns.

By indentures of lease and release, bearing date respectively the 8th and 9th days of May, 1800, and duly made and executed by and between the said William Colhoun, of the first part, the Appellant George Joy, of the second part, and the said Michael Joy, of the third part, the said William Colhoun, in consideration of £2000 paid to him by the Appellant George Joy, granted, released, and confirmed unto the Appellant George Joy, and his heirs, all that the said Manor or Lordship of Thorpe Hall, otherwise West Wretham, and the site of the said Manor, with the appurtenances: to hold the same, unto the Appellant George Joy and his heirs; subject to the said mortgage to the said Josiah Holford, for £12,000 and interest, and the said before-mentioned annuity of £300; to the intent that the Appellant George Joy, his executors, administrators, and assigns, should receive out of the said premises, during the lives of Abraham John Valpy and George Homer Joy, therein severally described, and the life of the survivor of them, one annuity or clear yearly rent-charge of £300, payable quarterly as therein mentioned, together with a proportionable part thereof up to the day of the decease of such survivor: and the now stating deed contained similar powers of distress and entry, and similar trusts, of a term of ninety-nine years, thereby limited to Michael Joy, as were contained in the first grant: the deed also contained a power of repurchase of the annuity at the sum of £2000, similar in terms [206] to the proviso for that purpose contained in the first grant.

On the 22d of February, 1812, William Colhoun entered into and concluded an agreement with the Respondent Wyrley Birch for the absolute sale to him of the said Manor of Thorpe Hall, and the site thereof, and all the other messuages, farms, lands, hereditaments, and premises, of him William Colhoun, therein called the Wretham Estate, including the premises comprised in the before-mentioned grants of annuities; the agreement was reduced into writing; and such written agreement, bearing date the 22d day of February, 1812, was signed by William Colhoun and Wyrley Birch, and Wyrley Birch thereby agreed with William Colhoun for the absolute purchase of the said Manor, messuages, farms, hereditaments and premises, subject to such incumbrances, and to the conditions therein mentioned, at or for the price or sum of £95,000.

On the 24th day of October, 1812, a further agreement was entered into between William Colhoun and Wyrley Birch for the purpose of facilitating the completion of the purchase of the Wretham Estate, by which it was agreed that Wyrley Birch was to be put into the possession of the said Estate, upon certain conditions therein mentioned. Shortly after the execution of the last-mentioned agreement, the Respondent Wyrley Birch got into the possession of all the estates and premises comprised in the before-mentioned agreement, or into the receipt of the rents and profits

thereof, and, after he had obtained possession of the estates, paid the Appellant George Joy several sums of money in respect of his annuities.

[207] By indentures of lease and release, bearing date respectively the 12th and 13th days of October, 1818, and made between William Colhoun of the one part, and the Appellant George Joy of the other part; for the considerations therein mentioned, William Colhoun granted, released, and confirmed unto the Appellant George Joy, and his heirs, all and singular the manors, messuages, farms, lands, hereditaments and real estates, in Great Britain and Ireland, whereof or whereto the said William Colhoun, or any other person or persons in trust for him, was or were seized or entitled, or over which he, the said William Colhoun, had any beneficial power or right of disposition, with the appurtenances: to hold the same unto and to the use of the said George Joy, his heirs and assigns for ever; subject to the charges and incumbrances affecting the same; upon trust, of his or their own proper authority, to sell, dispose of and convey the same, as therein mentioned, and with all necessary powers for that purpose; and upon trust to stand possessed of the monies arising from such sales in the first place, to retain and pay the expences of preparing and executing those presents, and of executing the said trusts; and in the next place to pay off and satisfy all the charges and incumbrances affecting the said premises or any part thereof; and to pay the surplus of the said trust-monies unto the said William Colhoun, his executors or administrators, or as he or they should direct or appoint. The object of this deed was alleged to be to enable George Joy to complete the contracts with Wyrley Birch.

In the month of April, 1824, the Appellant George Joy, being unable to obtain payment of [208] the arrears of his annuities, and also having other demands against the said William Colhoun, the said William Colhoun agreed to give the Appellant George Joy a charge upon all the hereditaments and premises contracted to be sold to the Respondent Wyrley Birch, and the purchase-money due for the same from Wyrley Birch, for the amount of the arrears of the said annuities, and the interest on such arrears, and for the other claims of the Appellant George Joy against him the said William Colhoun.

On the 3d day of April, 1824, an account of the arrears of the said annuities and of the interest thereon, and of the other claims and demands of the Appellant George Joy against William Colhoun, was settled and stated, between the Appellant George Joy and William Colhoun, up to the 6th day of April, 1824, and the amount thereof ascertained up to that day.

After the account had been so settled, an indenture of assignment, bearing date the 6th day of April 1824, was duly made and executed by and between the said William Colhoun of the one part, and the Appellant George Joy of the other part: and thereby the said William Colhoun assigned to the Appellant George Joy the balance of the purchase-money or sum of £95,000 and interest, to arise by the sale of the said property, contracted to be purchased by the Respondent Wyrley Birch, after payment thereout of the then incumbrances upon or legally affecting the same: to hold the said purchase-money and interest, unto the Appellant George Joy, upon certain trusts, for securing the payment of the amount due to him upon the balance of the before-mentioned account.

Shortly after the date and execution of the said [209] indenture of assignment, the Appellant George Joy gave notice of the same indenture and the contents thereof to the Respondent Wyrley Birch, and considerable negotiation took place between the Appellant George Joy and Wyrley Birch and his solicitor, respecting the Appellant George Joy's demand in respect of the arrears of the said annuities, and under the said deed: the Respondent Wyrley Birch ultimately refused to pay the same or any part thereof.

On the 10th day of July, 1825, Michael Joy, the trustee named in the grants of annuities, died, having made his will, whereby he appointed the Appellants, Henry Hall Joy and Elizabeth Joy, his executor and executrix, who, on the 23d of October, 1825, proved the will in the proper ecclesiastical court.

On the 25th day of October, 1825, the Respondent Wyrley Birch exhibited his bill of complaint in his Majesty's High Court of Chancery, which was afterwards amended, pursuant to an order of the said Court, dated the 21st day of November, 1825, and such amended bill was against the Appellants George Joy, Henry Hall

Joy, and Elizabeth Joy, and the said William Colhoun, and also against John Rose Drew and Priscilla Wollaston, since deceased, and the Respondent George Wollaston, as Defendants thereto.

The bill stated, among other things, the contract between William Colhoun and Wyrley Birch, of the 22d day of February, 1812, and the further agreement of the 24th day of October, 1812; and that in pursuance of the said last-mentioned agreement he, the said Wyrley Birch, was put into possession of the said estates, and into the receipt of the rents and profits thereof, and had [210] ever since been and still was in such possession and receipt, and that out of the said purchase-money he had paid off various charges and incumbrances on the said estates, to a very considerable amount: the bill also stated the before-mentioned indentures or grants of annuities of the 5th and 6th days of March, 1800, and the 8th and 9th days of May, 1800, and that the Respondent Wyrley Birch had paid the Appellant George Joy various sums in respect of the said annuities; and that being desirous of paying to the Appellant George Joy what might be justly due to him, and exonerating the estate and premises from the claims which the Appellant George Joy might have thereon, he had requested the said William Colhoun, in performance of the said agreements, to give to the Appellant George Joy such notice as was required by the said annuity deeds to enable him, the said William Colhoun, or the Respondent Wyrley Birch in his place, to repurchase the said annuities: and that such notice was accordingly reduced into writing, and duly delivered to the Appellant George Joy, on behalf of the said William Colhoun, on the 14th day of April, 1823.

The bill further stated, that pursuant to such notice, and on the 5th of May, 1824, the day mentioned in the notice, Mr. Tooke, the said Wyrley Birch's solicitor, and on his behalf, and Mr. Syms on behalf of the said William Colhoun, went to the Appellant George Joy's residence in New Ormond Street, for the purpose of tendering the sum of £4000, together with all arrears of the said annuities, and the costs and expences incurred by the Appellant George Joy in recovering the payment of the consideration money for the same; and also for the purpose of tendering the deeds of [211] transfer of the said annuities, for the execution of the Appellant George Joy; but that the said Mr. Tooke and Mr. Syms were then informed that the Appellant George Joy was from home, and gone to Guernsey or Jersey; and thereupon they left at his house a written notice in the words and figures, or to the purport and effect following; that is to say: "Sir, You are desired to take notice, that we have this day attended at your residence, No. 24, New Ormond Street, Bedford Row, for the purpose of tendering to you the payment in money of the principal and arrears due to you upon the two several annuities of £300 each, charged upon a certain manor, messuage, farms, lands and hereditaments, called Thorpe Hall, in the parishes of East and West Wretham, or one of them, in the county of Norfolk, late the estate of William Colhoun, Esq., and contracted by him to be sold to Wyrley Birch, Esq., together with the payment of all reasonable charges and expences incurred by you in recovering the payment of the same; and together also with the deeds of transfer of the said annuities, and other securities, the draft of which deeds of transfer have been submitted to Messrs. Amory and Coles, your solicitors, for perusal on your behalf. And we do hereby give you further notice, that the money for the discharge of the said principal and arrears, together with your reasonable costs and charges as aforesaid, and with the other deeds of transfer will remain at the office or chambers of Messrs. Tooke and Carr, situate in Holborn Court, Gray's Inn, for the space of ten days from the date hereof, for the purpose of being paid over to you, when you shall apply for the same [212] money, and shall execute the said deeds of transfer, pursuant to the covenant contained in the grants of the said annuities respectively. Dated this 5th day of May, 1824. (Signed) Tooke and Carr for the said Wyrley Birch, and Frederick George Syms for the said William Colhoun."

The bill further stated, that no conveyance of the said annuities had ever been executed by the Appellant George Joy and Michael Joy in his life-time, and the Appellants Henry Hall Joy and Elizabeth Joy, since his decease, or either of them, to the said William Colhoun, or the Respondent Wyrley Birch, nor had any conveyance of the estates and premises, or any part thereof, been executed by the said William Colhoun, to the Respondent Wyrley Birch: that the said John Rose Drew

and George Wollaston, and the said Priscilla Wollaston, claimed to be entitled to certain charges upon the said estate and premises, or the said purchase-money, to a very considerable amount: that the Respondent Wyrley Birch had offered to perform his part of the said agreement with the said William Colhoun, and to pay the remainder of the said purchase-money, after the payment of the incumbrances affecting the same, and which he was authorized by the said agreement to pay, as he the said William Colhoun should direct; and that he, the Respondent Wyrley Birch, had also offered to pay to the Appellant George Joy, what was justly due to him in respect of the said two annuities as aforesaid; but that the said William Colhoun, and the Appellant George Joy, refused to comply with such requests.

The bill charged, that the Appellants pretended that according to the terms of the conditions of [213] repurchase in the said indentures of the 6th day of March, 1800, and the 9th day of May, 1800, contained, the Appellant George Joy was entitled to receive, not only the several sums of £2000 and £2000, and the arrears due upon the said two annuities respectively to the said 5th day of May, 1824, and his reasonable costs, and which the Respondent Wyrley Birch tendered or offered to pay, but that he, the Appellant George Joy, was entitled to receive and be paid interest also at the rate of £5 per cent. upon the arrears of the said annuities respectively, from the time when such arrears respectively became due, and also the sum of £1000 for expences incurred, as he alleged, on account of such arrears: whereas the Respondent Wyrley Birch charged the contrary thereof, but that nevertheless the Appellant George Joy absolutely refused to permit the said annuities respectively, or either of them, to be repurchased or redeemed, unless the Respondent Wyrley Birch consented to pay such interest and expenses: and that the said William Colhoun, colluding with the Appellant George Joy, refused to complete the said agreement with the Respondent Wyrley Birch, by executing a conveyance of the said estates, until such unjust demands of the Appellant George Joy were complied with, and had actually given the Respondent Wyrley Birch notice to pay the same to the Appellant George Joy, in preference to previously existing incumbrances on the said estate, and had also conveyed to the Appellant George Joy all his interest in the residue of the said purchase-money.

The bill further charged, that the Appellant George Joy insisted for the reasons aforesaid, or for some other reason, or under some other pretext, [214] that he was entitled still to the benefit of the said annuities, and that the same or either of them had not ceased or been determined: whereas the Respondent Wyrley Birch charged the contrary thereof; and that under the circumstances thereinbefore mentioned, the said annuities respectively ceased and determined, and ought to be declared to have ceased and determined on or from the said 5th day of May, 1824.

The bill prayed, that William Colhoun might be compelled, by the decree of the Court of Chancery, specifically to perform the said agreements on his part, and to execute to the Respondent Wyrley Birch a good and sufficient conveyance of the said estates and premises, according to the terms of the said agreements, and to deliver up to the Respondent Wyrley Birch the possession of the several title-deeds, instruments, maps, plans and writings relating thereto: the Respondent Wyrley Birch being willing specifically to perform the said agreements in all respects on his part, and being willing, and thereby offering, to pay to the said William Colhoun, or according to his direction, the residue, if any, of the said purchase-money, after paying thereout such incumbrances affecting the estates and premises, as, under the terms of the said agreements, the Respondent Wyrley Birch was authorised to pay; and for enabling the Respondent Wyrley Birch thereto, that the priorities of the said incumbrances might be ascertained and determined by the direction and decree of the Court: and that it might be declared, that the two several annuities of £300 and £300 charged on the said estates, as thereinbefore mentioned, [215] ceased, and determined, on the 5th day of May, 1824: and that an account might be taken, by and under the direction and decree of the said Court of Chancery, of the arrears of the said annuities respectively, which accrued due on and prior to the 5th day of May, 1824, and of the costs and expences, reasonably incurred by the Appellant George Joy in respect of such arrears: and that on payment of what should be found due, together with what should be due on the two several sums of £2000 and £2000 to the Appellant George Joy, and which the Respondent thereby offered to pay, the Appel-

lants might be decreed to make and execute all deeds, and do all such acts as might be necessary to reconvey, transfer, and assign the said two annuities, and all securities for the same to the Respondent Wyrley Birch: and that in the mean time, the Appellants might be restrained, by the order and injunction of the said Court of Chancery, from commencing or prosecuting any action or actions at law, or taking out execution, or any other proceedings at law, against the Respondent Wyrley Birch, or the said estates, or any of them, or the tenants thereof, for compelling payment of the said annuities, or either of them, or any arrears thereof: and for general relief.

Priscilla Wollaston had died before the filing of the said original bill.

The Appellant George Joy filed his answer to the original and amended bill of complaint on the 23d May, 1826; and thereby, among other things, stated that he had been informed, and believed, that the said William Colhoun was, at the time in the said bill mentioned, seized in fee simple of, or **[216]** entitled to, the several messuages, farms, lands, tenements and hereditaments, estates and premises, in the said bill mentioned: and that about the time in the said bill mentioned, the Respondent Wyrley Birch did enter into and conclude an agreement with the said William Colhoun, for the absolute purchase thereof, subject as in the said bill mentioned. And the Appellant George Joy, by his said answer, admitted it to be true that the Respondent Wyrley Birch did discover that the estate and premises were charged with two annuities of £300 each, which were granted to the Appellant George Joy by the said William Colhoun many years ago, and which the Appellant George Joy, by his said answer, submitted were good and valid annuities, and well and properly charged upon the said estate and premises, or some parts thereof. And the Appellant George Joy, by his said answer, admitted it to be true, that such indentures of lease and release as in the said bill mentioned, to bear date the 5th and 6th days of March, 1800, were duly made and executed by and between the several parties thereto, and that the said indenture of release was between such parties, and of or to the purport or effect in the said bill in that behalf mentioned: and that such other indentures of lease and release respectively as in the said bill mentioned, were duly made and executed, and that the release was between such parties and to such purport or effect as in the said bill mentioned and set forth, as far as the same was set forth.

The Appellant George Joy by his answer admitted that the Respondent Wyrley Birch was in possession of the estate, and in the receipt of the rents and profits thereof; and stated **[217]** that he had been informed by the said William Colhoun, and believed that the Respondent Wyrley Birch did not request the said William Colhoun to give the Appellant George Joy such notice as in the said bill mentioned; but the Appellant George Joy by his said answer admitted it to be true that a notice, signed "William Colhoun by his attornies, Edward Coke and P. A. Hanrott," was served on him the Appellant George Joy. And he stated that he had always protested against the authority of the said Edward Coke and P. A. Hanrott to interfere in the concerns of the said William Colhoun, he, the Appellant George Joy, having, previously thereto, received from the said William Colhoun, an irrevocable power of attorney, at the instance of the said Edward Coke, and on the refusal of the said P. A. Hanrott to act in the management and settlement of the affairs of the said William Colhoun. And he submitted, for the reasons therein mentioned, that the said notice so given was altogether irregular and informal, and of no avail, inasmuch as the same was not in compliance with the terms of the said annuity-deed, which required that the notice to be given for the repurchase of the said annuity should be in writing under the hand of the said William Colhoun. He stated, that after the said notice had been so given, and before the time mentioned therein had expired, the said William Colhoun had settled his accounts with the Appellant George Joy, admitting that such notice was not available, or treating the same as of no effect: and that the said William Colhoun executed to the Appellant George Joy an assignment of all his the said William Colhoun's right and interest in the said purchase-money, for **[218]** securing to him, the Appellant George Joy, the payment of the amount due to the Appellant George Joy on the settlement of such accounts; which assignment, on the Appellant George Joy's return to England, was duly notified to the Respondent Wyrley Birch, and that in consequence thereof no tender was made to the Appellant George Joy.

The Appellant George Joy by his answer further stated that he had been informed, and believed that pursuant to such notice, and at or about the time in the said bill mentioned, which was the day in the said notice mentioned for the repurchase of the said annuity, the said Mr. Tooke, on behalf of the Respondent Wyrley Birch and Mr. Syms, pretending to act on the behalf of the said William Colhoun; but as the Appellant George Joy believed without his knowledge or any authority from him, went to the Appellant George Joy's residence in New Ormond Street, for the purposes in the said bill mentioned; and that the said Mr. Tooke and Mr. Syms were then informed, as the fact was, that the Appellant George Joy was then from home: but he said that he could not set forth whether they were informed that he, the Appellant George Joy, was gone to Guernsey or Jersey, the Appellant George Joy having been previously to the island of Jersey, but having left the same about three weeks before such enquiry was made. He further stated that he believed it to be true that at the time in the said bill mentioned, the said Mr. Tooke and Mr. Syms did leave at the house of the Appellant George Joy such written notice as in the said bill mentioned; to which said notice he craved leave to refer. The Appellant George Joy, by his answer, submitted that the Re-[219]-spondent Wyrley Birch was not, by virtue of the aforesaid agreement, entered into by the Respondent Wyrley Birch with the said William Colhoun, entitled to all the rights and privileges of the said William Colhoun, in respect to the power to repurchase the said two annuities from the Appellant George Joy, no conveyance of the said estates having been made to the Respondent Wyrley Birch by the said William Colhoun, and the said William Colhoun having by a subsequent deed recognised the annuities, and directed them to be kept on foot.

He stated that the amount of his claim down to the 6th day of April, 1824, was ascertained and admitted by the said William Colhoun, and the account settled, and the deed of assignment executed by him, and which the Appellant George Joy, by his said answer, claimed to be allowed accordingly, together with what had subsequently accrued due: and he submitted and insisted that the said annuities could not be discharged during the continuance of the only life for which each annuity was then held. He further stated, that the sum of £1000 in the said bill mentioned, was not, as in the said bill set forth, so much over and above his reasonable costs, but was in fact the reasonable and admitted amount of the Appellant George Joy's costs and expences, time and trouble, incurred in seeking to recover what was justly due to him in respect thereof, down to the date of the 25th October, 1817, and which amount having been allowed by the said William Colhoun, the Respondent Wyrley Birch undertook or agreed to pay, but which he afterwards refused to do; and he submitted that, under such circumstances, he [220] did require payment thereof. He further stated that the amount of his claim up to the 25th of October, 1817, appeared in the accounts which had been rendered by him to the said William Colhoun, and for the payment of which he gave an order on the Respondent Wyrley Birch at that time, and which demand of the Appellant George Joy on the said William Colhoun, together with the sum since accruing due, had been since recognised and confirmed by him, and in particular by the deed of assignment of the month of April, 1824: and that under the said agreement with the said William Colhoun, who (there being but one life on which each of the said annuities was held) was desirous to keep the said annuities on foot, and directed the Respondent Wyrley Birch to place a sufficient sum, part of the purchase-money, out on security, for paying the instalments to the Appellant George Joy, he the Respondent Wyrley Birch agreed so to do, but afterwards broke his agreement. And the Appellant George Joy, by his said answer, insisted that his demands were just, and that they had been ascertained and allowed by the said William Colhoun, down to the date of the said assignment: and that the demands of the Appellant George Joy were founded on such settlement, adjustment, or allowance, and on the principle established and admitted thereby.

On the 23d of May, 1826, the Appellants, Henry Hall Joy and Elizabeth Joy, filed their answer to the original and amended bill of complaint, without oath or signature, pursuant to an order of the Court of Chancery.

The several other Defendants to the original and amended bill of complaint, except Priscilla [221] Wollaston, who was dead, put in their answers thereto, and

the Respondent, Wyrley Birch, having replied to the answers, the cause was at issue.

Before any further proceedings were had in the cause, namely, on the 19th of April, 1829, William Colhoun died, whereby the suit and proceedings became abated as to him.

On the 16th day of November, 1829, the Respondent Wyrley Birch filed his bill of revivor and supplement in the court of Chancery, against the Respondents, Edward Coke, and Grace his wife, and Frederick George Syms, as Defendants thereto: the bill of revivor, among other things, stated, that the said William Colhoun departed this life intestate, leaving Grace, the wife of Edward Coke, Esq., his only child, and heiress at law, him surviving; and that upon the death of the said William Colhoun, all his right and interest of and in the said hereditaments and premises in the said bill mentioned, descended upon and became vested in the said Grace Coke, as his heiress at law. The bill of revivor further stated that on the 2d of May, 1829, letters of administration of the personal estate and effects of the said William Colhoun, were duly granted by the ecclesiastical court of the Archbishop of Canterbury, to the said Frederick George Syms, and that the said Frederick George Syms thereby became the legal personal representative of the said intestate William Colhoun: and the bill of revivor and supplement prayed, that the Respondents, Edward Coke, and Grace his wife, and the said Frederick George Syms, might answer the several matters aforesaid, and that the said suit and proceedings might stand and be revived against the [222] Respondents Edward Coke, and Grace his wife, and Frederick George Syms, and that the Respondent Wyrley Birch might have the same relief against them the said Edward Coke, and Grace his wife, and Frederick George Syms, according to their respective liabilities, as the Respondent Wyrley Birch was entitled to against the said William Colhoun: or that the said Edward Coke, and Grace his wife, and Frederick George Syms might shew good cause to the contrary.

The Respondents Edward Coke, and Grace his wife, and Frederick George Syms, duly appeared to the said bill of revivor and supplement, and put in their answers thereto; and the said suit was duly revived against the Respondents Edward Coke, and Grace his wife, and Frederick George Syms, by an order of the court of Chancery, bearing date the 21st day of November, 1829.

John Rose Drew departed this life some time in the year 1830, but the said suit was never revived against his representatives, or any proceedings consequential on his death taken.

No witnesses were examined in the cause on the part of the Respondent Wyrley Birch; but the execution of the power of Attorney from Colhoun to Coke and Syms was proved *vivâ voce* at the hearing.

On the part of the Appellants George Joy, Henry Hall Joy, and Elizabeth Joy, divers witnesses were examined in the cause; and the depositions of such witnesses proved, among other things, the due execution of the indentures of the 5th and 6th days of March, 1800; the due execution of the indentures of the 8th and 9th days of May, 1800; and the due execution of the inden-[223]-tures of the 12th and 13th days of October, 1818; the settlement by William Colhoun and the Appellant George Joy in the month of April, 1824, of the accounts between them, relating to the arrears of the said annuities, and the interest thereon, and the other demands of the Appellant George Joy against the said William Colhoun, up to the 6th day of April, 1824, after examination thereof by the said William Colhoun, and his agents: and also proved a letter of the said William Colhoun, dated Jersey, the 3rd day of April, 1824, wherein he stated that he had examined and approved of the said accounts, with the exception of a trifling error therein mentioned, which he had corrected; and another letter of the said William Colhoun, dated Jersey, the 3rd of April, 1824, wherein he stated it to be his wish that the said annuities should continue; the due execution, by the said William Colhoun, of the indenture of assignment of the 6th day of April, after examination of the before-mentioned accounts, as alleged in the answer of the Appellant George Joy.

The depositions also proved several other letters and documents written and executed by William Colhoun, which tended to establish the case of the Appellant George Joy, as stated in his answer.

The cause came on to be heard before his honour the Vice-Chancellor, on the 23rd

day of February, 1830; when upon hearing the before-mentioned exhibits, and the proofs taken in the cause, his honour the Vice-Chancellor made a decree in the cause, whereby it was declared that the agreements in the pleadings mentioned bearing date respec-[224]-tively the 22nd day of February, 1812, and the 24th day of October, 1812, ought to be specifically performed, and carried into execution: and it was decreed accordingly. And it was declared that the annuities of £300 and £300 in the pleadings mentioned, ceased and determined on the 5th day of May, 1824, when the notices to repurchase the said annuities, stated in such decree to have been admitted by the Appellant George Joy, by his answer to the original bill, to have been given by the said William Colhoun to the Appellant George Joy, expired. And it was ordered that it should be referred to the master of the said court in rotation, to take an account of what remained due to the Appellant George Joy, for the arrears of the said annuities which accrued due up to the said 5th day of May, 1824. And it was declared that the Respondent Wyrley Birch was entitled to a reconveyance of the terms created for the security thereof, upon payment to the Appellant George Joy, of the sums of £2000 and £2000, for the purchase-money of the said annuities; and also upon payment to the Appellant George Joy of what should be found due for such arrears thereof. And it was ordered that it should be referred to the said master, to enquire and state to the court what were the incumbrances affecting the estates comprised in the said agreements respectively, at the date of the said agreements, and to state their respective priorities; and what sum or sums of money had at any time since the date of the said agreement been paid by the Respondent Wyrley Birch, in respect of such incumbrances, or of any or either of them, out of the purchase-monies for the said estates; and what was due for principal and interest [225] upon such incumbrances respectively. And it was ordered that the said master should enquire and state to the Court what remained due from the Respondent Wyrley Birch, in respect of the purchase-money for the estates comprised in the said agreement. And for the better taking the said accounts and discovery of the matters aforesaid, the parties were to produce before the said master upon oath, all deeds, books, papers, and writings, in their custody or power, relating thereto; and were to be examined upon interrogatories, as the said master should direct, who, in taking the said accounts, was to make unto the parties all just allowances. And the Court reserved the consideration of all further directions, and of the costs of the suit, until after the master should have made his general report.

The Appellants, George Joy, Henry Hall Joy, and Elizabeth Joy, presented their petition of appeal in the cause to the Lord Chancellor, on the 2d day of April, 1831, from those parts of the decree, whereby it was declared that the annuities of £300 and £300, in the pleadings mentioned, ceased and determined on the 5th day of May, 1824; and whereby it was stated that notices to repurchase the said annuities were admitted by the Appellant George Joy, by his answer to the said original bill, to have been given by the said William Colhoun to the Appellant George Joy; and whereby it was ordered that it should be referred to the master of the said Court in rotation, to take an account of what remained due to the Appellant George Joy, for the arrears of the said annuities, which accrued due up to the said 5th day of May, 1824; and whereby it was declared that the Respondent Wyrley Birch [226] was entitled to a reconveyance of the terms created for the security thereof, upon payment to the Appellant George Joy, of the sums of £2000 and £2000; and also upon payment to the Appellant George Joy, of what should be found due for such arrears thereof: and the Appellants prayed his Lordship to rehear the said cause, as to such parts of the said decree, and to alter and vary the said decree, as to those parts, and in the respects by the Appellants complained of; and also to alter and vary the said decree, by referring it to the master to enquire and state to the Court what were the incumbrances affecting the purchase-money of the said estates, comprised in the said agreements of the 22d day of February, 1812, and the 24th day of October, 1812; and what was due for principal and interest on such incumbrances, or otherwise in that respect, as to his Lordship should seem just.

The appeal came on for hearing before the Right Honourable the Lord High Chancellor, on the 10th day of August, 1831, when his Lordship was pleased to order that the said decree should be affirmed with costs to be taxed by the master, and that the

£20 deposited with the registrar on setting down the petition of appeal, should be paid to the solicitors of the Respondent Wyrley Birch, in part of such costs.

This order, and also the decree of the Vice-chancellor, were passed and entered, of record in the High Court of Chancery.

The appeal to the House of Lords was from those parts of the decree of the Vice-chancellor of the 23d February, 1830, whereby it was declared that the said annuities of £300 and £300 in the pleadings mentioned, ceased and determined on [227] the 5th day of May, 1824, and whereby it is stated that notices to repurchase the said annuities were admitted by the Appellant George Joy, by his answer to the said original bill, to have been given by the said William Colhoun to the Appellant George Joy; and whereby it was ordered that it should be referred to the master of the said Court, to take an account of what remained due to the Appellant George Joy, for the arrears of the said annuities, which accrued due up to the said 5th day of May, 1824; and whereby it was declared that the said Wyrley Birch was entitled to a reconveyance of the terms created for the security thereof, upon payment to the Appellant George Joy of the sums of £2000 and £2000, and also upon payment to the Appellant George Joy of what should be found due for such arrears thereof. And from the order of the Lord High Chancellor of the 10th day of August, 1831, affirming the said decree; and the Appellants also prayed that the said decree might be further varied by referring it to the master, to inquire and state to the Court what were the incumbrances affecting the purchase-money of the estates comprised in the agreements of the 22d day of February, 1812, and the 24th day of October, 1812, and what was due for principal and interest on such incumbrances.

For the Appellants, Mr. Knight and Mr. Sharpe.

The notices by the bill alleged to have been given to the Appellant George Joy, to repurchase the said annuities on the 5th day of May, 1824, were not pursuant to the terms of the provisoes, for that purpose contained in the said grants of annuities of the 5th and 6th days of March, 1800, and the 8th and 9th days of May, 1800. The [228] power of attorney was insufficient and inoperative as to notice. General words are qualified by the recitals of a deed, and confined to the subject matter of the instrument; *Thorpe* v. *Thorpe* (1 Ld. Raym. 235), *Oliver* v. *Daniel* (1 Meriv. 500 note), *Simons* v. *Johnson* (3 Barn. and Adol. 175), *Payler* v. *Homersham* (4 M. and S. 423), *Solby* v. *Forbes* (2 Bro. and B. 38). No place is fixed for the payment. There is no evidence that the notice was not given by or upon the suggestion of Birch. If valid, it was a notice of Colhoun, and he was estopped, and the supposed notice avoided before it was to take effect.

Even if the notices alleged to have been given to the Appellant George Joy, should be considered to be according to the terms of the provisoes contained in the grants of annuities, it was neither proved in the cause, nor admitted by the Appellant George Joy, that such notices had in fact been given to him, nor that any tender had been made of the sum of £4000, the repurchase-money of the annuities, together with all the arrears of the annuities, and the costs and expenses incurred by the Appellant George Joy, in recovering the payment of the said annuities on the 5th day of May, 1824, the time mentioned in the said notice; nor that William Colhoun, or any agent on his behalf, was in fact prepared to make such tender at that time. Tender only stops interest where money is lying dead; *Gyles* v. *Hall* (2 P. W. 378). To make a tender valid * there must be an exhibition of the money or [229] a dispensation express or implied; *Thomas* v. *Evans* (10 East, 101). As to what the Appellant would have done upon supposition of such a case it is not allowable to speculate. In *Levy* v. *Lord Herbert* (7 Tau. 314), *Wilkes* v. *Atkinson* (1 Marsh, 412), and *Wilmot* v. *Wilkinson* (6 Barn. and C. 506), the arguments are founded upon questions as to contemporaneous acts, which are not applicable to contracts for repurchase of annuities. In this case no conveyance was proved to have been tendered or prepared, nor is it ascertained to whom the transfer by Joy was to be executed.

If the notices for repurchasing the annuities had been regularly given, they had

* See *Leatherdale* v. *Sweepstone*, 3 Car. and P. 342; *Church* v. *Bishop*, 2 Ves. sen. 372; *Garforth* v. *Bradley*, 2 Ves. sen. 678; *Meade* v. *Bandon*, 2 Dow. 268; and MSS. *pen Aut.*

been waived and abandoned, and rendered of no effect, by the settlement of accounts which took place between William Colhoun and the Appellant George Joy, in the month of April, 1824, and the letters written by William Colhoun on the 3d of April, 1824, and by the indenture of assignment of the 6th of April, 1824, executed by William Colhoun; in which accounts, letters, and assignment, William Colhoun treated the notices as void, and the annuities as subsisting and continuing annuities.

Even if the annuities did cease and determine on the 5th of May, 1824, the Appellant George Joy is entitled to interest on the two sums of £2000, and £2000, the purchase-monies of the said annuities, from the said 5th of May, 1824, to the time of the payment thereof; Wyrley Birch having ever since the 5th of May, 1824, been in possession or in the receipt of the rents and profits of the estates, upon which the annuities are charged, and having also been entitled under the agree-[230] -ments between him and the said William Colhoun to retain in his hands a sufficient part of the purchase-money of the estates, to satisfy the incumbrances thereon, including the annuities.

The Appellant George Joy is also entitled, according to the terms of the grants of the annuities, to be repaid, together with the purchase-monies of the said annuities, and the arrears thereof, all the reasonable charges and expenses incurred by him up to the 5th of May, 1824, in recovering the payment of the said annuities.

The Appellant George Joy, having by the evidence adduced by him in the cause, proved the due execution by William Colhoun of the indenture of assignment of the 6th of April, 1824, whereby William Colhoun charged the purchase-money due to him from Wyrley Birch, with the payment to the Appellant George Joy, of the sums mentioned in the said indenture, the Appellant George Joy was entitled, on the hearing of the cause, to have it referred to the master to inquire, and state to the Court, what were the incumbrances affecting the purchase-money, and what was then due for principal and interest upon such incumbrances.

For the Respondents, Mr. Wigram and Mr. Flather.

In equity a purchaser is entitled to all the privileges and advantages of the legal owner of the estate, from the time when, by the terms of the agreement, he is entitled to the beneficial interest; and therefore, in the month of April, 1823, and long previously, the Respondent Wyrley Birch was entitled to the benefit of the covenant to repurchase the annuities contained in the annuity deeds.

[231] The notice of the 16th of April, 1823, for the repurchase of the annuities is admitted by the answer, and it is in strict compliance with the terms of the condition of repurchase contained in the annuity deed; and it was not competent for the Appellant George Joy, after the receipt of such notice, to evade the tender of the purchase-money, by absenting himself from his dwelling-house at the time when, by the notice, the tender was to be made.

Notice for the repurchase of the annuities having been given by William Colhoun, the benefit of such notice belonged of right to the Respondent Wyrley Birch, as the purchaser of all Mr. Colhoun's interest in the estate: and therefore Mr. Colhoun had no power or authority to recal such notice, and by that means to continue the annuities a charge upon the estate previously sold by him, or to do any act to the prejudice of the interest of the Respondent Wyrley Birch in the estate purchased.

The claim of interest was not well founded. After the right of Birch under the agreement had vested Colhoun could not, by any contract with Joy, alter, or affect the rights of Birch. The conduct of the Appellant George Joy was the sole occasion of the delay in the completion of the repurchase. The annuity was satisfied at law by the tender, and the annuitant could not by his delay continue his right to the annuity contrary to the provision of the deed; the purchase-money was not only ready at the time when the Appellant George Joy ought to have accepted it, but the Respondent has since been exposed to the loss and inconvenience arising from his liability to be [232] called upon at any hour for so large a sum as £4000, which, therefore, he has been compelled to keep ready for that purpose ever since. This is a hardship to which he ought not to have been subjected.. There is no contract for interest, and as the annuities were never conveyed to the Respondent Wyrley Birch, he had not the power to enforce payment of them: the estate itself has not produced more than sufficient to satisfy prior charges thereon, and more than the whole of the purchase-money has been applied in paying off the incumbrances on the estate. Interest on a mortgage ceases after notice and tender made and refused; *Austen*

v. *Dodwell*, 1 Eq. Ca. Abri. 318. *Lutton* v. *Rodd*, 2. Ch. Ca. 206. *Manning* v. *Burges*, 1 Ch. Ca. 29, and *Garforth* v. *Bradley*, 2 Ves. sen. 678, which is an exception to the rule. Nor is it necessary for the Plaintiff to prove that the money was ready and no use made of it. The cases cited to prove that doctrine, *Gyles* v. *Hall* and *Lutton* v. *Rodd*, by no means prove it. The first only shews that where the mortgagee proves that the money has not been lying dead, he will be entitled to interest. In the second the decree is that interest is not to be paid.*

The indenture of the 6th of April, 1824, bears internal evidence of being the act of a mind at that time incapable of business, or of the exercise of undue influence on the part of the Appellant George Joy. William Colhoun was at the time of the execution of the deed of the age of seventy-five years, and was separated from his friends and pro-**[233]**-fessional advisers. The object of the Appellant George Joy, in obtaining that deed, was to increase his charge upon the estate at the expense of the Respondent Wyrley Birch, although nothing was justly due to him beyond his original claim.

The Earl of Devon: My Lords, this case of Joy and Birch is an Appeal from the Court of Chancery, in which Joy the Appellant, who was the Defendant in the Court below, complains of a judgment as it affects him, given by the Vice-Chancellor and affirmed by the late Lord Chancellor Brougham. This case was heard here on two days before my noble and learned friend, who had the assistance of the Lord Chancellor of Ireland and my Lord Lyndhurst. I was in hopes that both might have been here to-day, but they have given their attention to this case, and the House have had the advantage of hearing what their opinions are; but circumstances making it inconvenient for me to come at an early day again, my noble and learned friend on the Woolsack has permitted me to take this opportunity of stating what has occurred to me in this case; and without therefore venturing to move any judgment until the opinions of the other Lords who attended upon the argument have been offered to the House, I will now take the liberty of stating to your Lordships what has occurred to me upon a careful consideration of the case and attention to the arguments.

This was a bill filed by Mr. Birch, against Mr. Colhoun and Mr. Joy, and some other formal Defendants. The circumstances of the case were shortly these: Mr. Birch contracts in 1812 to purchase from Mr. Colhoun a certain real estate for a **[234]** sum of money somewhere about £90,000, and by that agreement Mr. Colhoun undertakes to convey the estate to him free from incumbrances. Birch shortly afterwards ascertains that among other incumbrances of which he was not in the first instance aware, there are two annuities charged upon the estate, which were created by deeds executed in the month of March, 1800, and the month of May, 1800. Upon discovering those two annuities, a second agreement is entered into between Birch and Colhoun, and that agreement provides for the discharge of certain incumbrances therein mentioned, including certain annuities; but takes no notice of the annuities granted to Joy, otherwise than that it provides in case of Birch being called on to pay those annuities for the manner in which he should stand creditor in respect of what he should so pay. That agreement does not take any notice with respect to the repurchase of these annuities. Various transactions then take place, and at last it ends in Birch filing a bill against Colhoun and Joy, calling for a specific performance of the agreement for the sale of the estate, and calling upon Joy to reassign the term by which the annuities were secured, alleging that under the covenant for that purpose contained in the annuity deed, a proper notice had been given to Joy of an intention to repurchase; and that circumstances had taken place which amounted or were equivalent to the payment to Joy, of the consideration money only of those annuities, and consequently the annuities had ceased, and that Joy was bound to reassign the annuities to the purchaser Birch. Answers are put in; no evidence is examined on the part of Birch, but several witnesses are exa-**[235]**-mined on the part of Joy. A decree is then made by the Vice-Chancellor, the effect of which decree is to declare that the annuities, in consequence of what had passed, had actually ceased on a given day, namely, on the 5th of May, 1824; and the decree uses this expression.

* It is said in the Report that it was so decreed, but the Plaintiff ought to make oath that the money was kept, and no profit made of it. See 2 *Sugd. V. and P.* 2, 9th ed.; *Powell, Mortg.* 6th ed. 935.

which it is important to notice, because upon that, I presume, the substance of the decree was founded, in which, however, I am under the necessity of saying that I cannot in any degree concur. The decree declared, "that the annuities of £300 and £300 in the pleadings mentioned, ceased and determined on the 5th day of May, 1824, when the notices to repurchase the said annuities, stated in such decree to have been admitted by the Appellant George Joy, by his answer to the original bill, to have been given by the said William Colhoun to the Appellant George Joy, expired." Upon this point, the question which your Lordships have to decide mainly turned, namely, whether there was such a compliance with the terms for repurchase contained in the annuity deeds as to justify the Court in saying, that the annuities did in point of fact expire, or are to be treated as having expired in May, 1824.

Now, with respect to this point, the facts appear to be of this nature. The bill alleges a letter of attorney given by Colhoun to Mr. Coke and Hanrott, making them his attornies to do certain things; and in the course of the arguments at the bar, a good deal was said with respect to the particular wording of that letter of attorney, and it was contended that the general words there used would entitle them to give the notice which is contained or referred to in these pleadings.

Under that letter of attorney, Coke and Hanrott [236] signed an instrument, being a notice of intention to repurchase the annuity at the expiration of twelve months from the time of serving the notice; and the first question then would be, whether that was such a notice as entitled Birch either in his own name, or making use of the name of Colhoun, to pay the money, and consequently to call for a re-assignment of the annuity; and another very important question is, whether supposing the notice to be good, any thing was done which amounted to an intention to pay, or can be taken as equivalent to payment.

To take the last question first, which perhaps is the most convenient way—I confess I cannot see upon what ground the House can judicially say, that that which took place (admitting it all to be as it is stated on the part of Birch) amounted to any thing like a payment, or what can be held equivalent to payment. I do not mean to involve the question in the technicalities of the law with respect to tender; but in order to make it payment, something ought to be done which shows that the individual to whom the money was to be paid, had distinct notice of the intention to pay at a certain time and place, and that it was his default that he did not receive the money; that I take to be the principle and the only principle upon which we could hold an offer of payment to amount to payment. I confess, I am of opinion, that nothing appears on these pleadings, certainly nothing is admitted in the answer, which justifies that conclusion, and consequently that we must say, that the consideration money for the repurchase of the annuities was not paid. The result of that opinion, if we went no further, would be that the annuities are now subsisting annuities, and so far, I think, we must [237] all concur. My opinion certainly is, that the annuities are now subsisting annuities, and that nothing equivalent to repayment has been done.

Then comes the question, whether, admitting that repayment has not been made, such a notice has been given as would entitle the party now to make the payment. If this House should be of that opinion, the result might possibly be to make some difference in the order which the House may make: the result may possibly be that the party would be at liberty now to make payment in virtue of the notice so given.

With respect then to the notice, I certainly during a great part of the argument was rather disposed to take that view of the case: but upon looking more minutely and accurately into the pleadings and evidence, and what Mr. Joy says in respect to this point, I cannot concur in that assumption in the decree that Joy admitted the notice in such sense, that effect ought to be given to it as an admission. What he says with respect to that notice, is accompanied and qualified by a distinct denial of any authority in the parties so to do; but what I think is of still more importance, whether they had a right to give that notice or not, it appears all through that it is professed to be given as the notice of Colhoun. Now, if it is given as the notice of Colhoun, the only piece of evidence that connects Colhoun with any knowledge of it at all—(indeed whether he was cognizant of it or not, we have no evidence in the cause) is that before the time expired at which that notice was to be acted on, he expressed his desire and intention that it should not be acted upon, but that another course should be taken—another course not at all unreason-[238]-able or unnatural,

because, although Birch unquestionably had a right to have the estate free from incumbrance, it does not follow that he had a right to take that particular mode, and that particular mode only, of getting a reassignment of the term. I am therefore further of opinion, that that notice cannot be treated as a notice upon which payment even now can be made. The result must be in that view of the case (and that, in fact, is the whole of the case)—the result must be, that the decree must be reversed so far as respects Mr. Joy. Mr. Colhoun is not a party to the appeal; neither he nor any body who represents him appeal. But speaking of my own individual opinion (in the substance of which I hope my noble and learned friends concur), I feel bound to say, that I cannot think this decree right, and therefore that it ought to be reversed; and I do not see how any thing short of a reversal of the decree *in toto* will answer the justice of the case, except this—that there is a complaint in the appeal that the decree does not direct any account to be taken of the purchase-money. So far I am disposed to think that the decree is right. I do not think upon these pleadings, any account of the purchase-money ought to have been directed. I merely throw that out because it will affect the form of the order. In point of form, if the House should concur in the view I have taken, and think that the decree should be reversed, then the costs paid (if they should have been paid) under the Lord Chancellor's order will be repaid.

Lord Lyndhurst *: The point upon which I [239] concur in the opinion that has been pronounced by my noble and learned friend is this, that I do not think those circumstances which are admitted in the answer of Mr. Joy are sufficient to extinguish the annuity, without saying any thing as to whether or not the power of attorney, executed as it was for the purpose of giving notice to redeem the annuities, was sufficient for that purpose: the service of that notice was, in point of law, a regular service; but after the notice had been served, then, at the expiration of the notice, it appears according to the admission in Mr. Joy's answer (and there is no evidence in the cause except the answer)—it appears by the admission in the answer that Mr. Tooke and, I think, Mr. Syms attended at the house of Mr. Joy, there being no evidence whatever to show where Mr. Joy was at that time, for the purpose of tendering the money, and attended also for the purpose of tendering a deed of transfer for Mr. Joy to execute; and Mr. Joy not being at home at the time, or the servant stating that he was not at home, they left the notice that is set out in the bill, and which notice is also admitted by Mr. Joy to have been left at his dwelling-house at the time in question.

Now it appears to me, having, at various times during the argument, and from that time to the present, turned my mind to it, and considering what was urged by Mr. Wigram, and the cases which he has cited, I am compelled to come to the conclusion, from which I have never in fact varied, that what has been done is not operative in itself to extinguish the annuities; and I beg leave therefore to offer my humble opinion to your Lordships, founded on that view and that alone, that [240] the circumstances so stated and so admitted by the answer of Mr. Joy, with no other evidence in the cause, are not sufficient to have the effect of extinguishing the annuities that were granted by Mr. Colhoun to Mr. Joy. It does not amount to that repurchase which alone can support the decree which has been pronounced by the Court below.

The Lord Chancellor: My Lords, it is a great satisfaction to me that the parties to this appeal have had the benefit of the consideration of the noble and learned Lords who have now expressed their opinions, and also of my noble and learned friend the Lord Chancellor of Ireland, who attended throughout the whole of the discussion, and has authorised me to say that he entirely concurs in the opinions expressed in this House to-day. My noble and learned friend, the Lord Chancellor of Ireland, has also desired that I would state that, in addition to the other reasons which might influence the judgment in this case, he entertains very great doubts whether, under the circumstances in which these parties were placed, it was competent to Mr. Birch to call upon Mr. Colhoun to exonerate the estate at the expense of repaying the whole of the £4000 after two lives had expired, and under the circumstances affecting the parties as they existed when the notice was given.

The object of this suit was to enforce a right of repurchase; the right of repur-

* His Lordship came into the House while the Earl of Devon was speaking.

chase being contained in the terms of the deed in these words: "That if Colhoun should be desirous to repurchase and buy up the said annuity, yearly rent charge, or annual sum of £300, and should give to the [241] said George Joy, his executors, administrators or assigns, twelve calendar months' notice thereof in writing, then the said George Joy, his executors, administrators and assigns, would at the end of twelve calendar months, for which such notice should be given, on receiving all arrear of the said annuity, accept and take the sum of £2000 in full for the repurchasing thereof, and upon payment thereof would, at the proper costs of William Colhoun, release and surrender the said several securities for the same to Mr. Colhoun."

Now, it is a well-established rule that under a clause of repurchase of this description, being for the purpose of determining an interest, it is required to be strictly complied with. That doctrine which was laid down in *Barrel* v. *Sabine*, 1 Vernon, 268, is confirmed by the case of *Ensworth* v. *Griffith*, in this House, in the fifth volume of Brown's Parliamentary Cases, 184; and it is further acted on in the case of *Davis* and *Thomas*, before the late Master of the Rolls, in 1 *Russell* and *Mylne*, 506. In the last case Sir John Leach expresses himself in these words: "Where there is no stipulation of forfeiture but a privilege conferred, provided money be paid within a certain time, the party claiming the privilege must show that the money was paid accordingly." And the language of the Court in *Barrel* v. *Sabine* is, that where there is a sale with a clause for a repurchase upon payment of the purchase-money, the time ought to be precisely observed. It was therefore necessary for the party claiming the benefit of this repurchase (I am now supposing Colhoun to be the party claiming the benefit of the repurchase) to comply strictly with the terms of the [242] proviso. He was bound therefore to give the regular notice, and, at the expiration of the regular notice, he was bound to pay, unless the payment was prevented by the situation of the party who received the notice. He was bound, therefore, either to show that he paid, or did that which, in law, would be equivalent to payment.

Now if you look to the terms in which these transactions are stated in the bill, and the way in which they are admitted in the answer (that being the only evidence on which the decree proceeded, there being no other evidence in the cause on the part of Birch), your Lordships cannot, I think, fail to come to the conclusion that there is a great want of all those requisites which would entitle the party seeking the benefit of the repurchase of these annuities to put himself in the situation in which, by his contract, he was bound to place himself. The bill alleges, "That all attempts of Birch to repurchase the said annuities proving unsuccessful, Birch, being desirous of exonerating the estates from the said annuities, requested Colhoun, in performance of his said agreement, to give Joy such notice as was required by the said annuity deeds, to enable him, Colhoun or Birch, in his place, to repurchase the said annuities, and that such notice was accordingly reduced into writing and duly delivered to Joy on behalf of Colhoun, on the 16th of April, 1823." The admission in the answer, on the subject of that notice, is in these terms: "And this Defendant, further answering, says, he has been informed by the said William Colhoun and believes that the Plaintiff did not request the said William Colhoun to give to this Defendant such notice as in [243] the said bill in that behalf mentioned, and Defendant admits it to be true, that a notice signed William Colhoun, by his attorney, was served on the Defendant, at or about the time in the bill mentioned." It does not refer to the bill for the purpose of adopting the statement of the notice in the way it is alleged in the bill. It merely says that a notice, not identifying any particular notice, or saying any thing more on the subject of the notice, than that a notice, signed William Colhoun, by his two attornies, was served on him at the time in the bill mentioned. The next allegation relates to what was done on the expiration of the term specified in that notice; and for that purpose the bill states, "That pursuant to such notice, and on the 5th May 1824, being the day for that purpose mentioned in the said notice, Mr. Tooke, the solicitor for Birch and on his behalf, and Mr. Syms on behalf of the said Mr. Colhoun, went to the Appellant G. Joy's residence, in New Ormond Street, for the purpose of tendering the sum of £4000, together with all arrears of the said annuities, and the costs and expenses incurred by the said Appellant George Joy, in recovering the payment of the consideration-money for the same, and also for the purpose of tendering the deeds of transfer of

the said annuities for the execution of George Joy; but Mr. Tooke and Mr. Syms were then informed that the said George Joy was from home and gone to Guernsey or Jersey; and thereupon the said Mr. Tooke and Mr. Syms left at his the said George Joy's house a written notice in the words or figures or to the purport and effect [244] following." It then sets out the notice that was left at the house.

Now what it was incumbent on the Plaintiff to prove was, not that the notice was left at the house, but it was incumbent on him to shew that he either did actually pay, or did that which the law considers as equivalent to payment, namely, that species of tender which would enable him to say that he had done all that it was incumbent on him to do to entitle himself to the benefit of his contract.

Now what the Defendant says (which is the only evidence in the cause) on that subject is in these terms: "And this Defendant says he admits it to be true that a notice, signed William Colhoun, by his attornies Edward Coke and Philip Augustus Hanrott, was served on him, this Defendant, at or about the time in the said bill in that behalf mentioned; but this Defendant says he has always protested against the authority of the said E. Coke and P. A. Hanrott to interfere in the concerns of the said William Colhoun, he, this Defendant, having previously thereto received from the said William Colhoun an irrevocable power of attorney."

These circumstances are in no way entered into or brought before the Court of Chancery by the Plaintiff. Coupled with the admission of the notice, there is a statement in the answer that two persons acting as attornies for William Colhoun were the persons who gave the notice; and there is a statement that the Defendant always disputed the title of those persons, stating that he had from William Colhoun, on whose behalf these two persons professed to act, an irrevocable power of attorney at an early date.

[245] The answer goes on thus: "And this Defendant says that the said Edward Coke, in a letter to this Defendant, dated on or about the 27th November, 1820, informed this Defendant that he the said Edward Coke would not act under a power of attorney, which Mr. Syms had unduly persuaded the said William Colhoun without the knowledge of the said Edward Coke, to execute to him; and the said Edward Coke in a subsequent letter to him, this Defendant, dated on or about the 16th of May, 1824, informed this Defendant that he, the said Edward Coke, considered this Defendant knew or was aware that for years he, the said Edward Coke, had not concerned himself with the affairs of the said William Colhoun, neither should he then: and this Defendant therefore believes that the signature of the said Edward Coke to such notice was incautiously given or surreptitiously obtained; and the said William Colhoun informed this Defendant that he the said William Colhoun had no knowledge of such notice, and had not given instructions to the said Edward Coke and Philip Augustus Hanrott, or either of them, to give the same on his the said William Colhoun's behalf." Then the "Defendant further says that after the said notice had been so given, and before the time mentioned therein had expired, the said William Colhoun had settled his accounts with this Defendant:" And this Defendant, further answering, says "that he is informed and believes" (this is the passage as to the transaction which is alleged by the Plaintiff to be equivalent to a tender)—"he is informed and believes that pursuant to such notice, and at or about the [246] time in the said bill in that behalf mentioned, the said Mr. Tooke on the behalf of the Plaintiff, and Mr. Syms pretending to act on the behalf of the said William Colhoun, but, as this Defendant believes, without his knowledge or any authority from him, did go to this Defendant's residence, in New Ormond Street, for the purposes in the said bill mentioned. And this Defendant says he believes that the day in the said bill, in that behalf mentioned, was the day in the said notice mentioned for the repurchase of the said annuities; and that the said Mr. Tooke and Mr. Syms were then informed, as the fact was, that this Defendant was then from home." But this Defendant says he does not know and cannot set forth, as to his belief or otherwise, whether they were informed that this Defendant was gone to Guernsey or Jersey; this Defendant having been previously at the island of Jersey, but having left the same about three weeks before such inquiry was made. And this Defendant further answering says, he has understood, and believes it to be true, that at the time in the said bill in that behalf mentioned, the said Mr. Tooke and Mr. Syms did leave at the house of this Defendant such written notice as in the said bill in that behalf mentioned; to which said notice, when the same shall be produced to this Honourable Court, this Defendant

craves leave to refer: that is the only passage in the answer which was read or relied on to prove, on the part of the Plaintiff, the fact of his having done that which was incumbent on him to do for the purpose of placing himself in a situation to determine the further payment of the annuity to Mr. Joy.

[247] Now the notice as stated in the bill (supposing that to be sufficiently admitted in the answer) is entirely silent as to any place at which the money was to be paid. The proviso in the deed is also silent as to the place where the money was to be paid, and the rule I apprehend to be very clearly established that, where that is the case, it is incumbent on the party giving the notice of the intention to repay, to specify the place at which he proposes to repay it. It was at one time a question whether where no place is stated, it is not necessary for the party to seek out the grantee and make a personal tender; but it has since been established that where there is no place mentioned, it is competent to him to specify in his notice a place, and the party then is bound to take notice of the place so specified. In the present instance there is no place mentioned; there is nothing to shew, even if all the circumstances took place which the Plaintiff alleges, that the house was a place where the Plaintiff was entitled to make the tender; there is a total failure of all evidence which amounts to any thing that may be considered as equivalent to payment; the fact admitted, and the only fact admitted, being, that the parties came to the house, and that the paper was left at the house: now, independently of that, there is a circumstance which is stated in the notice, which also throws an additional burthen upon the Plaintiff in making out his case, namely, that the payment must be accompanied by the execution of a deed. There is no statement, and therefore there can be no proof, that any previous steps had been taken to inform Mr. Joy of the nature or contents of the deeds which he was called upon to execute; and in [248] the case of *W.* and *Smith*, 3 Atkyns, 89, Lord Hardwicke held that a mortgagee could not be called on to execute a reconveyance unless a copy had been left with him and sufficient time allowed to him to advise on it before the time appointed for payment. There is therefore throughout an absence of all those circumstances which could entitle Mr. Birch or Mr. Colhoun (supposing the transaction be considered as the transaction of Mr. Colhoun) to insist upon these annuities having determined by his having done that which, by the decree, he was bound to do, in order to determine the annuities, or that which could be considered as equivalent to it. There are various other grounds, independently of those which I have now stated, which might probably have led me to the same conclusion, if it had been necessary to advert to them, but being quite satisfied on the facts, as far as I have stated them, that no case is made out on the part of the Plaintiff to determine these annuities, it is unnecessary to make any observations on the other parts of the case.

That makes it necessary to consider what, under the existing state of circumstances, is proper to be done with this decree. The decree, as far as it affects Mr. Joy, is in these words: "And it was declared, that the annuities of £300 and £300 in the pleadings mentioned, ceased, and determined, on the 5th day of May, 1824, when the notices to repurchase the said annuities, stated in such decree to have been admitted by the Appellant George Joy, by his answer to the original bill, to have been given by the said William Colhoun to the Appellant George Joy, expired." And it was ordered, that it should be referred to the [249] "Master of the said Court, in rotation, to take an account of what remained due to the Appellant George Joy, for the arrears of the said annuities which accrued due up to the said 5th day of May, 1824. And it was declared, that the Respondent W. Birch was entitled to a reconveyance of the terms created for the security thereof, upon payment to the Appellant George Joy of the sums of £2000 and £2000 for the purchase-money of the said annuities; and also upon payment to the Appellant George Joy of what should be found due for such arrears thereof." If your Lordships should concur in the view which I have ventured to suggest with regard to the merits of this decree, it is clear that all that part of the decree must be reversed. If that part of the decree be reversed (and the other parts of the decree do not affect Mr. Joy; they merely affect the accounts as between the vendor and purchaser), the result will be that the estate purchased remains subject to these annuities of £300 a year each. If, therefore, there had been nothing else to affect Mr. Joy's interest, and he stands in the situation of an annuitant as to these two sums, the bill then would properly be dismissed as against him, because then the only subject-matter with respect to which he was made a party would

fail, and he would be entitled to be entirely dismissed from the suit. But it is not his interest to be dismissed from the suit; and what appears in the cause makes it necessary that he should be continued a party to the cause, because, although what took place could not affect the interest of Birch, inasmuch as all the transactions were subsequent to the contract with Birch, which was in the year 1812, yet various transactions took [250] place afterwards between Mr. Colhoun and Mr. Joy, which makes it necessary that Mr. Joy should remain a party to the cause, for the purpose of receiving out of the purchase-money which Mr. Birch may have to pay those sums, which, by his subsequent arrangement with Mr. Colhoun, he may or may not be entitled to receive. This being a question between co-defendants, it cannot be the subject of adjudication at the hearing, but it may, very properly, I apprehend, be made the subject of inquiry; and it is absolutely necessary, that some inquiry should be made, in order that it may be ascertained what ought to be done with the purchase-money when the purchase-money is paid. It appears—(and that is a question which I do not further enter into than for the purpose of showing what the claims are, because, being a question between co-defendants, I apprehend your Lordships will be of opinion, that the proper course will be to leave all matters as between co-defendants as open as possible, but to put it in a train of inquiry by which the rights of the parties will be worked out)—it appears, however, in evidence, that in the year 1817, letters passed between Mr. Joy and Mr. Colhoun, which, as it has been contended on the part of Mr. Joy, entitle him to interest on the arrears of his annuity. It also appears, that in the year 1824, a deed was executed by which at all events (that deed not being impeached as between Mr. Colhoun and Mr. Joy), Mr. Joy claims the benefit of arrears of interest then existing upon his annuities. To what extent or in what way Mr. Joy may be able, as against the purchase-money coming from Colhoun, to work out these several claims, is a matter with which the decree at the hearing ought not, I [251] apprehend, otherwise to have interfered than by referring it to the Master, as between those co-defendants, to inquire whether Mr. Joy had any, and what lien or claim on the purchase-money, which would under the contract be paid by Mr. Birch to Mr. Colhoun. That is a matter with which Mr. Birch can have nothing to do, because it can only affect so much of the purchase-money as would otherwise be coming to Mr. Colhoun.

I should therefore submit to your Lordships' consideration, whether the proper course to be adopted would not be to reverse so much of the decree as I have already stated as affects the interest of Mr. Joy, and then direct a reference to the Master to inquire whether Mr. Joy has any and what lien upon or claim to any portion of the purchase-money, which would be payable by Mr. Birch to Mr. Colhoun.

The only other part of the case, as affecting the interest of Mr. Joy, which it is necessary for me to call to your Lordships' attention, appears to be the decree upon the appeal to the Lord Chancellor having directed Mr. Joy to pay the costs. It necessarily follows, if your Lordships adopt the opinion which I have formed on this subject, that your Lordships should order the repayment of those costs, which will then bring back the parties to the situation in which they would have stood, if the decree which I have ventured to suggest had been pronounced at the time of the original hearing.

Under these circumstances, I move your Lordships that this decree be reversed to the extent which I have stated, and that, in lieu of that part, there be substituted the inquiry which I have suggested.

[252] It is ordered and adjudged by the Lords Spiritual and Temporal in parliament assembled;

That so much of the said decree of the twenty-third day of February, 1830, complained of in the said appeal, as declares that the said annuities of £300 and £300 in the pleadings mentioned ceased and determined on the 5th day of May, 1824, when the notice to repurchase the said annuities (stated in such decree to have been) admitted by the Defendant George Joy, by his answer to the original bill, to have been given by the Defendant William Colhoun to the said George Joy, expired; and as orders that it be referred to the Master of the Court of Chancery, in rotation, to take an account of what remained due to the said George Joy from the arrears of the said annuities which accrued due up to the said fifth day of May, 1824; and as declares that the Plaintiff Wyrley Birch was entitled to a reconveyance of the terms created for the security thereof, upon payment to the said George Joy of the sums of £2000

and £2000 for the purchase-money of the annuities, and also upon payment to the said George Joy of what should be found due for such arrears thereof,—be, and the same is hereby reversed.

And it is further ordered and adjudged, that the said order of the tenth day of August, 1831, whereby it was ordered that so much of the said decree should be affirmed with costs, to be taxed by the Master, and that the £20 which had been deposited with the Registrar, on setting down the petition of appeal, should be paid to the solicitor of the Plaintiff Wyrley Birch in part of such costs, be, and the same is hereby also reversed; and it is further ordered, that the amount of costs paid in [253] pursuance of such order by the said George Joy to the said Wyrley Birch, and also the said sum of £20, be repaid by the said Wyrley Birch to the said George Joy.

And it is further ordered, that so much of the bill as prayed that it might be declared that the two several annuities of £300 and £300, chargeable on the estate thereinbefore named as thereinbefore mentioned, ceased and determined on the fifth day of May, 1824, and that an account might be taken by and under the direction and decree of the said Court of Chancery of the arrears of the said annuities respectively which accrued due on or prior to the fifth day of May, 1824, and of the costs and expences reasonably incurred by the Defendant George Joy in respect of such arrears; and that upon payment of what should be found due, together with what should be due on the two several sums of £2000 and £2000 to the said George Joy, and which the said Wyrley Birch thereby offered to pay the Defendants, George Joy, Henry Hall Joy, and Elizabeth Joy, might be decreed to make and execute all deeds and do all such acts as might be necessary to reconvey, transfer, and assign the said two annuities and all securities for the same to the said Wyrley Birch; and that in the meantime, the said George Joy, Henry Hall Joy, and Elizabeth Joy, might be restrained by the order and injunction of the said Court of Chancery from commencing or prosecuting any action or actions at law, or taking out execution or any proceedings at law against the said Wyrley Birch on the said estates, or any of them, or the tenants thereof, for compelling payment of the said annuities, or either of them, or any arrears thereof, [254] be, and the same is hereby dismissed with costs to be paid by the Plaintiff Wyrley Birch to the said George Joy, Henry Hall Joy, and Elizabeth Joy.

And it is further ordered, that it be referred to one of the Masters of the said Court of Chancery to enquire whether the Petitioner George Joy has any and what claim to or lien upon any part of the purchase-money to be paid by the said Plaintiff Wyrley Birch to the Defendant William Colhoun; and that the said Master do state the particulars of any such claim or lien, and the amount thereof and of what the same consists, and how the same arose: and it is further ordered, that after the Master shall have made his report thereon, the said Court of Chancery do proceed further in the said cause as shall be just and consistent with this judgment.

JOHN WILLIAM BIRCH,
Dep. Cler. Parliamentor.

[255]

ENGLAND.

(COURT OF CHANCERY.)

WILLIAM HOLMES,—*Appellant;* THOMAS HENTY, JEREMIAH LEAR, JOHN LEAR, and ROBT. FRENCH, and also JAMES HOPKINS, JOHN COLE TOMPKINS, and HENRY JAMES PARSONS,—*Respondents.*

[Mews' Dig. i. 335, 1065; xiv. 890. S. C. 4 Cl. and F. 99.]

By the statutes, relating to Savings' Banks in operation before July, 1828, the increase of the fund or surplus, after paying the expenses of management, and the interest upon the deposits, was directed to be distributed among, or for the benefit of the depositors. By the Act 9 G. 4. c. 92., which was passed in July, 1828, to consolidate and amend the laws relating to Savings' Banks,

it is enacted (s. 22.), that, within six weeks after the 20th November, 1828, the trustees, etc. shall ascertain the amount of the increased funds up to that date; and, after retaining so much thereof as might be necessary for future management should appropriate the same in manner provided for by their respective rules and regulations made before the passing of the act; or, in the event of no provision having been made by such rules and regulations, then in such manner as the trustees, or the major part of them, assembled at any general meeting convened according to the rules, etc. shall think fit and proper.

The Arundel Savings' Bank was established in 1818; and, in pursuance of this enactment, the increased stock or fund of that bank, up to the 20th November, 1828, was ascertained and found to amount to £742 15s. 11d. By the second of the rules, established at the first institution of the society, it was provided that no trustee, nor any person having any control [256] in the management of the institution, (except the actuary) should derive any benefit from any deposit made therein.

The trustees were owners of property in the town and county, and liable to be rated for the repairs of the bridge at Arundel. The Appellant was Bridge-Warden in 1828.

At a meeting of the trustees on the 11th December, 1828, it was resolved, that of the increased stock "the sum of £100 be returned for the future purposes or management of the bank; that the sum of £50 be paid for arrears of rent and firing to the fund of Arundel school; and that the remainder, £592 15s. 11d. be paid over to W. Holmes (the Appellant), and three other trustees, for the purpose of paying the expense incident to the widening the public bridge over the river at Arundel, the same being narrow and dangerous, and accidents having arisen thereupon; and, in case counsel be of opinion that the trustees are not so authorized to dispose of the money, that the same be disposed of in such manner as the trustees, or the major part of them present, at the annual meeting in November, 1829, shall order—that a case for the opinion of counsel be prepared," etc. A case was prepared accordingly, and the opinion of counsel being adverse to the appropriation, an amended case was submitted to him, which produced a favourable opinion.

In the mean time another case was submitted to counsel by those who opposed the appropriation, and an opinion declaring it to be illegal was produced by the opponents at a meeting in December, 1829, and the Appellant and the other trustees were required to rescind the resolution, and to restore the fund.

On the 1st March, 1831, a bill was filed by some of the trustees against the Appellant and the other trustees, into whose names the fund had been transferred, to restrain the application, etc. The answer contended for the legality of the resolution, and stated that part of the fund had been applied to the expense of widening the bridge; and, upon a motion made for the payment of the money into Court, the Appellant filed an affidavit, in which he stated that, on the 9th of March, 1831, he applied the residue of the fund, which had been transferred to him by the other Defendants, to the payment of the expenses of widening the bridge. Upon this motion it was ordered that the whole fund should be paid into court; and, upon the hearing, it was decreed that the Defendants had been guilty of a breach of trust, and were personally responsible for the misapplication of the fund, and were [257] charged with the costs of the suit. The order and decree were affirmed, with costs, upon appeal by one of the Defendants, the others not joining in the appeal.

In May, 1818, a Savings' Bank was established in Arundel under the name of the Arundel Provident Bank. The forms prescribed by the different acts of parliament for the regulation of Savings' Banks were from time to time duly complied with, and the business of the institution was conducted in the manner usual in Savings' Banks. The trustees, in whom the property belonging to the association was vested, were upwards of fifty in number.

On the 28th of July, 1828, the Royal Assent was given to an act of parliament (9 Geo. IV. c. 92.), intituled "An Act to consolidate and amend the Laws relating to Savings' Banks." The 22d section of the act ordered "That within six weeks after the 20th day of November, 1828, the trustees and managers of the different Savings' Banks already established in England and Ireland shall ascertain the amount of the increased stock or funds of their respective banks up to the said 20th day of November, 1828, and shall, as soon afterwards as conveniently can be, after retaining so much thereof as may be necessary for or towards the future purposes and management of the said Savings' Banks respectively, appropriate the same in the manner provided for by their respective rules and regulations made before the passing of this act; or in the event of no provision having been made by such rules and regulations, then in such manner as the trustees [258] or managers, or the major part of them, assembled at any general meeting to be convened according to the respective rules and regulations of such Savings' Banks, shall think fit and proper, anything herein contained to the contrary notwithstanding."

In pursuance of this enactment the increased stock or fund of the Arundel Provident Bank, up to the 20th of November, 1828, was ascertained, and was found to amount to £742 15s. 11d.

It was conceived that the rules and regulations of the Bank did not contain any direction as to the mode of applying this surplus, and on the 11th of December, 1828, at a meeting which was called a general meeting of the trustees, the Respondent J. C. Tompkins proposed, and the Appellant William Holmes seconded, a resolution for the appropriation of the increased stock. The resolution was, "That the sum of £100 be retained for or towards the future purposes and management of this Bank; that the sum of £50 be paid for arrears of rent and firing to the fund of the Arundel School; that the remaining sum of £592 15s. 11d. be paid over to the Reverend J. H. Parsons, William Holmes, James Hopkins, and John Cole Tompkins, for the purpose of paying the expense incident to the widening of the public bridge over the river at Arundel, the same being now both narrow and dangerous, accidents having arisen thereon; and that in case counsel be of opinion that the trustees are not so authorized to dispose of the money, that the same be disposed of in such manner as the trustees and managers present, or the major part of them, at the annual meeting in the month of November, 1829, shall [259] order; that a case for the opinion of counsel be prepared and submitted to the standing committee to be settled by them; that the treasurer do withdraw the whole of the surplus sum of £742 15s. 11d. and do dispose of it according to the preceding resolution." This resolution was opposed by some of the trustees present at the meeting, but a majority of them assented to it; the custom being for all who were present to sign such resolutions as were adopted, whether they approved of them or not. This resolution was signed by the eight trustees who were present, though some of them had voted against it. No notice had been given that the mode of applying the surplus fund was to be taken into consideration at that meeting.

A case, settled by the Committee, was accordingly submitted to counsel, who gave his opinion that the proposed application of the increased stock would not be according to law. Whereupon an additional or amended case was afterwards prepared by Mr. Holmes, who was an attorney and solicitor, there being no proof that it was settled by the Committee, and he obtained from the same counsel, in November, 1829, an opinion, that the trustees might be justified in applying the fund in the manner proposed. This additional or amended case was not settled by the committee.

In the mean time the £642 15s. 11d. had been paid over to the Defendants; and an account having been rendered by the Defendants, or some of them, to the Commissioners for the Reduction of the National Debt, in which it appeared that £642 15s. 6d., part of the increased stock or fund, had been appropriated, in conformity to the provision of the 9 Geo. IV. c. 92., the Commissioners, [260] by their secretary, inquired whether the sum had been paid to the depositors in cash, or only placed to their credit. The answer did not disclose how the money had been appropriated, but merely stated that it had neither been placed to their credit, nor paid to them in cash.

In December, 1829, one of the Respondents first heard of the intended appro-

priation of the surplus fund; and at a meeting of the trustees, held on the 21st of December, 1829, the Respondent, Mr. Henty, remonstrated strongly against it. He contended, that if the fund was to be touched, it ought to be applied to some purpose substantially beneficial to the institution or the depositors; and, as one of the many modes in which it might be so applied, he suggested that it might be laid out in the purchase of premises for carrying on the business of the Bank. Not having succeeded in getting the resolution rescinded, he took the opinion of the barrister appointed for the purpose of the Savings' Banks by the Commissioners for the Reduction of the National Debt, and was advised by him that the application of the surplus fund was contrary to law.

The subject was again brought forward at a meeting held on the 20th of December, 1830; Mr. Henty produced a case which had been submitted by him to counsel, and read the opinion; and both he and Mr. Lear remonstrated earnestly against carrying into effect the resolution of the 11th of December, 1828, and proposed that, at least, another opinion of counsel should be taken. But a majority of the trustees present rejected his proposal.

On the 9th of March, 1831, the sum of £592 15s. 11d. was paid over by the other Defendants to [261] Mr. Holmes, for the purpose of defraying the expense of widening the bridge over the Arun. Mr. Holmes was at that time Bridge-warden, and the owner of considerable property in the neighbourhood.

On the 1st of March, 1831, the Respondents filed their bill in the Court of Chancery against James Hopkins, William Holmes, John Cole Tompkins, and Henry James Parsons; which, under an order of the 13th of May, was amended before answer. The bill contained the allegations before mentioned, stating more fully that in May, 1818, certain persons formed a society in Arundel, in the county of Sussex, for the purpose of maintaining and establishing an institution, in the nature of a bank, to receive deposits of money for the benefit of the persons depositing the same, conformably to the then existing law. That such society was named the Arundel Provident Bank, and was intended, and declared to be intended, for the encouragement of industry, economy, and independence, by receiving and affording a secure investment for such small sums of money as might be raised from the earnings of servants, mechanics, and others, of Arundel and its vicinity. That in order to encourage and promote the said institution, small deposits therein were made by a great number of persons of respectability and property in the neighbourhood, and that rules and regulations for the management of the said institution were duly formed from time to time; and by the said rules and regulations the property and management of the said institution were vested in and intrusted to certain trustees, who always, or generally, were upwards of fifty in number. That at a general meeting of the trustees [262] of the Arundel Provident Bank, held on the 27th day of November, 1828, it was resolved, that the rules and regulations thereinafter mentioned should be the rules and regulations of the Arundel Provident Bank, in lieu of those at any time theretofore agreed upon; and that such amended rules and regulations should be thenceforth printed, and a copy thereof delivered to each trustee and depositor on application; and that among such rules and regulations were the following: 1st That the management of the institution should be vested in not less than twenty trustees, who shall have power to add to their number. 2d. No trustee, or other person having any control in the management of the said institution (except the actuary), shall derive any benefit from any deposit made therein. 3d. James Hopkins (the Respondent, and one of the Defendants to the said bill) is appointed treasurer. 7th. A committee of eleven trustees (any two of whom shall have power to act) shall be annually appointed at the first general meeting of the trustees after the 20th of November in each year; and the duty of that committee shall be, to superintend the accounts of the Bank, to report thereon yearly to the trustees, and to sign all orders on the investing of money in the Bank of England, and the drawing out the same; that they shall also be authorized and requested from time to time to report to the trustees their opinion on any plan or suggestions which may come under their notice, relative to the general management of the institution. 19th. That all sums received by the trustees be deposited with the treasurer the same day that they are received, and invested in the Bank of England, in the name of the Commissioners for the Reduction of the National Debt: [263] leaving such balance only in the hands

of the treasurer, as may be deemed necessary to answer the exigencies of the institution. 33d. That the accounts of the Bank shall be made up and balanced to the 20th of November in every year, and a statement of such balanced accounts, attested by two of the committee, and countersigned by the actuary, shall be transmitted to the Commissioners for the Reduction of the National Debt, within six weeks from such 20th of November; that a duplicate of such statement, attested and countersigned as aforesaid, shall be exhibited in some conspicuous part of the Bank during the following year, and every depositor shall be entitled to a copy of such annual statement on demand. 35th. That no alteration shall be made in any of the foregoing rules and regulations, without a month's notice having been given to each trustee, by note from the actuary, that such alteration was intended to be proposed; and that no alteration shall be valid, unless made at a meeting where five or more trustees are present.

The bill further stated, that a transcript, on parchment, of the said rules and regulations was duly submitted to John Tidd Pratt, Esq., the barrister-at-law, appointed in that behalf by the Commissioners for the Reduction of the National Debt, who certified that they were in conformity to law and to the provisions of the Act 9 Geo. IV. c. 92., intituled "An Act to consolidate and amend the Laws relating to Savings' Banks;" that the said transcript was duly deposited with and filed by the clerk of the peace of the county; that in 1824, and from that time down to the filing of the bill, the several Defendants had been and still were trustees of the said Savings' Bank; that James Hopkins in [264] and since November, 1828, had been and then was the treasurer thereof; and that the other trustees of the said Savings' Bank were upwards of fifty in number, and were too numerous to be made parties to the suit; that the Respondents were, in 1824, and had ever since been, and then were, all of them, either trustees of or depositors in, or both trustees of and depositors in, the said Savings' Bank; and that, by the said rules and regulations, and also by the act of parliament before mentioned, all monies, effects, and securities for money belonging to the said institution, were, and were then vested in the trustees thereof for the time being, for the use and benefit of such institution, and the respective depositors therein, their respective executors and administrators, according to their respective claims and interest; that, shortly previous to the 20th of November, 1828, the trustees of the said Savings' Bank ascertained the amount of the increased stocks or funds of the said Bank up to the said 20th November, 1828, when it was found that the said increased stock or fund amounted or would amount to £742 15s. 11d., or thereabouts; that the trustees of the said Savings' Bank were, and each of them was, trustees or trustee of the said increased stock or fund for the said Savings' Bank and for the depositors therein.

The bill further stated, that on the 13th of December, 1828, a meeting was held at Arundel, at which a few only of the trustees, and by no means a majority of their number, attended; and that the said Defendants procured a pretended resolution to be passed at such meeting, by which it was ordered that, after retaining £100 towards the future expenses and management of the in-[265]-stitution, £50, part of the increased stock, should be paid to the fund of the National or Free School of Arundel, and £592 15s. 11d., being the residue of the said sum, should be paid to the said James Hopkins, William Holmes, John Cole Tompkins, and Henry James Parsons, for the purpose of paying the expenses of widening the public bridge over the river Arun at Arundel; that the said sums of £50 and £592 15s. 11d. were accordingly paid over to the Defendants, and that they paid the sum of £50 to the said National School; and that they threatened and intended to pay the said sum of £592 15s. 11d. in repairing and widening the said bridge, or otherwise improving the same; however, the last mentioned sum was still, at the time of filing the said bill, in their hands, or invested in stock in their names; that the Plaintiffs (Respondents) did not concur in or consent to the said pretended resolution and the proceedings consequent thereon, and that when they first heard of the same, which was not till a considerable time after it had been adopted, they were greatly astonished, and some of them, at the next meeting of trustees of the said institution, remonstrated with the Defendants against the impropriety of the said resolution and proceeding, and suggested that, if the increased stock was to be touched, the same ought to be applied to some purpose substantially beneficial to the said institution

or to the depositors therein, and some of these Respondents suggested that the money might be expended in purchasing or erecting buildings for the carrying on the business of the said Bank, or as a bonus to and among such industrious labourers, servants, and mechanics, as were depositors therein ; [266] that from that time up to, and in December, 1830, the said remonstrances were frequently repeated by or on behalf of the Plaintiffs (Respondents), but the Defendants refused to pay any regard to any of the said remonstrances.

The bill further stated, that the Respondent, Thomas Henty, took the opinion of the barrister appointed for the purposes of the Savings' Bank Act by the Commissioners for the Reduction of the National Debt, as to the propriety of the proceeding, and was advised that the application of the sum of £50 and the intended application of £592 15s. 11d. were misapplications of the funds of the institution, and were contrary to law ; that, at a meeting of the trustees of the said institution, held on or about the 20th day of December, 1830, the Respondents, Thomas Henty and Jeremiah Lear, produced and read in the presence of the Defendants the case submitted to the aforesaid barrister and his opinion thereon ; and the Respondents protested against applying any part of the said increased stock towards widening or repairing the said bridge, but the said John Cole Tompkins used words to the effect following, that is to say, we (meaning the said Defendants) have got the money, and you (pointing to the said Respondents, Thomas Henty and Jeremiah Lear) may get it away from us if you can ; that the Plaintiffs (Respondents) delayed instituting proceedings in the hope that the Defendants would not persist in misapplying the said monies, but that there was at the time of filing the bill no means of preventing the misapplication of the said monies except by the interposition of the Court of Chancery.

[267] The bill charged that, though the business of the Bank had been carried on in a building belonging to the School, yet it was expressly agreed between the trustees and managers of the said Bank and the persons having the control of the property of the said School, that the business of the said Bank should be carried on in the building of the said School free of any expense ; that the said bridge at Arundel is a great public thoroughfare, and that the expense of repairing it and keeping it in a proper state ought in law to be borne either by the corporation of Arundel or by the said corporation and the inhabitants of Arundel jointly, and that all the Defendants were respectively owners of property of considerable value in Arundel, which would be chargeable in respect of the expenses of repairing the said bridge ; that all of them, except the said Henry James Parsons, were members of the corporation of Arundel, and William Holmes held the office of bridge-master of the said bridge, and had often declared that the inhabitants of Arundel were by law chargeable with the expense of widening the said bridge ; that by misapplying the property of the said institution to repairing and improving the said bridge, they, the Defendants, would acquire a personal benefit to themselves ; that the alleged meeting of trustees, at which the said resolution was passed, was not duly called, nor was due notice given thereof, or of its being intended to propose any such resolution touching the disposal of the increased fund ; that if due notice of the said meeting and of the intended business thereof had been given, the Respondents, Thomas Henty and Jeremiah Lear, and many other of the trustees, would have attended and [268] prevented the adoption of so improper a measure ; and that the alleged resolution was passed informally and irregularly, and was altogether invalid and contrary to the fundamental institution of the said society, and a violation of the trusts, which the trustees of the said society were bound to carry into effect.

The prayer of the bill was, that it might be declared that the Defendants were, at the filing of the bill, trustees of so much of the increased stocks or funds of the said Savings' Bank as had been so paid over to them or transferred into their names, or otherwise placed at their disposition for the use and benefit of such institution and the respective depositors therein ; and that the said Defendants had been guilty of a breach of trust in paying thereout the said sum of £50 to the said National or Free School, and that the application of any part of the said increased stock, to the purpose of widening or otherwise repairing and improving the said bridge, would also be a breach of trust ; and that an account might be taken of all sums of money

or stocks in the public funds, being part of or arising from parts of the said increased stocks or funds, which had been received by or transferred into the names of the Defendants, any or either of them, or any persons or person, for their or any of their use, or by their or any of their order, and of the interest or dividends with which they ought to be charged in respect of the said monies or stocks, and that the said Defendants might be decreed to pay what should be found due from them upon such account, either to the trustees of the said Savings' Bank, or as the said trustees should direct, or to the Commissioners for the reduction of the National [269] Debt, and that the said Defendants might be removed from being trustees of the said Savings' Bank, and that the said James Hopkins might be removed from being treasurer thereof and restrained from acting as such, and that the said Defendants might be ordered to pay to the Plaintiffs (Respondents) the costs of the suit, and in the mean time that the said Defendants might be restrained from applying the sum of £592 15s. 11d., or any other part of the increased stock or funds of the said Savings' Bank, towards defraying the expenses of widening or otherwise improving and repairing the said bridge at Arundel, or otherwise than for the special use and benefit of the said Savings' Bank or the depositors therein.

In 1831, James Hopkins, William Holmes, and John Cole Tompkins, filed their joint and several answers to the bill.

The Defendants by their answer, after admitting the formation and rules of the Bank and other matters as alleged in the bill, and particularly the Defendant William Holmes said that he having received a notice calling a general meeting of the trustees of the said Savings' Bank, on the 13th of November, 1828, attended at such meeting, and after much discussion respecting the then intended new rules and other matters, the manner in which the increased stock should be disposed of was talked about, and no specific plan of applying it was proposed by any one, but it was then mentioned by some of the trustees, and considered to be contrary to the act of parliament and the rules and regulations under which the said Savings' Bank was carried on, to distribute the said increased stock among the depositors, inasmuch as many of the [270] trustees, being also depositors, would then have received benefit from such distribution; and the said Defendant William Holmes at such meeting said, that if no other trustee proposed any other plan for disposing of such increased stock, he would propose that the same should be applied towards widening Arundel Bridge, when the proper time for disposing of it arrived; but the Defendants said, that no actual proposal or resolution was made or passed respecting the said increased stock at the said meeting of the 13th November, 1828.

And the said William Holmes said, and the said other Defendants believed, that William Holmes, James Hopkins, and John Cole Tompkins, and also the said Henry James Parsons, attended at the said general meeting of the said trustees, which was held on the 27th of November, 1828, when again the manner in which the said increased stock should be disposed of was discussed, and no mode of disposing of the same was proposed or adopted, or any determination made or come to as to the said increased stock, further than that it should be disposed of at the next general meeting then to be held; and the Defendant William Holmes then said to several trustees, that he would propose at the next general meeting that one fourth part of the increased stock of the Bank should be retained for the future purposes of the Bank, and that the residue should be applied for widening the said bridge, or to such or the like effect.

The Defendants, by their answer, further said that it was at the said general meeting, holden on the said 27th of November, 1828, ordered that a general meeting should be summoned for Tuesday, the 11th of December then next; and that, in pursuance of such last-mentioned order, a general meet-[271]-ing of the trustees of the said Bank was duly called by a written notice from the actuary of the Society; and that at the said meeting of the 11th of December, 1828, much discussion on many points took place, and particularly as to the disposal of the said surplus; and that it having been thereat proposed and unanimously agreed on that £100 should be retained for the future purposes and management of the said Bank, and £50 allowed for arrears of rent and firing to the said Arundel School, it was then, at the said meeting and after such discussion on the subject, proposed by the said John Cole Tompkins, and seconded by William Holmes, that, after retaining £100 for the future purposes and management of the said Bank, and allowing £50 for arrears of

rent and firing to the said Arundel School, the surplus should be applied for the purpose of widening the said bridge at Arundel: and the said proposal, being, at the request of the said Mark Aloysius Tierney, one of the said trustees, who appeared to object thereto, put to the vote by the chairman, the same was carried by a majority of the trustees then present; and that, after the said proposition had been carried as aforesaid, the said Mark Aloysius Tierney having started a doubt whether the law would permit such a disposal of the money, the said Defendant William Holmes proposed that the opinion of some eminent counsel should be taken on the subject, and that in case counsel should be of opinion that such an appropriation of the money was not authorized, it should be disposed of at the next annual meeting by a majority of the trustees to be then present, and that in the mean time the money should be withdrawn and put into the names of trustees, which last-[272]-mentioned proposal was unanimously agreed to by all parties present; and ultimately it was, at the said meeting of the 11th of December, 1828, resolved (amongst other things not relating to the increased fund) to the effect already stated.

The Defendants by their answer further stated, that in pursuance of the resolutions so come to as aforesaid, a case and an amended or additional case were prepared on behalf of the trustees of the said institution, and laid before counsel for his opinion as to the proposed appropriation of the said surplus; and the said counsel was of opinion, that the same would be a proper appropriation thereof; and that, at the general meeting of the said institution, which was duly held on the 21st of December, 1829, the said case and additional case, together with the opinion of counsel thereon, were produced and read to the said meeting, when the Respondent Thomas Henty, who was present at the said meeting, expressed a wish for a further opinion, and induced the chairman to put the question to the vote, which was accordingly done; and that, out of all the trustees then present, (about fourteen in number, as the Defendants best recollected and believed,) the said Thomas Henty stood alone in his vote for such further opinion: and by their answer, the said Defendants said that they believed the said sum of £50 had been paid to the fund of the said National School in the manner directed by and in pursuance of the said resolutions, and they admitted that the said sum of £592 15s. 11d. had been paid into the hands of the said William Holmes, for the purpose of being applied by him, acting for himself as one of the said trustees, and as bridge-warden for Arundel Bridge, and on behalf of the said other [273] Defendants and the said Henry James Parsons, as such trustees for the purposes directed by and in pursuance of the said resolutions; and that the said William Holmes, so acting as aforesaid, had applied part, and did intend to apply the residue of the said sum of £592 15s. 11d. in widening the said bridge, and that the said sum was, subsequent to the meeting of the trustees on the 13th of December, 1830, paid to and received by the Defendant William Holmes, as bridge-warden of Arundel Bridge, for the purpose of applying it towards the widening of Arundel Bridge; and that he had expended divers sums of money, amounting to £150 at least, towards carrying the said resolution into effect, and would in a short time expend upwards of the said sum of £592 15s. 11d., and that he had contracted for and procured divers articles and materials for widening the same bridge on the credit of the said last mentioned sum.

The defendants by their answer further said, they believed that the said Respondent Thomas Henty never attended any of the meetings of the Institution except those of the 13th of March, 1827, the 21st of December, 1829, the 13th of December, 1830, and the 20th of December, 1830, and that the said Respondent Jeremiah Lear did not attend any general meeting of the said Institution, from Michaelmas, 1827, until the said meeting of the 13th of December, 1830, when he attended with the said Respondent Thomas Henty, who then produced the case and opinion of Mr. Pratt, and that after such case and opinion had been read, the Defendant William Holmes stated, that the case was wrongly stated, and that the money was then disposed of, and must be applied for the purposes [274] for which it was ordered, and that the trustees had then no control over it; however, after the said Defendant William Holmes had left the meeting, the Respondents Jeremiah Lear and Thomas Henty pressed for another general meeting of the trustees being called, in order to take the sense of the trustees as to taking another opinion of counsel, and that the Respondent

Jeremiah Lear, in order to induce the trustees then present to acquiesce in such proposal, pledged himself, that in case the trustees at that meeting adopted such a proceeding, and the majority of the trustees who should assemble at the meeting to be so called should not agree with him to take the opinion of counsel, he (whatever his opinion might be) never would mention the subject again, or give any further trouble about it, or words to that effect; and that, in consequence of such requests and assurance, it was ultimately agreed on, at the meeting of the 13th of December, 1830, to call another general meeting on the 20th of the same month, for the purpose of determining whether or not any further opinion of counsel should be taken; and that a general meeting was accordingly called, and was held on the 20th day of December, 1830, when the question as to taking a further opinion was discussed, and the said Defendants, by their answer, said they believed that, with the exception of the said Respondents Thomas Henty and Jeremiah Lear, every trustee then present was against the said proposition, and it was finally resolved that no further opinion should be taken.

The Defendants by their answer admitted, that at the annual meeting in December, 1830, it was suggested by the Respondent Jeremiah Lear, that the [275] money might be expended in purchasing or erecting buildings, or a building for carrying on the business of the said Bank, or to some such effect; and that they believed it to be true that the said Respondent Thomas Henty did take the opinion of the barrister in the said bill mentioned, as to the propriety of the said proceedings upon some case or statement made for that purpose, and that upon such case or statement he was advised that the said application of the said sum of £50 and the intended application of the said sum of £592 15s. 11d. were misapplications of the said funds of the Institution; but they said that, to the best of their knowledge, remembrance, and belief, the case so submitted by the said Thomas Henty to the said barrister, for his opinion, was by no means a true or correct statement of the facts relating to the said proceedings and matters, and that the same were misrepresented or not correctly stated to him by the said Thomas Henty; and they admitted that the said Thomas Henty and Jeremiah Lear, or one of them, did produce and read in the presence of them, the said Defendants, at the said meeting of the 13th of December, 1830, the case submitted to the said barrister as aforesaid and his opinion thereon.

The said William Holmes further admitted, and the other Defendants believed, that William Holmes being then the bridge-warden, and having obtained plans and estimates for widening the said bridge, and made arrangements for completing the same, did, at the general meeting of the said trustees, held on the 13th of December, 1830, after the said case and opinion were read, state that the said money was already disposed of, and must be [276] applied for the purpose for which it was ordered, and that the trustees had then no control over it, or to some such effect.

The Defendants further said that the bridge was a great thoroughfare, and that the widening thereof would be a great improvement thereto, inasmuch as it would be a great convenience to the public, and allow carriages to pass each other thereon. And they said, that the Defendant William Holmes was, in October 1830, elected mayor of Arundel, and that the mayor of Arundel, for the time being, is bridge-warden, and always has the superintendence and management of the said bridge, from two sums of money, of £2 per annum and 3s. per annum, payable by the owners of two houses in Arundel; and if these sums were not sufficient, then the deficiencies had been, for many years past, paid for the repair of the said bridge by the overseers of the parish of Arundel, either to the bridge-warden or to the persons to whom the bills might be owing for the repair thereof.

And the said Defendants believed that the said houses were respectively, by law, liable to the payment of the several sums of £2 and 3s. for the repair of the said bridge, and that the corporation of Arundel had never paid, or been liable to pay, any thing towards the repair of the said bridge, and were no otherwise interested in the repair of the said bridge than as owners of about 100 acres of land in the said parish of Arundel, being about a hundredth part of the annual value of the said parish.

And by the said answer the said Defendant William Holmes said, and the other Defendants believed, that in 1806 the Defendant William [277] Holmes was elected treasurer of the bridge-rates of and within the rape of Arundel in Sussex, and

continued in such office till 1814, and that he then left it on account of the illegal or supposed illegal manner in which the bridges were managed; and that in or about 1806 and 1814, nine bridge-rates were made on the inhabitants of the rape of Arundel (but not on the inhabitants of the parish of Arundel itself, though it was in the midst of the rape) by the Courts of Quarter Sessions holden for the west part of Sussex, and received and expended by him the said William Holmes, as such treasurer, as the said Courts from time to time directed.

And that from ancient documents which he the said William Holmes had seen, he believed that Arundel Bridge had if not in every instance, for centuries past, generally been built by subscriptions amongst the inhabitants living in the western part of the county of Sussex (materially aided by large donations from the former Dukes of Norfolk); that it was anciently kept in repair by the said sums of £2 and 3s. annually paid for the repairs thereof, and more recently, and up to the then present day, had been kept in repair by such sums and from payments and contributions from the overseers of the poor of the said parish of Arundel; and that from time out of mind, the public or (what is usually termed in other counties) county bridges in Sussex have been repaired as follows, (that is to say,) in the eastern part of the said county, by assessments on the said three rapes jointly, for all the public bridges in those rapes; and in the western parts, by assessments made on the several rapes separately, in respect of their respective bridges, (the parish of Arundel, situate in the midst of the [278] rape of Arundel, not having been assessed, or if assessed, never paying the rate,) and that so it continued to the time of filing the said answer.

And the said Defendants admitted that they were either occupiers or owners of property in the parish of Arundel, as well as in the rape of Arundel, and out of the said parish of Arundel, and in other parts of the county of Sussex, (that is to say,) the Defendant William Holmes owned property of the annual value of £250, and occupied property of the annual value of £50 in the said parish of Arundel, and owned property of the annual value of £500 in the said rape of Arundel, not being in the said parish of Arundel, and owned property in the county (including the rape and parish of Arundel,) of the annual value of £752 10s.; and that the Defendant James Hopkins was the owner of property of the annual value of £10 in the rape of Arundel, not being in the said parish of Arundel, and of £194 in the county of Sussex, not being within the rape of Arundel, and occupied property of the annual value of £73 in the parish of Arundel, and county of Sussex; that the Defendant John Cole Tompkins was the owner of property of the annual value of £18 in the said parish of Arundel, of £235 in the said rape of Arundel, and not in the said parish of Arundel, and of £253 in the said county of Sussex, and is also the occupier, to the annual value of £2, in the said parish of Arundel, and of £250 in the said rape of Arundel, and of £252 in the said county of Sussex; and the said William Holmes, James Hopkins, and John Cole Tompkins, by their said answer, admitted that they were members of the corporation of Arundel.

[279] And the said Defendants denied, for the reasons thereinbefore mentioned, that the said meeting of the trustees, at which the said resolutions (hereinbefore set forth) were passed, was not duly called, for the said Defendants said that notices of such meeting were sent to them the said Defendants, and, as the said Defendants believed, to the said Plaintiffs (Respondents) as trustees, and to all the other trustees of the said Bank living near Arundel, or who had been acting within two years previously, and that such notices were dated the 4th of December, 1828, and signed by the actuary of the said Society, and in every respect conformable to the usual practice of the Society in calling of general meetings.

Henry James Parsons, by his answer, admitted that he was occupier of the vicarage house and garden in the parish of Arundel, and, as vicar of Arundel, was, at the time of filing his said answer, owner of the vicarage of Arundel.

In other respects his answer was in all material statements to the same purport and effect with the answer of the other three Defendants.

On the 17th day of August, 1831, notice was given of a motion for the production of the documents admitted by the said Defendants to be in their possession, and that the said Appellant William Holmes might be ordered to pay into court the sum of £542 15s. 11d. On this occasion the Appellant filed an affidavit, in which he swore that since the filing of the joint answer he had expended the sum of

£146 12s. in widening Arundel Bridge. The motion was heard before the Lord Chancellor in November, 1831; it was resisted on the ground that the money had been duly appropriated to defray [280] the expenses of widening Arundel Bridge, and that such an employment of the money was not a misapplication of it. The Lord Chancellor * was of [281] opinion that the Defendants had no right to apply the money to that purpose; and on the 26th of [282] November, 1831, his Lordship

* On that occasion the Lord Chancellor made the following observations:

In this case the question turned principally upon the construction of the 8th Geo. 4. chap. 92., the act as to the savings' banks, and upon the conduct of certain parties who had been acting as trustees for the Arundel saving bank. It was a motion, that four of seventeen persons, trustees, those four being the only defendants, should pay money into court, that money being the sums which they had received, admitted they had received, and in whole or in part (in my view of the case, it signifies not much, if at all) expended, according to the decision of the trustees, convened at an ordinary general meeting without special notice, and at which meeting the question had been raised, how the surplus funds of the bank, in their hands, should be disposed of. Now I am of opinion, upon the best consideration I have been able to give to the case (as to the great importance of which I entirely agree), that if it is clear that the trustees had no right to apply the money in the way in which they did apply it, I am entitled to call upon those trustees who are at present before the court or one of them (I think the motion is made against Mr. Holmes) to pay that money into court. The question is whether it be clear that that was, though *bonâ fide* and without any imputation upon the correctness of the conduct of these gentlemen, whether it was, technically speaking, and upon the construction of the act of parliament, a misapplication of the trust funds; and upon the best consideration that I have been able to give to this case, I have no doubt that it was a misapplication of these funds.

(His Lordship then, after going into a detailed calculation as to how the surplus had arisen, proceeded as follows:)

All I have to do at present is to show the grounds on which I feel that there is no doubt, (for I ought to have a clear opinion, before I order the money to be paid into court,) but I can have no doubt that this money has not been well taken care of, and that it ought to be brought into court, where it is quite clear it will be properly applied. Now the twenty-second section provided that within six weeks after the 20th of November, or as soon after as conveniently may be, where no other provisions are made by the rules of the society for the disposal of the surplus, that it should be disposed of in such manner as the trustees or the major part of them assembled at any general meeting to be convened, according to the rules, should think fit. The first question that arises is upon the kind of meeting and the mode of convening the body who came to the resolution, and made the order; and though I am certainly inclined to think there ought to have been a meeting convened for the purpose, and with express notice, and that that was in all cases, as I stated at the hearing of the motion, the safe construction towards which to lean to require notice; and though I think that the words here, even strictly, will bear that construction better than any other—"a general meeting to be convened as soon after as conveniently may be,"—yet, as that is not absolutely necessary to be decided on the present occasion, if I am of opinion that, how formally, regularly, and legally soever the meeting may have been convened, it did that upon its assembly which it had no right to do, I certainly should not stop, because it would be going out of the way, to dispose of that first question in the cause. For the same reason I shall not say any thing about the other point, whether the majority of the trustees who concurred in that resolution ought to have been an absolute majority, or only a majority of those convened who were at the meeting for a like reason that it is not necessary to be decided, holding the opinion I do on the main body of the question—the application or misapplication at the meeting, however convened, concurred in by whatever majority of the trustees, whether an absolute majority or only of the trustees who assembled, that that question, that main question is to be decided against the trustees, and consequently this decision renders the raising of the other two questions, one and both, wholly unnecessary. It is to be observed that the section requires them or enables

ordered that the said Appellant William Holmes should, on or before [283] the first day of Hilary Term then next, pay into the Bank, with the privity of the Accountant-[284]-General of the said Court, to the credit of the said cause, the said sum of £592 15s. 11d, and that the [285] same, when so paid in, should be laid out in the purchase of Bank 3 per cent. Annuities, in the name [286] and with the privity of the said Accountant-General in trust in the cause, who was to declare the trust thereof accord-

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them to make this appropriation; and it signifies not whether it only so enables or requires after retaining so much as would be necessary for and towards the future purposes and management. Now it is said that the words are perfectly clear, and give an absolute discretion to the trustees, to do whatever they please with this fund that is not prohibited by law, or by the rules and regulations of the society. And it is said, in answer to the question, why, according to this, they may put the money into their own pockets—No, they cannot put it into their own pockets, because they are expressly prohibited by the regulations of the society, and indeed the society would have no benefit of the act, if it had not such a regulation: they are expressly prohibited by those rules, and by the act itself, from taking any beneficial interest whatever. There seems some doubt, whether that regulation applies to all beneficial interest, direct or indirect, or whether it is not rather framed to strike at the preventing of their holding offices of profit, taking salaries, and being employed;—their being contractors, for instance, and taking any benefit or emolument in that kind of way; but I need not enter into that question at present, because it really does not go to affect, one way or the other, the opinion which I have formed upon the construction of the act. It must be admitted to be a startling proposition, (and yet it is one which those who maintain that the trustees were justified in that appropriation of the fund cannot recede from, but must take and must adopt,) that persons being appointed trustees of a savings' bank, the object of which institution is known and definite, namely, the sustentation of persons in poor circumstances by means of their savings deposited, withdrawing them either when they change their mind, or when they fall into bad circumstances, and are under the necessity of doing so—that this being the object, and only object of the institution, and the trustees having vested in them the management of that institution, and of none other, should have power, without any authority whatever from those who appointed them—without any authority whatever but what may be supposed to have been conveyed to them by the words of the act of parliament in question, of diverting the fund to totally different objects, of carrying it into a wholly different quarter altogether, of laying it out in a way that has no more to do with the objects of the institution than it has to do with the objects of any other the most dissimilar institution; as I put it to the learned counsel, in the course of the argument, that provided they did not do an illegal act, any act either unlawful at common law, or prohibited by some statute including the rules and regulations of this society, they might do any thing they chose, however wide of the objects of the institution over which they had a control, however fantastical in itself, provided they thought fit: for the words of the act, if carried to the extreme, make them the judges of what is fit or not, steering clear merely of the law and nothing else: they might do whatever they chose with these funds, be it ever so unlike or ever so opposite to the principle of the institution committed to their care; that for instance they might, as they have here, apply the fund in repairing a bridge—(that of itself is almost as wide as can be well imagined of the object of a savings' bank,)—that they might not only apply it to the repairing of this Arundel bridge—(I don't stop to inquire into the question, whether that is of utility for the inhabitants of the town or for the benefit of the King's subjects or not, because my opinion don't rest upon that)—they might not only have repaired Arundel bridge with it, but they might have repaired Southwark bridge, or York bridge with it, or they might have bestowed it upon charities in the kingdom of Ireland, or might have sent it abroad to foreign parts, or might have applied it to the funds of the Bible Society, or might have applied it to the lawful expense of a contest for the election of members to serve in parliament; for I can see no limit whatever, provided no law is broken, to the discretion which would be vested in those trustees, if the argument is to be allowed which leaves it to them to decide, provided they decide for nothing that is not positively prohibited by law. That is a proposition sufficiently startling of itself to

ingly, subject to the further order of the Court: and it was ordered that the dividends to accrue on the said Bank Annuities, and all accumulations of interest, should be from time to time laid out in the purchase of like Bank Annuities, in the name and with the privity of the said Accountant-General, in trust in the cause; and he was to declare the trust thereof accordingly, subject to the further order of the Court: and it was ordered that the said Defendant William Holmes, and the said Defendants James Hopkins and John Cole Tompkins, should leave with their clerk in court in the said cause, the several books, cases, letters, and papers admitted to be in their possession, with the usual directions in that behalf.

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make one look very narrowly into the object of the act of parliament, and into the other provisions by which that object is sought to be accomplished. Now the twenty-third section appears to be material in this view, although I agree that it applies not to the saving we are here dealing with, but to the new savings subsequent to the 20th of November, 1828, after deducting all such expenses as the trustees may deem proper: They are to pay over to the Commissioners for the National Debt the surplus, reserving such portion as may be necessary to meet the current expenses; and that surplus which they pay over is to be carried from the account in which it stood before, into a separate account,—I suppose for the purpose of preventing it bearing interest. I do not know whether that is the object, but it is to be carried to a separate and distinct account, and applied as any other money according to the provisions of that act may be applied, provided always that it shall be lawful for the trustees to claim and receive from the commissioners, who are hereby required to pay the same, upon such certificate as they may appoint, (that is to say, they are to appoint the form of the certificate,) any such sum so by them received for the purposes of the institution.

Now I take it upon this that no doubt whatever can arise. I take it to be perfectly clear that, if the question had been the construction of this section, and not of the twenty-second—if, in short, the question had arisen respecting the surplus since the 20th November, 1828, and not as it does only with respect to the surplus previous to the 20th November, 1828, there could be no doubt it would only have given the trustees the power after they had come in, to claim, and call on the commissioners to pay for the purposes of the institution; and that they would have in vain attempted to have gone with a certificate, (whatever the form might have been which the commissioners might have adopted), stating the object for which they wished to have money out to be the repairing of Arundel bridge. Now, if so, I think we may safely consider that the twenty-third section is to be taken along with the twenty-second section; and we may construe the one with the other, and assume that, as for the future, so for the past savings, they are to be applied for the purposes of the institution.

It may be said, and was no doubt contended with great force, and with great ingenuity as well as force, that you are in a great difficulty as to what you can do with the fund. How can you apply it? Admitting, as the learned counsel in candour were forced to admit, that there appears something violent in allowing such a total diversion of the funds from any thing like the object of a savings' bank, still, what are you to do with that money? The contributors of to-day are not the contributors of yesterday; the body is always changing; it is a fluctuating number of men, and the natural thing would be to give the accumulation of each man's deposit, the surplus of each man's accumulation, out to himself, and to none other; but it would be almost physically impossible to trace the person, in such a fluctuating body, who, under this rule, would be entitled. But that would apply just the same to the future savings as to the past, because it still will be a fluctuating body, and you still will have objects of the institution to supply; and, accordingly, the very same difficulty will arise on the construction of the twenty-third section. It will necessarily arise, I think, upon those words, "for the purposes of the institution," which is now alleged to arise on the construction of the twenty-second: but then it may be said, the legislature meant if it was not drawn out, that it should be applied "for the purposes of the institution," meaning the corporate purposes, if I may so speak, in contradiction to the giving back money to the individuals, such as making up deficits arising from accounts, paying arrears of bills, expenses of salaries, and so forth. If it cannot be applied for that, then the whole of this is meant to remain

The money was paid in, and was laid out in the purchase of £696 7s. 7d. 3 per cent. Cons. Bank Annuities.

The answers being replied to, and the cause [287] being at issue, witnesses were examined on both sides, and certain admissions were entered into on the part of the Plaintiffs and the Defendants.

George Biddle, Actuary to the Society, after proving a book containing the rules of the Society and the names of the trustees, deposed, that at the meeting, held on the 11th day of December, 1828, a proposition was made touching the disposition of the surplus fund or stock of the Society, the purport of which proposition was, "that £100 should be retained for, or towards the future purposes and management of, the Bank;" that £50 should be paid for arrears of rent and firing to the fund of the Arundel School; that the remaining sum of £592 15s. 11d. should be paid over to the Defendants Henry James Parsons, William Holmes, James Hopkins, and John Cole Tompkins, for the purpose of paying the expense incident to the widening of the public bridge over the river at Arundel, the same being both narrow and dangerous, accidents having arisen thereon: and that in case counsel should be of opinion that the trustees were not so authorized to dispose of the money, that the same should be disposed of in such manner as the trustees and managers present, or the major part of them, at the annual meeting in the month of November, 1829, should order: that a case for the opinion of counsel should be prepared and submitted to the standing committee, to be settled by them; that the treasurer should withdraw the whole of the surplus sum of £742 15s. 11d., and should dispose of it according to the preceding resolutions. And this Deponent further saith, he does not recollect which of the trustees made the said proposition, nor how many and which of the trustees [288] present at the said meeting supported the said proposition, nor how many and which of them opposed it; that the said proposition was carried at the said meeting, but by what majority this Deponent does not know. And this Deponent further saith, that an entry was made in the said book of proceedings touching the said proposition; and that the said Defendant Henry James Parsons, the said Arthur Atherley, and M. A. Tierney, the said Defendants William Holmes and James Hopkins, and the said

vested in the commissioners, and the public is to have the benefit of it. It may be undoubtedly said so. I do not see any reason for excluding that supposition from the construction of the twenty-second section. I do not say that that is absolutely excluded. But this observation I must make, that I do not feel pressed by the difficulty, as if it amounted to any thing like an impossibility of applying the fund, regard being had to the fluctuating nature of the body—of applying all those arrears previous to the 20th November, 1828, also to the purposes of the institution. One can imagine various ways in which money may be kept in hand to supply future deficits, and render it less necessary to draw out for those unexpected purposes; to render it less necessary to draw out under the twenty-third section the future arrears from that institution. At all events it must be admitted that this argument, as to the possibility of dealing with the funds arising in such a way, and beneficially possessed by such parties, by a fluctuating body, which would be applicable not only to the cases of savings' banks, but almost to every other institution which is not constituted a corporate body.

Therefore, upon the whole, I am of opinion that the trustees had no right to apply the money, as they have done; that it was a misapplication of the money: and they, having spent the money, part or most of it, in repairs, that they should restore that money, at least subject to the jurisdiction of this Court, until the question is decided, which I have now stated my view of, in the present instance. If I am wrong, the parties will have abundant opportunity of considering and setting the matter right in the subsequent proceedings, when the main question to which I have principally directed my attention comes to be decided. If what I have said does not satisfy the parties (and I have no desire that it should not go further)—if it does not satisfy the parties, the question will go further, and receive subsequently a more full consideration either here or elsewhere; and I cannot help observing, if a subject of such delicacy and interest to the contributors of this bank is liable to any doubt whatever, with respect to the construction of this act of Parliament (and it is chiefly for that purpose that I have thrown out these observations), the sooner it is set right by a decree, or a new enactment (if necessary) the better.

Thomas Constable, George Constable, and John Wilson, trustees, present at the said meeting, subscribed their names to such entry: but this Deponent does not know whether any and which of the persons whose names are so subscribed opposed the said propositions. That at a meeting of the 13th day of December, 1830, the Complainants Thomas Henty and Jeremiah Lear objected to the application of the surplus funds or stock to such purposes as those to which it had been proposed to apply it. And this Deponent does not recollect anything particular having been said by the Defendants; but there was a great deal of conversation and discussion amongst several of the trustees present, in consequence of which the trustees came to a resolution, which was entered into the said book of proceedings, to the following purport: "That a general meeting should be called, on Monday, the 20th day of the said December, for the purpose of considering whether another case should be submitted to counsel relative to the appropriation of the sum of £592 15s. 11d., which was placed in the hands of the said Defendants for the widening of Arundel Bridge." That at a meeting of the 20th day of [289] December, 1830, the Complainants Thomas Henty and Jeremiah Lear again objected to the application of the surplus fund or stock of the Society in the manner proposed; but that he cannot recollect that the Defendants made any particular statement: that there was a good deal of discussion amongst the trustees, but what words were spoken, or what was said by the Defendants, or by any particular trustee, this Deponent cannot recollect: that the said last-mentioned meeting made a resolution, which is entered in the said book of proceedings to the following effect: "That no further case should be submitted to counsel relative to the appropriation of the said sum of £592 15s. 11d., which was placed in the hands of trustees for the widening of Arundel Bridge." That at the said two last-mentioned meetings this Deponent, as he has before stated, heard the two complainants Thomas Henty and Jeremiah Lear object to the application of the surplus fund or stock of the said Society, in the manner proposed, but does not recollect any particular answer thereto by the said Defendants, or either of them. And this Deponent further saith, that Mark Aloysius Tierney attended the said meeting of the 11th day of December, 1828; and this Deponent believes that the said Mark Aloysius Tierney did oppose the resolution entered into at the said meeting, for applying the monies to the purposes directed by such resolution.

The Rev. Mark Aloysius Tierney, of Arundel, Sussex, Catholic priest, deposed, that the form usually followed, in order to attest that any particular resolution has been passed or adopted at meetings of the Society by the majority then pre-[290]-sent, is for all the trustees then present to sign their names at the foot of the proceedings of such meeting; but there are instances in which the chairman alone has signed such proceedings: that the purpose for which the trustees sign their names to any resolution is two-fold,—one to testify the presence of the several trustees who attend such meeting, it having been the usual practice not to insert the names of the trustees present in the entries of the proceedings; and the other to attest that the particular resolutions included in such proceedings have been passed and adopted by the majority present at such meetings: that such signature does not imply, nor is it understood to import, that the trustees, so signing, individually approve of the resolutions, but are merely considered as attesting that the particular resolutions were passed and adopted at the meeting at which they were present, as he has before stated; and that before a resolution is carried by a majority of a meeting of the trustees of the said Bank, those who have opposed the same have signed the proceedings; that meetings of the trustees of the said Bank were held on the 11th of December, 1828, and the 21st of December, 1829; that it appears from the signatures of the names of the trustees in the book of proceedings that eight trustees were present at the first of the said meetings, and that eleven trustees were present at the second of such meetings; but whether any other trustee or trustees attended at either of the said meetings, and went away before the business was concluded and without signing the said proceedings, this Deponent does not know and cannot depose to: That the names of the trustees who attended the said [291] meeting of the 11th of December, 1828, and signed the proceedings, are Henry James Parsons, Arthur Atherley, Mark Aloysius Tierney, William Holmes, James Hopkins, Thomas Constable, George Constable, and John Wilson; and that the names of the trustees who attended the said meeting of the 21st of December, 1829, and signed the proceedings, are Henry James Parsons, Mark Aloysius Tierney, Owen Marden, Robert Watkins, William Holmes,

John Tompkins, Thomas Constable, Samuel Evershed, Andrew Bartholomew, Richard Holmes, and James Hopkins; that at the said meeting, holden on the 11th of December, 1828, a proposition was made to apply £100, part of the surplus stock of the said Society, towards the future purposes and management of the said Bank: that another proposition was made to pay £50, further part of the said surplus stock, for arrears of rent and firing, to the fund of the Arundel School; and that a third proposition was made to apply the sum of £592 15s. 11d. for the purpose of paying the expense incident to the widening of the public bridge over the river at Arundel; that the Deponent does not recollect by whom the proposition was made, but he believes that the second proposition was made by Henry James Parsons; that he cannot positively say by whom the third proposition was made, but the Deponent verily believes that William Holmes either made, or seconded, the third proposition; that the two first propositions were carried unanimously, and entered in the book of proceedings; that as to the third proposition much discussion arose; that it was supported by five of the eight trustees whose names are subscribed to the proceedings, as before mentioned, [292] namely, William Holmes, James Hopkins, Thomas Constable, George Constable, and John Wilson, and was opposed by the remaining three trustees, namely, Henry James Parsons, Arthur Atherley, and this Deponent; and that on a division there was a majority of two of the said eight persons in favour of the said third proposition, but the Deponent says no entry was made in the said book of proceedings touching this resolution: and he saith, that in consequence of the continued remonstrances made by the said Henry James Parsons, Arthur Atherley, and this Deponent, against the illegality as well as the injustice of such an application of the money, another resolution was proposed, and, as he verily believes, by the Defendant William Holmes, to the following effect: "That the said sum of £592 15s. 11d. should be paid over to the Reverend James Parsons, William Holmes, James Hopkins, and John Cole Tompkins, for the purpose of paying the expense incident to the widening of the public bridge over the river at Arundel;" and that in case counsel should be of opinion that the Trustees were not so authorized to dispose of the money, the same should be disposed of in such manner as the trustees present, or the major part of them, at the annual meeting in the month of December, 1829, should order, and which proposition was carried, and substituted for the former resolution, and entered in the said book of proceedings; and the Deponent does not recollect any division on the last-mentioned resolution, or that any opposition was made to it by any of the trustees present, although the opinion of himself, and the said Henry James Parsons and Arthur Atherley, remained unchanged: and the [293] Deponent saith he did not oppose the last-mentioned resolution, because it offered the only chance of recovering the money voted away by the previous resolution, for what he conceived to be the legitimate object of the fund: And he further saith, that it was proposed that Mr. Atherley and himself should be two of the persons to whom the money should be paid over, but they refused to accede to such proposal; that at the said meeting of the 21st of Dec. 1829, the case at the meeting of the 11th of December, 1828, directed to be prepared for the opinion of counsel, was produced, with the opinion and further opinion of Mr. Tinney thereon; that there was considerable discussion on the contradictory opinions of Mr. Tinney, but he does not recollect whether any specific proposition was made at this meeting touching the disposition of any part of the said surplus fund; that he was present at the meetings of the trustees of the said Bank, on the 13th of December, 1830, and the 20th of December, 1830; that, as appears by the book of proceedings, sixteen trustees attended the said first-mentioned meeting, namely, the Reverend Mr. Cartwright, the Reverend Mr. Hardy, the Reverend Mr. Tierney, the Reverend Mr. Marden, Messrs. William Holmes, Richard Holmes, Watkins, Tompkins, Hopkins, Henty, Calhoun, Lear, Fletcher, Evershed, Salter, and Blanch, and that, as appears by the said book of proceedings, eighteen trustees attended the said meeting of the 20th of December, 1830, namely, the Reverend Mr. Tierney, the Reverend Mr. Marden, the Reverend Mr. Hardy, Messrs. Drewitt, S. Evershed, Hobbs, T. Constable, Bartholomew, Blanch, G. Constable, Wardroper, Shoesmith, Tompkins, Wilson, Hop-[294]-kins, Lear, Henty, and Calhoun; that at both the said meetings the Complainants Jeremiah Lear and Mr. Henty (but whether it was the Complainant Henty or not this Deponent cannot say, for the reason mentioned in the Deponent's answer to the first interrogatory) objected to the application of the said surplus fund

to the purposes to which the Defendants proposed to apply it; that Deponent does not recollect what particularly was said by any of the Defendants touching the said surplus fund or the application thereof at the said meetings; that at the meeting, held on the 11th of December, 1828, the said Arthur Atherley and the Defendant Henry James Parsons did, in the presence and hearing of this Deponent, and in the presence and hearing of the Defendants William Holmes and James Hopkins, object to and remonstrate against such application of the surplus stock of the Society, as in the pleadings of the said cause mentioned, and did contend that such application was illegal and unjust; but he does not remember what was said by the said two Defendants in answer thereto; that at a meeting of the said trustees, held the 21st of December, 1829, objections were likewise urged against the proposed application of such surplus stock, that the Deponent did, at the said last-mentioned meeting, object, as he always had objected, to the said proposed application of the same, and suggested that as the resolution of the 11th of December, 1828, contained only a conditional appropriation of the money, and allowed the then meeting, in a certain condition, to dispose of it otherwise, the trustees of the Bank still possessed a power over the same, and might then order it to be otherwise applied; to which suggestion the Defendant William Holmes replied, [295] that the resolution of the 11th of December, 1828, gave such conditional power to a meeting to be held in November, 1829, but that not having met until December, they were too late; to which the Deponent replied, it was unfair to take advantage of a clerical error which had occurred in consequence of an alteration in the rules, and that it was well known that though November was specified in the resolution, it was only intended to designate the next general annual meeting of the trustees.

Charles Street, one of the clerks in the banking-house of Messrs. Hopkins, Drewitt, and Wyatt, of Arundel, deposed, that James Hopkins, one of the said firm, is the treasurer of the Arundel Provident Bank, that the said banking-house, in consequence as he believes of an order from the trustees of the said Provident Bank, received, on the 30th day of December, 1828, a Government debenture for the sum of £645; that, in pursuance of a resolution of the said Provident Bank, agreed to, as he has been informed and believes, at a general meeting of the trustees of the said Provident Bank, holden on the 11th day of December, 1828, the sum of £50, part of the amount of the said debenture, was placed to the account of the trustees of the Arundel School: that the said sum of £645, the amount of the debenture, was placed to the account of all the above-named Defendants, at the time it was so paid into the said banking-house; and after the transfer of £50 to the account of the trustees of the Arundel School as aforesaid, the sum of £595 remained to the credit of all the said Defendants, until the 9th day of March, 1831, when the sum of £592 15s. 11d., part of the said £595, was transferred from the account of the said [296] Defendants and placed to the separate account of the said Defendant William Holmes, at the said banking-house, for the purpose of paying the expense incident to the widening of the public bridge over the river Arun, as this Deponent verily believes, and as is stated in a receipt, dated the said 9th day of March, given to the said James Hopkins, by the said Defendant William Holmes, under his hand, for the said sum of £592 15s. 11d., and left at the said banking-house; and that the sum of £2 4s. 1d., the remaining part of the said Government debenture, still remains to the credit of all the said Defendants in the said banking-house.

The following admissions, entered into by the Plaintiffs and Defendants in the cause, were read at the hearing.

That the document marked with the initials of Edward Hillier and Edward Blackmore, in their respective hand-writing, numbered 1, shall be received, without further proof, as the original case, and additional case, stated for the opinion of counsel, and as the opinions thereon, respectively bearing date the 29th day of October, 1829, and 14th day of November, 1829, referred to in the schedule to the answer of the three first-named Defendants; and that the same were laid before William Henry Tinney, Esq.; and that the opinions thereon are his opinions; and that such opinions and the signatures thereto, are severally of the hand-writing of the said W. H. Tinney, as set forth in the answer of the three first above-named Defendants.

That the several documents signed with the same initials, and numbered 2, 3, 4, 5, and 6, are [297] true copies of the notices referred to in the said schedule,

from the actuary of the Society, for the meetings holden on the 13th November, 1828, 27th November, 1828, 11th December, 1828, 21st December, 1829, and 20th December, 1830, and which were forwarded to the trustees or managers of the said society for the several meetings respectively, and that the same were so forwarded in the usual mode of forwarding such like notices.

That the rules of the society, set forth in a book, purporting to be printed in the year 1818, and the rules of the society, set forth in a book, purporting to be printed in the year 1824, and the rules of the said society, set forth in a book purporting to be printed in the year 1829 (all referred to in the said schedule to the said answer), and marked with the like initials, and numbered 7, 8, and 9, were respectively the rules of the said society and were duly constituted such rules according to law; and that the latter-mentioned rules were and are comprised in the rules signed by the under-mentioned solicitors, as well as by the clerk of the peace of the county of Sussex, and were duly certified and allowed by John Tidd Pratt, Esq., the barrister duly appointed for that purpose, and were duly signed, enrolled, and registered by the said clerk of the peace, in pursuance of the act of parliament in that case made and provided at the several times and dates specified on the enrolment thereof, and that the copy of such enrolment, marked with the aforesaid initials, shall be taken as a true copy of such enrolment, without further proof.

That the names of Thomas Henty and Jeremiah Lear, entered in the list of the trustees, contained [298] in the books numbered 7, 8, and 9, are two of the plaintiffs in the cause: that the list printed in the said book, numbered 9, is a true copy of a list purporting to be the names of the trustees of the said society, entered in their minute-book on the 27th day of November, 1828.

That notices of the meetings of the said trustees of the said society were from time to time sent to the said plaintiffs, Thomas Henty and Jeremiah Lear, by the actuary of the said society, and that the said Plaintiff, Thomas Henty, attended and acted as a trustee of the said Society, at the several meetings of the trustees, held the 13th March, 1827, 21st December, 1829, 13th December, 1830, and 20th December, 1830.

That the Plaintiffs, Robert French and John Lear, are respectively depositors in the Arundel Provident Bank.

That the minute-book of the said society, commencing in the year 1818, and continued from thence to the year 1831, (which minute-book, so far as respects the several orders and resolutions entered therein, it is agreed shall be admitted in evidence in the cause, in like manner as if the same had been duly proved,) contains the several proceedings, orders, and resolutions, which have been from time to time, had, made, and passed, at the several meetings of the trustees of the said society, at which the same purport to have been, had, made, and passed.

That the application of the surplus funds, as proposed at the meeting of the 11th of December, 1828, was objected to by the plaintiff Thomas Henty, at the meeting of the 21st December, 1829, and by the said Thomas Henty and Jeremiah Lear, [299] at the meeting of the 13th and 20th December, 1830.

That the two several documents, marked with the said initials of the said Edward Blackmore and the said Edward Hillier, numbered respectively 10 and 11, (described in the said schedule to the said answer,) are respectively the letter (dated 17th December, 1830,) and receipt (dated 9th March, 1831,) of the said Defendant William Holmes; and that the name "W. Holmes" subscribed thereto respectively, is of the hand-writing of the said Defendant William Holmes; and that the sum of £592 15s. 11d., mentioned or referred to in the said receipt, is the same sum as is mentioned in the pleadings of this cause, and admitted by the said William Holmes to have been received by him.

The minute book contained an entry of the resolutions in question for the appropriation of the fund.

The Case and opinions referred to in the Admissions were as follow:

Case.

Herewith left is the act to consolidate and amend the laws relating to Savings' Banks, 9th Geo. IV. c. 92, to the 22d section of which your attention is particularly

requested, because it is as to the appropriation of the surplus fund in that section mentioned that your opinion is requested.

Herewith also left are the rules and regulations of the Arundel Savings' Bank, under which the surplus created was in existence at the passing of that act, by which rules and regulations you will [300] perceive there is no provision for the appropriation of the surplus fund.

Hereto annexed is a copy of the order made by the trustees or managers, for the disposal of the surplus, at their meeting holden for the purpose of making the order agreeably to the act.

Copy order annexed.

'From the Arundel Provident Bank of proceedings, 11th December, 1828.

'That the sum of £100 be retained for or towards the future purposes and management of this Bank.

'That the sum of £50 be paid for arrears of rent and firing to the fund of the Arundel School.

'That the remaining sum of £592 15s. 11d. be paid over to the Reverend Henry James Parsons, William Holmes, James Hopkins, and J. C. Tompkins, for the purpose of paying the expense incident to the widening the public bridge over the river at Arundel, the same being now both narrow and dangerous, accidents having arisen thereon; and that in case counsel be of opinion that the trustees are not so authorized to dispose of the money that the same be disposed of in such manner as the trustees and managers present, or the major part of them, at the annual meeting, in the month of November, 1829, shall order.

'That a case for the opinion of counsel be prepared and submitted to the standing committee to be settled by them.

'That the treasurer do withdraw the whole of the surplus sum of £752 15s. 11d., and do [301] dispose of it according to the preceding resolutions.'

With respect to the order for disposing of the remaining sum of £592 15s. 11d., so much of it as required the payment of the sum over to the Reverend H. J. Parsons, W. Holmes, James Hopkins, and John Cole Tompkins, was carried into effect immediately after the order was made. The sum of £592 15s. 11d. now remains in their hands.

Your opinion is requested whether they can safely apply the money for the purpose mentioned in the order; or in other words, whether the trustees or managers had authority to make the order.

OPINION.

Lincoln's Inn, 29th Oct. 1829.

I am of opinion that Messrs. Parsons, Holmes, Hopkins, and Tompkins, cannot safely apply the sum of £592 15s. 11d. to the purpose directed by the order of the 11th December, 1828. I think the trustees and managers had not authority to make the order for such application.

The trustees and managers, or some of them, are probably liable to contribute to the expenses of the repairs and even the widening of the public bridge. At all events, the trustees and managers resident in or near Arundel would receive benefit from the proposed application, contrary to the second rule, and indeed contrary to the act, 9th Geo. IV. c. 92, s. 6, as well as to the original act of 57th Geo. III. c. 130, s. 3. A further difficulty occurred to me which the question put has not made it necessary for me to consider. The present Institution was of course established under [302] the act, 57th Geo. III. c. 130; now the first section of that act speaks of Societies established only for the benefit of the depositors. Under that act an application of the surplus fund to a purpose wholly foreign from the objects of the Society would have been questionable. That act is repealed, and the 22d section of the act 9th Geo. IV. c. 92, seems to give a discretionary power of application to the trustees and managers, so that they do not derive any benefit from the appropriation. It may yet deserve consideration whether the trustees should consider an application not beneficial to any of the depositors, as a fit and proper appropriation of the surplus of the depositors' fund. On comparison of the 2nd section of the act 9th Geo. IV. c. 92, with the 1st section of the 57th Geo. III. c. 130, a slight variation of expression

with respect to the objects of a Savings' Bank Institution occurs. I throw this out merely for the consideration of the trustees and managers, not having thought it necessary to arrive at a conclusion upon it. W. H. TINNEY.

FURTHER CASE.

There is no foundation for the presumption that any of the trustees or managers are liable to widen the bridge.

Several of the trustees and managers were and are depositors, so that the distribution of the surplus amongst either the former or present depositors would be in direct violation of the second rule; besides, as it should seem in opposition to the spirit of both the acts of parliament, as the former one limits the amount of interest, and the [303] latter (because it was before too much) lessens and limits it.

No English coin could be found small enough to repay the difference to any of the trustees and managers for the benefit they would derive from this money being applied to the repairs of the bridge, (but the order is "*widen*," and there is no intention to apply it towards repairs,) and the application of the money to the discharge of the National Debt, where it is to go, (of course to the benefit of the trustees and managers contrary to their second rule,) unless it be otherwise disposed of by their order, respecting which, *vide* the mistake in the order of the mention of the month of November, and the act which directs the month of December.

In case you should still remain of opinion that this money cannot be applied towards widening Arundel bridge, be pleased to point out what other safe mode the trustees (in whose names it is now placed) can adopt to dispose of the money.

FURTHER OPINION.

Lincoln's Inn, 14th Nov. 1829.

On reconsideration of the acts, and being assured that the trustees and managers are not in any manner liable to widen the bridge in question, I think the objection and doubt I made to the proposed application of the money are not tenable.

My chief reasons are, that a mere public accommodation is not, I think, a personal benefit to the trustees within the meaning of the acts and of the rules; and that by the act 1st Geo. IV. c. 83, s. 13, it was expressly provided that any increase in the stock, beyond the stipulated rate of interest, should [304] be applied and disposed of *amongst the depositors*, as the trustees, at a meeting, etc., *should think fit and proper*.

The new act, in making the power *general*, I think, repeals the restriction; and therefore the application need not be for the benefit of the depositors.

I cannot determine whether the meeting, at which the order was made, was a regular general meeting, within the 9th Geo. IV. c. 92, s. 22. The rules and regulations furnished to me contain nothing about the convening of a general meeting.

I presume the meeting was regular; and am inclined to think that if it was according to the practice, and especially *upon due notice*, within rule 26, it would be sufficient.

I do not see the force of the observation about the mistake of November for December in the order. I have not met with anything in the acts requiring the meeting to be in December. W. H. TINNEY.

Then followed copies of the notices for calling general meetings of the Society, and of the rules and regulations of the Society, with the names of the trustees.

These notices were numerous, but almost all of them in nearly the same terms. The following was one addressed to Mr. Holmes, upon the subject in question:

Arundel School, 14th Dec. 1830.

Sir: A general meeting of the trustees of the Arundel Savings' Bank will be held at this place on Monday, the 20th instant, at one o'clock, for the purpose of considering whether another case [305] should be submitted to counsel, relative to the appropriation of the sum of £592 15s. 11d., which was formerly placed in the hands of trustees for the widening of Arundel bridge, and whether the report of the committee concerning the description of persons in future to be allowed to become depositors in this Bank shall be adopted. Your attendance is very earnestly requested. Sir, your most obedient servant, GEO. BIDDLE, *Actuary*.

W. Holmes, Esq., Arundel.

The rules and regulations of the Society, printed in the years 1818, 1824, and 1829, with the names of the trustees.

The letter and receipt of the Appellant mentioned in the admissions were as follows: to Messrs. Hopkins and Co., Bankers, Arundel, and to Mr. James Hopkins, the Treasurer to the Arundel Savings' Bank.

Brookfield, 18th Dec. 1830.

GENTLEMEN,* In consequence of a letter from the actuary of the above Bank, addressed to the trustees, calling a general meeting, for the purpose of considering whether another case shall be submitted to counsel relative to the appropriation of the sum of £592 15s. 11d. now in your hands as bankers, placed there in the names of trustees for the widening of Arundel bridge, it is my duty, as bridge-warden for the present year, to inform you, that that sum of money is already irrevocably appro-[306]-priated, according to the provisions of the act of parliament for disposing of it.

On the perusal of the 9th Geo. IV. cap. 92, sec. 22, and the order of the trustees of the 11th December, 1828, you will find this to be the case; and by the subsequent correspondence between the committee of the last year and the National Debt Office, contained in the book of proceedings (of the Savings' Bank), you will also discover that those who represent the National Debt Office are satisfied of the legality and propriety of the mode in which the money has been appropriated; and if they were not so satisfied, it would be for them, and not the trustees of the Savings' Bank, to dispute the propriety of its appropriation.

You are probably aware that (after the meetings in the two past years approving of the mode of appropriating this money and refusing unanimously, save one, the further consulting of counsel on the subject) at the annual meeting of the present year, an anonymous statement or case of the most slanderous and deceitful nature on this subject was produced and read, and that the opinion of Mr. Pratt, founded on such statement, was also read; that Mr. Pratt should have been so much misled as to have been induced to give such an opinion, every public good man may regret. The opinion states that the money should have been distributed amongst the depositors.

Now the second rule of the Savings' Bank was that no trustee or other person, having any control in the management of this institution (except the clerk), should derive any benefit therefrom, and many of the trustees (amongst them the collector [307] of the Customs at this port) were depositors to a very considerable amount; so that the manner in which Mr. Pratt says the surplus money should have been distributed is clearly wrong, and by reference to the regularly distributed Statutes you will find, not only that section 8, which he alludes to in his opinion, was a clause copied from the first act of parliament, passed before any surplus fund existed, and therefore could not possibly apply to that fund.

It was the intention of the narrow-minded gentleman, who drew the last act, that the surplus money should go to the depositors, yet the more liberal mind of Parliament directed otherwise; and this is most miraculously made manifest by the appearance of the word "distributed" in the marginal note of the above-mentioned section 22, directing the appropriation of the surplus money, and its omission in the body of the clause, wherein the word "appropriate" only is to be found.

To have distributed this money amongst the depositors would have been to have appropriated it in direct opposition to the second rule of the Society, and consequently in direct opposition to the acts of parliament.

It would have also been in direct opposition to that rule to have allowed the money to have been applied for the reduction of the National Debt for which it would have gone but for this rule, and the very proper order of the trustees for otherwise appropriating it, because the trustees would or might have derived a pecuniary benefit in the discharge or reduction of the National Debt.

It was under these difficulties, and after it had [308] at two previous meetings of the trustees been stated that an intention of proposing a mode for appropriating this

* This letter contains the substance of the Appellant's argument on hearing the appeal.

surplus money, in the absence of any other proposal from any other trustees, would be proposed by me, (and this, as well as the manner of the appropriation, was communicated to most of the trustees who attended those meetings,) that I did propose that this "surplus money should be appropriated for the purpose of paying the expense incident to the widening of the public bridge over the river at Arundel, accidents having arisen thereon."

This appropriation of the money, that very able and conscientious King's counsel, W. H. Tinney, Esq., informed the trustees (they not being able to widen the bridge) was a proper application of the money according to the last passed act of parliament for appropriating it.

And he gives, as his reason, that "the mere public accommodation was not a personal benefit to the trustees, within the meaning of the acts, and of the rules; and that the previous acts, by which the depositors were more benefited, were repealed by the last act," and he might have added, because the last act was passed principally to lessen the interest on the deposits and other benefits to the depositors, which certainly is directly in opposition to the notion that they were to be benefited by the receipt of the surplus money, especially so far as the clause for so appropriating it was repealed by that act.

It is the duty of trustees of public monies to dispose of them not only for public but permanent purposes; and by the act of parliament in question [309] the money is directed to be so applied, in case the rules had not already disposed of it, and the trustees did not discover some more pressing occasion for it.

Personal or temporary benefits, such as clothing or food for the poor, however desirable at any moment, is not a proper appropriation of this money; if so appropriated it would be in charity for a personal and temporary, and not a public and permanent purpose, which this act clearly contemplates.

We have all a right, and it is our duty as well as our pleasure, to put our hands in our pocket for charitable purposes, but the public money must be applied for public and permanent purposes for all his Majesty's liege subjects, not alone for A. B. and C.; and whether it be so applied at Arundel, or at Charing Cross, it is equally for all his Majesty's liege subjects. Well would it have been for the kingdom at large if all the surplus money of the Savings' Banks had been disposed of for similar benefits, each in its immediate neighbourhood. I will instance one more to our own, namely, by the appropriation of the surplus money of the Pulboro' Savings' Bank, on Hardham Causeway (its immediate neighbourhood), all his Majesty's liege subjects would have been allowed to pass at all times; which is not the case now: and is there any man who will say that the money being appropriated for that purpose would not have been better applied for the public than the manner in which it has been appropriated, in which the public have derived no benefit whatever?

On the day of the quarterly meeting of the committee of trustees, in June last, the comptroller of [310] the Customs of this port (one of the committee) mentioned that the collector of the Customs had in very strong terms reprobated the manner in which the surplus money had been appropriated, and also stated that the collector had said that the trustees would act rascally if they did not allow him, as an original depositor, to participate in the distribution of the surplus money. If they had done so, in my judgment, they would have acted most grossly.

This is mentioned merely to show how much the collector of the Customs was mistaken, when, in addressing the trustees at the last meeting, he personally asserted himself to be totally disinterested, and asserted that I was greatly interested: now the collector was a large depositor, and I no depositor at all; on the contrary, in widening the bridge in the manner proposed, I shall personally experience a pecuniary disadvantage of about £200, which I shall be compensated for only by the recollection that I may have tended greatly to the convenience of the public and my neighbours, amongst them the collector himself, who must daily cross the bridge, or give up his place in the Customs.

The estimate of widening the bridge exceeds, by near £200, the money to be paid me for completing it; and I have neither the means of enforcing, or the intention of seeking for, any remuneration for this additional expenditure. Perhaps this fact being known to the gentlemen who think this money wrongly applied, and who have now again agitated this question, for reasons best known to themselves, it

may be satisfactory to them: however, be it so or not, the money will be applied [311] agreeably to the orders of the trustees, the law of the land, and the act of parliament, as soon as practicable; and in the mean time I take leave to communicate to those who think themselves injured, or interested in the money, or that it is misappropriated, that I am more than ready to meet them before the Chancellor, or any other tribunal on earth which they may think proper to resort to. The more openly and the more fully (if openly and with truth and candour) this subject be discussed, the more agreeable to me; and after the many malicious insinuations against the Arundel inhabitants, respecting the appropriation of this money, especially that they were going to ease themselves of a burthen by appropriating it for the repair of the bridge, when it was never intended to have been so applied, but for widening the bridge only, that is, adding to it, and thus, by the increase of the size of the bridge, increasing the burthen of the inhabitants, it will not be just or honest if neither a public opportunity be given them of meeting their opponents, or a true representation of the case be made where it has been partially canvassed and grossly misrepresented.

You will be pleased to receive this as a notice not to part with the money but for the purpose mentioned in the order. It is quite proper that you should make this communication at the proposed meeting of the trustees of the Savings' Bank, on the 20th instant, where you have my authority to allow the actuary, or any one else, to read this communication, and the trustees have my assent for making what use of it they please.

I will just add, that I am a little surprised, although revolutionary movements are just now [312] most fashionable, at the one here attempted; and I would ask of the trustees whom they expect to obey their orders or wishes if, after their orders have been repeatedly made, considered, and confirmed, they are to be revolutionized by the production of such a slanderous case as the one produced at the last meeting, or indeed by any other means.

Obedience to orders, or compliance with rules, can only be expected by those who are consistent in forming and executing them; and it is not because some are fickle and changeable that all should be expected to or should be so.

(Signed) W. Holmes.
9th March, 1831.

Received of Mr. James Hopkins the sum of five hundred and ninety-two pounds, fifteen shillings, and eleven pence, the sum of money ordered on the 11th day of December, 1828, by the trustees of the Arundel Provident Bank, for the purpose of paying the expense incident to the widening of the public bridge over the river at Arundel.

£592 15s. 11d. W. Holmes.

On the 27th of February, 1833, the cause was heard before the Vice-Chancellor, when his honour declared that the application of any part of the surplus trust-fund belonging to the Arundel Provident Bank in the pleadings mentioned, for the purpose of widening the public bridge over the Arun at Arundel, in the county of Sussex, was a misapplication of the said fund; and that the £696 7s. 7d Bank 3 per cent. Annuities, standing in the name of the Accountant-General of the said Court, in trust in the said cause, and the sum of £20 17s. 10d. cash in the Bank placed to the credit [313] of the said cause, being cash arising from the dividends of the said stock since the purchase thereof, belonged to the said Arundel Savings' Bank; and it was ordered that the said £696 7s. 7d. Bank 3 per cent. Annuities, and the sum of £20 17s. 10d. cash, should be transferred and paid to the said James Hopkins the treasurer of the said Arundel Provident Bank, and for the purpose aforesaid the said Accountant-General was to draw on the Bank in the usual manner; and it was ordered that it should be referred to the Master of the said Court in rotation, to tax the said Plaintiffs their costs of the said suit up to that time; and that the said Defendants William Holmes and James Hopkins, John Cole Tompkins, and Henry James Parsons, should pay to the said Plaintiffs what should be taxed for such costs; and the said Court did not think fit to make any order as to the said sum of £50 in the pleadings mentioned, and any of the parties were to be at liberty to apply to the Court as there should be occasion.*

* In pronouncing the decree the Vice Chancellor gave his reasons as follows:

[314] This decree was signed by the Lord Chancellor, and inrolled.

[315] The Defendant William Holmes appealed against the order of the 26th November, 1831, so far as it **[316]** directed the payment of the money into Court, and gave consequential directions, and also against the **[317]** decree, except as to that part of it which declared that the Court did not think fit to make any order **[318]** as to the sum of £50 in the pleadings mentioned. The other Defendants did not concur in the appeal.

[319] For the appeal the Appellant in person.

It is very plain that what has been done cannot be supported. The act 9 G. 4. s. 22. directed that within six weeks after the 20th November, 1828, the trustees and managers of the different savings' banks shall ascertain the amount of their increased funds up to the 20th November, 1828, and shall, as soon afterwards as conveniently can be, after retaining so much thereof as may be necessary for or towards the future management of the bank, appropriate the same in the manner prescribed by these rules; or if no provision be made by the rules, then in such manner as the trustees or managers, or the major part of them, assembled at any general meeting to be convened according to the respective rules and regulations of such savings' banks shall think fit and proper. The first question is, what is to be inferred from the provisions of this act of parliament as to the destination of the fund in the event of the rules of the savings' banks not prescribing at all or affecting the question, how the surplus should be applied. Now, in order to construe that, it appears to me necessary to consider several other clauses which are contained in this act of parliament. The act directs, in the first place, that the surplus which should accrue after the 20th November, 1828, should be paid to the commissioners for reduction of the National Debt; and that section also directs that it shall be lawful for the trustees or managers to require and receive from the commissioners, for the purpose of the institution, any sum of money equal to the whole or any part of the principal monies which may have been discharged from the account of the savings' banks. Then, by the forty-sixth section, it is directed, that for the more effectually ascertaining from time to time the actual and progressive state of the several savings' banks, the trustees shall annually cause a general statement of the funds to be prepared up to the 20th November in each year, shewing the balance or principal sum due to all the depositors collectively in such savings' banks, and a statement of the expense incurred, and stating in whose hands such balance shall then be remaining. And the forty-seventh section directs that the trustees shall cause a duplicate of such annual statement, with a list of the trustees and managers of such institution for the time being, to be publicly exhibited in some conspicuous part of the office or place where the deposits of such savings' banks are usually received, for the information of all persons making deposits therein. And then it directs, in the forty-eighth section, that the commissioners shall lay accounts annually before parliament, which accounts shall be of the gross amount of all sums received and credited, including interest, and of all sums paid, including interest, from a given day to a given day. And then, by the fifty-ninth section, it is directed, amongst other things, that all accounts and returns shall be made in such form and manner, and containing such particulars, and under such regulations as shall from time to time be directed by the commissioners.

Now it appears to me that what the legislature had in view was the benefit of the parties who were the depositors in the banks; that is, so much kept in view, that, by the twenty-third section, though the surplus might have been paid over, it would be repaid by the commissioners to the trustees of any bank, if it were wanted for the purposes of the institution; and the account which is directed necessarily would include in it (at least the first account) the statement of what was that surplus sum which the trustees might have in their hands upon the 20th November, 1828, by reason of the accumulation, *ultra* the interest, which, according to the preceding act of parliament of 5 G. 4. was payable to the depositors. If the account must necessarily have included it, and it appears from the books of the society that the very first account which was made up, namely, the account of the 20th November, 1829, did contain an item which expressed that there was appropriated, agreeably to the rules of 9 G. 4. a certain sum, including the sum in question; and that this form was according to that which the commissioners had directed, is reasonable to be inferred

The order of the 26th November, 1831, presumed the points of law adversely to the Appellant, and prejudiced the merits which ought to have been reserved till the hearing of the cause, and there were no peculiar circumstances requiring such an order to be made before the decree. By the construction of the act 9th Geo. IV. chap. 92. sec. 22. the trustees and managers of the Arundel Savings' Bank had power to order the application of that part of the surplus which was applied by the Appellant for the purpose of widening the public **[320]** bridge at Arundel, and the same was duly appropriated to that purpose under their direction. If the application of the

from the circumstance that you have a correspondence between the trustees and the secretary to the National Debt Office, with respect to that very entry which is contained in the first account. When it is directed therefore that all accounts (and of course including the first account) should shew the balance or principal sum due to the depositors, and a statement of the expense incurred, it certainly strikes me that parliament concluded that the account would contain what was due to the depositors, and a statement of the expense, and nothing else. It is assumed that no account will contain any thing except that which represents what is due to the depositors, and what has been the expense; and there is no other item whatever noticed as a thing which is to be contained in the account. That, therefore, leads me to suppose that parliament necessarily inferred that a sum of money, which was to be divisible, would in some manner or other be appropriated for the benefit of the depositors. Now, in order that every body who was concerned might know what was taking place with respect to the account, the provision in the forty-seventh section is introduced, which directs a copy of the account to be publicly fixed in some conspicuous part of the place where the deposits of such savings' banks are usually received, for the information of whom? For the information of all persons making deposits therein. I must suppose, therefore, that the account was directed to be exhibited in order that all the parties should know how these funds were applied; and the only parties who are stated as persons likely to be interested, are the persons making deposits in the bank. I must suppose, therefore, that parliament did, by this section, shew their view of the case, that the persons who would be interested in the accounts would only be the persons who were depositors therein, and not strangers. Then I find, when this account was communicated, there is a correspondence, as I said before, between the trustees and Mr. Hyam, in which Mr. Hyam requests to be informed whether the sum of £642 15s. 11d. was actually paid to the depositors in money, or whether it was merely placed to their credit. Now the question evidently shews what it was which the commissioners, or at least their secretary, apprehended to be the meaning of the act of parliament; and it is observable that the answer which is given does not state exactly what was the intention of the trustees with regard to the sum of money, but it merely answers the question in terms, and not in substance, for it answers the question by stating that the sum of £642 15s. 11d. was neither paid to the depositors in money, or placed to their credit; but it does not state how it was applied, and that answer never could have furnished the information; and when Mr. Hyam writes a second letter, and asks that the commissioners might be furnished with a copy of the warrant under which the sum of £642 15s. 11d. was appropriated; then the committee directed that the answer to be given should be, that it was appropriated under the act of 4 G. 4. c. 92. s. 22. referring only to the section; but still it does not state what was the specific purpose for which the meeting of December, 1828, had directed that the money should be appropriated. The provisions of the act lead me to infer that the legislature contemplated nothing but an appropriation, which in some manner or other should be for the benefit of the general depositors. But now I have to consider whether, in point of fact, even admitting that it might have been otherwise applied, the thing has been applied in a manner which the act of parliament authorized. It appears to me that the act of parliament evidently supposed that any appropriation which should be made would be an appropriation that would be made by virtue of a resolution made by the trustees at a meeting as soon as conveniently could be, after the 20th November, 1828. Now what was done? There was a meeting held on the 11th December, 1828, in which it was resolved that the sum of £592 should be paid over to certain persons for the purpose of paying the expences incident to the widening a public bridge; and, in case counsel should be of opinion that the trustees were not so authorized to dispose of

surplus under the 22nd section of the act 9th Geo. IV. chap. 92. is to be construed to mean some purpose immediately beneficial to the depositors, or to the trustees and managers, those purposes would be unlawful, and if it means any other beneficial purpose for the Bank, inasmuch as all future necessary purposes were provided for, and by the act are required to be so, the beneficial purposes contemplated must mean an application with all convenient speed to some unnecessary purposes, or else must mean some future purposes at present not necessary, in which case the whole ought to have been retained.

the money, that the same be disposed of in such manner as the trustees or managers present, or the major part of them, at the annual meeting of November, 1829, shall order; that a case for the opinion of counsel be prepared and submitted to the standing committee, to be settled by them. It was part, therefore, of this resolution that the opinion of counsel should be taken upon a case which should be settled or approved of by the standing committee; and, if the opinion upon the case so stated and settled was against the application of the money to the purpose of widening the bridge, that then the fund should be applied in such manner as a general meeting, held in November, 1829, should direct. Now what was the fact? That on the 19th October, 1829, a case was presented and approved of by the committee; and my opinion is, the case having once been presented, and approved of, the resolution of the 11th December, 1828, was to be dealt with, having regard to the opinion which should be given upon that case, and the opinion that was given upon that case was against the application of the money for the purpose of widening the bridge, but what was done? The case was in effect altered by that statement which was introduced upon it after Mr. Tinney had given his opinion on the 29th October, 1829; and upon that case so altered, which altered case never was approved of by the committee (at least there is no evidence to shew that it was), Mr. Tinney gave an opinion which sanctioned the application of the money in the manner first of all proposed.

Now it appears to me that, according to the plain terms of the resolution which the trustees adopted on the 11th December, 1828, when Mr. Tinney had given his opinion on the first case (the only case approved of by the committee), they had no power whatever to do any thing else than merely to call a meeting in November, 1829, for the purpose of deciding how the money should be disposed of, because that was the course which the resolution of 1828 directed; but, instead of that, it does not appear that there was any meeting held in November, 1829, for the purpose of considering the subject at all; and my opinion therefore is, that according to the true construction of the resolution of the 11th December, 1828, nothing was done, nothing was resolved which would justify the trustees in parting with the fund at all. I cannot but think that, after the trustees had actually made a return to the commissioners, by that return, which is dated the 20th November, 1829, whereby they represented that there had been an appropriation (which return was made for the purpose of enabling the commissioners to make the return before parliament), they had not the power to come to the resolution which they adopted on the 20th December, 1830. The act of parliament, as I understood it, evidently contemplated that, for the purpose of letting it be known to the commissioners, by the return of the 20th November, 1829, what the account was, that the account should contain a statement of the appropriation of the fund, by reason of the resolutions which the trustees might come to at the meeting, to be held as soon as conveniently could be after the 20th November, 1828; and, if it were otherwise, the whole of the provisions of the act of parliament would be defeated: my opinion is, that the trustees did wrong. I don't say morally wrong; but they did legally wrong; they did that which the act of parliament never contemplated when they allowed the return to be made to the commissioners, therefore they had made the appropriation at a time when it shews there was no resolution made which could have justified that appropriation; in point of fact, there are no resolutions at all which, in my mind, could in the least be considered as directing what the appropriation should be, until the resolution was made of the 20th December, 1830.

It appears to me, therefore, that, upon the substance of the case, the trustees were wrong; and, upon the form of the case, they were wrong, because they did not comply with the plain provisions of the act of parliament, which in my mind meant that is

This suit is not rightly framed to raise the questions which have been decided by the decree, it being a suit on behalf of all the trustees and depositors except the Defendants against them, as parties acting under the orders and as the agents of the trustees and managers, the parties who complain.

The construction of the act of parliament is a doubtful question concerning the duty of trustees, and the Appellant acted under the authority of the trustees, and as their agent upon a bona fide construction of the act of parliament by the trustees, and the decree ought therefore not to have charged the Appellant personally, and in any event ought not to have been made with costs.

For the Respondents Mr. James Russell.

The appropriation of the sum of £592 15s. 11d., to widen the bridge over the Arun, was not authorized by the trustees or managers of the Arundel Provident Bank, or the major part of them, assem-[321]-bled at a general meeting convened according to the rules and regulations of the bank.

Such an application of the sum in question is not warranted by the sound construction of the 9th Geo. IV. c. 92.

The Lord Chancellor: In this case there are two questions. That which relates to the order for the payment of the money into Court is preliminary—and it is argued, that this order was contrary to the practice of the Court. It does not appear so to me. I think it was the duty of the Court to pronounce that order. The propriety of the order is apparent upon the facts stated in the answer. If the Court was of opinion, that it was money which the Defendants had no right to retain—that the claims of the Plaintiffs upon the fund might be established, it was in the ordinary course of practice to order the payment into Court. It is objected that under the authority and by a resolution of the trustees, it was paid over to the Defendants for a specific purpose and has been so applied; but this is no answer, if in the opinion of the Court the resolution and application was contrary to law. The opinion, however, and the order, is not conclusive upon the other question which involves the substance and merits of the case. The order is made only for the security of the fund.

Upon the principal question as to the application of the money, it is immaterial to the decision of the case, whether the bridge at Arundel requires widening. The question is not whether the bridge will be improved by such application, but whether the money is legally applicable. Upon this question, it is to be observed, that the fund in question [322] arose from an increase and surplus of monies deposited in the Arundel Savings' Bank, which was a fund in the hands of trustees. Before the passing of the act 9th Geo. 4. c. 92. no question could have arisen as to the discretionary application of such a fund. Under all former acts and on principle, the profits arising from deposits could only be applied for the benefit of the de-

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soon as conveniently could be, after the 20th November, 1828, it should be decided how the money should be applied. Upon that part of the case it is quite clear that the trustees were wrong. It is no objection whatever to this suit that Mr. Henty has been made a party, because it appears to me there is sufficient evidence to justify the placing of his name upon the record, as one of the trustees. His name appears in that book as one of the trustees, and it appears, in point of fact, that he attended three meetings, and, as I understood, in the character of trustee. Neither does it appear to me that the suit is defective in respect of not having upon the record any of those persons who concurred in the resolutions which were made either upon the 11th December, 1828, or the 20th December, 1830; for the resolution was nothing; it was the application of the money, the taking it away from the funds of the society, which constituted the act of which alone the parties had a right to complain. It is in respect of that act only that the complaint is made; and the preliminary steps which regarded the resolution appear to me no more to make the parties who concurred in the resolution necessary, than it was necessary to make the actuary a party who issued the notice to get the trustees together at the meeting. It appears to me, therefore, on the substance of the case, that the Plaintiffs are right, and the trustees are wrong; and, though I admit this is a hard case, and there has been no corruption or morally improper dealing with the fund, and the thing was meant *bonâ fide*, my opinion is, that the matter is not to be supported in point of law; and those who would defend the case must pay the costs of the suit.

positors, and nothing less than the authority of an act of parliament could warrant any other application against the will of the parties. No other persons could by possibility have any right to the fund, or direct the application of it, except by contract between the parties and under their authority. There was no such contract as to this fund, and the trustees created by former acts held in trust for the depositors all the monies deposited, and all profits arising from the employment of the monies. That being the state of the law and the rights of the parties when the 9th Geo. 4. c. 92. was passed, the question in this case, arises whether they are taken away, or how far altered by that act. The accumulation in this case existed before the act; the question is whether the right of the individuals to that surplus which then was theirs is taken away, and powers given to apply it to other purposes.

The scheme of the 9th Geo. 4. c. 92. as to this surplus, appears in the 22d and 23d sections of that act. It was provided, that from that time the surplus of funds deposited to be ascertained according to the directions of the act, should be paid over to the Commissioners of the National Debt, who should hold it subject to the public undertaking to pay it or any part of it as provided **[323]** by the act upon the claim of the trustees. But it was thought unjust to apply such a provision to the times which preceded the act; because, those who had before made their deposits, did so upon the faith of laws established by previous acts of parliament or contracts among themselves. Those who deposited afterwards were aware of the law. As to those previous deposits, the act provides by the 22d section, that "within six weeks after the 20th of November, 1828, the trustees and managers of the Savings' Banks already established, shall ascertain the amount of the increased stocks or funds of their respective banks up to that date, and after retaining so much as may be necessary for the future purposes and management of the respective banks, appropriate the same in the manner provided for by their respective rules and regulations made before the passing of the act, or in the event of no provision having been made by such rules and regulations then in such manner as the trustees or managers, or the major part of them assembled at a general meeting to be convened according to the respective rules and regulations of such Savings' Bank shall think fit and proper."

The second rule of this Society prohibits the application of any part of the fund for the benefit of the trustees, or any person having control in the management of the institution. If then, as it appears they would be liable for the repairs of the bridge, or derive a benefit from its improvement, the application to such purpose was not according to the then existing rules of the institution, as the act directs that it should be. It has been contended by the Appellant that the surplus upon all **[324]** deposits made previous to the 9th Geo. 4. c. 92. are to be in the discretion of the trustees to apply to any meritorious purpose in any part of the kingdom, where there is no express direction by existing rules as to its application. But considering the words in the 22d section of the act, together with the second rule of the Society, it appears to me that their discretion could not be exercised directly or indirectly for their own benefit, which is the result of their resolution and the consequent application of the fund. If your Lordships should concur with me in this view of the case, the principal question before the House will be disposed of.

But it was then pressed upon the House by the Appellant, that the costs of the suit ought not to be borne by him in a case where he had applied the fund under the order of the trustees, and if the Appellant had so applied it in the execution of his duty without notice of his risk, or complaint of such appropriation, it might have been a case of hardship, and although it might have been no answer to a claim of the depositors, it might have raised a ground of question as to the costs. But, the Defendant, as it appears, took a bold course. Upon this point it is necessary to look at the answer. It is thereby admitted, that the Appellant at a meeting of the trustees, proposed the application of the surplus to the purpose of widening the bridge at Arundel, and a resolution to that effect was passed; but upon the suggestion of one of the trustees that the application might be illegal, it was agreed that a case should be stated, and an opinion of counsel taken upon the subject. This was accordingly done, and the opinion was adverse to the legality of the application. But the Appellant **[325]** thinking the opinion wrong, stated an amended case and obtained a favourable opinion.

The first opinion given by Mr. Tinney was certainly entitled to great consideration and ought to have put the parties on their guard. It was a very decisive opinion without qualification, that the proposed application was illegal. The opinion also distinctly points out the ground of objection, viz. that the trustees were probably liable to contribute to the repairs and even the widening of the bridge, in and near Arundel, and would receive benefit from the proposed application, contrary to the second rule, and indeed contrary to the acts 9th Geo. 4. c. 92., and 57th Geo. 3. c. 130. The opinion also points out that the Society having been established under the latter act, an application wholly foreign from the objects of the Society would have been questionable, as the act contemplates societies established only for the benefit of the depositors, and although repealed and a discretionary power of application given to the trustees, so that they do not derive benefit from the appropriation —yet that the trustees ought to consider whether an application not beneficial to any of the depositors was a proper appropriation of the surplus of the depositors' fund. The case was then amended, by stating that the trustees were not liable to widen the bridge, and that the trustees being depositors, a distribution of the surplus among them would be in direct violation of the second rule, as they would derive benefit: but this is a mistake; the benefit to be guarded against relates to them not as depositors but as trustees. The amended case goes on to state, that no English coin could be found small enough to repay the difference to any of the trustees for the benefit they [326] would derive from the proposed application, and that the application of the fund to the discharge of the National Debt would be also for the benefit of the trustees. But the question does not turn on the benefit or amount of benefit which is to be derived from the employment of the money.

It seems that the Appellant, who had a duty to perform as trustee, was, at the time in question, mayor of Arundel, and had an apparent interest in the improvement of the bridge. In the joint answer this passage occurs: "This Defendant, William Holmes, was, in October, 1830, elected mayor of Arundel, and that the mayor of Arundel for the time being is bridge-warden, and always has the superintendence and management of the said bridge, and repairs said bridge from two sums of money, one of £2 per annum, payable by the owner of a certain house in and adjoining the High Street and Farrant Street in Arundel, now belonging to Mr. Thomas Mansfield Halliday, of Petworth; and the other of £3, payable annually by the owner of another house situate near the bridge, in Arundel aforesaid, belonging to his Grace the Duke of Norfolk; and if these sums are not sufficient, then the deficiencies have been for many years past paid for the repair of said bridge by the overseers of the parish of Arundel, either to the bridge-warden or to the persons to whom the bills may be owing for the repair thereof." Then "they admit that they are either occupiers or owners of property in the parish of Arundel, as well as in the rape of Arundel, and out of said parish of Arundel, and in other parts of the county of Sussex; (that is to say,) Defendant William Holmes owns pro-[327]-perty of the annual value of £250, and occupies property of the annual value of £50 in said parish of Arundel, and owns property of the annual value of £500 in said rape of Arundel, not being in said parish of Arundel, and occupies property of the annual value of £100 in said rape of Arundel, not being in said parish of Arundel, and owns property in the county (including the rape and parish of Arundel) of the annual value of £752 10s."

The answer then sets forth the interest of the other Defendants. Being, therefore, an owner of property, and liable to be rated for the repairs of the bridge, it may be assumed that he felt some interest, and naturally a disposition to apply, to a beneficial purpose, money which seemed to belong to nobody; and, upon obtaining the second opinion of Mr. Tinney, the resolution for the appropriation of the fund to the improvement of the bridge was adhered to. The second opinion, retracting the objection stated in the first, proceeded upon the assurance and assumption that the trustees were not liable to the expense of widening the bridge, that the mere public accommodation (by widening it) was not a personal benefit to the trustees, within the meaning of the acts and rules, and that the act 1 Geo. 4. c. 83., which required an appropriation for the benefit of the depositors being repealed by the new act, which made the power general, the application need not be for the benefit of the depositors. Mr. Tinney's doubt was removed and his opinion changed, but,

at all events, two opinions were before the trustees opposite to each other, and, in such a case, no prudent man would have acted as a trustee, especially where the counsel, giving the opinions, [328] considered the question as one of doubt and difficulty. Besides this, the opinion of another counsel having been taken, which agreed with Mr. Tinney's first opinion, being adverse to the legality of the appropriation, was produced by the Respondents, at a general meeting of the trustees, and a protest made by them against the application of the fund to the widening of the bridge; but the Appellant said they had got the money, and the Respondents might recover it as they could. Notwithstanding these difficulties the Appellant, and those who acted with him, did not think fit to take any further opinion. They adhered to and confirmed their former determination, resolving to proceed in the dark. They were informed that the new opinion was adverse to their proceeding, yet they determined to take no other advice. At this time they were fully aware of the doubts and difficulties upon the question.

The bill was filed on the 1st of March, and on the 9th of March the money, being then in the hands of the trustees, was applied to and expended in the improvement of the bridge. It is possible they might have acted upon good motives and from a desire to effect a public benefit; but they cannot say they did it in ignorance of what might be the consequence. Costs are not given in Courts of Justice by way of punishment, nor are they intended as any moral degradation. The question for the Court is generally, which party shall pay. The Plaintiffs have obtained the judgment of the Court of Chancery, and have shown that the Appellant acted upon an erroneous view of the law, knowing his conduct to be at least of a doubtful character. Ought the Plaintiffs or Respondents to pay for this? If the [329] Appellant does not, they must. In my opinion justice would not be done if the Respondents were not indemnified; and this principle applies equally, if not more forcibly to the appeal, because the doubts and remonstrances of the Respondents have been confirmed and sustained by the judgment of the Vice Chancellor and the Lord Chancellor. I move your Lordships to affirm the judgment with costs.

Judgment affirmed.

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[330]

IRELAND.

(Exchequer Chamber.)

The Right Rev. NATHANIEL, Lord Bishop of MEATH, and the Rev. JAMES ALEXANDER, Clerk,—*Plaintiffs in Error;* The Most Noble CHARLES, Marquis of WINCHESTER,—*Defendant in Error.*

[Mews' Dig. v. 21, 1227, 1254; vi. 688, 700. S. C. 4 Cl. and F. 445; 3 Bing. N. C. 183. 3 Scott, 561. Explained and applied in *Carlisle* v. *Whaley*, 1867, L. R. 2 H.L. 391. On point as to "proper custody" (10 Bli. N.S. 447), followed in *Doe* d. *Neale* v. *Samples*, 1838, 8 Ad. and E. 154.]

Upon a bill of exceptions to the admission and rejection of evidence and the directions of the judge, the following points were decided on a writ of error:

1. In *Quare impedit*, to recover the presentation to the church of K., the advowson whereof was claimed to be part of the temporalities of the Bishop of M., the following documents were produced in evidence, viz., a deed, dated in 1637, granting to D. the next avoidance of the church of K., and a case dated in 1695, stated for the opinion of the counsel, on the part of A., then Bishop of M., containing a statement that in 1637 C. granted to D., then incumbent of the church of K., the next presentation thereto; and that in 1642 both rectory and vicarage being void by the death of D., his widow and executrix presented *pro hâc vice* B. to both, who was instituted by the Bishop, and inducted by his successor. The deed and case were found by W. among books which W. stated to be visitation books and other papers of the diocese of M., in a house in-

habited by a person of the same family name as A., Bishop of M., and which was stated in evidence to be the family house of A., and where his papers were kept. The documents so found were handed by W. to S., who delivered them over to C., by whom they were produced. C. was a descendant of Bishop A., but had never seen these documents in the house, nor any papers of the family, or relating to the diocese. The proofs as to the custody being in some respects equivocal, on the examination in chief, were so left without cross-examination. It was proved that there was no registry of ecclesiastical or other records in the registry office of the diocese of M. anterior to 1717.

Held that the deed and case were admissible in evidence on **[331]** behalf of the Plaintiff, against a successor of the Bishop in the see of M.

2. By Letters Patent 9 Edw. 4. the advowson of the rectory and vicarage of K. was granted to W. Bishop of M. and his successors. By an act of parliament 10 Hen. 7., reciting the necessity of protecting the King's subjects in Ireland, and reducing the land to obedience, and the diminution of the revenues by improvident grants, "to divers persons, such as for the most part do full little service to the common weal, for lack of which revenues the land could not be defended for the destruction of the Irish enemies," it was enacted that all manors, etc., advowsons of churches, etc., whereof the King or any of his progenitors Kings of England were at any time seised in fee simple or fee tail from the last day of the reign of Edw. 2. to this present act, etc., by any letters patent under the great seal of England or Ireland to any person or persons by whatsoever name, etc., be resumed, revoked, annulled and deemed void, and of none effect etc. But the manor of R. was, by a document annexed to the act, excepted.

Held that the grant of Edw. 4. was avoided by the act of Hen. 7., and that the advowson was by the statute re-appended to the manor.

To a count in the declaration in *Quare impedit* stating the title of the Plaintiff, and that the advowson was appendant to the manor of R., the Bishop by his pleas asserted a seisin of the advowson in gross in right of his see, and traversed the appendancy of the advowson to the manor, and the title of the Plaintiff. The clerk's pleas were in substance the same. On these pleas, issue being joined, a fine levied by B., in respect of whose estate the Plaintiffs claim is not admissible in evidence upon such issue, and, if received ought not to be left to the jury to say whether it barred the action of *Quare impedit*: and, held, that it did not bar the action.

This was a Writ of Error brought by the Plaintiffs in error, who were Defendants in the original cause, to reverse a judgment of the Court of Exchequer Chamber of Ireland affirming a judgment of the Court of Common Pleas in Ireland, by which it was adjudged that the Marquis of Winchester, the Plaintiff in the original cause, **[332]** should recover his presentation to the church of Killucan, otherwise Rathweir, situate in the diocese of Meath and county of Westmeath.

On the 15th day of February, 1828, the benefice of Killucan, otherwise Rathweir, became vacant by the death of the Reverend Henry Wynne, the late incumbent thereof; whereupon the Marquis of Winchester, the Defendant in error, claiming the advowson as trustee for the Marquis of Clanricarde, presented his clerk, the Reverend Cecil Crampton, to the Bishop of the diocese of Meath, one of the Plaintiffs in error, as a fit and proper person to be admitted, instituted and inducted into the same. The Bishop of Meath refused to admit the presentee of the Marquis of Winchester, and collated to the vacant benefice, being the rectory and vicarage of Killucan, his son, the Reverend James Alexander, the other Plaintiff in error.

The Marquis of Winchester thereupon brought his action of *Quare impedit* in the Irish Court of Common Pleas against the Plaintiffs in Error, as of Michaelmas term in the year 1828; and upon the return of the writ of *distringas*, being the last stage of process, the Bishop of Meath appeared by his attorney; but the other Defendant, instead of appearing to any of the writs which had been successively served upon him, cast an essoign, which, upon the application of the Plaintiff below, was quashed by order of the Court of Common Pleas; and the Defendant, the Reverend James Alexander, was ultimately compelled to appear.

The Plaintiff's declaration contained six counts; but as the verdict for the De-

fendant in error was taken upon the fifth count only, it is not necessary [333] further to advert to the other counts of the declaration or the pleas thereto.

By the fifth count of the declaration the Plaintiff, after setting forth the pedigree of the house of Clanricarde, from the first to the fourth Earl of the family, stated that Rickard, the fourth Earl of Clanricarde was in the year 1626 seised in his demesne as of fee of and in the manor of Rathweir, with the appurtenances, in the county of Westmeath, to which the advowson of the church of Killucan, otherwise Rathweir, was appendant; and that being so seised, he the said Rickard, Earl of Clanricarde, on the 12th of April, 1626, presented to the said church Doctor Edward Donnellan, his clerk, who was on such presentation admitted, instituted and inducted into the said church: that upon the death of the said Earl in the year 1635, his eldest son and heir-at-law, Ulick, the fifth Earl of Clanricarde, became seised of the said manor of Rathweir, and the said advowson appendant thereto. The count then stated the rebellion in Ireland in the year 1641, and that by reason thereof the manor of Rathweir, with the advowson appendant, were, with the other possessions of the Earl of Clanricarde, seized and sequestrated into the hands of the Crown. The pedigree of the Clanricarde family is then deduced to Rickard, the sixth Earl of Clanricarde, and heir male of the body of Ulick, the first Earl of Clanricarde.

The count proceeds to state that by letters patent, bearing date the 8th day of April, in the fourteenth year of the reign of his late Majesty King Charles II., his said late Majesty granted unto the said Rickard, sixth Earl of Clanricarde, (amongst other properties of which Ulick, the fifth [334] Earl had been seised in the year 1641,) the manor of Rathweir, with the advowson appendant thereto, to hold to the said Rickard and the heirs male of his body, with remainder to the heirs male of the body of Ulick, first Earl of Clanricarde, remainder in fee to the heirs of the said Ulick, first Earl of Clanricarde.

That by the statute made in Ireland in the fourteenth and fifteenth years of the reign of his said Majesty King Charles II., commonly called the Act of Settlement, the said letters patent were fully confirmed.

That upon the death of the said Rickard on the 10th of August, 1666, without issue male, his only brother, William, seventh Earl of Clanricarde, as heir male of the body of Ulick, the first Earl of Clanricarde, became seised in fee tail of the manor of Rathweir, with the advowson of Killucan appendant thereto; and being so seised, the said William, Earl of Clanricarde, by indenture made on the 2d of May, 1670, conveyed to Sir Patrick Mulledy and his heirs the said manor of Rathweir; expressly excepting and reserving to him the said Earl, and the heirs male of his body, the advowson of the said church of Killucan, whereby the said Sir Patrick Mulledy became seised of the manor of Rathweir; and the said William, Earl of Clanricarde continued to be seised in tail male of the said advowson, which thenceforward became an advowson in gross.

That William the seventh Earl being so seised of the advowson in gross, died on the 10th day of October, 1687, leaving Rickard his eldest son, eighth Earl of Clanricarde, who thereupon became seized in fee tail of the advowson.

[335] The count then set forth the act of parliament, made in Ireland in the second year of the reign of her late Majesty Queen Anne, intituled "An Act to Prevent the further Growth of Popery;" whereby the advowsons of Roman Catholics became vested in the Crown, until conformity, as therein provided.

That Rickard, the eighth Earl of Clanricarde, being so seized of the advowson, died on the 6th of April, 1708, without issue, leaving John, who thereupon became ninth Earl of Clanricarde, his brother and heir at law. That John, ninth earl, being a Roman Catholic, the advowson in gross became vested in the Crown, under the said act of parliament, until such conformity as thereby directed. That John the ninth Earl died in 1722, leaving Michael his son and heir at law, who became tenth Earl of Clanricarde, and who duly conformed to the Protestant religion; whereupon the advowson of Killucan became revested in him in tail male. That on the 28th day of November, 1726, Michael the tenth Earl died, leaving John Smyth, his eldest son, who thereupon became eleventh Earl of Clanricarde, and seised in fee tail of the advowson of Killucan.

The count proceeds to state that, by a private act of parliament made in England, in the tenth year of the reign of his late Majesty King George III., the said advowson

was, amongst other things, limited to the use of the said John Smyth, eleventh Earl of Clanricarde, for the term of his natural life, with remainder to his eldest son Henry, Lord Dunkellyn, for his life; remainder to the first and other sons of the said Lord Dunkellyn, in tail male; with remainders over, and the reversion in fee to **[336]** the said John Smyth, eleventh Earl of Clanricarde: and by the said last mentioned act of parliament the said Henry Lord Dunkellyn was empowered to appoint a jointure, chargeable upon said settled estates, in favour of any woman with whom he should intermarry, and to limit and create a term of years for securing the due payment of such jointure. It then states the death of John Smyth, the eleventh Earl, in the year 1782, leaving the said Henry, Lord Dunkellyn, his eldest son, who thereupon became twelfth Earl of Clanricarde, and seised for the term of his life of the advowson in gross.

The count then alleges that Henry, twelfth Earl being so seised and empowered, in the year 1785 intermarried with Urania Anne Paulett (now Dowager Marchioness of Clanricarde); and that by deed, bearing date the 15th day of March, 1785, and made before and in contemplation of the said marriage, the said Henry, twelfth Earl of Clanricarde, by virtue and in exercise of the said power, limited and appointed to the use of the said Urania Anne, a jointure of £2000 per annum, charged upon said settled estates; and also thereby limited, appointed, and demised unto Henry Penruddock Wyndham, and the said Marquis of Winchester, amongst other things, the said advowson of the church of Killucan for a term of five hundred years, for the better securing to the said Urania Anne the due payment of the said jointure of £2000. That the said Henry, twelfth Earl of Clanricarde, who was afterwards Marquis of Clanricarde, died on the 10th of May, 1797, leaving the said Urania Anne Marchioness of Clanricarde, his widow, him surviving (and who is still living). **[337]** That the said Henry Penruddock Wyndham, and the said Marquis of Winchester, being possessed (amongst others of the said settled estates) of the said advowson for the said term of five hundred years, the said Henry Penruddock Wyndham died on the 1st of May, 1810, leaving the said Marquis of Winchester, the now Defendant in error, him surviving, and sole possessed of the said advowson for the residue of the said term of five hundred years, and intitled to present a fit and proper person to the said church of Killucan, when the same became vacant by the death of the said Reverend Henry Wynne, the last incumbent thereof, on the 15th of February, 1828.

To this fifth count of the declaration the Bishop of Meath, one of the Defendants below, pleaded thirteen pleas: by the first of said pleas the said Bishop traversed the appendancy of the advowson to the manor.

Secondly. The seisin of Rickard, fourth Earl of Clanricarde, of the manor with the advowson appendant.

Thirdly. The admission and institution of Edward Donnellan on the presentation of Rickard, fourth Earl of Clanricarde.

Fourthly. The seisin and sequestration of the manor and advowson to the use of King Charles II.

Fifthly. The grant of the manor, with the advowson appendant, by King Charles II., to Rickard sixth Earl of Clanricarde.

Sixthly. He pleaded *nul tiel* record of the letters patent of the 8th April, 14th of Charles II.

Seventhly. He traversed the grant of the advowson by John Smyth, Earl of Clanricarde, unto **[338]** Eaton Stannard and Robert French, by a deed bearing date the 25th of May, 1745, mentioned in the fifth count of the declaration, and thereby stated to have been lost, but not material to be further adverted to.

Eighthly. He traversed the loss of the said deed of the 25th of May, 1745.

Ninthly. He pleaded *nul tiel* record of the Act of Parliament 10th of George III.

Tenthly. He traversed that Henry, Earl of Clanricarde, did by the deed of the 16th of March, 1785, limit, appoint, and demise the advowson to Henry Penruddock Wyndham and the Marquis of Winchester.

Eleventhly. That the deed of the 16th of March, 1785, was made and is lost.

Twelfthly. That the Marquis of Winchester is possessed of the advowson.

Thirteenthly. He pleaded a grant by his late Majesty, King Edward IV., on the 9th of January, in the ninth year of his reign, of the said advowson in gross to

William, then Bishop of Meath, and his successors; and that on the 12th day of April, 1626, Edward Donnellan was collated to the said church by Anthony, Bishop of Meath, in right of his said bishoprick, and traversed that the said Edward Donnellan was admitted to the said church on the presentation of the said Rickard fourth Earl of Clanricarde.

The Reverend James Alexander, the other Defendant below, pleaded eight pleas to the said fifth count of the declaration.

The first, second, third, fourth, sixth, and eighth, of the clerk's pleas correspond with the first, second, third, fourth, ninth, and twelfth of [339] the Bishop's pleas. He further traversed the seisin of Michael, tenth Earl of Clanricarde.

And, that it belongs to the Marquis of Winchester to present a fit person to the said church.

The eleventh plea of the Bishop to the fifth count of the declaration having been so framed as to render it impossible for the Plaintiff below safely to take issue thereon, he was compelled to demur thereto; and the Bishop having joined in demurrer the same was argued in the Irish Court of Common Pleas, and judgment had thereon in favour of the Plaintiff below.

Issue being joined upon the other pleas, the cause was tried at the bar of the Court of Common Pleas in Ireland, and before a special jury of the county of Westmeath, on the 15th day of November, in the year 1830.

To maintain the said issues on the part of the Plaintiff below, the substance of the proofs adduced was as follows:—

It was shown that King Edward II. being seized of the manor of Rathweir with its appurtenances, granted the same, together with all advowsons of churches thereunto belonging by letters patent, bearing date the 6th of April, in the 9th year of his reign, to John d'Arcy and Johanna his wife, in tail male: and it appeared by the enrolment of a writ issued on the 21st of July, in the fifth year of the reign of King Edward III., ordering the justices of Ireland to cause an extent of the said manor to be made, and also by the enrolment of an extent of the said manor made in pursuance of said writ, at Drogheda, in the fifth year of the reign of King Edward III., that there then was in the [340] said manor a certain parish church, the patronage of which belonged to the said manor. There was further shown by an entry in an ancient book remaining of record in the registry office of the diocese of Armagh, the presentation by Sir William d'Arcy of one Dermott Martin to the rectory of the parish church of Rathweir, on the 13th of March, 1509, therein stated to be then vacant by the death of Thomas d'Arcy, the last incumbent thereof. An inquisition taken before the Barons of the Exchequer of Ireland, at Dublin, in the twenty-third year of the reign of King Henry VIII. was also shewn, whereby, amongst other matters, it was found that the said King Henry VIII. was seised of the said manor with its appurtenances; and there was further shown the enrolment in the Rolls' Office of the High Court of Chancery in Ireland of a presentation by King Henry VIII., dated the 18th of August, in the twenty-fourth year of his reign, of one William Cocks to the said church of Rathweir, being then vacant, and to the donation of the said king belonging.

It was further shown, that King Henry VIII., by his letters patent bearing date at Westminster, the 16th of August, in the twenty-sixth year of his reign, granted the said manor of Rathweir, with its appurtenances, together with the advowsons of churches, to one John D'Arcy and his assigns for life, at the rent of twenty marks: and by letters patent, bearing date at Westminster the 29th of October, in the fourth and fifth years of the reign of King Philip and Queen Mary, reciting the said life estate of the said John D'Arcy, in the said manor of Rathweir with its appurtenances: also the Crown's reversion in the same after the death [341] of the said John D'Arcy, the said king and queen granted to Gerald, Earl of Kildare, and Mabella, his wife, and to the heirs male of the body of the said Earl, the reversion of the said manor of Rathweir with its appurtenances, and all advowsons and right of patronage of churches thereto belonging, or in any manner whatsoever appertaining.

It further appeared, that by letters patent of King James I., bearing date, at Dublin, the 30th of October, in the first year of his reign, after reciting the said last-mentioned patent of King Philip and Queen Mary, and reciting that said Gerald, Earl of Kildare, was dead without issue male, the said King James I. granted and

confirmed unto one John King all his reversion in the said manor of Rathweir, with its appurtenances, and all advowsons and patronage of churches in any manner belonging or appertaining to the said manor, as fully as he the said King James, or any of his progenitors had enjoyed the same, to hold to the said John King, his heirs and assigns for ever.

The Plaintiff below also produced an attested copy of a fine, bearing date on the morrow of the Purification, in the fourth year of the reign of King James I., and levied by the said John King, and Catherine his wife, to Rickard Burke, fourth Earl of Clanricarde, of the manor of Rathweir, with all advowsons, rectories or rights, patronage and other appurtenances to the said manor belonging; also a copy of the enrolment from the Rolls' Office of Chancery of a king's letter, bearing date the 8th of April, in the sixth year of the reign of King James I., directing the acceptance from Rickard, fourth Earl of Clanicarde, of a **[342]** surrender of all his manors and temporal and spiritual hereditaments in Ireland; and that a new grant of the same should be made by letters patent; and that a commission should issue under the great seal of Ireland to inquire as to the same; and also an inquisition taken at Athlone, on the 4th of May, 1609, pursuant to said commission, finding that the said Rickard, Earl of Clanricarde, was then peaceably seised in his demesne as of fee of the manor of Rathweir with its appurtenances, by purchase from John King, as appeared by deed of bargain and sale, dated 1st January, 1606, and of all advowsons of churches and vicarages in any manner belonging to the same; and as also appeared by the exemplification of the said fine; and also letters patent, dated, at Dublin, the 19th of July, in the eighth year of the reign of King James I., whereby he granted and confirmed to Rickard, fourth Earl of Clanricarde, the manor of Rathweir, with all its rights, members, and appurtenances, and hereditaments, as fully and amply as the same ever came or ought to have come to the Crown by any legal means whatsoever, to hold to the said Rickard, fourth Earl of Clanricarde, and his heirs and assigns for ever.

And the Plaintiff further produced and proved a duly attested and compared copy of the letters patent mentioned in the fifth count of the declaration, and dated at Westminster the 8th of April, in the fourteenth year of King Charles II., and confirmed as hereinbefore stated by the Act of Settlement, granting, amongst other things, the said manor, and all rectories and advowsons of churches whatsoever in Ireland, which Rickard, fourth Earl, or Ulick, Marquis of Clanricarde, was **[343]** possessed of by any title or any claim, to Rickard, sixth Earl of Clanricarde, and the heirs male of his body; remainder to the heirs male of the body of Ulick, first Earl of Clanricarde; remainder to the right heirs of the said Ulick.

The pedigree of the Earls of Clanricarde, as stated in the fifth count of the declaration, was admitted by the Defendants below; and also that there had been a conveyance of the manor of Rathweir to Sir Patrick Mulledy, and that he or the persons deriving under him had forfeited, and that all their property had vested in the Crown under the Act of King William the Third.

The Plaintiff below also produced from amongst the papers of the present Marquis of Clanricarde two deeds; one bearing date the 4th of March, 1699, whereby Rickard, then Earl of Clanricarde, conveyed to John Morgan of Monksfield, in the county of Galway, Esquire, and his heirs, upon trust, the advowsons and rights of presentation to churches of the Clanricarde family; and the other bearing date the 27th of March, 1744, purporting to be a reconveyance by John Morgan of Kilcolgan, in said county of Galway, to John Smyth, Earl of Clanricarde, of the said advowsons; and, amongst others, the advowson or right of patronage of, in, and to the rectory and parish church of Rathweir and Killucan, in the county of Westmeath.

And the Plaintiff below produced and gave in evidence an attested copy of the private act of parliament in the fifth count of the declaration, mentioned to have been made in the tenth year of the reign of King George III., and vesting the settled estates of John Smyth, Earl of Clanricarde, **[344]** in the kingdom of Ireland, in trustees to the uses therein mentioned, discharged of the trusts contained in the deed of 25th of May, 1745; and by which act the power mentioned in the said fifth count was vested in Henry, then Lord Dunkellyn, the eldest son and heir of the said John Smyth, Earl of Clanricarde, to charge the said settled estates with a jointure of £2000, and to secure the same by a trust term, as in the said count mentioned; and also the original memorial of a deed dated the 16th of March, 1785, whereby the

said Henry, Lord Dunkellyn, upon his intermarriage with Urania Anne Paulett, the present Marchioness Dowager of Clanricarde, exercised his said power of charging his said estates (including said advowson) with said jointure of £2000; and by which, for securing the payment of said jointure, he the said Henry, Lord Dunkellyn, created and vested a term of 500 years in the same, in the said Henry Penruddock Wyndham and the said Marquis of Winchester, and which said term then was and still is vested in the said Marquis of Winchester, he having survived his said co-trustee, the said Henry Penruddock Wyndham.

The evidence relied upon by the Plaintiff below, with respect to seisin of the advowson, or the exercise of the right of patronage, to the rectory and vicarage of Killucan, was as follows:—

1. An attested copy of a royal commission, bearing date the 22d of June, in the fifteenth year of the reign of King James I. to inquire, amongst other matters, by whom the several parsonages, vicarages, and other spiritual livings, then were and had been held and enjoyed, and a duly compared and attested copy of an **[345]** entry in the regal visitation-book of the year 1615, being the return to the said commission in the words following: "1615. Rectoria de Rathweir, alias Killucken, comes Clanricarde, patronus: dicta rectoria valet per annum, £200; Magr. Johannes Carter, clericus, in artibus Magr., verbi divini predicator, rector. Vicaria de Rathweir, alias Killucken, ecclesia et cancel. reparat. comes de Clanricarde patronus: dicta vicaria valet per annum £10, Magr. Nicholas Robinson, clericus, verbi divini predicator, vicarius; Mr. Jacobus Byram, clericus, in artibus bachalarius, verbi divini predicator, curat." Also an entry in the book containing returns of institutions and collations by the archbishops and bishops of Ireland remaining of record in the First-Fruits Office in his Majesty's Court of Exchequer, showing by certificate of Anthony, Bishop of Meath, dated the 28th of April, 1627, that Edward Donnellan was admitted to the rectory and vicarage of Rathweir: and by certificate of Arthur, then bishop of Meath, dated in 1743, that one Peter Warburton was instituted on the 13th of February, 1741, into the rectory and vicarage of Rathweir: also an entry in the regal visitation-book of 1633, whereby it appeared that Mr. Edward Donnellan was then rector and vicar of the said rectory and vicarage.

2. An attested copy from the book of commissioners in the Vice Treasurer's office of Ireland, of a commission of the Commonwealth of England, dated Dublin, 19th August, 1653, directing inquiry by the Commissioners of Revenue, by examination of witnesses on oath, among other things, "of all manors, rectories, and other hereditaments, who owned same upon the 23d **[346]** of October, 1641, and who now enjoy or claim the same; and what estate in the same was enjoyed or claimed in 1641, and what now." And an attested copy of the original return to the said commission, dated Athlone, 7th November, 1653, for county Westmeath, now remaining of record in the said Surveyor-General's office, finding upon oath, "that the parsonage and vicarage of the parochial church of Killucan was on the 23d of October, 1641, held by Edward Donnellan, clerk and parson of the same by virtue of the presentation of the Earl of Clanricarde, patron thereof, and by the admission of the ordinary."

By the examination of three witnesses, namely, Anthony Dopping, John D'Arcy, and Sir William Betham, the Plaintiff below proved the finding at Lowton House, in the county of Meath, of two documents; one a parchment deed bearing date the 28th day of March, 1637, and purporting to be a grant of Ulick, fifth Earl of Clanricarde, to Doctor Edward Donnellan of the then next avoidance of the rectory and vicarage of Rathweir, otherwise Killucan; and the other dated 28th of February, 1695, and purporting to be a case stated for the opinion of counsel on the part of the said Anthony Dopping, Bishop of Meath, wherein it was, among other things, stated on the part of the said Bishop, "that in the year 1637, Ulick, Earl of Clanricarde, granted to Doctor Donnellan, incumbent of Rathweir, his executors and administrators, the next presentation to the rectory and vicarage of Rathweir, dated the 28th March, 1637; that in 1642, both rectory and vicarage being void by the death of Doctor Donnellan, his widow and executrix, presented *pro hâc vice tantum* William Barry to both, who was insti-**[347]**-tuted by the bishop June 13th 1642, but not inducted till the 27th February, 1660; and that, by a mandate from the Bishop's successor, the bishop that instituted being dead before William Barry's induction."

The documents were produced by Anthony Dopping, who deposed that he was a descendant of Anthony Dopping, Bishop of Meath, and that he had in his possession several papers which were handed to him as coming from Lowton House, where the Dopping family papers were kept, that Lowton House is the family mansion of the Doppings, and that the papers in his possession were handed to him by John Darcy, who is a relation of the Dopping family, and that the two documents were handed to him among the said papers by John Darcy at a Major Sirr's, and that he never saw the said two documents or any of them at Lowton House. John Darcy deposed that he handed a parcel of papers to Anthony Dopping, the last witness, and that he got the said parcel of papers from Sir William Betham. Sir William Betham deposed that he found a parcel of papers at Lowton House among other papers, and that the Reverend Mr. Sirr was with him, that he found the said parcel of papers in a room with other papers relating to the see of Meath, and that he handed the said parcel of papers to the said Mr. Sirr; that Lowton House belonged to or is inhabited by a Mrs. Dopping, a middle aged lady, and that he put no mark on the said parcel of papers, but that he took copies of them; and the two documents produced were among them; that at the time of finding the said parcel of papers he found several visitation books of the diocese of Meath, particularly one of the year 1616. By the **[348]** evidence of the Rev. G. Brabazon, the registrar of the diocese of Meath, it appeared that there was no registry of ecclesiastical or other records of the diocese of Meath (except one old roll) anterior to the year 1717, and that no visitation-books of the diocese, or entries of presentations, admissions, institutions, or collations to ecclesiastical benefices within the diocese, or other papers or records relative to the diocese, or the benefices within the same, were preserved or to be found in the said registry office, relating to any period anterior to the year 1717.

To the admission of these documents (the grant and case) in evidence and the directions of the Court exceptions were taken on the part of the Defendant, the substance of which is set forth in the errors assigned in the Exchequer Chamber, and in parliament as after stated.

The Defendants below having relied upon the grant of King Edward IV. to William Sherwood, Bishop of Meath, stated, in the thirteenth plea of the Defendant the Bishop, the Plaintiff below (protesting against the validity of said alleged grant and further insisting that it had not in a single instance been acted upon) relied upon its total extinction, (if it ever had valid existence,) by the act of resumption of the tenth of King Henry VII., which was given in evidence on the part of the Plaintiff below; and by which, for the reasons and considerations therein contained, it was ordained and enacted, and established by the authority of the then parliament, "that there be resumed, seized, and taken unto the said King's hands, amongst other things, all manors, lordships, castles, advowsons of churches, free chapels, lands, tenements, rents, services, fee farms, and all other **[349]** manner of profits, hereditaments, and commodities, whereof the said sovereign lord, or any of his noble progenitors, kings of England, was at any time seised in fee simple or fee tail, from the last day of the reign of King Edward II. to the passing of the said act; and by the same authority all manner of feoffments, gifts, intails, grants, leases for term of lives, or term of years, releases, confirmations, and reversions, of all and every of the aforesaid honours, manors, lordships, and of all others as before specified, or of any parcel of them, as well by authority of parliament, as by any letters patent made under the Great Seal of England or Ireland, to any person or persons, or by whatsoever name or names, they may be named jointly or severally, from the said day to be resumed, revoked, annulled, and made void, and of none effect in law.

The evidence on the part of the Defendants below (the now Plaintiffs in error) consisted of the following documents.

An attested copy of a king's letter or mandate, bearing date the 8th day of July, 1354, in the twenty-eighth year of the reign of King Edward III. whereby, after reciting that the judgment against Roger De Mortimer, Earl of March, had been annulled as erroneous, the said King Edward III. commanded that the rolls' memoranda and muniments, which belonged to the said Earl, and which were in the treasury of the Exchequer, should be delivered over by the treasurer and barons of the Exchequer to Roger de Mortimer, then Earl of March, cousin and heir of the said late

Earl, or his attorney in that behalf; to which letter a memorandum is attached, of the delivery of certain rolls pursuant thereto, to the treasurer of the said Earl.

[350] Also an attested copy of letters patent of King Henry V. dated 9th March, in the second year of his reign, containing certain recitals, and granting certain privileges to Roger, Earl of March.

Also an attested copy of the alleged grant by King Edward IV., to Bishop Sherwood, as set forth in the thirteenth plea of the Defendant below, the Bishop of Meath.

And a parchment roll purporting to be a proxy roll of the diocese of Meath, and to be written in the year 1518.

The Defendants below also gave in evidence an entry in the visitation-book of the diocese of Armagh for the year 1664, stating that William Barry exhibited collation of the rectory and vicarage of Killucan, otherwise Rathweir, granted by Anthony, bishop of Meath, dated 13th January, 1642, and exhibited mandate to induct into the aforesaid rectory and vicarage, by Henry, Bishop of Meath, dated 16th February, 1660; and another entry from the visitation-book of the diocese of Armagh for the year 1745, in these words: "Rathweir or Killucan rectory and vicarage, collative, rector and vicar, Peter Warburton:" also the collation of the Reverend Anthony Dopping, by Anthony Dopping, bishop of Meath; and the collation of the Reverend Henry Wynne, the late incumbent of the said benefice.

The Defendants below further gave in evidence an attested copy of a fine, bearing date on the morrow of the Holy Trinity, in the first year of the reign of King James II., purporting to be a fine levied by William, Earl of Clanricarde, and Helen, Countess of Clanricarde, his wife, to John Brown, Gerald Dillon, and Anthony Mulledy, Esquires, of (amongst other things) the advowson of Killucan.

[351] This evidence was the subject of an exception on the part of the Defendant in error, who relied upon the inadmissibility of the said alleged fine upon any of the issues, knit upon the record between the parties, as also upon its non-operation, to bar his the Marquis of Winchester's claim to the advowson, even supposing it to have been admissible in evidence.

The Defendant also gave evidence of collations made in some instances by the Bishop of Meath, which the Plaintiff offered evidence to explain.*

Upon the foregoing pleadings and proofs, the special jury, empanelled to try the issues joined between the parties, found a verdict upon all the issues in favour of the Plaintiff below.

The Defendants below took a bill of exceptions to the charges and direction of the Court to the Jury; and judgment thereon having been given for the Plaintiff below, the Defendants below brought their writ of error in the Irish Court of Exchequer Chamber, and assigned for errors the same causes as constituted their exceptions in the Court of Common Pleas.

The substance of the errors assigned was, that the Court of Common Pleas ought not to have allowed the said two documents produced from Lowton House to have been given in evidence.

That the court ought to have told the jury, that if they believed that King Edward IV. made the grant of the advowson to Bishop Sherwood, and that he was seised of the manor at the time of making the grant, in such case the grant was a **[352]** good and valid grant at the time of making thereof, and had rendered the advowson for ever disappendant and in gross, and that it never again became appendant to the said manor, and did not pass to the said John King by the letters patent of the first year of King James I.

That the Court ought not to have told the jury, that although they should believe that King Edward IV. was seised of the manor, and had made such grant of the advowson to the said Bishop Sherwood, yet that the said advowson had again become appendant to the manor by force of the act of the 10th of King Henry VII.

That the Court ought to have told the jury, that the grant of the advowson by King Edward IV. to Bishop Sherwood was not resumed, revoked, or avoided by the act of the 10th of King Henry VII., and that the grant, notwithstanding the said act, or any other act or matter, was and still is a good, valid, and subsisting grant.

That the Court ought not to have told the jury, that the grant to Bishop Sherwood

* See the bill of exceptions in the appendix to the cases in the House of Lords, the errors assigned, and the argument, *post*.

became, and was, on the passing of the act of the 10th of Henry VII. resumed, revoked, avoided, and made of none effect.

That the Court should have told the jury, that if they believed that King Edward IV. was seised of the manor and advowson as of his private property, and, being so seised, had made the grant, that the same was not resumed, revoked, or avoided by the act of the 10th of Henry VII.

That the Court told the jury, there was no evidence that King Edward IV. was seised of the advowson as of his private estate.

That the Court refused to direct the jury, that **[353]** by the effect and operation of the fine levied by William, seventh Earl of Clanricarde and Helen his wife, to John Brown, Gerald Dillon, and Antony Mulledy, all the estate and interest of the said Earl William and his heirs, of and in the said advowson, was conveyed and passed away from the said Earl and his heirs; and that the said Earl, and his heirs, and the Plaintiff below, were estopped, barred, and concluded thereby from having, acquiring, claiming, or alleging any estate term, interest, or possession, of or in said advowson.

That the Court told the jury, that the fine was not a bar to the Plaintiffs' right to recover on the issues.

And—That the Court refused to tell the jury, that the fine was sufficient evidence to show that the Plaintiff was not, and had not been, possessed of the said advowson, or any term therein.

The Defendant in error having filed a joinder to the errors so assigned, the case was argued on several days by counsel for both parties respectively, in the Court of Exchequer Chamber in Ireland, whereupon the judgment obtained by the Defendant in error, in the Court of Common Pleas, was affirmed.

From this judgment a writ of error was brought in parliament where the same errors were assigned.

For the Plaintiff in error, the Attorney General and Sir William Follett (in chief and in reply).

The title of the Plaintiff in this case stands upon the allegation of one grant and one presentation and admission under it, supported by documents which have been improperly admitted in evidence: whereas, upon the face of this record, at least from the year 1626, this living has continually been filled by collations from the Bishop of Meath, **[354]** and it is only in the year 1828, two centuries after the time when we can trace the rights of the Bishops of Meath, that it has been called in question. That appears on the face of these proceedings. If we could travel out of the record into matters which have since been investigated, we could shew that they have collated long prior to that date.

It appears that in the year 1626, the very person upon whose presentation they count, namely, Donnellan, was collated by the Bishop of Meath. It appears that in 1642, William Bury, who they say was presented by a grant of the Earl of Clanricarde, was collated by the Bishop of Meath. It appears that in 1695, Anthony Dopping was collated by the Bishop of Meath. In 1741, Peter Warburton was presented, not by the Earl of Clanricarde, but by the King, in consequence of a vacancy created by that Anthony Dopping being made a bishop. In 1784, Henry Logan was collated by the Bishop of Meath, and he held it down to the year 1828, when the present possessor was collated by the Bishop of Meath. To get rid of the effects of these collations, it is suggested that it is the duty of a bishop to collate to the benefice in the event of a lapse; but how do they account for the Bishop of Meath collating in 1626, and continuing to do so without any opposition, the individuals so collated continuing to hold the living to their death, and upon their deaths the then bishop again collating to that living? the strongest proof of the continued exercise of the right.

Against such proof a verdict has been obtained by the admission of documents not duly authenticated and misdirection of the Court. Those docu-**[355]**-ments were, in truth, the only material evidence in the cause, and having been erroneously submitted to the jury, it must be inferred that they produced the verdict; and, therefore, the question at issue ought to be sent to a new trial. What is that issue? The Plaintiff's present to the living under the title of the family of Clanricarde. They count upon the presentation of a person of the name of Donnellan in 1626. Since that year there has been no exercise of the right by the family. But inde-

pendently of the unauthenticated documents, how do they make out their title? It is admitted that by grant of Edward IV. to the Bishop of Meath of the advowson it had been severed from the manor, and then became an advowson in gross. They produce a grant to John King by letters patent of King James I., bearing date at Dublin the 30th October in the first year of his reign. In this grant nothing is said about the advowson of this church. It is a grant of the manor of Rathweir, with all the rights and advowsons belonging or appertaining to the manor. King James I. does not profess to grant to John King the advowson to this church; he gives him the manor of Rathweir; and the only mode in which the Earl of Clanricarde can set up any title under this grant is by shewing that when King James executed the letters patent, this advowson was appendant to the manor of Rathweir, that is the first step in their title.

In the fourth year of the reign of King James I., a fine was levied by John King and Catherine his wife to Richard Burke, fourth Earl of Clanricarde, of the manor and lordship of Rathweir, with all advowsons, rectories, or rights of patronage, and other appurtenances to the said manor belonging, [356] so that John King also passes only the manor with the advowsons belonging to it. Then a king's letter bearing date the 8th day of April, in the 6th year of King James I., directs the acceptance from Richard, fourth Earl of Clanricarde, of a surrender of all his manors, and temporal and spiritual possessions and hereditaments in Ireland, held by patent or other instruments; that a new grant of the same should be made by letters patent; and that a commission should issue under the great seal of Ireland to enquire as to the same: and by an inquisition taken at Athlone on the 4th of May, 1609, it is found that the then present earl of Clanricarde and his ancestors were lawfully seised in his demesne as of fee of the manor of Rathweir, with all appurtenances belonging to the same by purchase from John King, as appeared by deed of bargain and sale, dated 1st January, 1606, specifying among other things the said manor, and all advowsons of churches and vicarages in any manner belonging to the same; so that here again there is nothing said about the advowson of this church; no advowson is mentioned by name, but simply the manor with its appurtenances. Nor is this advowson mentioned expressly in any of the conveyances to the Clanricarde family. Such is the title under which they claim.

The question is, whether the advowson of the church of Killucan was at the time of the grant by King James, appended to the manor; of this there is no evidence, except in the two documents mentioned in the bill of exceptions. There is a deed dated in 1702, which recites that Richard, late Earl of Clanricarde, by indenture, dated 6th April, 1702, and made between the said Richard and John [357] Morgan the elder conveyed unto the said John Morgan, among others, the advowson or right of patronage of the rectory of Rathweir and Killucan. That is the only deed in which the advowson is mentioned by name, and it destroys their title.

The first plea of the Bishop, after stating that he is seised of the advowson in gross, in right of the see, traverses the appendancy of the advowson to the manor of Rathweir, there is therefore a distinct issue raised on this fact. The next material plea is a denial that Richard the fourth Earl was seised of the manor with the advowson appendant; and there is a denial that Edward Donnellan was admitted and instituted on the presentation of Richard the fourth earl.

The Plaintiffs, to prove the facts, offer a deed which they state to have been found in Lowton House; that deed is not pretended to be an act of the fourth Earl of Clanricarde whose seisin is traversed, or any presentation of Edward Donnellan, whose alleged presentation is traversed. It has been contended that we have no right to offer in evidence a certain fine, because it was not properly admissible upon any of the issues raised. Now upon what issue is the deed of the fifth Earl of Clanricarde or the presentation of Barry, admissible evidence, unless it be upon the general one to prove the title of the Plaintiff? Is it because the fifth Earl of Clanricarde granted the next presentation to Donnellan, that therefore the fourth Earl of Clanricarde was seised of the advowson; or what proof does that afford that Edward Donnellan was presented by the fourth Earl of Clanricarde? It is admissible in evidence no doubt because it shews the title of [358] the Clanricarde family, under which the Plaintiff counts: And therefore when you come to the general traverse, no doubt the deed of the fifth Earl of Clanricarde, or the presentation by the representative of Donnellan would be admissible in evidence, but it is no evidence

under the special traverses. It is important for your lordships to bear in mind that the most material document of evidence for the Plaintiff is offered, not upon a distinct issue or traverse, but upon the general traverse upon which they say our fine is not admissible in evidence.

Supposing that the documents are receivable in evidence upon the pleadings as they stand, and that if properly authenticated they prove the title of the family of Clanricarde, the next question is whether they were properly authenticated. We contend, that according to the established rules of evidence, neither the deed nor the case ought to have been submitted to the jury at all. It has been superfluously contended that it is a rule of law, that a deed thirty years old does not require proof by an attesting witness, and that the courts discountenance the production of an attesting witness to prove the execution of such a deed. But this doctrine must be qualified by the question, does it come from the proper custody, which is the material point of the issue in this case, and it applies to both documents. As to the case, supposing it properly authenticated, there is another and distinct objection, the objection to receiving it in evidence, as being a statement made by a client for the opinion of his counsel.

With respect to the deed, the proof that it comes from the proper custody is upon the Plaintiff. In [359] the course of the discussion which has taken place, it has been assumed that these papers have been found in the custody of a descendant of the bishop of Meath. The evidence proves no such thing; Dopping says, "he is a descendant of Anthony Dopping, formerly Bishop of Meath, and that he has in his possession several papers." But where did he get those papers? he never had the custody of those papers. He must shew that he is that species of descendant who was likely to have the papers of the party, and that they were properly in his custody as the descendant of that person. But the mere fact that he was a descendant, if he had produced them from his own house, would not be sufficient to allow those papers to be received in evidence. This he does not shew, and therefore so far as regards authentication these papers might as well have been produced at the trial by a stranger. It appears that Sir William Betham went to Lowton House, "and that the Rev. Mr. Sirr was with him; that he found said parcels of papers in a room with other papers, and that he handed said parcel of papers, to the said Mr. Sirr on or about the 28th of October, 1828; that Lowton House belongs to or is inhabited by Mrs. Dopping, a middle aged lady." But whether she is connected with the family of the Bishop of Meath does not at all appear. Sir W. Betham says, "he put no mark on the papers, but that he took copies of them; that at the time of finding the papers he found several visitation books of the diocese of Meath, particularly one of the year 1616, by George, Bishop of Meath, and that there were in the same room other papers relating to the see of Meath, several of [360] which were in the parcel which he brought away." These other papers were not produced.

Suppose a witness to state that he found certain papers, produced with a book which he says was a visitation book of the diocese of Meath; and suppose upon enquiry it turned out that the book was a book belonging to the diocese of Ossory: does it not show the extreme danger of allowing a witness to state the contents of a written paper? If the document is to receive authentication upon the ground that it was found with the visitation book of the diocese of Meath, it was most important that the book should be produced to show that it was in fact the visitation book of the diocese of Meath. Are we to take the statement of Sir William Betham, the brother of the party in the cause, that this book belonged to the diocese of Meath, and that these papers were found in connection with it? Lowton House has no connection with the registry of the diocese; and, if these papers are to receive authentication merely from being found in company with the visitation book belonging to the diocese of Meath, that book ought to have been produced.

In the case of wills, if a witness goes to the proper custody for such wills, and says, "I found this among the wills of a certain date," you need not produce the other wills to prove that they bore that date. But if, as in this case, a witness goes to a house unconnected with the diocese, not proved to be connected with the Bishop or any of the parties, then if such paper is to receive its authentication by other papers that are found with it, those papers should be submitted to the court, that the court may see whether they answer the [361] description given by the witness; otherwise

a great doubt may arise, and the fact may be disputable. It is different where the paper is produced from a place where such documents are likely to be, or ought to be, as from among the title deeds of an estate, from the muniment room or office where they ought to be kept; that is enough. So, if the witness in this case had been to the Bishop's registry, and produced the paper from the place where the visitation books or where the presentations are kept, that would be good evidence without producing those other documents. But where the whole effect of the document is to depend on the papers which are found with it, and they are found in a place where you would not expect to find any paper connected with the document, then, to authenticate the paper in question the others must be produced; otherwise, you allow the witness to give parol evidence of the contents of papers, in order to make an ancient document evidence. This would be a most dangerous rule to lay down.

But if the finding of the document at Lowton House is material, should not Mrs. Dopping, who is the inhabitant, or somebody connected with that house, have been called as a witness to authenticate those papers? Where were they when found? Sir William Betham goes into this house, and finds them. But where? not in a place of deposit. Apparently, for anything that appears in the evidence as stated, these were papers that might have been put on a table in that house for the express purpose of being found by Sir William Betham. Should we not have the evidence of some witness who knew the papers, and that they **[362]** belonged to the Dopping family (of which we have no evidence). Anthony Dopping seems to have no knowledge of these facts. If those papers belonged to the Dopping family, ought not some person to have been produced, who could prove that they belonged to the family, that they were kept in that house, and that they were found by Sir William Betham in the usual place of deposit? It appears on the proceedings, that there are no papers in the registry of the diocese of Meath prior to 1717. It is suggested that the papers might have been in the custody of a bishop of Meath; that these papers were found among the papers which were kept and belonged to, and have descended from, a bishop of Meath prior to 1717; that these papers were in the company of papers belonging to a bishop of Meath prior to 1717; and that they were kept with other papers relating to the affairs of the diocese, and continued to be so kept down to the time when they were found. These are ingenious suggestions, but there is no evidence to support them.

There is something extremely suspicious about the production of this paper, not to take it on the naked question of admissibility of evidence. Why have they not called persons connected with this house, and these papers? Why have they left it to a relative of one of the parties, to go to that House and pack them up, and, instead of producing them himself, handing them to some other person to be produced, who states himself to be a descendant of the family? The document itself is not quite free from suspicion on the face of it. It is a cancelled deed, dated in 1637, and without a seal: then how is it connected with the Dopping family? It purports to be dated in 1637. But there is no evidence that any person of the name of Dopping **[363]** was Bishop of Meath in 1637. No person of that name became Bishop of Meath, until long after that date. How did this cancelled deed get into the possession of Bishop Dopping? It professes to be a deed granting the next presentation by the then Earl of Clanricarde to Dr. Edward Donellan. Where should that deed be? Not in the custody of any bishop. It has been suggested that the bishop might want the deed for his own protection. In what way? A stranger, if he made the presentation to the next turn, would be expected to produce to the bishop the authority under which he made it. But he would not leave it with the bishop. It would remain in the hands of the grantee. They say there was a *quare impedit*; but if so the bishop does not want the deed, for he has no interest whatever, but is bound to present the person who produces the deed. It is not to the bishop that you would look, but to the family of the grantee; that is the proper custody of the deed. If a search had been made among the papers of the family of the grantee, and the deed had not been found, but it was produced from a place of custody beyond all suspicion—for instance, the registry of the diocese—it might be said that, although the deed would most properly have been in the possession of the grantee, yet, inasmuch as the bishop must have acted on the deed, and it was found among the documents of the diocese, the court might properly under such circumstances admit the deed to be produced in evidence. But

in this case there is no evidence that any bishop of Meath ever lived in Lowton House, or that it ever belonged to any bishop of that see. There is no evidence that any papers belonging to that see were ever kept there.

[364] The case on which the Plaintiff mainly relied, of *Bullen* and *Michel* (2 Price, 399. ; 4 Dow, 298), differs from this in the facts. There it appeared, that the monastery on the dissolution had come into the King's hands, and he had granted it out again ; and a great portion of the possessions of that abbey had been granted to a person under whom the Earl of Bath claimed ; and the Earl had in his muniment room the title deeds relating to that property ; and among other deeds was found a certain chartulary of the abbey ; upon proof of these facts, it was held that the document came from the proper custody, for Lord Bath was possessed of the very land to which the document related, and it was kept among the title deeds of the property. But suppose there had only been evidence at the trial that somebody had gone into the house of Lord Bath, and carried away that chartulary without proof how it was kept, and without connecting Lord Bath with the monastery, the witness merely stating that he found it ; or suppose another witness had been called to state that papers relating to the abbey were found in that house ; would that have been sufficient evidence?

The case of *Bullen* and *Michel,* so far from being an authority for the Plaintiff, is an authority to shew the deficiency of his evidence. None of the facts proved in that case to shew that the document came from the proper custody are in proof here. If they existed they might have been proved, and the defect of proof raises a suspicion.

Again, *Randolph* v. *Gordon* (5 Price, 312) is an authority against the admission of this evidence. In that case, the Lord Chief Baron held that the book was **[365]** not admissible, and said, that though the Defendant was the grandson of the party who was the former rector, yet he might have got the book from somebody else, who handed it over for the purpose of having it produced. There was no proof that it had existed for any length of time among the documents of the family, and therefore it was not admissible. In that case, many of the entries purported to be made by the rector, the grandfather of the person from whose custody it came ; but it was held that it was not sufficient without proving that it was found among the papers belonging to that rector. In this case, there is no proof that this deed was found among the papers belonging to Anthony Dopping, who was Bishop of Meath ; nor is there any legitimate evidence that it was found among any papers relating to that see. The substance of the rule is, that the custody of the document should be connected with an interest in the estate. If this does not appear, directly or indirectly, it is not admissible in evidence. In *Potts* v. *Durant* (4 Gwill. 1453), the proof was rejected, because the document came from the custody of a private person. So in *Michel* v. *Rabbets* (3 Taun. 91), where it came from the Bodleian Library. So in *Swinnerton* v. *M. of Stafford* (3 Taun. 91), where a grant was brought from among the Cottonian MSS. in the British Museum. In *Atkins* v. *Hutton* (2 Anstr. 386) a terrier was rejected because it was not found in the registry of the bishop or the archdeacon of the diocese, but was brought from the charter chest of Trinity College, Cambridge. So in *Miller* v. *Foster* (2 Anstr. 416), as to a terrier found in the registry of the Dean and Chapter of Litchfield. In **[366]** *Randolph* v. *Gordon* (5 Price, 312) the document was rejected, being produced by the grandson of the rector without shewing any connexion with the rectory. *Earl v. Lewis* (4 Esp. C. 1) was a case where the papers were delivered by the son of a deceased rector, to the attorney of his successor in the living ; they were identified by the attorney, and held admissible without producing the son, the connexion between the custody of the papers and the estate being established. So in *Bullen* v. *Michel* (2 Price, 339) the document was produced from the custody of the grantee of the crown.

The objection to the deed, as not being admissible from defect in the proof of custody, is applicable equally to the case. The deed is most material evidence supposing it were acted upon, but of this there is no evidence. So far as the evidence goes, it shews that the deed was not acted on, that no person under that deed presented any clerk at all, but that a clerk was collated by the Bishop of Meath, and apparently in his own right ; for the entry is that he was collated in the ordinary form. But they seek to make out that the deed was acted upon by the production of this case, for without the case the deed is nugatory.

The case as offered in evidence purports to be a case for the opinion of counsel on the part of Anthony Dopping, Bishop of Meath; on whose behalf, on the 28th of February, 1695, it appears to have been stated, that in the year 1637, Ulick Earl of Clanricarde granted to Dr. Donnellan, incumbent of Rathweir, the next presentation of the living. If it contains such statement, it is at variance with the fact; for an ori-[367]-ginal visitation book was produced of the diocese of Armagh, for the year 1664, from which there was read this entry: "At a triennial visitation for the diocese of Meath, etc., William Barry appeared and exhibited collation of the rectory and vicarage of Killucan, alias Rathweir, granted by Anthony Bishop of Meath, dated the 13th of January, 1642." According to the evidence of this visitation book, there could not be any presentation under this deed. The fact therefore according to the evidence is contrary to the statement, supposing the case to state it.

But how is this case evidence against the present Bishop of Meath, the Defendant in this cause? There is no proof that this case was drawn by Anthony Dopping, Bishop of Meath. It is not his hand-writing. It does not come from any place of deposit of his papers. It is not authenticated as a statement made by him, or in his behalf; but it is a case, found in the same way as the deed in Lowton House, with which it is not shewn that the Bishop ever had connection. They say, with respect to the deed, that the witness having stated that it was found among other papers relating to the diocese of Meath, that evidence might in some degree authenticate the deed; but how does it authenticate the case? This is a case said to be sent at the instance of some particular bishop. It is not shewn that he had any connection with the place where it was found; there was no person inhabiting that house, proved to be a relation or connection of his; there was no proof that the paper was signed by him, or that any paper belonging to him, or over which he had any control, or that he was ever in that house. According to the bill of [368] exceptions it does not appear that the case was laid before counsel.

The argument for the Plaintiff refers to a class of cases of which *Higham* v. *Ridgway* (10 East, 109) furnishes a clue to the others, as to entries made against a man's own interest. If a party make an entry charging himself, that entry after his death is evidence in an action between third parties. To say that it is evidence against a party when it is made against his own interest, having no interest to misstate or misrepresent, is stating the proposition too broadly.

The Courts have narrowed the rule, considered as settled in the case of *Higham* v. *Ridgway*. In *Chambers* v. *Bernasconi* (1 Cro. and Jer. 451) a document of this sort was tendered in evidence. It became important to ascertain the date of the arrest of a bankrupt, and the bankruptcy. The sheriff's officer who arrested him died; they offered in evidence a return made by that officer to the office of the sheriff of Middlesex, stating the arrest; the officer stated the arrest to have taken place at a house in the parish of St. Marylebone, on a certain day. And it appeared, according to the course of the practice of the sheriff's office, that the sheriff's officer is bound to make a return to that office of the time and place of every arrest he makes; that document so signed renders the officer liable to his principal, the sheriff. It was contended on behalf of Chambers in that action, that this entry of the return made by the sheriff's officer fell within the ordinary rules; that it was made by a person who clearly had no interest to misrepresent the place or the time; that, on the contrary, it was made by a person who, to a certain extent, was rendering himself liable, for he was re-[369]-turning to his principal the fact and place of the arrest, and if any escape had taken place after that return he would have been liable to that principal. Lord Lyndhurst, before whom the case was tried, received that evidence. Upon a motion for a new trial, the Court of Exchequer decided that Lord Lyndhurst was wrong, and that that document was no evidence of the place of the arrest. Mr. Baron Bayley stated, that the cases had gone far enough, that this was not one that fell within the ordinary rule of a party charging himself, and it was not receivable in evidence. The case went again to trial; the same document was tendered to Lord Lyndhurst, who, on the authority of the Court of Exchequer, rejected it; and a bill of exceptions was then tendered. It was argued in the Exchequer Chamber, and they confirmed the decision of the Court of Exchequer, that the document was not receivable in evidence.

The proposition as laid down for the Plaintiff is too broad. It is not every

entry, or every statement made by a person, even against his interest, or having no interest to misrepresent, that is receivable. To bring it within the authority of the cases, it must be an entry made by a party charging himself; an entry so made as to render him liable to some duty, or some action. If this document be receivable in evidence at all, it must be upon the ground, that it is a statement made by the Bishop of Meath against the interests of that see, and that, if so, it is receivable in evidence against his successors. That must have been the ground on which the Court in Ireland received it, and not on the general ground of its being a statement made against the interest of the party. If it is proved that during **[370]** the time when a certain person was Bishop of Meath he made a declaration, touching that diocese, against his interest, that might be receivable in evidence against his successors. But it must be shewn that it was made in his corporate capacity. A letter found in a corporation chest containing a statement by a person who, at the time, was not a burgess, was held inadmissible to affect the corporation. *Rex* v. *Gwyn* (Strange, 401).

The case of *Maddison* v. *Nuttall* (6 Bing. 226), to which reference has been made, proceeded on that ground. It was a case tried before the Lord Chief Justice of the Common Pleas on the western circuit. The question turned on the admissibility of a document purporting to be a terrier. The terrier was not found in the proper place of custody, but in the hands of a land-owner in the parish: and therefore certainly it was not in proper custody. But it was not tendered in evidence as a document authenticated by coming from a certain place of custody. Proof was given to authenticate the document *aliunde*. They called witnesses to prove, by comparing the signature and the writing in that terrier with documents admitted to be in the hand-writing of the rector of the parish at that time, that this terrier was in the same hand-writing. On the face of that terrier there was a modus in the parish, covering the tithe of hay, and the question was whether that document was receivable in evidence against the successors. The Lord Chief Justice held that it was, not on the ground that it came from the proper place of custody, but as a statement made by the rector in a matter connected with the rectory against his interest at the **[371]** time when he made it, and that the succeeding rector was bound by the statement; besides which, it may be considered as a question of reputation, whereas here is a question of particular facts. The Plaintiff refers to that case to shew that the statement or declaration made by the Bishop of Meath against his interest, or the interest of his diocese, ought to be received in evidence against his successors. If they had proved that Anthony Bishop of Meath had written or authorised that statement, *Maddison* v. *Nuttall* would apply, but in the absence of that proof it is inapplicable. They might have proved that it was in the hand-writing of the Bishop, but they did not. They might have proved that the writing, in some way or other, was a statement authorised by the Bishop of Meath at that time, but there is no such evidence. There is no evidence that he wrote, that he authorised, or that he ever saw the case.

A statment *purporting* to be the statement of the rector is not evidence; it must be proved to be a statement of the rector. In this case they say that the document, although not proved to be in the hand-writing of the Bishop of Meath, is authenticated because it came from Lowton House. But the objections to the evidence apply to this case in the same manner as to the deed.

There is another objection to the case very important, not only as regards this point, but the general policy of the law. In *Bolton* v. *The Corporation of Liverpool* (3 Sim. 467, and on App. 1 M. and K. 88), the Vice-Chancellor directed that corporation to produce to the Plaintiff, who filed a bill of discovery, a case prepared on behalf of the corporation to be submitted to counsel: **[372]** and on appeal to the Lord Chancellor, the decision was, to a certain extent, confirmed; but with observations which authorise a statement that his lordship did not approve of the principle involved in that decision. Confidential communications from a client to his counsel or attorney are not receivable in evidence on settled principles (In the suit pending *Preston* v. *Carr*, 1 Y. and J. 175. See *Greenough* v. *Gaskell*, 1 M. and K. 98). It is not the privilege of the legal adviser; it is the privilege of the client: and is founded on this reason, that it is right as a general rule, and for the general safety and convenience of the subjects of this country, that they should be allowed

freely and unreservedly to communicate any difficulties respecting themselves and their estates, to their legal adviser. It is more conducive to the public benefit to establish that as a general rule, than it is to compel or admit a breach of confidence by receiving, in such a case, a statement of a party against his own interest. An admission made by a party generally is receivable in evidence; it is strong evidence against the person making it: that is the general rule. But there is also another rule arising out of the principle, which prevents a court of justice, not only from compelling, but in an ordinary case from allowing, any disclosure of a professional communication to be made. If you consult an attorney verbally, he is not at liberty to disclose the statement you make; and for this reason, that if he might do so, if that statement made to him in this office, privately and confidentially, were given in evidence, it might have the effect of preventing all consultations with a legal adviser. If you state facts in a case for the **[373]** opinion of counsel, he would not be allowed to produce or give evidence of it. If you write a case to an attorney, the attorney not only cannot produce it, but he would not be allowed to refer to it. Would it be receivable in evidence, if some other person had got that case so laid before a counsel or attorney? If an attorney were to hand that case over to another person fraudulently, or if that other person had procured the case from the office of the attorney, and produced it in Court, a judge would not allow it to be read. Is it not quite as much a violation of principle and of policy to receive it through another medium as to receive it directly from the counsel or the attorney? If this were allowed, then an attorney to whom a confidential letter had been written might, in any case, collusively put that letter on a table, and allow some colleague to take it away, and produce it in evidence. That cannot be the doctrine of law, because it involves an absurdity; because it is allowing parties to do indirectly that which, for the purposes of general policy, is not allowed to be done directly.

In *Bolton* v. *The Corporation of Liverpool*, the Vice Chancellor directed the production of the cases. If those cases are produced, with a statement by the parties in whose possession they are, the cases alone could not be read in evidence at the trial, and if they were read they could not bind the parties by the statement in the case. Lord Brougham, in giving judgment in the appeal in *Bolton* v. *The Corporation of Liverpool*, says [1 My. and K.] (page 94), "It seems plain that the course of justice must stop if such a right exists. No man will dare **[374]** to consult a professional adviser with a view to his defence, or to the enforcement of his rights. The very case which he lays before his counsel to advise upon the evidence, may, and often does, contain the whole of his evidence; and may be, and frequently is, the brief with which that or some other counsel conducts his cause. The principle contended for, that inspection of cases, though not of opinions, may always be obtained as of right, would produce this effect, and neither more nor less, that a party would go into Court to try the cause; and there would be the original of his brief in his own counsel's bag, and a copy of it in the bag of his adversary's counsel. Nay, as often as a party found himself unprepared, or suspected that something new had come to his adversary's knowledge, he might (at least if he were Plaintiff) postpone the trial, and obtain a discovery of those new circumstances, which, in all likelihood, had been laid before counsel for advice. If it be said that this Court compels the disclosure of whatever a party has at any time said respecting his case; nay, even wrings his conscience to disclose his belief; the answer is, that admissions not made, or thoughts not communicated, to professional advisers are not essential to the security of men's rights in Courts of Justice. Proceedings for this purpose can be conducted in full perfection without the party informing any one of his case, except his legal advisers. But without such communication, no person can safely come into a Court, either to obtain redress, or to defend himself."

Lord Brougham: That is not in any action, but in the very suit in which the discovery is prayed.

[375] For the Plaintiff in error.

It makes no difference whether it be with relation to that particular action or any other; for it depends entirely on the principle or reason of the rule, which is, to allow a person freely and unreservedly to communicate with his professional adviser. It applies equally to all persons in all actions. A doctrine was once laid down by Lord Tenterden, that the question of privileged communications only

referred to a case where an action was about to be brought, and a communication was made in reference to that action. That *dictum* of Lord Tenterden's has been overruled.

Lord Brougham: That doctrine was considered in *Greenough* v. *Gaskell* [1 My. and K. 98]. I pronounced judgment, after much deliberation and consulting with Lord Lyndhurst, and several of the judges. In that case Lord Tenterden's law was considered.

I ought to mention that, with respect to the case of *Bolton* v. *The Corporation of Liverpool* [1 My. and K. 88], both I and Lord Lyndhurst, (probably because we had come from the other side of Westminster Hall,) had so great a dislike of acting on the inveterate and not now to be changed practice in courts of equity, that we did all we could to limit that principle and introduce the exception which the case of Hughes and Biddulph [4 Russ. 190] and others have now introduced; we acted with the concurrence of other judges in the Court of Chancery. But we would fain have carried it a step further, according with your argument, for we felt the principle, but we were met by *Radcliffe* v. *Fursman* [2 Bro. P. C. 514], decided in the House of Lords, and decided on great deliberation: that case gives the law, which we could not alter. The case is not **[376]** accurately reported, but the law of that case is not to compel the party to produce the case with his answer to explain it, but to allow the case to be received in evidence without any explanation.

For the Plaintiff in error.

As to that doctrine of Lord Tenterden's, he so decided at Nisi Prius: if he had investigated the matter, he would have seen that the principle applied to other cases, as well as to actions pending. What is its meaning? if it is not established in consequence of the general principle or policy of the law, why should it exist at all? if it be allowed in the case of an action, should it not be allowed in the case of a party consulting an attorney as to the title of his estate? and ought not his communication with his attorney to be free and unreserved, and privileged in that case? If that were not so, instead of acquiring safety by consulting an attorney or counsel as to the title of an estate, that very consultation might lead to the destruction of your property. Well known cases have occurred of a party laying his title before an attorney; and in consequence of disclosure of facts by the attorney contrary to his duty, a ruinous litigation ensued. Such was the case of Lord Clinton; and if courts of justice were to allow cases laid before attorney or counsel to be given in evidence without explanation or qualification, they would destroy the principle on which the rule itself is founded.

In *Bolton* v. *The Corporation of Liverpool* [1 My. and K. 88], the judgment on appeal, so far as regarded the cases, rested on the ground that they related to the action then before the Court. But it appears that the observations of the Lord Chancellor apply equally **[377]** to all communications of that sort: he says, "It seems plain that the course of justice must stop; if such a right exists, no man will dare to consult a professional adviser, with a view to his defence or the enforcement of his rights: without such communication, no person can safely come into court either to obtain redress, or to defend himself." This principle would equally apply whether the case was laid before counsel, respecting a particular action then in dispute, or a general case in reference to some other action, or still further, to a case laid before counsel where no action was pending or contemplated; but a mere statement to get the advice of counsel, on some supposed defect in the title of the party consulting him. Is it not then within the principle stated by the Lord Chancellor applicable to consultations on the title of an estate? is it not essential to the security of men's rights that they should have the power to obtain advice freely, fully, and unreservedly? Yet if you allow this case to be received, supposing it were authenticated, what is it? It is a statement of a Bishop of Meath on some supposed defect of title respecting the advowson, and asking of a professional man advice on the question, how he is to act respecting that advowson. And will your Lordships allow that which he lays before his professional adviser in the full confidence that no possible use can be made of it, to be received as evidence, and as the only evidence on which the parties profess to dispute his successor's right to present to that advowson? If this can be recognized as law, the party is without defence: and on this statement alone so made (supposing it was made) by a bishop

to his professional adviser, freely, fully, [378] and unreservedly, as he thought he might safely do under the protection of the law, he, or his successor, is to be deprived of his property.

In the case on appeal of the Corporation of Liverpool, the Lord Chancellor goes on to say, " Yet violent as such compulsory disclosure may be deemed, and wholly inconsistent with the possibility of safely transacting judicial affairs, if the authorities are in its favour, we must submit. *Radcliffe* v. *Fursman* [2 Bro. P. C. 514] is the case commonly relied on in these questions. It is a decision of Lord King's, affirmed in the House of Lords. If it had decided the point in question, there would have been no alternative but submission. The report in Brown's Parliamentary Cases is imperfect, and in one respect not correct; for it conveys an inaccurate notion of the nature of the demurrer. But even by the report, and certainly by the printed cases which I have examined, together with my noble and learned predecessor, it appears plain that the record did not shew any suit to have been instituted, or even threatened, at the time when the case was stated for the opinion of counsel: and the decision being upon the demurrer, the Court had no right to know anything which the record did not disclose. All the Court knew was, that a case had been laid before counsel at some time, in order to satisfy the party consulting whether his rights had been affected by a certain lapse of time. And the ground on which the production was resisted, appears to have been the mischief of disclosing statements confidentially made for the private ease and satisfaction of parties." The rest of the judgment of the Lord Chancellor proceeds on that distinction, and he overrules so much of [379] the Vice-Chancellor's decision as related to the case, which was the subject matter of the suit. But in this cause it is not a question, whether or not appeals in the House of Lords, or suits in the Court of Chancery, have been rightly decided. It may be that a court of equity might direct the production of this case; but it is a very different thing, whether a court of common law would receive it in evidence upon the mere production of the case, without any explanation whatever. I can find no precedent which has gone to that extent. Among all the authorities to which the Court refers, and upon which comments are made in the judgment in the appeal case of the Corporation of Liverpool, I can find none in which a court of common law has allowed the case to be so received in evidence.

If, then, there be this mischief in the rule, if the Lord Chancellor and his noble and learned predecessors were so anxious to destroy that practice in a court of equity, but found themselves bound down by authority, sitting in appeal from a court of equity, your Lordships sitting as a court of common law at least will not allow that doctrine to be introduced into the courts of common law, where it has never existed. The question here is, whether you will allow this case, supposing it to come from among the documents of the Bishop of Meath, to be received in evidence, though it is stated in the bill of exceptions, that it purported to be confidential and submitted by the Bishop of Meath to his counsel to advise him on his right and title respecting the advowson now in dispute. On this ground also this case is not receivable in evidence. To allow its reception would be a most mischievous doctrine, and effect an extension of a rule already [380] considered contrary to policy and principle, further than the decided cases warrant.

In the case of *Greenough and Gaskell* (1 Mylne and Keen, 98), according to the marginal abstract, " upon a bill which sought to charge the solicitor with a fraud practised on the Plaintiffs in the course of proceedings on his client's behalf, the Court refused to order the production of entries and memorandums contained in the Defendant's books, or of written communications made or received by him relating to those proceedings, and admitted by the answer to be in the Defendant's custody." (Communications, written or verbal, the Court refused to permit him to disclose.) " And generally it seems that a solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though such business had no reference to legal proceedings, either existing or in contemplation."

Lord Brougham. This ought not to have been in the *semble*; it goes a great deal further than the principle, and destroys the distinction which Bolton and the Liverpool Company imposes. In the Court of Chancery the client has protection as against the confidential communication to his solicitor; but you may wring his conscience so as to know his innermost thoughts. You may ask what his opinion

is; what are his expectations; or, perhaps, what are his wishes. There is scarcely a question which you may not ask him; such is the doctrine of *Radcliffe* v. *Fursman* [2 Bro. P. C. 514] as regards the bill of discovery, but I agree that your distinction is very material; it does not follow because I [381] have a right in equity to discover for my party, and even for the purpose of a suit at law to discover from my adversary, all his most inward thoughts, that I have a right to have out of his attorney's mouth, or to take out of his own repositories and give in evidence by itself a paper explained by the rest of his answer.

For the Plaintiff in error.

On these grounds we submit that this document on which the verdict must have turned is inadmissible; it is not receivable on general principles. It is a statement made (according to the bill of exceptions) by a party to his counsel, concerning his right or title to this very advowson. As such it is a confidential communication, made to obtain advice, and that is the main ground of objection; there is another which applies equally to the deed, namely, that there is no authentication.

Now as to the other part of the case. The defence is not only a denial of the title of the Plaintiff, but an assertion of the title of bishop. It is not disputed that the bishops of Meath were formerly owners of this adowson under a grant from Edward IV.; and the question is, whether that advowson so vested has by any act been taken away.

It appears according to the evidence, that the bishops of Meath have been in the habit of collating to this living; we have, therefore, the grant of the king, and acts of ownership on the part of the bishops.

It may be argued that, notwithstanding these collations, long since the statute of 10 Henry VII. that act has had the effect of destroying the right under the grant, and of reappending the advowson [382] to the manor; but that statute did neither the one nor the other.

The object of the act is stated to be that the king intended to have a general resumption of his whole revenues. But this is a question not touching the royal property of the King of England, but a question touching the private property of King Edward IV. It is not property that ever belonged to the Crown of England; it belonged to Edward IV. under a distinct title, and would have gone to his heirs, and not necessarily with the crown. The object of the statute was to take back into the king's hands such of the property of the King of England which he had in Ireland *jure coronae* as would afford revenues to the Crown. It is one of the grounds of objection that the judges told the jury, when they expounded to them the statute of 10 Henry VII., that there was no evidence whatever that the manor or the advowson of the parish church of Rathweir ever had belonged to the Earl of March in right of that earldom. This can only be accounted for by supposing that the judges did not refer to the evidence given on both sides; for it is necessary to go from one part of the evidence to the other, to shew that this title is traced down to the Earls of March; but the fact is clearly made out by the following documents, in the reign of King Edward III., reciting the desire of the king to ascertain the real value of the manor of Rathweir, etc., which were of Roger de Mortimer, late Earl of March, and which were then in the hands of the Crown as escheats by forfeiture, etc.

1. A king's letter or mandate in the 28th year of the reign of King Edward III., directed to the [383] barons of the Exchequer, reciting that the judgment by which Roger de Mortimer, late Earl of March, was adjudged in parliament an enemy, and his heirs disinherited, was, on account of divers errors found on the record and process of judgment, annulled, and his lands, etc. restored; and the king thereby commanded that all charters, etc. be delivered over to Roger de Mortuo Mari, now Earl of March, cousin and heir of the late earl.

2. An Inquisition taken before the barons of the Exchequer of Ireland in Dublin in the 23d year of the reign of King Henry VIII., whereby it was found that King Edward IV. was seised in his demesne as of fee, the day on which he died, of the manor of Rathweir; and had issue Elizabeth, Anna, Cecilia, and Bridget, his four daughters; and that being so seised, he died on the 9th of April, in the 23rd year of his reign; and that after his death, the said manor, with all its appurtenances, descended to his said daughters in right of heirship, and that afterwards King Henry VII., in the 1st year of his reign, took to wife Elizabeth, one of the said

daughters, by virtue of which King Henry VII., and Elizabeth the queen, his wife, as in right and title of the same queen, entered into the same manor, etc.

It appears, therefore, that the manor of Rathweir had not been held by Edward IV. in right of his crown; for if so, the eldest daughter alone would have inherited the manor. An observation has been made that the sons of Edward IV. are not here mentioned; it is a curious fact that in a statute of Queen Elizabeth, tracing the property of the queen to lands in Ireland, the sons of Edward IV. are also omitted.

[384] Lord Brougham: It appeared in a late argument before the Privy Council on the subject of coronations, that a notion had prevailed, which was then not quite exploded, although it never was founded on any judicial authority, that a coronation was necessary not to substantiate the title, but to make conclusive evidence of the fact of the devolution of the Crown. It was not supposed to be a proof of title, but a sort of evidence of possession. Neither of the young princes were crowned, but Richard III. most decidedly was crowned, and he is omitted also in the pedigree set forth in this inquisition.

For the Plaintiff in error.

He would have had no claim, in his natural capacity, to the land, as representing Edward IV. who was Earl of March, and the property by this inquisition is traced from the natural person of Edward IV. to his daughter's heiresses in a private capacity. The reason why the two sons are omitted is difficult to account for; it might be that the order of descent could not be traced, as it was unknown which of the princes died first. Henry VII. never admitted that he held the crown in any right derived from his wife, but always repudiated that title in the acts of parliament passed in his reign.

Upon this proof could it have been just to tell the jury that there was no evidence that the property belonged to the earldom of March? On that point it is conclusive, yet the judges in express terms directed the jury that there was no evidence of it whatever. On that ground, alone, independently of other objections, the Defendants are entitled to a new trial. If it was an important fact **[385]** that the advowson was not the property of the King Henry VII., in right of his crown or as King of England; but that he held it in right of his wife alone, as surviving co-heiress of Edward IV., the jury were misdirected on that point. As to the mode in which that property ought to have been granted—under what seal that grant was made does not appear, and is not material; but it is important to see under what seal King Edward IV. granted away any part of the possessions of the earldom of March. It appears by the case in Plowden, that the kings of England were in the habit of granting sometimes under the great seal of England (which they had full power to do) land held in their private right, but they were also in the habit of granting such lands under different and distinct seals. If this advowson was granted as part of the possessions, and under the seal, of the earldom of March, the statute of 10 Henry VII. does not apply to it either in word or in spirit.

In an English act of parliament, 4 Henry VII., cap. 14, entitled, "Sealing of writings touching the earldom of March," there is a recital that every grant made by King Edward IV., of any part of the possessions of the earldom of March, was made under the special seal of that earldom. If so, the advowson in question was granted under the seal of March, and not under the great seal of England. Edward IV. being king might have passed the advowson either by letters patent sealed with the great seal of England, or with the private seal of the king, and no livery of seisin was necessary. But it appears by the recital of this act of parliament that every grant **[386]** which Edward IV. made of the property of the earldom of March, was sealed with the seal of that earldom, and it is thereby enacted, that "all feoffments, gifts, grants, etc., where sealing is requisite to be made of any parcel of the said earldom, be had, done, and made by the king, our said sovereign lord, under the broad seal of his Chancery, as it is used in all other things concerning the Crown by the course of the common law and by none other seal." This is a prospective act of parliament, and recites the fact that Edward IV. made his grants of the property of the earldom of March, under the seal belonging to that earldom.

At the date of the grants in question, the kings of England had not assumed the title of kings of Ireland, they were then named lords of Ireland. The Irish statute of 33 Henry VIII., cap. 1, confers the title on the kings of England from that

time; reciting that they had borne the title of lords of Ireland before. It was supposed that the Irish did not pay the obedience to the king which they ought, on the assumption that he was not king of Ireland. The statute declares that the kings of England shall be kings of Ireland, and shall have all the same rights and privileges they had in England. As lord of Ireland he had the same powers though under a different name.

The object of the act 10 Henry VII. was to take back into the king's hands certain property of the Crown, from which formerly were derived certain revenues in Ireland. This act of parliament can apply only to such parts of the Crown lands, as yielded a revenue to the Crown; it cannot apply to the grant of an advowson in gross which was not the subject of profit, the king could derive no profit [387] from resuming it, he had no right to receive any money payment, or derive any income or benefit whatever from such property. Even supposing that the advowson yielded a profit, the act of parliament on the face of it, does not purport to take back any property granted by the Earl of March.

The act of parliament using the words "noble progenitors, the kings of England and Ireland," could not include King Edward IV. We do not rely on the literal meaning of the word "progenitors" as excluding Edward IV.; but on this ground, that Henry VII. never, in any act of parliament or any document to which he gave his assent, acknowledged that any princes of the house of York were his progenitors. He did not acknowledge the title of the princes of the house of York. In the acts of parliament passed in his reign relating to the property of the Crown, he draws the distinction between King Richard III. and Edward IV. and the princes of the house of Lancaster, using the word progenitors as applicable to the latter, and distinguishing the other persons as not falling within that designation. The observation made upon this argument from the bench in the Court below was, "You say that Henry VII. meant to resume into his hands all the grants made by the princes of his own family, but did not mean to resume into his hands the grants made by the enemies of his house." But probably the princes of the house of York, made no grants of the lands of the Crown in Ireland; and if they did make grants of part of the private possessions of the house of York, it was not intended by Henry VII. to resume them. It is unimportant what the object of the king was; because you find upon [388] the face of this act that it does not apply to grants made by Edward IV. of part of the possessions of the house of York, and if you collect that not only from the object of the act, but from the words used in it, you cannot take from persons a right to this property which they have held for centuries, unless you bring them within the clear meaning and object and letter of the act.

Henry VII. had married a daughter of King Edward IV., and in the public acts which were passed in that reign, King Edward IV. is not called a usurper, he is called King of England; but he is not called a progenitor or prince belonging to the house of King Henry VII.; a distinction is made between him and King Richard III., who is described as a person who held the crown by wrong. But the princes of the house of Lancaster are described as the progenitors of this king. That is a distinction made in all the acts which passed in the reign of Henry VII.

In the act of parliament referred to, and set forth in Plowden (case of the Duchy of Lancaster, Vol. I. fo. 220), entitled "A repeal of a feoffment made by King Edward IV. of certain lands and tenements of the Duchy of Lancaster, by authority of Parliament, for the performance of his last will, in the twelfth year of his reign," the distinction is manifest which is made between the princes of his own house and the House of York: every thing proceeded upon the repudiation of the title of the House of York, and in the documents and the statutes of that reign there is no acknowledgment of the House of York, either as the kings of England or as the progenitors of Henry VII.; on the contrary, the persons [389] he described as progenitors were those who descended from the House of Lancaster, and not those who descended from the House of York. That, of itself, would be a reason for not applying this act of parliament to a grant made by Edward IV. of possessions of the House of York. The earldom of March was part of the possessions of the House of York, it was no part of the possessions of the House of Lancaster, it was no part of the possessions of the Crown of England, and Henry VII. might do what, in those days, might be considered an act of justice, in resuming into his own hands property that was held by his own family,

as kings of England, which he might have scrupled to do, had any part of it been the private property of the House of York. On this act of parliament there is nothing to lead to the inference that it was so intended.

It has been contended, that all property which vested in a king of England would immediately become part of the possessions of, and would merge in, the Crown, no matter how they were derived. We deny that proposition: the power and the privileges of the king would attach to those lands just in the same way as they attached to lands held *jure coronae*, with respect to the mode of conveying them, and as to all rights and powers which the king might exercise over lands held *jure coronae*. But this does not apply to the course of descent; such lands do not merge and go to the kings of England, but to the heirs of the natural body of the king. As to lands which the king takes by purchase after he is king, the proposition is not denied; but as to lands which come to him by descent, or by some other title, they are not [390] affected by the prerogative except in so far as it is applied to them. The lands which Edward IV. held in right of the duchy of York, or the earldom of March, on his accession to the Crown, he would have a right to dispose of in such manner as he could dispose of the lands of the Crown; but the lands of the duchy of York, or the earldom of March, which descended to him before he became king, would not be affected as to the line of descent, but would go to the heir of Edward IV. of his natural body, and not to the king of England; and therefore the possessions of the house of York, or earldom of March, instead of going to Richard III. would go to the daughters of Edward IV. That it is so in point of law was the understanding at least, and the feeling of that day; for the inquisition says that it was property which belonged to Edward IV., and did not go to Henry VII., or Richard III., as king, but descended to the daughters of Edward IV.

The case in Plowden is considered an authority. The act of parliament procured by Henry IV. to separate the possessions of the duchy of Lancaster from the possessions of the Crown, raised an assumption that, if it were not for that act, those possessions would have merged in the Crown. That is an unfounded notion; for the descent of lands of the duchy of Lancaster is regulated, not by that one but by several acts of parliament, and, among others, by the act which passed in the reign of Henry VII. after the battle of Bosworth. The law respecting those lands is laid down in Plowden (in *Wyllion* v. *Barkley*, fo. 250), not as the Plaintiffs contend the law to be, as I read the case, but directly the other way. The Lord [391] Chief Justice, in his judgment (page 250), says, "As to the matter in law I am of the same opinion," etc. And then he says, "Such heirs must come from the natural body, for the body politic cannot beget issues." There may be a grant to the king and the heirs of his body, but how would that go? it would not merge in the Crown but go to the heirs of the body of the king. Then he says "So that the limitation of the inheritance here to the heirs male of his body distinguishes the body in which the donor had a mind the king should take it." Suppose the grant had been made to Edward IV. and the heirs of his body, would it have gone to Richard III.? Would it have gone to Henry VII.? Certainly not; it could only have gone to the heirs of the body of the king,—to the daughters and their heirs. The judgment goes on to say "For if King Henry VII., after the remainder limited to him, had been removed from the royal state and another had been made king, neither the succeeding king, nor his heirs, should have had the land, because the donor limited it to Henry VII., and to the heirs male of his body; and if the heirs of the other body should inherit it, it would be contrary to the limitation and will of the donor, for there is not any such inheritance limited by the gift; wherefore the limitation here has respect to the natural body of King Henry VII. and to the heirs male which his natural body shall beget, and so the capacity and body in which he shall take it is distinguished and limited in the gift."

Lord Brougham: There was a remarkable instance of a bargain made between Henry VII. and [392] the Earl of Berkeley, touching the castle and barony of Berkeley Castle. Upon a question which arose in this House on the claim to a barony (Berkeley Peerage Case), a territorial barony, it appeared, by the evidence produced, that there was a grant, by means of which the rank of marquis was conferred on a certain series of heirs, and on the tenant of the fee simple of Berkeley Castle. Henry VII., a very avaricious prince, as Lord Bacon says he was generally supposed to be, obtained, as a consideration for giving this title, a grant in tail male, of Berkeley Castle, failing

the issue male of the body of the grantor. He had heirs male of his body, Henry VIII. (of pious memory). Henry VIII. had heirs, Edward VI.; and the estate coming to Edward VI., who died without issue male of his body, Elizabeth and Mary being the only heirs of the body of Henry VIII., and there being no heirs male of Henry VII., the estate tail, limited by the grant, was exhausted and expired in the person of Edward VI., and then the estates came back under the reversion in fee simple to the heir at law of the grantor. That is a case which aids your argument,—if they were Crown lands they ought to have gone to the queens, Mary and Elizabeth. Lord Hale differs from some other lawyers on that question.

For the Plaintiff in error.

The judgment goes on thus: "So if a man gives land to a bishop, and to his heirs thereby, he distinguishes in what capacity he has a mind to place the inheritance and in what capacity the bishop shall take it; and as the donor pleases to limit it, so it shall enure: for if he had given the land here to King Henry VII. and to the heirs of his body, and the body of Elizabeth, his wife, [393] begotten, such heirs, and none other, shall take it. And land may be entailed to the king as well as to another, for King Henry IV. entailed the duchy to him and to the heirs of his body begotten, and the Crown was entailed to Henry VIII. and the heirs of his body; so that the king may make an entail as well as another, and the remainder here vested in the body natural of King Henry VII. So that if he had resigned the Crown to King Henry VIII., yet he should have held the land to him, and to the heirs of his body, as land distinct from and no part of the Crown."

Now, it is impossible that language can be stronger against the proposition for which the Plaintiff contends, that all land belonging to the king, no matter how it came to him, from the moment he acquires the Crown becomes merged in his political character of king, and must go to the kings of England, as all other parts of the land which are held *jure coronae*.

Lord Brougham: Lord Holt (*The Queen* v. *Smith*, 7 Mod. 78) says that all lands and tenements of the king belong to him *jure coronae*; for a purchase to him, and his heirs, shall vest in his political capacity, and the king can have nothing in his private capacity unless in right of his duchy or an estate tail.

For the Plaintiff in error.

The authority of Plowden (see Plowden, 234) proves this, that the lands belonging to the Earldom of March are no part of the lands of the king held *jure coronae*, in the ordinary sense of the word. We do not contend that he might not have applied the prerogative to them: but he did not hold them as part of [394] the possessions of the Crown which were to go with the Crown at all times. The object of this act of parliament is, to take back the revenues of the kings of England and Ireland, which were not part of the possessions of the House of York. The very object shewn in the act negatives the fact of their applying to these possessions.

As to the authority in *Coke on Littleton* (15 b.), it is confined to lands held *jure coronae*. He says, "And you shall understand that, concerning descents, there is a law, parcel of the laws of England, called *jus coronae*, and differeth in many things from the general law concerning the subject." Then he gives various examples: "The king, in any suit for any thing that pertains to the Crown, shall not shew in certain his cosinage as a subject shall do, or as he himself shall do for things touching his duchy." (He makes a distinction in the very passage.) "And in the case of the king, if he hath issue a son and a daughter by one venter, and a son by another venter, and purchaseth lands and dieth, and the eldest son enter and dieth without issue, the daughter shall not inherit these lands nor any other fee simple lands of the Crown, but the younger brother shall have them." (That is, so as to fee simple land which belongs to the Crown, or which the king purchases.) "Wherein note, that neither *possessio fratris* doth hold of lands of the possessions of the Crown, nor half-blood is no impediment to the descent of the lands of the Crown, as it fell out in experience after the decease of King Edward VI. to Queen Mary, and from Queen Mary to Queen Elizabeth; [395] both which were of the half-blood, and yet inherited not only the lands which King Edward or Queen Mary purchased, but the ancient lands parcel of the Crown also. A man that is king, by descent of the part of his mother, purchases lands to him and his heirs, and dies without issue: this land shall descend to the heir of the part of the mother; but in the case of a subject, the heir of the part of the father shall have them. So King Henry VIII. purchased lands to him

and his heirs, and died, having issue two daughters, the Lady Mary and the Lady Elizabeth: after the decease of King Edward, the eldest daughter Queen Mary did inherit only all his lands in fee simple. For the eldest daughter or sister of a king shall inherit all his fee simple lands. So it is if the king purchaseth lands of the custom of gavelkind, and die, having issue divers sons; the eldest son shall only inherit these lands. And the reason of all these cases is, for that the quality of the person doth in these, and many other like cases, alter the descent, so as all the lands and possessions whereof the king is seised in *jure coronae*, shall, *secundum jus coronae*, attend upon and follow the Crown; and, therefore, to whomsoever the Crown descends those lands and possessions descend also; for the Crown, and the land whereof the king is seised in *jure coronae*, are *concomitantia*. If the right heir of the Crown be attainted of treason, yet shall the Crown descend to him, and *eo instante* (without any other reversal) the attainder is utterly avoided, as it fell out in the case of Henry VII. And if the king purchase lands to him and his heirs, he is seised thereof in *jure coronae*, *à for*-[396]-*tiori*, when he purchases lands to him, his heirs, and successors."

No doubt the king holding lands in *jure coronae*, they would be attached to the Crown and go with it; therefore if the king resigned the Crown the next day after the purchase, they would go to the succeeding king. But there is a note to the passage, in *Coke on Littleton* (15 b.) which is taken from Lord Hale's manuscript. That note explains the decision and the distinction.

"*Nota*, by the common law the king is a corporation, and purchases made by him after assumption of the Crown vest in a politic capacity: hence if an usurper purchases lands, and the right heir resumes the Crown, he shall have the purchases; *et e converso*, an usurper shall have the purchases made by a rightful king, so long as he has the Crown. So it happens in the cases of Henry IV., Henry V., Henry VI., Edward IV., Richard III., Henry VII. But *nota*, purchases made before accession of the Crown or descents from collateral ancestors after accession of the Crown, vest in a natural capacity; and therefore in the re-ademption of the Crown by Edward IV. there was a special act to give to the king all the possessions of Henry VI. But such lands are qualified and affected differently from those of other persons. They will pass by letters patent only, and without livery; and the grants of them shall not be avoided by nonage *et similiter*. As to acquisitions by conquest by the King of England, they are annexed to his Crown, as his purchases are; as Ireland, Man, Berwick, Calais, and the New Plantations, the ancient territories of Normandy, Aquitaine, [397] Anjou, and also many other lands which descended in England from collateral ancestors, though in their original vested in a natural capacity, yet partly by attainder, partly by long continuance united to the Crown, partly by occupation, were in some manner annexed to the Crown, and will go with it."

This note points out the distinction, for it says where the king purchases after he becomes king, or they are annexed to the Crown, they are taken by him in his political capacity; and wherever the Crown of England goes, these lands will go with it, even to a usurper. But those lands which the king purchased before his accession to the Crown, or which came to him by collateral descent, not from the kings of England, remain in him in his other character. These lands are subject to all the same powers as regards the king, as the land held in *jure coronae*, but not subject to the same descent: they will descend to the heirs of the parties from whom they came: to the heirs of the body of the king, if the king hold them in tail: they will go to the heirs general of the king, if he hold them to him and his heirs, but not to the Crown. The authorities are clear on that point. Whether the lands of the manor of Rathweir were held by the Earl of March in fee simple or in fee tail does not appear, and it is immaterial for this purpose; because in either case Henry VII. could have had no title. The king, as such, could have had no right to them, having married one of the four daughters who was entitled in coparcenary to the possessions of that earldom, Henry VII. had in him a title in that right.

The act of parliament which directs the resumption into the king's hands of the grants of the [398] kings of England to increase their revenues, could not apply to property so held by Henry VII., with three other persons, in right of his wife, and which, according to the finding of the inquisition, descended on the heir of Elizabeth as the heir of the Earl of March, and not on Henry VIII., as king of England; and

according to that finding, if the other sisters had not died without issue, three fourths of those lands would not have descended to king Henry VIII., but would have gone to the heirs of the other coparceners. This act of parliament cannot be taken to apply to land which was the private property of Edward IV. The application for the enactment comes from the commons of Ireland: it was not likely that they could have had any interest in the king's getting this property away from the grantee of Edward IV. under the seal of the Earldom of March.

The form of the grant of the advowson by the letters patent does not affect the question. For if the king granted part of the Earldom of March, the advowson of this living to the Bishop of Meath, he might grant it in much the same form as he granted the lands held *jure coronae* under letters patent in his name of King. If they were lands in Ireland, he would follow the form of the king's grant, which is the same in substance and form, with the sanction and under the authority of the Lord Lieutenant of that part of the king's dominions, as if the lands were held *jure coronae*. And the grantee of them would preserve as evidence that copy of the letters patent, which would be enrolled and form the evidence of the title of the grantee. Lord Hale says (p. 213), "So that he cannot do it without doing it as king; and it [399] would be inconvenient and beneath the dignity royal, for the law to make the king give livery in proper person to a subject. And besides, livery of seisin is matter of fact, which the king cannot do, for his acts ought to pass by matter of record which is suitable to his Majesty; and therefore the land shall pass by the king's letters patent only by the course of the common law. And so it has been the practice with regard to the lands which descended to the king from the Duke of York, the Earl of March, and others of the king's ancestors who never were kings."

There is another argument to be raised on the construction of this act of parliament, that it clearly applies only to lands granted under the great seal of England and Ireland. These words might have been introduced into the act for the express purpose of excluding the grants made by Edward IV. of the Earldom of March. We have a right to assume, after the recital in the English act of Henry VII., that there is no grant of the possessions of the Earldom of March, made by Edward IV. under the great seal of England or Ireland; for that act of parliament shows that all such grants were made under the seal of the Earl of March. The words would not apply to a grant so made. It appears moreover that in certain cases the statute in question had not been acted on. In the 25th Henry VIII. chap. 2. of the Irish statutes, there is a recital that advowsons, grants, etc. by Edward IV. shall not be affected by the title of Henry VII., for what reason or under what circumstances does not appear, nor is it necessary to ascertain; but it furnishes explanatory reasons why the act in question should be allowed [400] to remain on the parliament roll, unheard of until this action, just as much as if the act of parliament had fallen into desuetude. (Lord Brougham here intimated that the counsel for the Defendant in error would be allowed to rejoin to this part of the reply, as being new matter.) It is sufficient to state, that the act is not applicable to this particular property. And that would account for the fact of the Bishop of Meath having, notwithstanding this act of parliament, been in undisturbed possession of this property for so many centuries.

They can make nothing of their case, unless it be found on one of these issues that the advowson was appendant to the manor of Rathweir: that is not a mere technical objection, but one that goes to the very root of their title; for the patent of James I. does not profess to grant the advowson of this church, nor does the conveyance of the king to the Earl of Clanricarde. It conveys only the manor; and unless this advowson is appendant to the manor, the Plaintiff has no right to present. But what is the meaning of the act of parliament? unless the effect of it is to make null and void *ab initio* the grant of Edward IV., and of all the kings from Edward III. down to the time of passing the statute in question, this advowson cannot be appendant to the manor. It is conceded that the grant of King Edward IV. disappended the advowson from the manor. It is not disputed that the effect of the grant of King Edward IV. was to convert what had been an advowson appendant to the manor, into an advowson in gross, in the hands of the Bishop of Meath and his successors. The question is whether the act of parliament can re-annex it and make it append again? [401] The law on that point is this: If an advowson appendant to a manor become dis-annexed and severed from that manor, and be afterwards regranted or

surrendered back to the owner of the manor, it does not become appendant again. It does not lose its character of an advowson in gross, but will be held by the lord of the manor in gross, distinct and separate from the manor itself. The argument is, that the advowson was re-appended; that if the grant which severed the advowson from the manor be put an end to, if it be rendered null and void altogether, then the advowson will become appendant to the manor again. Taking therefore these to be the two propositions of law, the point to be determined is, whether this act of parliament rendered the grant of Edward IV., the grants by Edward II. and all his successors down to the time of Henry VII., void from the time of the original grant, or whether it only annulled them from the time of the passing of the act. Surely but one construction can be put on the act of parliament, viz. that from the time of the passing of the act, the grants that had been made by preceding kings of England became annulled, and that the king then took back, or resumed the possessions of the Crown which had been separated from it.

We are hardly to suppose that in any times of our history, an act of parliament could have been passed to declare void those grants from the beginning, seeing the injustice which must have ensued. Every act which had taken place under the grants would have been an act of wrong, and actions might have been brought. The very fact of the apparent owners being in possession of the land would be a trespass; no act done on the land thus granted [402] could have been justified, but the parties would have been wrong-doers, though they held under a grant from the Crown. The object of the act is not to give to the king any by-gone right, previous to the passing of the act, but to resume into the king's hands from that time the revenues of the Crown, and to render them applicable to the uses of the Crown. It was not necessary to do more than annul the grants from the time of the passing of the act; and therefore unless the words of the act of parliament are explicit to annul them from the time of the grant, the construction of all Courts would be to hold them annulled only from the time of the passing of the act. The language of the act shews that there was no intention to declare that these grants were void from their very inception. Having recited that the revenues had been diminished, it "ordains and establishes that there be resumed and taken into the king's hands all manors, etc. whereof any of the kings of England were seised from the last day of Edward II. to the passing of the act," (that has no by-gone application, that is prospective). Then come the words on which they rely; "and all grants, etc. from the said day to be resumed," etc. They read "from the said day" to apply to the words, "resumed," etc.: that is not the meaning of the passage: it is, "all manors, etc. etc. granted from the said day." It applies to the grants of manors, and feoffments made by the authority of parliament, from that day, namely, the last day of Edward II. What then? That they be resumed: What is the meaning of that? The resumption cannot be applied to the time of Edward II.: it must apply to the time of the passing of the act, and [403] that from that time they shall be declared void and of none effect. These are all prospective enactments, that all grants from that day be resumed, and they are declared void, and of none effect. The effect of this act of parliament can only be to take back into the king's hands, from the time of the passing of the act, the possessions which had been granted by the preceding kings, and to declare and make void from that time all grants of the king's predecessors.

The whole of the law as to the appendancy of advowsons is laid down in Comyn's Digest, title Advowson B: it is laid down thus—"An advowson may be appendant to a manor, or in gross. Appendant to a manor is, when it has always passed by a grant of the manor *cum pertinentiis*." Then he puts various examples of appendant and in gross. He proceeds thus: "If an advowson be in gross, it cannot afterwards by any act be appendant, except where the act which made it in gross be totally avoided, as a recovery after an usurpation. As where the reversioner of a manor to which an advowson is appendant usurps, then the particular estate determines, and the advowson is become appendant again. An advowson is appendant to the demesnes, not to the rent;" and for that doctrine he quotes 1st Leonard. But there is another case, the first case in 2nd Modern Reports ([2 Mod. 1] *The King* v. *The Bishop of Rochester*): the law is there distinctly laid down, that if the advowson be once severed from the manor, the resumption of that, or the surrendering it back into the hands of the Crown or the owner of the manor, does not re-append it; but it must be some

act which makes the grant itself void from the beginning, which will alone re-append it to the manor.

[404] In the case of *Reynoldson* v. *Blake and The Bishop of London* (Lord Raymond, p. 192), the question arose on a *quare impedit;* and the declaration stated, "that it was a grant by deed of the rectory to which the vicarage of Saint Anne's, Blackfriars, appertained by Sir George Gouge." The judge said, "he would consider what would destroy an appendancy. If an advowson by act of the party be once severed from the manor, to which it is appendant, though but for an instant, it becomes in gross, and the appendancy is destroyed for ever. And therefore the difference is, if a man seised of a manor to which an advowson is appendant, accepts a fine of the advowson and grant, and renders every second turn, by the alternate turn the appendancy continues. But if he levies a fine of the advowson, and accepts a grant and renders, the appendancy is totally destroyed, because there was an instantaneous severance. So if there be two co-parceners of a manor to which an advowson is appendant, and they make partition of the manor without taking notice of the advowson, the advowson at each turn continues appendant; but if they make express exception of the advowson upon the partition, it becomes in gross. If they make partition of the manor, and the rents are allotted to the one, and the services to the other, the manor is destroyed and the advowson becomes in gross. But if the one dies without issue, so that the demesnes descend to her who has the services, or *vice versâ*, the manor is revived and the advowson becomes appendant again because it was by act in law. So that the diversity is where the severance is by act of law, and where by the [405] act of the party, by 17 Edward III. ch. 38, and the 12 Henry VII. ch. 5. The question then will be if the union be an act in law, and he was of opinion that it was; because it was made by the spiritual judge, who is the chief actor in it. And though the advowson be destroyed by the severance, yet when it is severed in turns, each turn becomes appendant still, because it is done by act in law, which does not alter the nature of the thing. And that union does not destroy the appendancy, he cited Dier, 259 B. as an express authority; and Windsor's case is an authority in point; for that was a *quare impedit*, for a Church united as appendant, as appears by Croke Elizabeth, page 688. If then at Common Law union would not destroy the appendancy, much less will an Act of Parliament do it, which is an act of the highest law, which designs to do no wrong to any, but only to take away the incumbency, and give to each a second turn instead of it, and in the same plight as he had the advowson before."

It is argued that this was a resumption into the king's hands of an advowson granted by Edward IV. and, being by Act of Parliament, it became appendant again. This case is no authority for that proposition. The case is, that he formed a union between the two parishes, and he directed that each should present in turn: that act of parliament which so united the two parishes, and directed the parties to present, did not operate to dissever the advowson at all: it was not the question but it did not operate to dissever it from the manor to which it originally belonged. But the statute of 10 Henry VII. is not to be considered as an act of parliament to [406] that extent: it is an act done by the legislature and we must admit by consent of the House of Commons of Ireland; and even if the king is to take back into his hands what had been granted, it would have no other effect than if it had been surrendered into the king's hands: he would then not take it and hold it again as appendant to the manor: all that is said is, the king resuming it, the grant shall be void from that time. The effect of that act of parliament is nothing more than to give back to the king that advowson which he had given to the Bishop of Meath: it would not be appendant again, but be holden separately and in gross. That point therefore of the issues is sufficient to prevent the operation of this act of parliament, for the act it is under which they claim: they claim it as being appendant to the manor: and unless it be appendant, they have no title.

We rely mainly on this position, that the statute of King Henry VII. applies to no grant whatever, made by King Edward IV. of possessions of the Earldom of March: that it is not within the spirit, scope, object, or letter of the act; that this is not a possession of the Crown: and that the act of parliament does not in any way apply to it: that it is a different sort of property: and therefore the act does not apply to it. The advowson did not here become appendant to the manor or pass under that deed

of King James I. to John King under which the Earls of Clanricarde pretend to found their title. It does not confer the title on that house but the advowson is either in the Crown, if that act of parliament had any application at all, or if not in the crown, it remains in the Bishop of Meath under the grant of Edward IV. who claimed the right to it.

[407] There is one other point, on the effect of the fine. This is not an objection going so strictly to what may be called the merits of the case. It is used by the Defendants, not for the purpose of shewing a title in themselves but for the purpose of protecting their possession by shewing that it is not in the Plaintiff. The fine will not affect any title whatever in the Bishop of Meath, but only have the effect of excluding the present claimants.

The first question is, whether or not that fine be admissible in evidence? Now one of the pleas of the bishop by way of inducement is, "That the said Plaintiff ought not to have, or maintain his action thereof aforesaid against him, because he saith that his predecessors (Bishops of Meath) were, and he the said bishop was, and is seised in the manner in the said first plea to the said 5th count mentioned of the advowson of the said church in the said 5th count mentioned: and being so seised, collated the same, being vacant, to the said reverend James Alexander, his clerk in the manner and at the time in the said first plea to the said 5th count mentioned, as he might lawfully do without this, that the said Plaintiff is possessed of the said advowson of the said church of Killucan, otherwise Rathweir, in manner and form as the said Plaintiff hath in the said 5th count of the said declaration alleged, and this he is ready to verify." It becomes unnecessary on that plea of the bishop to enter at all into the argument, that the clerk could not plead any plea which would let in this fine against the Earl of Clanricarde. The bishop at all events may so plead. But supposing the objection good, this is not the stage of proceedings in which notice could be taken of the objection, or [408] an opinion formed upon it: you are now sitting to try whether or not certain evidence is receivable, but not on the effect of that evidence at the trial. It is said the plea is bad. Then they ought to have demurred to it. We by no means concede that it is bad; but if it be so, it would be bad only on special demurrer, not in any way that would allow the Plaintiff to take advantage of, or objection to, that plea is this course of proceeding nor can the House take notice of it: it is not in the bill of exceptions, nor is it noticed in the errors assigned on the record. No error is assigned respecting the form of those pleas. As a Court of Error your Lordships' attention is not called to the forms of the pleas at all. We affirm that the pleas are good; and if the question had been raised, some authority must have been shewn to induce you to decide that they are bad. That it is a correct mode of pleading could be shewn if the point were in dispute. As far as regards the plea of the bishop, what does it amount to? The traverse and the issue taken on that traverse is, that the Plaintiffs were not possessed of the advowson, and the right to present in the manner and form they have alleged. It being argued that this fine would shew the title to this advowson out of the Plaintiff, they contended that the fine was not admissible in evidence on that issue. The court below held it was admissible in evidence.

It has been suggested that it was not receivable in evidence unless specially pleaded; and that observation certainly is entitled to great consideration. But we contend that it is not necessary to plead it, and moreover it could not be pleaded. If a fine or any other thing is relied on as an estoppel between the parties, it must be pleaded. [409] An estoppel will only operate if pleaded. And if we have recourse to this fine to shew that the Earls of Clanricarde (who were parties or conusors of the fine) are estopped by it, in the literal meaning of the word, it ought to have been pleaded. But the question is whether we have a right to use it as evidence to shew that the Earl of Clanricarde parted with this advowson, if he had it, for the words of this fine include the advowson, and therefore this fine, if it belonged to the Earl of Clanricarde, would pass the manor and the advowson appendant to it out of the house of Clanricarde. In that sense this could not have been pleaded. It is an elementary rule of pleading that you cannot plead specially any matter without confessing and avoiding the statement of the opposite party. You may confess and avoid the title which is set out in the record, by some other matter; but unless you do so, you can only traverse. They say that this advowson was in several Earls of Clanricarde,

whose descent is set out on the record, and the title is traced down to the present Plaintiff. Any special replication, any allegation of a new matter in pleading, must have admitted the fact stated in the declaration. We could not have alleged any new matter merely consistent with the fact stated in the declaration, but it would have been necessary to confess the declaration before we could have pleaded any special matter. The pleading therefore of the fine would have been bad pleading, it would have been alleging a matter inconsistent with the title of the Plaintiff; but not the confession and avoidance of that title, nor would it have been a traverse.

The proper course of pleading in such a case is [410] to deny the title of the Plaintiff, and then any act or matter which shews that the Plaintiff had not a title is properly receivable in evidence, under the traverse of that title.

The authorities on this point are all collected in the argument of counsel, in the case of *Arlett* v. *Ellis* (7 Barnewall and Cresswell, 346). In a case like the present, if you intend to rely on the evidence of any matter which shews that the Plaintiff has no title to present, the proper form of pleading is to traverse the right to present; to plead a fine, or any other matter specially, would be bad pleading. *Arlett* v. *Ellis* was the case of an action of trespass brought by certain persons for breaking and entering a close: the plea was that this place was parcel of a certain manor, and that the copyhold tenement there in question was within the manor, and that the Defendant had a right of common over it. The Defendant then justified under a lease of that copyhold tenement, for breaking and entering, and prostrating the fences as under a right of common. The issue was on the mere right of common. The replication took issue on the custom, that is to say, stated that there was no such custom in the manor for the owner and occupier of that messuage to have any right of common over the *locus in quo*. The question at the trial was whether there was in fact any custom within the manor for the lord of the manor to inclose parcels of waste against the commoners; and whether the lord, in accordance with that custom, had inclosed the *locus in quo* previous to the trespass complained of. It was objected that that was not admissible in evidence on a mere traverse on a right of common, and that a person under whom the Plaintiffs claimed ought to have specially [411] pleaded the custom to inclose within the manor, and that the land in question had been enclosed. It was argued on the part of the Plaintiff, who claimed the right for the lord to inclose, that not only that special replication was not necessary, but that it would have been bad pleading, and the Court acquiesced, and on this simple ground, that the right was set up as a customary right of common as a freehold tenement at the time of trespass committed, and that you cannot reply specially any fact inconsistent with it; you must confess and avoid, or deny it. If you make a special replication you must confess the fact. If you mean to say the right of common did not exist at the time of the trespass, you must deny the right stated, and then you will be at liberty to give in evidence the custom to enclose under it. The Court were of that opinion; they adopted that proposition of law on the authority of several cases. In the case of *Margatroid* v. *Law* (Carthew, 116), the Defendant pleaded in bar that he was seized in fee of his close, and that all those whose estate he had therein, had been accustomed to take the water for the convenient watering of their cattle in the close. Upon general demurrer, the plea was adjudged ill, because the Defendant had neither confessed and avoided, nor traversed the matter alleged in the declaration; but it was said if he had pleaded the general issue, the facts stated in the special plea would have been a good answer to the action. So the parties here having traversed the right of the Plaintiffs to this advowson, and to present; anything shewing that the Plaintiffs had not a right to present, was admissible under that issue. So in a case of a [412] party who justified under a right of common, the issue being taken on that, the defence was that the right of common had been released before action brought. Under what replication should that release have been given in evidence? Under the replication denying the right of common; for otherwise you plead badly by not confessing and avoiding the statement of the opposite party. The inducement to this traverse cannot be traversed: it is wholly immaterial: the only effect and object in having it on the record is, that if there is any question or matter of law, the opinion of the Court may be taken at once on the law, stated in the inducement; but the fact submitted to the jury is on the traverse: the Court look to that, and both parties must be governed by it. The traverse is that the Plaintiffs

had no right to this advowson; and if anything be shewn proving that the Plaintiffs had no right to this advowson, it is properly receivable in evidence.

Suppose an action on a deed, and instead of pleading *non est factum*, I plead *nil debet*, which is a bad plea on special demurrer! If they join issue, the Plaintiff may prove the whole allegation in the declaration; it puts in issue the whole. Though the Plaintiff need not have joined issue upon it, being a bad plea; yet if he joins issue, he is bound to prove the whole allegation; and under that plea of *nil debet*, the Defendant would give in evidence any thing shewing that the Plaintiff had no right of action against him.

Now, on this plea of the bishop, and the pleas of the clerk, which deny the fact of possession, and the right of the parties, the fine was properly receivable in evidence. By those pleas traverse is [413] taken on the ownership of this advowson, and the right to present. What is the effect of the fine? It is not for a nominal consideration, but for a large sum of money to pass this estate into the hands of other parties. It was contended that the conusor of the fine, the then Earl of Clanricarde, had done nothing afterwards in it: and that, as they shewed, the Earls of Clanricarde were treated as owners of the advowson afterwards, it might be presumed that the conusee of the fine became a trustee for that family. The facts stated on the fine lead to the opposite inference. It is for a large money consideration. But assuming it to be open for them to argue the point, is it not a question for the jury; and should it not have been left to them, whether the conusor was trustee for the Earl of Clanricarde, whether they would presume a conveyance from the trustee of that to which the fine professed to relate? It was said by the judge below, that the fine had no reference to those proceedings; he told them that the fine was no bar to the Plaintiff's right to recover on the issues, but he should not have received the fine in evidence when tendered by the Defendant's counsel, and objected to on behalf of the Plaintiff: he erred in telling the jury that it had no weight in the case. Whether the fine had any or no weight, whether it might be supposed that the conusees were trustees for the Earl of Clanricarde, were questions for the jury. They ought to have had the fine submitted to them for consideration whether it had such effect; but no such question was submitted to them. The judge took away the fine entirely from the consideration of the jury. That is one of the points on which we except to his direction. The judge [414] ought to have submitted to the jury the question whether or not the fine destroyed the Plaintiff's right to present, for the Plaintiff has no right to bring this action against the Bishop of Meath, unless he is owner of the advowson. He has no right to put himself in the position of the Crown if the advowson vested in the Crown; and it appears on the evidence that the manor so granted, afterwards escheated and became vested in the Crown. On that ground also, we are entitled to your Lordships' judgment on the bill of exceptions. The fine is material evidence to shew at least that the Plaintiff had no right to present to this living. If he treated it as a living or advowson appendant to that manor, and that had been taken from the Earl of Clanricarde and forfeited to the Crown, the Plaintiff who claims under the Earl of Clanricarde, could have no right to present to it.

We submit on all the points taken before the Court below on the bill of exceptions, that the Plaintiffs in error are entitled to your Lordships' judgment, and the cause ought to be sent to be tried by another jury, where the evidence may be properly sifted; where that which is not evidence shall not be presented to the jury, and that which is legitimate evidence may be presented to them with all its proper weight and authority.

For the Defendant in error, Sir F. Pollock and Mr. Miller.

In this case the principal question arises upon the evidence. It is alleged that the grant of the next avoidance which was executed by Ulick, the fifth Earl of Clanricarde, and the case prepared on behalf of Bishop Dopping, were not admissible. The result of the evidence relating to the circumstances under which those documents were [415] obtained is, that no diocesan records of the see of Meath, are to be found in the registry of the diocese of Meath, antecedent to the year 1717; that necessarily therefore any such as do exist at all, must be sought for and found in some other place; that certain of those records and documents of the see, anterior to that period, were found in a place called Lowton House, which house is designated as the family

mansion and the residence of the Dopping family; the family of a former Bishop of Meath; that some at least of those documents ought to have been deposited in the public registry of the diocese, and that *quoad* those documents Lowton House, the place in which they were so discovered, must under the circumstances be regarded as the diocesan registry.

It appears, that the documents applicable to the present case were found among other coeval records of the see of Meath; and if so, the grant of the next avoidance was found with, and among the accompanying documents in the society of which it ought to have been found. That grant was originally given to the grantee named in it, for the express purpose of its being delivered to the bishop of the diocese when the occasion for using it should arise. But it is said, that it at all events amounted to nothing further than a claim of right, not followed by enjoyment or possession, at least that there is no evidence of the claim having been admitted or recognized. But if the other document similarly circumstanced and found at the same place, and at the same time, shall appear to have been legitimately admissible in evidence as against the present Plaintiff in error, then there is the fullest and the most complete admission and [416] recognition of the right under which the present Defendant in error claims: furthermore there is the admission that on the presentation and under the authority of that grant, the nominee of the grantee was admitted instituted and inducted into the benefice.

But, is there no intrinsic evidence of the grant having been so acted upon? Why is the document found among the records of the see of Meath? Because it was necessarily produced and delivered to the bishop of that diocese, to shew and explain to him how a stranger to the patronage called upon him to institute his presentee, and because the bishop retained it as his warranty for instituting the nominee of a stranger into the benefice. If he had rejected the presentee, he should have returned the deed of gift. To have repudiated its authority, and to have retained the documents would have been a species of fraud: it would have been disabling the presentee from ascertaining the right he derived under that document, and by it; but the natural and more reasonable inference is, that the Bishop of Meath of that day did comply with the requisition of the patron of the benefice, and having done so he retained and deposited amongst the archives of the see the instrument which had authorized him so to act. It was an act of prudence to himself, and of justice to the patron; it demonstrated the authority on which the bishop acted, and it was fair to the patron in recording the exercise of his right, or as it is technically called his seisin of the advowson. The fact of the exercise of such right, with all its accompanying value, will be fully established by the other document similarly circumstanced and [417] similarly obtained, if it be ruled that the latter document was properly received in evidence. In support of the propriety of its admission and reception there are many decided authorities. In the case of *Doe* v. *Robson* (15 East, 34) Lord Ellenborough stated, that the ground on which the evidence in that case (which was an entry in a deceased attorney's costs' book to shew the true time of executing a lease) had been received was this, that there is a total absence of interest in the persons making the entries to pervert the fact, and at the same time a competency in them to know it. In the case before your Lordships, there was a competency in the person stating the facts to have known them accurately, and it was contrary to his interest to state them in the manner that he has done.

In the case of *Higham* v. *Ridgway* (10 East, 120) it is stated, that the like evidence has been admitted in other cases where the Court were satisfied, that the person whose written entry was offered in evidence, had no interest in falsifying the fact, but on the contrary had an interest against his declaration or written entry. That is the opinion of Mr. Justice Le Blanc in that case, and that is the precise case here.

Lord Ellenborough's principle, namely, the absence of any interested motive to misrepresent, and a competency to know the fact, is fully recognized by the barons of the Exchequer in the case of *Bullen* v. *Michel* (2 Price, 440); and Mr. Baron Graham (adverting to the case of the Chartulary of the Abbey of Glastonbury, which was found in Lord Bath's [418] possession, who was owner of some of the possessions of the Abbey by grant from the Crown, although not of the parish in which the controversy in the case about moduses arose) says, "I also ground my opinion, that the document was properly admitted in evidence upon this simple rule, that an instrument of this

sort, coming from a custody, which gives it authenticity as a genuine document, and relating to the subject of inquiry or point in issue, must be read to the jury, as bearing upon the question in issue. That judgment was affirmed in this house. In the case of *Short* v. *Lee* (2 Jacob and Walker, 148), the Master of the Rolls decided, that where an inquiry is carried back to a remote period, the dearth of evidence naturally leads the Court from its desire of ascertaining the truth, rather to let in, than exclude what is offered, taking care always not to exceed the bounds of legal rules. He said, "these documents (old Proctors' accounts) possess those qualifications which always make the declarations of deceased persons evidence; namely, that they were persons having a competent knowledge, or whose duty it was to know, having no motive to make a false representation: and their written declarations being directly at variance with their interest, such declarations are universally evidence." In the case of *Fenwick* v. *Reid* (6 Mad. 1), it was held that a letter appearing on the face of it to be written by the Defendant's ancestor upon the subject of the suit, and coming out of the custody of the representative of the Defendant's attorney, was admissible without proof of the hand-writing, and that such a letter being found amongst the papers of the [419] attorney was *primâ facie* evidence, that it was written to the attorney, there being no address to it and the envelope being lost. Surely, that is carrying the principle much further than we have attempted to do in the present case.

In *Maddison* v. *Nuttall* (6 Bing. 226), the documents purporting to form a modus were found in the possession of a land owner of the parish, whose rights upon such a question were adverse to the other party, and whose claim would be sustained by proof of the modus: how much stronger would the case have been, if the documents had been found among the papers of the rector? In the case of *Isham* v. *Wallis* (4 Sim. 25), the copy of a faculty, granted in 1613, was admitted in evidence in a tithe suit, it being produced from the custody of a person whose rights were abridged by it, and there being evidence that the original could not be found in the proper depository which was destroyed in the great fire of London. In that case a copy was admitted in evidence. In this case we produce the original document.

Much indulgence is due in respect to matters of evidence recorded in these Ecclesiastical depositaries in Ireland: they have been subject to much spoliation; indeed, there is not perhaps an instance of a perfect registry in that part of the kingdom. The various commotions that have from time to time afflicted the country have led to the removal, suppression, or destruction of documents which it would have been much for the interest of the public to have preserved; but, owing to that circumstance, there is a great difficulty in producing on any necessary occasion, documentary evidence of any remote date.

[420] As to Bishop Dopping's knowledge of the facts, he undertook to state them, and he may have had personal knowledge of these facts; there may not be evidence (though the fact is stated) of the date of his birth; but, at all events, he possessed all necessary means for acquiring information on the subject, or he could have procured it; he had access to the Ecclesiastical Records then in existence, but which are not now to be discovered; and he was in possession of the grant of the next avoidance: he probably knew this Mr. Barry whose institution he states; or there might have been contemporaneous circumstances, from which every thing could have been learnt by him: and it is to be presumed, that he left no legitimate means untried, to acquire for himself the most accurate as well as the most authentic information on the subject, when the avowed object of his inquiry was as to the practicability of conferring such important and valuable benefits on a member of his own family: for in that case, as in the present, the collatee of the Bishop was his son.

An inconsistency is sought to be made out as to the institution of Doctor Donellan, he having been entered on the visitation books as a collatee. That is probably the clumsy substitution which so often occurs in those Ecclesiastical Records of one technical phrase for another. The term collation is not, in much better-considered works, confined to the strict sense. In a case (*Mutter* v. *Charwell*) that is reported in 1 Merivale 490, the word "collate" is not used in the limited sense to which it is endeavoured here to restrict it. Sir Simon Degge says, "A donative is a spiritual preferment in the church, which is [421] in the free gift or *collation* of the patron, without making any presentation to the Bishop," manifestly referring to a lay impropriation and using the word collation nevertheless. There is a further

reference in the note to Degge's Parson's Counsellor, part 1. ch. 13. p. 204. Be that as it may, Bishop Dopping adopted the state of facts on which we rely, and which are before your lordships; and as he possessed the means of knowing accurately how the matter stood, and as he had a direct interest in not representing the facts as they appear stated in the case, the evidence comes precisely within the principle laid down by Lord Ellenborough, and on which the most eminent judges in questions of this nature have uniformly hitherto acted.

With respect to the power of one party to compel another to produce a case stated for the opinion of counsel, the authorities upon it, are conclusive. *Ratcliffe* v. *Furzman* (2 Brown's Cases in Parl. 514. Tomlin's ed.), *Stanhope* v. *Roberts* (2 Atk. 214), *Richards* v. *Jackson* (18 Vesey, 472), *Garland* v. *Scott* (3 Sim. 396), and *Newton* v. *Beresford* (Young, 377), where it was recently decided by Lord Lyndhurst, that cases in the possession of a rector, which he or his predecessors had stated for the opinion of counsel, should be produced in a cause instituted by parishioners against their rector. In *Browne* v. *Rawlings* (7 East, 279), a letter received from a confidential agent in 1728, containing a minute account of the tenants and rents of the estate received by a tenant for life, who had a limited leasing power reserving the ancient [422] rent, and endorsed by that tenant for life, in these words "a particular of my estate," etc. and handed down to the succeeding tenant for life, who had a like limited power, by whom it was also preserved and handed down amongst the muniments of the estate to the first tenant in tail, was held to be evidence for the tenant in tail, against a lessee of the second tenant for life in order to shew, that the rent reserved by the second tenant for life, was less than the ancient rent which was reserved at the time to which such letter referred. In that case Lord Ellenborough says, after some preliminary observations, "It appears that the former tenant for life, by whom the paper was then accredited, was not only disinterested in respect of the then existing rent, but that he had an interest the other way to diminish the amount of it; then at this distance of time with the means and knowledge which he had of the fact, and his interest in declaring it the other way, we think that his declaration is evidence of the fact to go to the jury. There are several instances in the books where the declaration of a person having knowledge of a fact, and no interest to falsify it has been admitted as evidence after his death." Lord Ellenborough then gives some instances and proceeds thus, "And the reason given is, that it is hard to prove ancient things, and the finding the papers in such a place is a presumption that they were fairly and honestly obtained and reserved for use, and are free from suspicion of dishonesty; the paper, therefore, having been found among the muniments of the family accredited by one who could not have used it in his own favour, and preserved by him and the succeeding tenant for life, against whom it might have been used [423] adversely, we think that it was evidence to be left to the jury of the amount of the ancient rent at the time it bears date." This is a further confirmation and recognition of the doctrine we have been contending for, and the objections rather apply to the *weight* of the evidence than to its *admissibility*.

As to the operation of the statute of Henry VII. it is, in its terms, sufficiently comprehensive and explicit to resume every thing that had been granted by the Crown since the conclusion of the reign of Edward II.; but it is contended that it has not that effect with respect to the grant made by King Edward IV. to Bishop Sherwood, on three grounds: first, that it did not contemplate corporations; secondly, that the advowson had been the private property of King Edward IV., and that the act only resumed grants of property held *jure coronæ*; thirdly, that the advowson, having become severed and in gross, could never be re-appended to the manor. We admit the distinction between natural and artificial persons; but, nevertheless, the statute of Non-Claim in respect to fines,—(a statute of 10 Charles I. in Ireland), which only speaks of persons and their heirs, and is silent as to corporations, and their successors, was decided to extend to such corporations as have an absolute estate and authority, such as mayor and commonalty, dean and chapter, clerks, and so forth. That is to be found settled in the case of *Croft* v. *Howell* (Plowden, 538). Sole corporations are not included in that decision; not because the word "persons" is not sufficient to include them, but because they have but a limited qualified estate and authority, and their acts required the assent of [424] third persons.

In the case before your Lordships the statute is applicable equally to corporations, either sole or aggregate; its words are "by whatever name or names they be named." That must mean the designation of the persons, not merely their names and surnames.

An argument is sought to be derived from the statute of uses, because bodies politic cannot be seised to a use; but the reason why bodies politic are not capable of being seised to a use or trust, is given in *Bacon's Abridgment* (Title, *Uses and Trusts*), because they are bodies formed at the will of the king, and no further capable than as he wills them; for it is his will that they should purchase for the common benefit and the ends of their creation, and not that they should take any thing in trust for others: and also being incorporeal the Chancery had no process on their persons to compel them to discharge their trust. The words "jointly and severally" have been made use of in the Act of Resumption. But although a corporation cannot be seised jointly, that establishes nothing. The statute uses expressions applicable to all description of persons who could be seised under all former grants; it is not confined to such persons only as are capable of being seised in any particular way, it extends to all who could be seised in any possible way. The principle which ought to govern this case is, that the statute was made for the benefit of the king, its object was to increase the royal revenue, at that period when the king's resources were so much required, in order to suppress the outrages by which the country at that time was so [425] severely afflicted, and which outrages are enumerated and adverted to in the preamble of the statute; the principle of construction is to be found in *Comyn's Digest*, title Parliament, 21.—A statute made for the benefit of the king shall be construed most beneficially for him. In *Reinger* v. *Fogossa* (Plowden, 11) the statute *de prerogativa regis*, 17 Edward II., orders that the king shall have wardship of lands of such who hold of him in chief by knight's service, whereof his tenants are seised in demesne as of fee at the times of their death; which words, demesne as of fee, have two intendments, fee simple and fee tail, and the most common intendment is fee simple; yet it has been adjudged, and is now clear law, that the king shall have as well the lands which his tenant held in fee tail as those which he had in fee simple; which case is as a rule given us, that where the words, "in the gifts of subjects made to the king by parliament have two intendments, they shall be construed most strongly for the benefit of the king."

It is objected that this doctrine does not apply to advowsons, as they are not productive of income to the Crown. But the king's rent books abound with rents reserved from those spiritual possessions. The proviso annexed to the statute in express terms refers to advowsons, and certain corporations are excepted from its operation.

In reference to the argument that this advowson was the private inheritance of King Edward IV., we contend that whether the manor of Rathweir be regarded as having been held by King Edward IV. as private property or as regal property, whether it descended to King Henry VII. *jure coronæ*, [426] or *jure uxoris*, is perfectly immaterial; it stands directly affected by the resumptive words of this act of parliament.

The words of the act relate to property whereof any of the king's progenitors, kings of England, were seised in fee simple, or fee tail, at any time theretofore. The introduction of the words fee tail would naturally lead to the conclusion that private property was contemplated by the act, and, on the other hand, that it extends to their coronal property, for it says "whereof any of the predecessors, kings of England, were at any time seised." From the evidence in the cause it is perfectly manifest that the predecessors of King Henry VII. were seised of this property, because, in the first place, on the attainder of the De Lacy family (the most ancient grantees of the Crown) it reverted to the Crown; it afterwards was regranted to the Mortimer family, and upon their forfeiture it was resumed into the hands of the Crown. It is stated, that there is a recital in one of the documents of a reversal of that latter attainder. But, be that as it may, it literally comes within the description contained in the Act of Resumption.

Whatever may have been the quantity or quality of the estate which King Edward IV. was seised of in this property, or whatever may have been the mode by which it was acquired, the moment he became king, his interest in the estate became affected and qualified by the annexation of the kingly, to his individual, capacity.

The whole doctrine as to the effect of this junction of the natural person and the body politic of the king is stated in the case relating to the duchy of Lancas-[427]-ter, reported at such length in Plowden, 212, and *Willion* v. *Berkley*, p. 238. of the same book. That doctrine is briefly this: "Not but that the person of the king shall sometimes change the course of things, and that not in respect of the nature of the estate, but of the quality of the person: as, if a common person purchases land, and has two daughters and no son, the land shall descend to both the daughters; but if the king purchases land, and has issue two daughters, and dies having no son, this land shall descend only to the eldest daughter, and that is by reason of the quality of the king's person, as it is said before. But if land descends to the king, and to another, the king shall take only a moiety; for if he should take the whole, he would do a wrong to the other, which his prerogative will not suffer him to do. So, if land in gavelkind descends to the king and to his brother, each of them shall take but a moiety: but there, if the king has two sons, and dies, the king's moiety shall not descend to his two sons, but the eldest only shall have it by prerogative; for there the quality of the person alters the descent, but not the estate, for the estate is as it was before, whether it be fee simple or fee tail, so that the estate shall be in the king as in another; and therefore the estate before issue had was, before the statute, the same in the king as it was in a stranger." The same doctrine is to be found in Coke on Littleton, 15. b.

Before the statute of uses, if a person seised to the use of another became king, he would immediately hold the lands discharged as to the use, and that in consequence of his acquirement of the royal dignity. Chief Justice Holt, in the case of [428] *The Queen* v. *Smith* (7 Mod. 78), says the king can have nothing in his natural capacity if it be not in right of his duchy, or an estate tail, by the statute *de donis*; for if the king purchase lands to him and his heirs, he shall have it in his politic capacity; and wherever the king is said generally to be seised, it shall be intended a seisin *jure coronae*. The inquisition here finds that King Edward IV. was seised, and on the authority of this case was seised *jure coronae* at the time of his death.

Whatever may have been the primary or original right of King Edward IV. to the manor of Rathweir and its dependencies, the moment he became king he held it as king, and he granted it as king, and he could have granted it in no other manner than as king—that is to say, by letters patent; and consequently, whether he is to be considered as holding *jure coronae* or *privato jure*, his right corresponds to that referred to by the statute of Henry VII. as a manor and advowson, "whereof some of the king's progenitors, kings of England, were seised in fee simple or fee tail."

With respect to the confusion thrown into the case by adverting to that inquisition, it is right to observe that the instrument itself is, on the face of it, historically inaccurate. The daughters of King Edward IV. were not coparceners: Elizabeth should have succeeded alone. Her brothers are overlooked in that document, as though they never had existence; and so is the existence of King Richard III., who probably, as king, possessed this property after the death of Edward IV. But it is perfectly immaterial in what right King Edward IV. was seised of this property, and [429] whether there was or not evidence (which must mean, of course *sufficient* evidence) of its having been private of public property.

The contention here as regards this property is, that it was private property. Now, in the thirteenth plea of the Bishop, his Lordship says, "And for a further plea as to the said church in the said fifth count of the said declaration above-mentioned, the said Bishop, by like leave of the Court, saith, that said Plaintiff ought not to have or maintain his action aforesaid thereof against him, because he saith that long before the time in said fifth count mentioned His late Majesty *King Edward IV. was seised of said advowson of said church, as in gross as of fee in* RIGHT OF HIS CROWN OF IRELAND, to wit, on the 9th of January, in the 9th year of his reign at Killucan aforesaid." It is true that it is only by way of inducement, but it is an assertion of the Defendants on the record, to which we may apply the maxim to be found in the fourth institute, that *allegans contraria non est audiendus.*

Some critical observations have been made upon the term "progenitors," seeking to confine it to a meaning synonymous with forefathers. But is it to be conceived that King Henry VII. intended by this statute to revoke and annul all the grants and favours which had been conferred by his family upon their adherents and friends,

and to leave undisturbed the grants and favours that had been conferred by the hereditary and irreconcilable enemies of his house, at least such as he conceived them to be.

But even taking the term in the limited sense to which the Defendants would cut it down, it **[430]** fully answers the description in the act of parliament, because it is evident, on this record, that this property was in the seisin of the kings, Edward II. and Edward III., who were the progenitors, even in that confined sense, of King Henry VII.; Edward III. was the father of John the Duke of Lancaster, from whom the Lancastrian line derived their descent.

But there is an important contemporaneous exposition of the term; for in the same year of the same reign an act of parliament was made in Ireland, in these words: "Item, prayen the Commons, that, for as much as there had been many and divers good and profitable statutes, late made within the realm of England, by great labour, studie, and policie, as well in the time of our Sovereign Lord the King, as in the time of his full noble and royal *progenitors*, late kings of England, by the advice of his and their discreet counsail, whereby the said realm is ordered and brought to great wealth and prosperity, and by all liklyhood so would this land if the said estatutes were used and executed in the same: wherefore be it ordeyned and established by authority of this present parliament, by the assent of the Lords spiritual and temporal, and Commons assembled in the same, that all estatutes, late made within the said realm of England, concerning or belonging to the common and publique weal of the same, from henceforth be deemed good and effectuall in the law, and over that be acceptyd, used, and executed within this land of Ireland, in all points, at all times requisite, according to the tenor and effect of the same."

[431] Now, will it be contended that the people of Ireland, whose lives and fortunes were thenceforward to be regulated and governed by the statutes of England, were to search through the English statutes and select such of those acts of parliament, passed in England, as were enacted merely in the times of the reigns of princes of the House of Lancaster, and to reject all statutes that happened to be enacted when a king of the House of York was on the throne, however publicly beneficial such might be? The absurdity of that argument, and its futility, strongly illustrate the minute and the forlorn grounds upon which it is sought to struggle against the judgment in the present case.

It has been argued that the grant to Bishop Sherwood, by King Edward IV., having disappended the advowson from the rectory, they could not, by any legal possibility, be afterwards reannexed. If by the act of the parties the advowson be disappended from its principal, whether that principal be a manor, or any other species of property, it never can be reappended by any act of the parties. But it may be reappended by operation of law. The doctrine applicable to that part of the subject is to be found in Mallory's *Quare impedit* (page 39), where he lays down that if a man seised of a manor to which an advowson is appendant, leaseth the manor for life, reserving the advowson; this, at common law, made it an advowson in gross, but when the estate for life is determined, it becomes appendant again. Upon this point he refers to Watson (Ibid. 61), Hobart (Ibid. 323), and Plowden (Ibid. 170. B.).

[432] He also refers to Sir Moyle Finch's case (6 Coke's Rep. 64. A.): "If, upon a partition between co-parceners, the advowson is allotted to one coparcener and the manor to which it was appendant to the other; and after one dies, without issue, by which the law unites them again; in this case, the advowson, which was once severed and become in gross, is now become appendant again."

In *The King* v. *The Bishop of Chester* (1 Ld. Raymond, 302), the doctrine is this: "Tenant in tail of a manor to which an advowson is appendant, reversion in the queen in fee, tenant in tail commits treason; then the queen, in reversion, usurps: by this the advowson is in the queen in gross; afterwards tenant in tail is attainted, the advowson is become appendant again; etc. because, by the attainder, the estate tail is extinct and the queen is seised in her reverter." There are many cases to be found in the books establishing the principle, that although no act of the parties can restore the appendancy, yet that, by act of law, the advowson may be again annexed to the principal from which it was severed.

To apply that doctrine to the present case, can there be a more effectual reannexation, by act of law, than that produced by this statute? The only act of severance alleged is the grant by King Edward to Bishop Sherwood of the advowson, separate

and distinct from the manor. But this statute, this act of law, this legislative omnipotence (if one may apply the term to temporal matters), has annulled, extinguished, and determined the act by which the temporary severance [433] was created; it has restored the properties to their original union, to all intents and purposes, and to the utter annihilation of all intervening time and occurrences.

As to the fine said to have been levied by William, the seventh Earl of Clanricarde, to Sir Patrick Mulledy and others. First, the fine was not pleaded,—yet it was offered in evidence,—and although objected to it was received and permitted to go to the jury. The doctrine of estoppel does not in any respect apply to the case, for the Plaintiffs in error here are strangers to that record. There is no mutuality,—and, in truth, the point was given up, upon the argument, in the Court of Exchequer Chamber. It is not pleaded as it should have been, to give it any effect. But the Plaintiffs in error are estopped, by their implied admissions on this record, from relying upon the fine, even supposing that, in other respects, it could have the effect contended for, or even supposing that, for any reasons, it should otherwise have been at all received in evidence.

The date of the alleged fine is the first year of the reign of King James II., that is to say, the year 1685. The declaration alleges that William, the seventh Earl of Clanricarde, the supposed conuzor of the fine, died on the 10th of October, 1687, (two years later than the date of the alleged fine), seised of the advowson in gross, leaving Richard, his eldest son, who became the eighth Earl, and John, his second son, him surviving; that thereupon Richard, the eighth Earl, became seised of the advowson in gross. That, on the 6th of April, 1708, Richard having died without issue, and John, the next in inheritance, being a papist, the advow-[434]-son vested in Queen Anne, under the Irish act (2 Anne), to prevent the further growth of popery. Which act provides, that where any person professing the Roman Catholic religion, becomes entitled to an advowson, or to a presentation to a church, that right is, *ipso facto*, transferred at once to the Crown, and there to remain till the Roman Catholic, or his heir or heirs, shall conform in the manner prescribed by the statute. The declaration here asserts that on the 6th of April, 1708, upon the death of Richard, and by the popery of his brother John, it came under the operation of that statute and vested in her Majesty. These are allegations of events in the Clanricarde family, and results from those occurrences, which could by no possibility have taken effect if the advowson had antecedently been passed out of their family by the operation of that fine.

The declaration alleges a subsequent vesting in King George I., under the statute of Anne. Then the seisin of Michael, the tenth Earl, is traversed by the clerk; but his conformity and the revesting the estate in him, by virtue of that conformity which are stated in the declaration, are not traversed; and the seisin of his son John the eleventh Earl of Clanricarde, who inherited by virtue of his father's conformity, is also admitted, at least not traversed. So are the seisins of all the subsequent members of the Clanricarde family in like manner. It is averred in the declaration, that upon the death of the eleventh Earl, Henry the twelfth Earl became seised, and this seisin is not traversed; but the appointment by the deed of March, 1785, under which the Plaintiff claims, is traversed; and this [435] brings the case within the authority of *Cowlishaw* v. *Cheslyn* (1 Crompton and Jervis, 48), where the Court decided that merely traversing the grant by a person averred to have been seised, but whose seisin was not traversed, admitted the seisin, and that evidence to the contrary (as the fine here) ought not to have been received.

These events then, so incompatible with the imputed operation of the fine, are admitted by the pleadings; but it is sought to throw an increased burthen of proof upon the Plaintiff, by reason of a general traverse pleaded by the clerk, namely, to the allegation that it belongs to the Plaintiff to present, and also the averment that he is not possessed. With respect to that traverse of its belonging to the Plaintiff to present, the ancient reports abound with cases of *quare impedit*, which appears to have been a form of action very much resorted to in former times. There are also numerous pleadings in this form of action set forth at length in the old books of entries. There are several books of pleadings, ancient and modern, both when the principles and rules of pleadings were most strict and when they were more relaxed. There is not an instance in the whole series of these distinguished works of a declaration in *quare impedit* that did not conclude with an averment that there-

fore, by reason of the facts antecedently stated, it belongs to the Plaintiff to present. In the whole series there is not one instance of a plea in these terms.

Two cases have been relied upon, but do not deserve the name of exceptions to the principle,—the case of the *Grocers' Company* (3 Wilson, 214), and the case of **[436]** *Thrale* v. *The Bishop of London* (1 H. Blackst. 376). The case of the *Grocers' Company*, where that passage is introduced, is in the replication; it is not in the plea. It was a traverse by the Plaintiff himself in his replication, that it belonged to him to present in a particular turn. The Defendants alleged that the Plaintiffs had missed their turn, that they ought to have presented in the second turn,—that this being the third turn it now became the right of them, the Defendants, to present: and, in reply to that, the Plaintiff closes his replication by a traverse that it belonged to him to present in the second turn. There is a *dictum* subjoined to that case of *De Grey* C. J., from which it might be inferred that such a traverse as that would not be disapproved of by him. But it is remarkable, that in the report of the same case, by Sir William Blackstone (Vol. ii. 770.), that imputed *dictum* of Lord Chief Justice De Grey is not adverted to.

The case of *Thrale* v. *The Bishop of London* is also a traverse in a replication, denying that it belonged to a particular person to present upon a particular event: and in that case, it was deemed so immaterial a traverse, that the other parties passed it by in the rejoinder, and traversed the inducement to it contrary to the principle of pleading that a traverse cannot be had upon a traverse; nevertheless, the traverse was allowed to be a good one from the immateriality of the traverse in the replication. These are cases of mixed law and fact which are traversed; whereas the allegation at the conclusion of a declaration in a *quare impedit* is a mere inference of law deduced from a multitudinous statement of facts. This case strongly illus-**[437]**-trates the point, because here we have been obliged to deduce facts almost from the first invasion of Ireland. So the case stands upon authority. With respect to the effect which it ought to have in relation to the evidence, the Defendants below have traversed specially every allegation which they required to be proved, and the Plaintiff below has established all those allegations by evidence. The general traverse, if it puts the Plaintiff upon any proof, would demand proof of the whole matter of the count; and if so, what can be the supposable use of a number of special traverses introduced to the enormous extension of the pleadings and a vast increase of expence? It would be giving to this novel plea all the effect of a general issue in a form of action in which there is no general issue, or at least only a general issue which admits the Plaintiff's title, and merely controverts the charge of disturbance. That no general issue is allowed in this form of action, appears from Mallory, page 210, from the case of *Reid* v. *Brookman* (3 Term Rep. 158.) and the case of *Colt*, and *Glover* v. *The Bishop of Litchfield and Coventry* (Hobart, 162.), and also from the general doctrine of Mr. Stephen's book on pleading, page 173. It is manifest that the pleader himself here did not calculate upon such an effect from his plea, because, if he had done so, he certainly would not have introduced more than 120 special pleas in aid of it.

The pleas traversing that it belongs to the Plaintiff to present, and that the Plaintiff is possessed, were compared to pleas in ejectment. There the Plaintiff proceeds upon a right of entry within the last 20 years. It has been asked, how does the admission of this plea and the extended effect sought **[438]** to be given to it injure the Plaintiff, seeing that the Defendant may specially traverse every allegation in his declaration? The simple answer to that is this—if the Defendant were so to abuse the indulgence of the Court by unnecessary or vexatious, or multitudinous traverses, the rule for liberty to plead several matters would be rescinded, as was done in the case of *Gully* v. *The Bishop of Exeter* (5 Bing. 171: 2 M. and P. 266.), where a numerous set of pleas of this description were referred to one of the learned judges to be revised, and his Lordship struck out a great many of them. He retained several, and, amongst the rest, one with respect to the possession similar to the one here. But if his Lordship was of opinion that that opened the whole case to the Defendant, and threw the entire burden of proof of all the allegations upon the Plaintiff, his Lordship would have decided that that single plea would have sufficed, and he would have struck the whole out save and except that one.

So far as the pleas are to be found in the pleadings of the clerk, we submit that

they were not admissible at all, and upon this principle—that the effect of such proof would be to shew a title out of his patron; at common law, the clerk was not allowed to plead as to the title to the patronage at all; he had no interest in the patronage. If the patron was not named in the writ, the clerk might have pleaded in abatement; and then where the patron was brought into the action, he had the means and opportunity of defending both his own rights and those of his clerk as derived through him: still the clerk was exposed to this disadvantage, the patron might be supine or indifferent, or there might be [439] collusion between the patron and the Defendant, or there might be false pleading. To remedy this mischief, the statute which is called the statute *De Clero*, the 25 Edward III. ch. 7. was passed, enabling the clerk to defend the title of his patron; for which purpose he is not only bound to commence his plea by stating his possession, that is, that he is parson imparsonnee, but he must also set forth on whose presentation he is that parson; and that allegation is material and traversable, and then he may defend his patron's right or his patron's title, but not by shewing title out of his patron: he cannot state that he is parson imparsonnee on the presentation of A. B., and then shew a title in C. D., although in point of fact C. D.'s title would effectually defeat that of the Plaintiff.

Accordingly, it is laid down in Mallory, page 213., referring to Hobart 320., that "even though the title that the parson sets up in the King or J. D. after he hath shewn himself parson imparsonate of the presentation of J. S., will destroy the Plaintiff's title, that shall not avail him." The same doctrine is fully established in Hobart 320. Here the alleged fine, if it had any operation at all, would equally have the effect of conveying away the property from the Bishop of Meath, as well as from the House of Clanricarde; that is, it would have the effect of conveying it away from the Bishop by whose collation the Defendant pleads that he is parson imparsonnee of this benefice. Indeed, it would appear, that the attempt to enforce this evidence is a strong and implied admission of the absence of title in the clerk's patron, inasmuch as no act of an Earl of Clanricarde could convey [440] the advowson, if in truth it belonged to the Bishop of Meath.

An argument perhaps more of a popular character than a legal one was pressed into the discussion of this case, founded upon an alleged long-continued exercise of right over this benefice by the Bishops of Meath. From the record itself, it will appear that that allegation is totally unfounded. But assuming for a moment that it were otherwise, and that numerous collations had been made by the Bishops of Meath, it would not advance the argument in favour of the Bishop.

Bishops have various duties to discharge, and one of the most important is the providing for the spiritual concerns of the inhabitants of parishes under their charge. It is the bounden duty of the Bishop, when a benefice becomes vacant, to supply the charge provisionally, so as that the flock shall not sustain any spiritual privation, and he may do that within the six months which are allowed to the patron to present; but if the six months elapse, he may and ought to appoint permanently, that is, during the life of the incumbent whom he selects. But in either case he acts as and for the patron, and in his right, place, and state. He is a mere trustee: he is in some books called the attorney for that purpose of the patron, and therefore his interference in filling a vacant benefice is by no means necessarily referable either to title or patronage.

This doctrine is fully sustained by *Green's* case (6 Coke, 29 b.), where it is ruled, "If the ordinary collates within six months and his clerk is inducted, yet the rightful patron cannot be put out of possession, [441] nor put to his *quare impedit*, but may present, by which it appears that the very patron without a presentation cannot be put out of possession."

Again, in Boswell's case (6 Rep. 50. a.), "If a bishop collates without title to a church presentable and his clerk is inducted, yet that should not put the rightful patron out of possession, for that is but a provision for the celebration of divine service, in the mean time, till the patron presents, and that belongs to his office, and therefore shall not put the patron to a *quare impedit*, but his presentee ought to be received without any process of law, and therefore in such case, no plenarty by collation can be pleaded against the patron, for no plenarty is available in law against him who has title to present, but only plenarty by presentation." That is, by presentation by an adverse patron.

In Hobart's Reports, page 302., it is said "Collation makes no disappendency nor plenarty, but the church remains void, and the patron may not only bring his *quare impedit*, but present upon the bishop's clerk seven years afterwards." In Wood's Institutes, page 160., that principle is extended, for it is stated, that "the right patron may at any time bring his writ to remove the person collated." And in the case of *The Queen* v. *the Archbishop of York* (1 Leonard, 226), it is decided that not two, three, or more collations, give any possession of an advowson to a bishop, "though he should collate not as patron, but as ordinary." That is, that he cannot usurp.

Mallory, in page 26., says, "The right of presentation in the patron seems to be such as that even **[442]** the ordinary's collation is but in right of the patron, and by his default, and that even when the king presents by lapse, he does not present as supreme ordinary, but as supreme patron, and his presentation through the patron's default is an affirmance of the patron's right, and maintains the possession of the true patron." The Plaintiff in *quare impedit* may count upon a collation as effectually as he can upon the presentation by himself, if it be a collation upon a lapse.

In page 118. Mallory says, "Lapse is not an interest naturally as the patronage is but a mere act or office of trust reposed by law in the ordinary or metropolitan, and lastly in the king, the end of which trust is to provide the church, in default of the patron, and yet as to him and for his behoof, so that the ordinary, or he that is to present by lapse, is as it were *negotiorum gestor*, or a kind of attorney made by law to do that for the patron which it is supposed he would do for himself, if there were not somewhat to hinder him, and therefore the collation by lapse is in right of the patron, and for his turn, and he shall lay it as his possession for an assize of darreign presentment."

Lord Brougham: Suppose instead of presenting after six months, the bishop had been found again and again for a series of avoidances, to present within six days that act of user would not be equivocal. Your argument is that the books all say that a collation after six months may be counted upon by the patron to prove his right, and if relied upon by the bishop, does not avail for him that it is an equivocal act—that it is not necessarily adverse, for it may be by him in his right of **[443]** the patron, or it may be by him as attorney of the patron; but that observation is not applicable to a series of presentments by the bishop within the six months.

For the Defendant in error.

If he collates within six months to a benefice that is presentable, it is a nullity to all intents and purposes as regards the patron's right of presentation.

Lord Brougham: You are now upon the effect of the user of the bishop for a series of years collating, and I agree that such series of collations at the end of six months is an equivocal act. It may be referable either to his title as patron, or it may be referable to his office as attorney of the patron; but I am supposing a series of presentments, each within three months of the avoidance: how in that case would you refer it to the bishop's title, *quasi* attorney of the patron? Would not that have some avail in the argument between him and the patron?

For the Defendant in error.

A collation within six months is clearly an equivocal act, because he is not then entitled to collate for lapse; and it may be that he is assuming either to collate as patron, or provisionally till the patron shall nominate.

Lord Brougham: If you will satisfy us that the bishop has any right within six months to provide for the living.

For the Defendant in error.

The authorities prove that it is his duty not to suffer the wants of the parish to be unprovided even for six months.

Lord Brougham: He would not do it by **[444]** collation; no bishop would, in order to supply the vacancy within six months, present a clerk as for induction.

For the Defendant in error.

It is not usual, but he may do that if he pleases; and the moment the patron comes forward with his presentee, there is an end to the collation. It is always open to impeachment by the patron; but if the bishop allows the six months to elapse, and he then collates, but does not in his book state that he so collates by lapse, then it is a trespassing upon the rights of the patron, which the patron cannot *pro hâc*

vice disturb; but the bishop in that case is bound in common justice to state in his books that he collates upon the lapse of the patron, and then there is a recorded admission of the Plaintiff's title, and that is an act, the neglect of which is universally complained of in Ireland; that the collations which appear upon the bishops' registries do not set forth whether they are in any assumed right of patronage in the bishop himself, or on behalf of a negligent patron.

But it is material to give attention to the actual state of the facts, as appearing upon the record. The utmost diligence that has been exercised cannot trace out more than nine instances in which this benefice has been filled. This property was originally that of the D'Arcy family; and accordingly on the 13th of March, 1529, we find a person of the name of Dermott Martin presented by William D'Arcy. That presentation recites that it was upon the demise of the preceding incumbent, who was Thomas D'Arcy. Then the property comes to King Henry VIII., and he exercised the right of seisin, by presenting on the 18th **[445]** of August in the 24th year of his reign, William Cocks, and presenting him *pleno jure*. In 1615, we find the entry of Mr. Carter being the incumbent, Lord Clanricarde being the patron; and in 1626, we have Edward Donnelan presented by Richard, fourth earl of Clanricarde; then in 1660, comes Barry's presentation by the grant of the Lord Clanricarde; and in 1691 there is the institution of a Mr. Warburton by the Crown, upon the promotion of the preceding incumbent, it being the prerogative of the Crown when an incumbent is promoted to fill the vacant benefice. These are seven out of nine instances; there remains but two—one of those the usurpation of Bishop Dopping, who collated his own son in 1695; and that of the last incumbent, Mr. Wynne. Two writs of *quare impedit* were executed against Bishop Dopping; he extricated himself from that difficulty, not by the verdict of a jury or the judgment of a court, but he complained to the House of Lords of a breach of privilege committed in his person against the house, and the attorney was brought to the bar of the House of Lords, and only discharged upon making an ample apology.

If the case rested upon the title proved, independently of the documents found at Lowton House, there was enough to have induced any court and any conscientious jury to find a verdict for the Plaintiff in this action.

It is competent for your Lordships, as the Court of dernier resort in appellate jurisdiction, to look to the whole of the evidence as set out upon the record; and if your Lordships are satisfied, that independently of any evidence to which any objection can be urged, a title is legally established in favour **[446]** of the Plaintiff, to confirm the judgment that has been pronounced. There are several cases in which that principle appears to have been recognised.

In the case of *Lord Teynham* v. *Tyler* (6 Bingham, 561), the Court decided that they would not grant a new trial upon the ground of improper evidence having been admitted, there being enough on the report of the learned Judge to satisfy them that the verdict was right, independently of the objectionable evidence. So, in *Edwards* v. *Evans* (3 East, 451), the same principle was adopted upon a rejection of evidence which ought to have been received. In this house, also, in the case of *Maccabe* v. *Hussey* (5 Bligh, N. S. 715), this doctrine is stated: "This house, sitting as a court of appeal from a decree of the Court of Chancery, where evidence has been improperly rejected, will look at that evidence, and see whether or not, if admitted, it ought to have affected or varied the judgment." Then upon the authority of the case in 6th Bingham, I submit the converse of that proposition. I do that, however, not by any means admitting that there has been a particle of evidence here received which should have been rejected.

"So, a court of error will look to the whole evidence on both sides to see whether it be sufficient to sustain the verdict, although the exception referred to the Defendant's evidence alone." They will travel out of the exception to see if they can sustain the judgment. That is the case of *Vines* v. *The Corporation of Reading* (1 Young and Jervis, 4).

The following observations were made by the **[447]** Lords Brougham and Lyndhurst in the course and at the conclusion of the argument.

Upon the question whether there was sufficient evidence that the house called Dopping House was the depository of the Dopping family papers; whether Mrs. Dopping, who was said to reside there, was a relative or connection of the family of the

Bishop of Meath of that name; and whether it was the family mansion, it was said: that if parties do not cross-examine, but leave the evidence vague and loose for the purpose of making objections afterwards, that is not a practice to be encouraged.

As to the proof of the deed found in the house in question, it was said: that it was unnecessary to prove an ancient deed by comparison of the hand-writing of the period, if it was shewn to come out of the proper custody; and if otherwise, the hand-writing would be immaterial, as it would not have been evidence against the successor.

Upon the questions whether the grant of the next presentation ought to have been in the custody of the bishop, and as to the case, the following observations were made.

A man keeps his title to an advowson because he presents *toties quoties*; but if it be the next avoidance the whole grant is spent in the grantee upon the presentation; and he might naturally permit the bishop to retain it, and indeed the custody of it might be necessary for the bishop's protection, as the owner of the advowson might send another presentee to the bishop, who would not have the best evidence of the former presentation; at all events, the bishop's family would have the custody of the case, if not of the deed. Then if [448] the house in question is to be considered the family house of the bishop and his descendants, that might be conclusive upon the question, if such case and custody is evidence against the successors. The grant is good for nothing without the case. The custody of the Bishop is the proper custody of the case; then if the case is rightly in the bishop's custody, that is connected with the grant, for the case refers to the grant. The objection as to custody does not seem to apply to the case.

Upon the question as to the right to compel production of the case, the decision in *Radcliffe* v. *Fursman* [2 Bro. P. C. 514] was suggested to the counsel, and it was said that the bishop might have been compelled, by order of the Court of Chancery, to produce the case which he had laid before counsel; that attempts had been made to apply the doctrine to suits actually depending; but that was resisted by the Court in the case of *Bolton* v. *The Corporation of Liverpool* [1 My. and K. 88]. That harsh as the practice may appear, it is accordant with the principles applied in courts of equity upon bills of discovery, in which the plaintiff has a right to wring the conscience of his adversary, and to inquire what he asserted in conversation with other persons, even with his attorney. The case of an action pending is an exception; but before litigation, although you cannot ask the attorney or counsel what passed in private consultation, you may ask the client. In *Bolton* v. *The Corporation of Liverpool* the case did not so much turn upon its being a case of tolls, or matter of public interest, as that it was within the common rule of equity as to discovery. The effect of the decision is that you have no right to that which touches the title of your adversary only, but that [449] if it is part of your own title, or a title in common, the production may be compelled: but here was no question of compulsory production; the document being produced, the question is whether it is admissible in evidence. The decisions in courts of equity shew that where a case has been laid before counsel, it is the inveterate practice of those courts, acted upon daily, that in any proceeding except the suit actually pending, the Defendant may be compelled, by a bill of discovery, to produce the case laid by him confidentially before his counsel, but not the answer nor the opinion of the counsel; a rule, apparently, not very consistent.

The exception of *lis mota* cannot be sustained, except with reference to a suit pending at the time or in immediate contemplation. The documents if ordered to be produced in a court of equity must be evidence at law; if there is any objection to them as evidence, that would be a reason against the discovery, and might prevent the production in equity. *Preston* v. *Carr* [1 Y. and J. 575] is a strong case on this point. *Greenough* v. *Gaskell* [1 My. and K. 98] was a case of solicitor charged with fraud. It may be difficult in principle to distinguish between what passes in the consultation room of the counsel upon a verbal consultation, which the client may be compelled to disclose, and the opinion given upon a case which is a written consultation. The question has not been pressed in courts of equity on this special point of argument.

A declaration made by bishops or other persons in their corporate character is evidence against successors, although it relates to facts which occurred before their existence, since they might have seen documents, and had before them proofs which

have [450] since perished. If Bishop Dopping in the case asserts that a particular person was presented to the living, he might have seen the instrument of presentation. If he says that he was in consequence instituted, he might have seen the instrument of institution, or an entry in the book of the bishop which might have recited on whose presentation he was instituted, and thus have acquired competent knowledge of the facts, according to the rules of evidence, although the facts happened before his birth. In this case it seems he saw the person in actual possession of the living.

As to the operation of the statute 10 Henry 7. it was observed, that as it was enacted that " all the feoffments, grants, etc. enumerated were to be deemed void and of none effect in law," it could not reasonably be argued that what had been done with respect to the manor and the advowson had the effect of a severance, since by a fair construction of the act, the effect upon the grants, etc. was to make them utterly void, as if they had never been made.

As to the argument grounded upon the use of the words " Great Seal," as applying only to the possessions of the Crown, it was suggested that the words did not override the whole clause, the resumption applying first to all manors, lordships, castles, garrisons, fortresses, advowsons of churches, etc., whereof the kings of England were at any time seised in fee simple or fee tail from the time of Edward II., and then by a clause very distinctly severed all feoffments, gifts in tail, grants, etc., as well by authority of parliament as by letters patent, made under the Great Seal of England or Ireland, etc., that the former gifts independently [451] of and as well as the latter, viz. the feoffments, etc. under the Great Seal are declared to be null and void from the reign of Edward II.

As to the admissibility of the fine in evidence it was said, suppose the traverse puts in issue all the allegations in the declaration, it is not competent to the Defendants to prove an independent fact in answer to those allegations. The duty of the Plaintiff is only to prove these allegations: how then could the fine be received in evidence, unless it had been pleaded, assuming, as it is contended that by the traverse all the facts stated in the allegations of the declaration are put in issue? What is it incumbent on the Plaintiffs to prove but those allegations? The defendant cannot cross him by a fine which he has not pleaded.

Lord Brougham: My Lords, this case is one of considerable importance, not only with respect to the interests involved in it, but the points of law raised in the Court below, and on which your Lordships have the judgment of the learned Judges in Ireland, before whom the question came in its different stages, and who pronounced judgment against the Plaintiff in error. It becomes now my duty to state to your Lordships the questions which it appears to be expedient you should put to the learned Judges who have assisted you in listening to the argument of this writ of error, for the purpose of getting the benefit which their learning and experience in dealing with the points made at the bar are calculated to throw on the present question. It is obvious from the course of the argument which has been held before you, that there may be said to be three great branches of [452] this case, to all of which I propose shortly to direct the attention of the learned Judges, in the few observations I am about to make, and which shall be confined simply to an explanation of the matters in question, in order that there may be no part overlooked of what has been urged by the counsel at the bar, and that you may see the force of the questions which the points of argument suggest.

The most important question relates to the admissibility of certain evidence under the issues joined. Although there were many pleas, and a great number of issues joined on those pleas the jurors were discharged without finding any verdict except as to the issues upon the 5th count.

The first of those three branches relates to the admissibility of certain evidence; the second relates to the power, force, and effect of a certain statute; and the third to the power, force, and effect of a certain fine.

If any other point has escaped me in this enumeration, I should wish to have it suggested before the questions are finally settled for the learned Judges; it is very material no one point should be left out. As it is impossible to anticipate what may be the result of the consultation of the learned Judges, or of the opinions subsequently formed by your Lordships on the result of that consultation upon the first question,

as to the admissibility of certain evidence, it becomes necessary to request the attention of the house and of the learned Judges, in the first instance, to all those three branches, because, although undoubtedly if the first should be decided in one way, the others would cease to be material, and the whole question would be disposed of for the present; yet, if that [453] first question should be decided in another way, the other questions must necessarily in succession arise.

The first of these questions is, as to the admissibility of the evidence of the deed of grant from a certain Lord Clanricarde, (who at the time was seised of the advowson in question)—of the next presentation on the next succeeding avoidance of that living to an individual who presented a clerk to the then bishop, and whom the bishop, it is said, instituted; that deed was found in a certain place: And the question arises first—Ought that deed to have been admitted in evidence or not, regard being had to that which forms the principal ground of objection to its reception, namely, the defective proof of its custody. Perhaps a difficulty might arise even if the evidence of custody were perfect as to the binding nature of that on the present bishop, the successor of the then Bishop Dopping; but, however, on that branch the principal point is the custody. I have an inclination of opinion upon that subject. I have not often in my experience on these questions, which is very much inferior to that of many of the learned persons assisting your lordships, but I do not recollect to have observed any case in which there was so scanty a proof, compared with that which is usually required in trials as a security to defend the rights of parties and protect courts from misapprehension or from fraud in the fabrication of evidence. I do not recollect any case in which those rules which have been adopted to defend parties and protect the courts in receiving old instruments, have been so little attended to. The most scanty evidence of custody, and of acts arising from custody, was produced; though it is certainly doing no more than justice to [454] say, that it was the fault of the party now objecting to the defective proof of custody, that it was so little, inasmuch as they did not cross-examine to it; and it is past all doubt that a party is not allowed to lie by at the trial when they might have got answers which would have explained the evidence, thus to shut the door in the face of the evidence, and then insist that the proof was defective.

The next question relates to a case found in the same repository, which in some respects raises a doubt on other grounds as to its admissibility, and raises again the question of proper custody, but not as it appears to me to the same degree in which the deed raises it. It does not follow, although the evidence as to the deed was not sufficient, that the evidence as to the case might not be sufficient, because undoubtedly it is a case respecting the affairs of the diocese, and is laid before counsel by a bishop then having the see. That is the second point, and raises several questions, all of which fall within the comprehensive question, admissible or not admissible, which I have framed on purpose to lay before the learned Judges. The admissibility of that sort of evidence to a certain degree has been tried by questions raised on bills in equity, for discovery being filed against parties to compel them to produce cases which they had laid before their own counsel. The practice has been subjected to many observations made at the bar; and it is, perhaps, to be lamented that there ever was such a decision pronounced or affirmed by this house, which is the court of last resort, as the decision in that case of *Ratcliffe* v. *Fursman*, the effect of which is, that when a man has laid before his counsel a confidential statement, for the purpose of enabling [455] himself to prosecute his claim or defend his possessions, another person in another suit, provided he makes a case for a decree, generally is enabled to extract from that party cases so prepared, and laid confidentially before his counsel.

It is, perhaps, much to be lamented that that should be law; but the law is inveterate—it is sanctioned by a decision solemnly pronounced by this house in that case; it has always been acted upon since, and acted on to a great extent until the three late cases of *Tooke* v. *Paisley*, *Hughes* v. *Biddulph*, and *Bolton* v. *The Liverpool Corporation* [1 My. and K. 88]. In all these cases it has been acted on less vigorously, and to a smaller extent, and the right of the party has been confined within narrower bounds than ever was done in former cases. The house is bound by the decision in *Radcliffe* v. *Fursman* [2 Bro. P. C. 514], and the only question is, whether any thing is to be extracted from the limitations established by subsequent authorities, which will enable you to qualify the application of that principle as far as it is applicable to the admissibility of such a case as this.

A question for consideration also might be raised, whether the case, if the production be compelled, or the evidence admitted, is to be accompanied with explanation, which may be given by the answer, or whether it can ever be used by a jury without the answer being read. Then it is to be considered, whether that does not differ from this case, and even now exclude it. If acting on the advice of the learned Judges, or in any other way, we shall be of opinion that the Court below was wrong in admitting the evidence, either of the case or the deed, and that the party bringing a bill of exceptions tacked to his writ of error, ought to prevail on those excep-**[456]**-tions, I hold it to be utterly immaterial, and not to be worthy of putting a question to the learned Judges, to inquire what would be the effect of that evidence if it were received, or what would have been the effect of shutting out that evidence: for whatever may be the effect of the decision in the case of *Teynham* v. *Tyler* (6 Bing. 561), or any other case of the sort, where the court is called on to exercise its discretion in granting a new trial, I believe all the Judges are of opinion that the question is on the record by a bill of exceptions brought here tacked to a writ of error: it is error on the record, and therefore a *venire de novo* would be granted as a matter of course.

The second branch of the case relates to the effect of the statute of the 10th of Henry VII., upon the grant of Edward IV. That must be discussed on the merits, and it is only necessary to lay before the Judges a question, conveniently framed, to take their opinion on the effect of that statute upon the grant.

Another question arises as to the effect of the statute in reappending the advowson to the manor of Rathweir.

This brings us to the third branch of our case: the first question on that point arises partly on the pleadings, partly on the admissibility, and partly on the effect of the evidence, whether in that state of the pleadings it is admissible. Now on that also I shall only state to your Lordships further the sort of questions which it is fit to propose, and it is nearly the same question as with respect to the deed. With respect to the fine levied of the manor and advowson, the question resolves itself into three: first, whether **[457]** or not the fine (stating the circumstance of the fine being levied by the party whose estate the present party, the Defendant in error, has—the Plaintiff in the *quare impedit*)—whether the fine being so levied is admissible in evidence upon the issues raised on the 5th plea in this state of the record. In consequence of the argument in reply by the counsel for the Plaintiff in error, the second question which it is material to put, is whether if receivable it ought not to be left to the jury to say, whether the effect and force of that fine was a bar to the action; and the third, supposing it is on the record, is, whether the force and effect of that fine is sufficient to bar the action.

These questions, the first two on the admissibility, the second two on the force of the statute, and the last three on the fine levied, will, as far as I am advised, exhaust the enquiry.

Upon the motion of Lord Brougham, the following questions were put to the judges:

"In *quare impedit* to recover the presentation to the church of K., the advowson whereof is claimed to be part of the temporalities of the Bishop of A., a deed was offered in evidence purporting to be brought from the custody particularly described in the bill of exceptions: And also a case purporting to be a case stated for the opinion of counsel on the part of a former Bishop of A. and brought from the same custody:

1. Is the deed admissible in evidence against the successors to the Bishop of A. in that see?

2. Is the case admissible in evidence against the same party?

[458] An act was passed in 10th Henry VII., (see page 348.) and a grant of the advowson of C. by King Edward IV., was made to Bishop of A. (see page 338.)

3. Did the said act of Henry VII. avoid the said grant of Edward IV.?

4. Did the said statute re-append the advowson to the manor, whereto it was appended before the grant?

In a *quare impedit* brought by C. against the Bishop of A., it is pleaded (amongst other things) (see pleas to 5th Count, page 337.), on which issues are joined. On these issues a fine is tendered in evidence levied by B., whose estate C. hath (see page 350. and appendix 84.)

5. Is such fine admissible in evidence on the said issue?

6. If received, ought it to be left to the jury to say, whether it barred the action of *quare impedit*?

7. Did the fine bar the action of *quare impedit*?"

On the 25th of May, 1835, the Lord Chief Justice of the Court of Common Pleas delivered the unanimous opinion of the judges present, upon the said questions of law, as follows:

"With your Lordships' permission we shall reverse the order of considering the first and second questions, and give our answer to the question, whether the case was admissible in evidence. For as the deed and the case were found at the same time, by the same persons, at the same place, and indeed in the very same parcel of papers, the question of admissibility so far as it depends on the custody is precisely the same [459] with respect to both; but a difficulty which might exist with respect to the deed, but which forms no ingredient in the consideration of the admissibility of the case, will be avoided if the case should be held to be receivable in evidence; and upon the question, whether the case stated for the opinion of counsel is admissible, the judges who have heard the arguments of counsel upon this point, are of opinion, that it would be admissible in evidence on the trial of the *quare impedit* above supposed to be brought; for although two of my learned brethren, Mr. Justice Park and Mr. Justice Coleridge, did at one time feel doubts as to the propriety of admitting such evidence, I am authorized by them to state, that upon further consideration, those doubts are removed, and that they agree in opinion with the rest of the judges.

"It is not necessary to determine on the present occasion, whether the supposed Plaintiff in the *quare impedit* could have compelled the Bishop, the supposed Defendant, to produce in evidence the case which had been stated for the opinion of counsel by his predecessor, either by any proceeding in a Court of Equity or otherwise; or whether the counsel or attorney who drew up the statements contained in that case, could have been compelled to disclose such statements, either as against their client or the successor of their client. The present inquiry stands unembarrassed with the consideration of that question: for the case stated for counsel has actually come into the possession of the Plaintiff in the *quare impedit*, and the Plaintiff himself produces it, at the trial of the cause, as part of his evidence, and the question is the same as if a case with the [460] opinion of counsel which one party was not bound to produce, had found its way by accident, or otherwise into the hands of the other party. Upon this view of the subject it appears to us, that the only considerations which arise upon the production of the case, are two: First, whether the custody in which it is found is such as to stamp it with authenticity as a genuine document; and secondly, if it is to be taken to be genuine, whether the statement of the facts contained in it are admissible against the interests of the successor of the former bishop, who made or caused to be made the statement contained in the case.

"The first, and indeed the principal question is, whether this document was found in such custody and under such circumstances attending the finding of it, as to give it authenticity as being a case really stated by the authority and on the behalf of a former bishop of the same see.

"Now, before we consider the facts relating to the finding of the case, as stated in the bill of exceptions to which we are referred; we cannot but observe, that the statement itself in the bill of exceptions is very loose and inaccurate: but we think in construing the statement contained in the bill of exceptions, we are to consider ourselves placed in a situation analogous to that of a jury, and that like a jury we are bound to make every legal presumption from the facts stated, and every reasonable inference which those facts will bear.

"Supposing facts, therefore, are stated by the Plaintiff's witnesses in an uncertain or ambiguous manner, as the Defendant's counsel have neglected by cross-examination, of which they [461] had the opportunity to render the statement more clear and certain to remove any ambiguity of expression; it is not competent for the Defendant below, in this advanced stage of the proceedings, to make his stand upon the looseness and ambiguity of the testimony of which he is to a considerable extent himself the cause. In such case, the judges can only, as judges of the fact, and with the eyes of common men, endeavour to discover the truth through the vagueness and uncertainty of the statement, and then only to act upon it where they can feel a solid foundation on which they can rely. This observation will dispose of much of the objection which

has been made in the course of the argument against the testimony of the witnesses, who depose to the time, place, and manner of the finding of the case and of the grant; and looking at the statements in the bill of exceptions, we think the fair result of the evidence, is that both the documents to which exceptions have been taken were found tied up together with other papers relating to the see, in a house called Lowton House, which was the family Mansion House of the Doppings, that is, the Mansion House of the family of which Anthony Dopping, formerly Bishop of Meath, was one member, and of which the witness who gave the testimony was another; that this house was occupied by a member of the Dopping family, at the time the papers were found there; and lastly, that it was the house in which the Dopping family papers were kept. There is not one of these facts vague, as they appear at present, which might not have been cleared from all ambiguity by a very little cross-examination, if they **[462]** are founded in truth; and on the other hand, not one which would have stood the test of such cross-examination if untrue. Other parts of the bill of exceptions corroborate and confirm the result of the evidence as above stated. That there was an Anthony Dopping, who had been Bishop of Meath, that he had some family, and that he had collated his son to the living now in dispute, is proved by documentary evidence set forth in the bill of exceptions, which documentary evidence was contemporaneous with the fact and cannot mislead. Again, as the original documents do not appear before the judges in a bill of exceptions, but the transcript only is set out upon the record, it is the proper and necessary intendment that there is nothing upon the face or in the condition of the documents themselves which excites suspicion as to their genuineness; for in this stage of the proceedings credit must be given to the Court below, that they would not have allowed the documents to be read if they had borne upon their face, or in their condition, any evidence against their admissibility.

"The result of the evidence upon the bill of exceptions we think is this: that these documents were found in a place in which, and under the care of persons with whom, papers of Bishop Dopping might naturally and reasonably be expected to be found, and that is precisely the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit.

"If documents continue in such custody there never would be any question as to their authen-**[463]**-ticity; but it is when documents are found in other than the proper place of deposit that the investigation commences, whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they are actually found; for it is obvious, that whilst there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and probable, though differing in degree, some being more so, some less; and in those cases, the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine.

"That such is the character and description of the custody which is held sufficient to render a document admissible, appears from all the cases. On the one hand, old grants to abbies have been rejected as evidence of private rights, where the possession of them has appeared altogether unconnected with the persons who had an interest in the estate. Thus a manuscript found in the Herald's office, enumerating the possessions of the dissolved Monastery of Tutbury, (*Lygon* v. *Strutt*, 2 Anstr. 601.); a manuscript found in the Bodleian Library, at Oxford, (*Michel* v. *Rabbets*, etc. in 3 Taunt. 91.); an old grant to a priory brought from the Cottonian MSS. in the British Museum, (*Swinnerton* v. *Marquess of Stafford*, 3 Taunt. 91.), were held to be inadmissible, the possession of the documents being unconnected with the interest in the property. On the other hand, an old Chartulary of the dissolved **[464]** Abbey of Glastonbury, was held to be admissible, because found in the possession of the owner of part of the abbey lands, though not of the principal proprietor. This was not the proper custody, which, as Lord Redesdale observed, would have been the Augmentation Office, (4 Dow. 321) and as between the different proprietors of the abbey lands it might have been more reasonably expected to have been deposited with the largest; but it was as the Court argued, a place of custody where it might be reasonably expected to be found, (*Bullen* v. *Michell*, 2 Price Rep. 413). So also in the case of *Jones*

v. *Waller*, 2 Gwill. 346, the collector's book would have been as well authenticated if produced from the custody of the executors of the incumbent or his successor, as from the hands of the successor of the collector. (See also to the same effect the case of *Bertie* v. *Beaumont*, 2 Price, 307).

"Upon this principle we think the case stated for the opinion of counsel, purporting to be stated on the part of Bishop Dopping and found in the place, and in the custody, before described, was admissible in evidence. It was a document which related to the private interest of the bishop at the time when it was stated, for it bears date in 1695; about which time it appears, from other facts found, that Barry, the late incumbent, was dead, and that before 1697 Bishop Dopping had collated his own son; it related, therefore, to a real transaction which took place at the time. And although it might be said to have related, in some degree, to the see, for the right of collation was claimed as of an advowson granted to the see, yet it is manifest this case [465] had been stated, with reference to the private interests of the bishop, in the particular avoidance, and that it was more reasonable to expect it to be preserved with his private papers and family documents than in the public registry of the diocese. But even considered as a document belonging to the see, it was not unreasonable that it should have been found in the bishop's mansion house; for, upon the evidence, there is only one single ecclesiastical record preserved in the registry of the diocese of Meath, of an earlier date than 1717; and, on the other hand, the case and grant are found in the same parcel with several papers relating to the see of Meath, and in the same room were several visitation books of the diocese, and other papers, relating to the same see. It is objected in argument, that it does not appear, by legal evidence, what these papers were; but it seems a sufficient answer to that objection, that the papers themselves were not called for at the trial, which they might have been, neither is their non-production made the ground of any exception to the Judge's direction at the trial. The case stated for counsel, therefore, so found, and the reasonableness of its custody being corroborated by so many concomitant circumstances, we think it was properly admitted in evidence.

"But it is objected, secondly, that though it might have been admissible against the bishop, for whom it was stated, it cannot be so against his successor, because the facts, stated in the case, took place long before the bishop had any interest, and before he can be supposed to have had any knowledge of the see. The case, indeed, [466] is dated in 1695; the grant which is set out in it is dated in 1635; the presentation under the grant in 1642; and the induction in 1660. Undoubtedly, if by knowledge is meant a personal knowledge of the facts, it must be held to have been wanting in the present case; but the facts stated were all facts that are evidenced by written documents; the grant itself accompanied the case, being bound up in the same parcel; the presentation and induction are only to be proved by written entries, which were peculiarly within the bishop's reach, with such, the best means of knowledge; therefore we think the statement by him, or by his attorney, of a fact in the case, directly against his own interest, at the time when the case was stated, was not only an admission against him but against his successors, who stood in the same situation.

"So much having been said about the case, it is scarcely necessary to refer to the grant; it is set forth in the case, and thereby authenticated, and this alone would make it producible; but it is in itself a grant of great antiquity, and we are bound to assume, without any apparent infirmity or defect on the face of it, to render it unworthy of credit. Upon the whole, therefore, our opinion is, that both the one document and the other were admissible."

Your Lordships next direct the attention of the Judges to an act of parliament, passed at a parliament held at Drogheda, in the tenth year of King Henry VII. (set out in the appendix to the bill of exceptions, to which we are referred), and to a certain grant of the advowson of C., by King Edward IV., whereof he was seised in the same [467] right as of the advowson of Rathweir, in the said appendix mentioned; which grant was made to the Bishop of A., and is assumed to be in the same terms as that which is contained in the said appendix, and upon these latter documents your Lordships propose the two questions. (See p. 458.)

And upon these questions we are of opinion that the statute of Henry VII. did avoid the said grant of Edward IV., and that it did also reappend the advowson to the said manor. Several objections have been urged against holding the grant to fall

within the operations of the statute: first, it is said, that the statute revokes no grants made by any kings, except those who were the progenitors of Henry VII., in the strict sense of the word, and that Edward IV. was not a progenitor of that king; secondly, that the statute does not extend to grants of which such progenitors were seised *jure privato* only, and that Edward IV. was seised *jure privato* of the advowson in question; thirdly, that it does not extend to revoke grants to corporations, whether sole or aggregate; and lastly, that it does not extend to any grants but those under the great seal, either of England or Ireland, and that the grant of the advowson in question is made under neither. Upon these several objections we shall observe in their order.

As to the first objection of the term progenitors, is it to be understood in its literal sense? then the only king of England who, since the last year of Edward II., was a progenitor of Henry VII. would be Edward III., for Henry VI. was no progenitor, in the strict sense of the word, but as he is expressly named in the preamble to the statute **[468]** 19 Hen. VII. c. 18.: he was the uncle of the king. As, however, the term used in the act is the plural term progenitors, more than one king must have been intended, and it seems not possible to extend it beyond one, without allowing it to be synonymous with "predecessors;" a word with which it is often put in apposition in statutes of the same reign. (See 11 Hen. VII. c. 18.) And again, the statute referred to by the counsel for the Plaintiff in error, as set out in Plowden, Rep. 226.; wherein Henry IV., Henry V., and Henry VI. are called the king's noble progenitors, affords itself a proof that the word is used in a wider sense, for those kings were his predecessors, but not his progenitors. Again, the word must either comprise all his predecessors and kings of England, or his precedessors who were of the house of Lancaster only: but it would lead to an unreasonable result if the word is confined to the latter only, for, in that case, all the grants made by the house of Lancaster to their friends would be annulled, and those made by the house of York to the enemies of the house of Lancaster would be confirmed; and when the object of the statute is considered, which was that of bringing money into the king's coffers by the annulling all former improvident grants of the crown, there can be no reason to doubt that it was intended to comprise within it the grants made by former kings of England, whether of the one house or the other.

As to the objection secondly above urged, that the statute extends to grants only of such property whereof the crown was seised *jure coronae*,—no such distinction appears upon the face of the statute itself. The king (Edward IV.) was equally **[469]** seised in fee, whether the advowson belonged to him *jure privato* or *jure coronae*. "Advowsons of churches" are within the express words of the statute; independently of which the sale of the next presentations, or the sale of the advowsons themselves, made them the possible source of profit to the crown, and whether the advowson in question, supposing there had been no grant by Edward IV., would have devolved upon Henry VII. as parcel of the possessions of the crown, or whether he would have taken it in right of his wife, by descent to her and his marriage; in either case the advowson would have been valuable to him, though perhaps to a different extent upon the two suppositions.

It seems, therefore, to become unnecessary to determine whether, on the facts stated in the bill of exceptions, this advowson was the property of Edward IV. in right of his crown or not: but it appears to follow, from the decision of the case in the duchy of Lancaster, in Plowden, and by what is said by Holt C. J. in the Banker's case (Skinner's Rep. 603), that whatever belonged to Edward IV. before he came to the throne, on his accession to the crown belonged to him in *jure coronae*, in his politic capacity and not in his private; and, as such, it would descend to Edward V., be transferred to Rich. III. on his accession to the crown, and, in like manner, devolve upon Henry VII. In this respect, therefore, the earldom of March, and all the lands and tenements belonging to it, would be precisely on the same footing as the duchy of Lancaster would have been, but for the charter of Henry IV., confirmed by parliament; which, according to the **[470]** doctrine laid down by the Judges, would have been otherwise annexed to the crown (Plowd. Rep. 214).

As to the third objection, that the statute extends only to the case of grants to private persons, and does not include those to corporations, either sole or aggregate, we think it sufficient to observe, that the words are large enough to extend to both; the very expression of "any person or persons by whatever name or names they may

be named," pointing as well, or rather more expressly, to a body politic, which is known only by name, than to persons in their individual capacity, and, if this were left in doubt, the exception annexed to the act of the grant to the archbishop of Dublin and to the corporation of the bailiffs of Dundalk, shows that, if not specially excepted, bodies corporate, both sole and aggregate, were understood to be included in the operation of the act. The only remaining objection is that which limits the operation of the statute to grants under the great seal of England or Ireland. Upon this head of inquiry the Plaintiffs in error object that the grant in question does not appear to have been made under the great seal, either of the one or the other kingdom. The argument appears to stand thus: that from the facts, stated in the bill of exceptions, Edward IV. must be taken to have been seised of this property as Earl of March; that by this title, deduced in the inquisition, 23 Henry VIII., it appears that the March property was always kept by Edward IV. distinct from property held *jure coronae*; a course of descent being in that inquisition traced from him to Henry VIII. quite inconsistent with that of Crown land. It is inferred, therefore, *à priori*, [471] that Edward IV., granting in the right of his earldom of March, would grant under some seal belonging to him as such; at all events, neither by the great seal nor by acts of parliament: that nothing appears on the face of the grant to contradict this presumption, the letters not being stated to be patent, nor any seal now appearing, nor any circumstance from which it can be argued that the grant was originally under the great seal in either country. It is further alleged, that by 4 Henry VII. c. 14. (English act) it is expressly recited, that in Edward IVth's time all grants of property, parcel of the earldom of March, were made under a special seal, called "Seal of the Marches," and that for redress of mischiefs ensuing thereupon, it is, by that statute, enacted, that, for the future, all such grants shall be made under the great seal. Now, looking at and examining the grant in question, it appears, upon the face of it, to relate to a subject matter which the king held as lord of Ireland and granted as such. No allusion is made to any individual, or particular character, but the king grants with the assent substantially of the lord lieutenant, who, as such, would have nothing to do but with the property of the king held *jure coronae*; further, the grant is made with a *non obstante* of any statute, act, or ordinance to the contrary: a clause which the king granting merely as Earl of March never would assume to have power to add: the *teste* also is from the year of the reign, a circumstance which would rather indicate the grant to have been made by the king *jure coronae* than the contrary. This inference, arising upon the face of the grant itself, is confirmed by the acknowledged principle of law, that upon the access of Edward IV. to the Crown, [472] his possessions, as Earl of March, would become annexed, in point of government and administration at least, to the possessions of the Crown. The authority of the Judges in the case of the Duchy of Lancaster (Plowd. 213), is precisely to the point. Speaking of the mode of passing land, held by the king *jure coronae*, by letters patent only, without livery of seisin, they add, "So it has been the practice, with regard to the lands which descended to the king from the Duke of York, the Earl of March, and others of the king's ancestors, who never were kings" (see also Mo. Rep. 9).

The land, therefore, of the earldom would properly be passable by such form of grant only, as would be used by the king in conveying property held *jure coronae*. This is a well known consequence resulting not from the title of the property, but the dignity of the holder in whom the body politic absorbs the body natural.

Whether, therefore, the property of the Earl of March were annexed to the crown at the date of the grant in question or not, seems not very material, for being at all events in the hands of the king for the time being, the legal presumption is that it would for that time be granted as if it were held *jure coronae*. The argument, therefore, deduced from the title and course of descent, traced by the inquisition relating to the manor of Rathweir, with its appurtenants, fails in its application, even if we could attach much weight upon a question of fact, to a document which is manifestly inaccurate upon the bare inspection of it, omitting as it does all mention of the two sons of Edw. IV., from the eldest of whom Henry V., and not from the father, the daughters must have inherited.

[473] But the difficulty still remains as to the recital in the English statute 4 Hen. 7. c. 14. If this had been an inquiry as to property in England, that recital would

undoubtedly have presented a difficulty almost unsurmountable, for a fact is stated therein, and a mischief resulting from it, for the redress of which the statute is made. Whatever legal presumptions there may be to the contrary, the recital affords strong evidence that the irregular practice complained of in the statute had actually taken place.

The weight however of this evidence, and even its applicability to the subject under discussion, is answered by the consideration, that we are now dealing with property in Ireland. The remedy was certainly intended to apply, and at the time was applicable only to England and Wales, for Poynings' law had not then passed. There is no ground for presuming that the English legislature took notice of any matter passing in Ireland: and the seal spoken of in the statute, "The Seal of the Marches," seems in terms rather to apply to the border property in England and Wales, than to patrimonial domains in Ireland: and there is, *de facto*, an improbability that grants in Ireland should have passed under a seal used for and permanently kept in England or Wales. It is further to be observed, that the bill of exceptions expressly states the document in question to be letters patent of Edw. IV.: a description which *primâ facie* would imply that it was under the great seal, and still further, that the description is in the very same terms with that given of the letters patent of Edw. III., by which he granted the manor and advowson to John Darcy and Johanna, his wife, in tail male: which letters [474] patent must have been under the great seal, as the property was then vested in the crown *jure coronae*, under the escheat from Roger Mortimer, Earl of March; if therefore the letters patent are under the great seal in one case, why are we to intend otherwise in the second instance which is now under discussion?

Upon examination, therefore, of this question by the light afforded by the bill of exceptions, and by such legal presumptions as the facts therein stated afford; we think this grant of Edw. IV. did fall within the operation of the statute of Hen. VII., and that it was avoided by that statute.

Upon the question next proposed to us, whether by the effect of such resumption of the grant, the advowson became reappended to the manor, which still remained in the hands of the crown, we think the words of the statute itself give the answer, without entering into the discussion of the various authorities which have been cited in the argument before your Lordships. Nothing but the grant of Edw. IV. had disappended the advowson from the manor; the resumption act "annuls, makes void and of none effect in the law," the grant itself. This is not the case of a parliamentary reconveyance, but the cause of disappendancy ceases from the time of passing the act as if it had never been, and with it all effect of the grant from that time must necessarily also cease. It was urged at your Lordships' bar, that the consequences would be monstrous if the grant were to be held altogether void; that it would avoid and render illegal all intermediate acts founded on a grant legal in itself when made; but we are far from thinking the consequences above stated would follow; a grant which is to be deemed void in law, and as if it had never [475] been from a certain day, may yet be regarded as having had existence at a former period, for the purpose only of preventing parties who have dealt with the property from being treated as trespassers or wrong-doers, and protecting acts done at an intermediate time. For the reasons therefore above given, we think the advowson became reappended to the manor by the legal operation of the statute above referred to.

Your Lordships lastly refer to the pleadings upon the fifth count, putting the case of a *quare impedit* brought by C. against the Bishop of A.: and to the issue joined in those pleas: and after premising that on these issues a fine is tendered in evidence levied by B., whose estate C. hath, which fine is set forth in the pleadings to which we are referred, your Lordships propose three questions. (See p. 458.)

The fine in question is stated to have been levied in Trinity term, 1 Jac. 2. by William, seventh earl of Clanricard, and Hester his wife, to John Brown, Gerald Dillon, and Anthony Mulledy, and the heirs of the said John Brown, of the manors of Rathweir and Killucan, with the appurtenances, and divers quantities of land therein specified; and also of the advowson and right of patronage of the parish of Killucan. In answer to the first of the questions proposed by your Lordships, we are of opinion, that the fine upon the state of the pleadings on the record, was not admissible in evidence under any of the issues joined therein. There are only three issues upon

which there can be any ground whatever to contend that the fine was admissible: the issue taken upon the traverse by the bishop in his twelfth plea (which is precisely the same in terms as the issue taken by the clerk in his eighth plea), [476] and the issue taken upon the traverse by the clerk in his fifth and seventh pleas; all the remaining issues being raised on single points quite unconnected with and altogether unaffected by the fine.

The traverse of the bishop is in these terms: "Without this, that the Plaintiff below is possessed of the said advowson of the said church of Killucan, otherwise Rathweir, in manner and form as the said Plaintiff hath in his said fifth count alleged." That this traverse would have been held bad upon a special demurrer there can be no doubt; but it is contended that as the Plaintiff has, instead of demurring, taken issue upon this traverse, he has waived any objection to it, and must be contented to admit under it, all such evidence as by law it is calculated to receive. We must consider the point, therefore, as though this had been the only issue upon the record; and whether it would have been competent in that case to the Defendant to give in evidence the fine by William, the seventh Earl, and Hester his wife, is the question before us. No authority can be found in the books which will throw any light upon the question, for no instance can be brought forward where any parties in a *quare impedit* have proceeded to trial on such an issue. If the precedents given in Mallory on *Quare Impedit*, and the more numerous precedents to which he has referred from the best books of entries, are consulted, it will be found that, with scarcely an exception, all of them contain at the conclusion of the count the allegation which is found in this, viz. "Whereby the Plaintiff became possessed of the advowson," or "of the right to present," and yet in no single instance is there any traverse of that allegation. What evidence [477] therefore may or may not be admitted under that traverse, must depend upon principle and analogy to other cases, and cannot be governed by any direct authority. The first inquiry is, to what allegation does the traverse relate?

The Plaintiff having in his fifth count distinctly alleged the death of Mr. Windham, who had been shown to be joint tenant with the Plaintiff of a certain term of years in this advowson, proceeds to allege: "Whereupon and whereby the Plaintiff became and still is possessed of the said advowson, as of an advowson in gross, for the remainder of the said term so theretofore granted." This is the allegation, and the only allegation in this count to which the traverse can possibly apply; and as the traverse is taken upon the precise terms of this allegation, one ground upon which the fine may be held to be inadmissible is, that the traverse is confined to the possession of the Plaintiff by reason of the term for years, and of his surviving his co joint-tenant in the term, such being the fair and natural import of the allegation made by the Plaintiff. It is unnecessary to say, that if such be the proper construction of the traverse, the fine is altogether inadmissible.

But admitting for the purpose of the argument, that the declaration takes a wider range, and that it amounts to an allegation, that by reason of all the various steps in the title of the Plaintiff, which are set out in the fifth count of the declaration, the Plaintiff is possessed of the right to the advowson, and admitting the traverse to be equally extensive and to put all those steps of the title in issue, still we think by analogy to the rules of pleading, the utmost effect that can be given to such a traverse [478] is that it is a simple denial of the different allegations of the descent, and of the other steps of the title, so as thereby to put the Plaintiff to the proof of his whole declaration; but that the traverse will not admit of new and affirmative evidence on the part of the Defendant, taking the title out of the Plaintiff and vesting it in another person. The general principle of pleading is that the Defendant must either deny, or he must confess and avoid the charge in the declaration; the same plea cannot do both; but supposing this traverse to have the effect of a general denial of each link in the chain of title, if besides compelling the Plaintiff to prove them, and bringing his own witnesses to contest the truth of its existence, he might prove affirmatively a title in another person, what is that in effect but giving to this anomalous and unheard of traverse the double force of a denial of all the steps of the title, and at the same time, a confession of the existence of the title, but an avoidance of its effect?

In the present case, there is only one allegation in the count to which the fine

could by possibility apply, and that is the allegation which, after stating William, the seventh Earl, to have been seised in fee tail of the advowson in gross, by virtue of letters patent and of an act of parliament, and that he continued so seised, avers that, "upon his death the advowson descended upon Richard, the eighth Earl, as his son and heir in tail male;" and we hold that admitting the traverse to amount to a denial of the steps by which Earl William's title in fee tail is deduced, it will not allow the Defendant to prove by the fine that such title ceased before his death; for if the title in fee or fee tail is once admitted or [479] proved in any person, it must be intended to continue in that person, without any allegation that it does, until the contrary is shown (1 Lutw. 357, Plowd. 431); and the cesser of that estate by conveyance or otherwise, is affirmative matter which ought to be shown by a special plea on the other side.

We therefore think ourselves well warranted in the conclusion that the fine was not admissible under the issue above considered.

With respect to the traverse taken by the clerk in his seventh plea, it is in these terms, "that it doth not belong to the Plaintiff to present a fit person to the church in manner and form, etc." This is no more than a precise denial taken by the Defendant of the last words in the Plaintiff's declaration, viz. "and for that reason it now belongs to the said Plaintiff to present a fit person to the said last mentioned church." It is a mere inference of law resulting from all the facts stated in the count, and altogether unlike the traverse in the case of the *Grocers' Company* v. *The Archbishop of Canterbury* (3 Wilson, 214), which included a matter of fact material to the right.

But taking it to be a traverse of all the steps by which the title to the advowson is deduced to the Plaintiff from Richard the fourth earl, who is averred to have been first seised in fee: the same objection applies to the admissibility of the fine in evidence, under this traverse, as under that to the bishop's twelfth plea; and the same observation may also be made with respect to the issue on the fifth plea, as to the seisin of Michael, the tenth Earl; and, besides, there is another reason why, under [480] the traverses in the fifth, seventh, and eighth of the clerk's pleas, the evidence of the fine should not be admitted, though the same reason does not exist as to the traverse in the twelfth plea of the bishop, in which he claims to present as patron. It is clearly established, that neither the clerk nor ordinary, in that character, could counterplead the Plaintiff's title at common law, for neither of them had any interest in this patronage, and under the statute 25 Edward III. s. 3. c. 7. the incumbent (as possessor when presented and instituted) could not counterplead the Plaintiff's title, without maintaining his own title, and that of his patron on which his own depends. This is distinctly laid down by Lord Hobart in the case of *Elvis* v. *Archbishop of Canterbury* (Hob. 11. 315.), for the statute only allows the pursuer "to have his answer, and shew and defend his right upon the matter." The plea, therefore, which sets out the title of the patron, ought, in order to maintain it, to traverse the Plaintiff's title so far as it is inconsistent with that of his own patron, and so far only; and, in that sense, the traverse in the fifth, seventh and eighth pleas must be understood, if the pleas are good in substance; that is, it must be taken that the clerk means not to set up the title of a stranger to both the litigant parties, which would cut down the title both of himself and of his patron, which the law does not permit him to do, but to affirm that the title to the advowson was in the Bishop of Meath, or some one under whom they claim, and not in Earl Michael or the Plaintiff, at the times respectively mentioned in the fifth count, and referred to in the traverses contained in the fifth, seventh and [481] eighth pleas of the clerk. In this mode of construing the traverses it is clear that the fine which showed the title to be in third persons was not admissible in evidence under any of the issues joined on this record.

With respect to the second question, lastly above proposed to us, viz. whether, if the fine were received in evidence, it ought to be left to the jury to say whether it barred the action of *quare impedit*, we all think that the legal effect of such fine, as a bar to the action of *quare impedit*, is a matter of law merely, and not in any way a matter of fact, and, consequently, the Judge who tried the cause should state to the jury whether, in point of law, the fine had that effect, or what other effect on the rights of the litigant parties, upon the general and acknowledged principle "ad questionem juris non respondent juratores." In answer to the last question proposed to us, we all agree in opinion, that the fine did not, if properly received in

evidence, absolutely of itself bar the action of *quare impedit*. It could not do so on the ground of estoppel, because the parties to this suit did not both claim respectively under the parties to the fine, and the fine is an estoppel only between parties and privies; and though it operates as a conveyance from Earl William, the seventh earl, to Brown, Dillon, and Mulledy for a valuable consideration, it was possible that this was a conveyance by way of mortgage which had been paid off, or that these parties might have reconveyed the advowson to Earl William or some subsequent earl; and there is even some evidence stated in the bill of exceptions to raise a presumption that it was so, for in 1699 Earl Richard conveyed to John Morgan, [482] and in 1744 John Morgan reconveyed the advowson to Earl John Smith, and there was no evidence of any dealing with the advowson or presentation by the conusees of the fine, or any one claiming under them. It cannot, therefore, be said that the fine alone, if it had been admissible, was an absolute bar to the action, which is the last question proposed by your Lordships.

On the 1st Aug. 1836, the judgment was affirmed, without any material observation.

Judgment affirmed, with costs.

[483]

IRELAND.

(Court of Chancery.)

Sir GERALD NOEL NOEL, Baronet, *Appellant:* GUSTAVUS ROCHFORT and Others, —*Respondents.*

[Mews' Dig. v. 392, 454, 465, 489; xi. 1069. S.C. 4 Cl. and F. 158.]

In 1801, R. a partner in a banking concern in Ireland, applied to N. and Co. a banking-house in London, for a loan of £10,000 to bring into the Irish firm as his share of the capital; which sum they advanced upon the security of four bonds for £2500 each, with warrants of attorney to confess judgments; which were accordingly entered up in the Court of King's Bench in Ireland, in the year 1803. The bonds were expressed to be for the sum "of £5000 sterling," and the condition was for the payment of the sum of "£2500 sterling of good and lawful money of Great Britain, with legal interest." The warrants of attorney recited the bonds in the same words. The judgments had only the expression "£5000 sterling." Upon the execution of the bonds credit was given to R. in the books of N. and Co. for the sum of £10,000, of which R. being advised, he by letter dated in August, 1801, authorized N. and Co. to answer bills to the amount of £10,000, which were afterwards drawn by the Irish firm, and accepted and paid by N. and Co. Payments on account of the debt were made at various times to B. a legal agent of N. and Co. at Dublin, and he accepted and accounted for those payments as made in Irish currency. Upon a bill filed by the assignee of the debt, held, that it was payable in English currency and with English interest.

The Appellant, together with George Templer, Nathaniel Middleton, and Richard Johnson, all since deceased, and John Wedgwood, being engaged in the banking business in the city of London, in [484] and before the year 1800, and Sir John Hadley Doyley, baronet, John Sperling, and Edmund Grange, being engaged in the business of brewers and distillers in copartnership in the city of Dublin, under the style of Edmund Grange and Company, the Appellant's house of Messrs. Noel and Company had various dealings with them, as bankers and agents, to a very considerable extent.*

In the year 1801, Gustavus Rochfort, (the father of the Respondent,) a gentleman of large landed estate, entered into an agreement with the firm of Edmund Grange and Company, to become a partner therein, and to advance the sum of £10,000 as his

* The history of the transactions between these firms, and other questions arising between the Appellant and Respondents, are reported [5 Bli. N.S.] p. 667.

share of the capital; but not being prepared to make an immediate payment thereof, he applied to the Appellant's firm of Noel and Company, and requested them to lend and advance that sum to him, and the Appellant's firm thereupon agreed to lend the sum of £10,000 to Gustavus Rochfort upon the security next hereinafter mentioned.

Gustavus Rochfort accordingly executed to Richard Johnson, in trust, for himself and his copartners, four several bonds, dated respectively the 3d of August, 1801, with warrants of attorney for confessing judgment thereon, in order to secure the payment of the loan of £10,000, by four instalments of £2500 each, payable on the 29th of September, 1802, the 25th of March, 1803, the 29th of September following, and the 25th of March, 1804; and Richard Johnson caused four several judgments to be duly entered up on the said bonds [485] in the Court of King's Bench in Ireland, as of Trinty term, 1803.

The bonds, warrants of attorney, and judgments are in the following form:

"Know all men by these presents, that I, Gustavus Rochfort, of Rochfort, in the county of Westmeath, esquire, am held and firmly bound unto Richard Johnson, of Stratford Place, in the city of London, in the sum of £5000 sterling, good and lawful money of Great Britain, to be paid to the said Richard Johnson, or his lawful attorney, executors, administrators, or assigns; to the which payment well and truly to be made I do bind me and my heirs, executors, and administrators, and every of them firmly by these presents, sealed with my seal, and dated the 3d day of August, in the year of our Lord 1801.

"The condition of the above obligation is such, that if the above-bound Gustavus Rochfort, his heirs, executors, administrators, or assigns, do well and truly pay or cause to be paid unto the above-named Richard Johnson, his executors, administrators, or assigns, the just and full sum of £2500 sterling, of good and lawful money of Great Britain, on the 29th day of September, 1802, with legal interest, without fraud or further delay, that then the above obligation to be void and of none effect, or else to stand and remain in full force and virtue in law.

(Signed) GUSTAVUS ROCHFORT.

"Signed, sealed and delivered in the presence of W. G."

"To William Baillie, gentleman, attorney of his Majesty's Court of Exchequer in Ireland, or any of them, or to any other attorney of the same [486] Court, or to any attorney of any other his Majesty's Courts of Record in Ireland aforesaid, Great Britain, or elsewhere.

"These are to desire, authorize, and appoint you, or any of you, to appear for me, Gustavus Rochfort, in the county of Westmeath, esquire, at the suit of Richard Johnson, of Stratford Place, in the city of London, esquire, his executors or administrators, and confess a judgment as of last Trinity term, or of any term or time whatsoever, after the day of the date hereof, with stay of execution until the 29th day of September, 1802, in the said Court of Exchequer, or any other his Majesty's Courts of Record in Ireland, Great Britain, or elsewhere, by acknowledging the action or otherwise, upon a declaration there to be filed against me, upon a bond of £5000 sterling, *good and lawful money of Great Britain*, bearing equal date with these presents, conditioned for the payment of £2500, with legal interest, of like lawful money of Great Britain, upon the said 29th day of September, 1802; and for your or any of your so doing, this shall be your sufficient warrant and discharge.

"And know all men by these presents that I, the said Gustavus Rochfort, do hereby, for me and my heirs, executors, and administrators, authorize you or any of you to remise, release, and for ever quit claim unto the said Richard Johnson, esq., his executors, administrators, and assigns, all and all manner of error or errors, or misprision of error or errors, or erroneous proceedings whatsoever, that are or may be in the said judgment or the proceedings thereupon. [487] Witness my hand and seal the 3d day of August, in the year of Lord God, 1801.

"(Signed) GUST. ROCHFORT. (L.S.)"

"Pleas, etc. of Trinity term, in the 41st year of the reign of Geo. III., etc. (Witness) ARTHUR VISCOUNT KILWARDEN," etc.

"County of the city of Dublin (to wit). —Be it remembered, etc. Richard Johnson, etc. complains of Gustavus Rochfort, etc. of a plea that he render to him the sum of £5000 sterling, which he owes him and unjustly detains; for that whereas on the 3rd day of August, 1801, at Castle Street, in the said city, by his certain writing

obligatory, sealed with his seal, and to this Court now here produced, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound to him, the said Richard, in the said sum of £5000 sterling, etc. It is, therefore, considered that the said Richard do recover against the said Gustavus, his said debt," etc.

Upon the execution of the bonds, the sum of £10,000 was immediately carried to the credit of Gustavus Rochfort, in Noel and Company's books of account, and he had liberty to draw for the same as he should think proper, and was by letter duly advised thereof by Noel and Company; and Gustavus Rochfort shortly afterwards wrote and sent a letter, dated the 22d of August, 1801, acknowledging such letter of Messrs. Noel and Company, accompanied by an authority, whereby he authorized and requested them to answer the bills of Edmund Grange and Company to the extent of the money for which they had agreed to give him [488] credit, and to debit his account for those sums up to the extent of £10,000.

Shortly after the receipt of this authority, Edmund Grange and Company drew upon Noel and Company five several bills of exchange, amounting altogether to the sum of £10,000 British, which were all duly accepted and paid in pursuance of the authority before referred to, and upon the security of the four bonds hereinbefore stated.

The house of Noel and Company continued to transact business as bankers and agents of the firm of Grange and Company, until January, 1804, when Grange and Company became greatly embarrassed in their circumstances, and were indebted to the Appellant's house, in respect of monies advanced by them to and for the use of the firm of Grange and Company, in a sum of upwards of £120,000, exclusive of the before-mentioned sum of £10,000. And it was thereupon represented to Noel and Company, that it would be for their benefit to accept a composition for their debts due from the house of Grange and Company, rather than drive them to a bankruptcy.

The Appellant and his co-partners, acting under the representations made to them, agreed to accept a sum of £42,000 as a composition for the debt so due to them from the firm of Grange and Company, to be secured in the following manner: £10,000, part thereof, by a mortgage on certain estates, the separate property of Gustavus Rochfort; the further sum of £10,000, other part thereof, by a mortgage on certain estates, the separate property of John Sperling; £15,000, further part thereof, by a mortgage on the partnership premises, wherein the business was carried on; and £7000, residue [489] of the said £42,000, by a rent-charge of £1000 per annum, for the term of seven years; and accordingly Gustavus Rochfort executed certain indentures of lease and release, by way of mortgage, bearing date respectively the 25th and 26th days of May, 1804, for carrying such arrangement on his part into effect. Gustavus Rochfort, also in pursuance of an agreement in the said mortgage deed contained, executed a bond conditioned for the payment of £10,000, bearing even date with the last-mentioned indenture, as a further security for the payment of the said £10,000, secured by the mortgage, on which bond judgment was entered up in the Court of Common Pleas in Ireland, as of Easter Term, 1823, and with a view to the further performance of the agreement for a composition; and in consideration of such composition a certain indenture of release, bearing date the 25th of May, 1804, was executed by Noel and Company to Grange and Company.

A question was raised, whether such release was intended to extend beyond a release from the house of Noel and Company to Grange and Company, for the partnership debt, so as to make void any securities passed by the several individual partners in the house of Grange and Company to the house of Noel and Company, and in particular to extend to or affect the four bonds executed by Gustavus Rochfort for his individual debt, and then held by Noel and Company. This question was disposed of in favour of the Appellant.

The mortgage and mortgaged premises and the bond and warrant of attorney, and also the four bonds and judgment, after several mesne assignments, became ultimately vested in the Appellant.

[490] On the 1st of July, 1824, the Appellant filed his bill in the Court of Chancery in Ireland, in the nature of an original and supplemental bill, stating, among other matters, the facts and proceedings upon a bill of foreclosure and

questions, raised in the Courts below, and on former appeals: and also stating the death of Gustavus Rochfort the elder, and that he had, by his last will and testament, charged his estates in Ireland with payment of his debts; and it prayed, amongst other things, an account of the real and personal estate of Gustavus Rochfort, deceased, and of his debts, funeral expenses, and legacies; and that all persons having incumbrances might come in and prove the same; that the priority of the said debts might be ascertained; and that an account might be taken of the said judgments, and the interest and costs, and that the Appellant might be paid the same; and that if the personal estate of the said Gustavus Rochfort should be insufficient to discharge the same, then that his real estates, or a competent part thereof, should be sold, and that the Appellant and the other creditors might be paid according to their priorities.

The Defendants having put in their answers to the bill, replications were filed, and the cause being at issue, witnesses were examined on the part of the Appellant, who were cross-examined on the part of the Respondent.

Robert Burrowes proved that, acting as agent for the banking house of the Appellant, he, subsequently to the date of the release and mortgage, pressed Gustavus Rochfort for payments on account of the four bonds; and that Gustavus Rochfort, after craving indulgence from time to time, examined all the accounts with the deponent, in the **[491]** presence of William Baillie, Gustavus Rochfort's solicitor; and that the said Gustavus Rochfort did not dispute the debt in respect of the four bonds, but that, to the best of his belief, he (Rochfort) made an objection that the advance of £10,000 should not be considered as English, but as Irish currency; and that he also made an objection as to the period from which interest should be charged upon his bonds.

On the 28th of June, 1828, the cause came on to be heard before the Lord Chancellor of Ireland (Sir Anthony Hart), when his Lordship directed certain issues to be tried. Against that order the Appellant appealed to the House of Lords. Upon the hearing of that appeal, the issues were amended in certain respects, and the House affirmed the order in other respects (*Ante*, Vol. 5.). The issues as amended were tried on the 22d, 23d, 24th, and 25th of November, 1831, and a verdict found for the Defendant in the action (the Appellant) upon both the issues, thereby establishing the fact that the sums secured by the bonds had not been paid, or the debts thereby created released, or otherwise satisfied.

The cause came on for further hearing, upon the Judge's certificate, on the 31st of December, 1831, when it was decreed that the will of the testator (Gustavus Rochfort) was well proved; and it was, amongst other things, referred to the Master to take an account of the sums due to the Appellant on the foot of the said four judgments, for principal, interest, and costs; and the Master was thereby directed to take an account of the testator's real and personal estate, and of his debts and funeral and testamentary expenses.

[492] Witnesses were examined upon interrogatories, before the Master, on behalf of the Appellant; and William Dallas, to the second interrogatory said, that he was in the employment of Noel and Company, in the year 1802, as book-keeper and accountant; and that he was acquainted with the dealings of the house of Noel and Company, and Gustavus Rochfort, esquire, deceased; and that he had looked upon four paper writings, marked with the letters N, O, P, Q, respectively produced to him; and that such paper writings purported to be bonds from Gustavus Rochfort, in the county of Westmeath, esquire, to Richard Johnson, of London, esquire, each being for the consideration of £2500 of Great Britain; and he said that, to the knowledge of this deponent, acquired in the capacity as clerk and accountant to the said firm of Noel and Company, and from an examination of the books of the said firm, the four several sums of £2500 aforesaid, amounting in the whole to the sum of £10,000, secured by the said produced bonds, was and were advanced to the said Gustavus Rochfort, the obligor in the said bonds respectively, or for his use, or by his direction, by the said firm of Noel and Company; and he said that the said four several sums of £2500 mentioned in the condition of the said produced bonds, and amounting in the whole to the said sum of £10,000, was and were so advanced to the said Gustavus Rochfort, or for his use as aforesaid, by the said Noel and Company, in British currency.

Robert Burrowes, to the said interrogatory deposed, that he was the law agent to

the banking house of Noel and Company, in the year 1803, and that he continued to act in that capacity to the middle of the year 1806; and that the said bank-[493]-ing house had a demand against the late Gustavus Rochfort for the amount of four several judgments of £2500 each, obtained on four bonds; and he said he was employed by the said banking house to obtain payment of the said judgments in the year 1803, and that he received several sums of money on account of the said judgments from the said Gustavus Rochfort, or from persons acting on his behalf; and that the sum and sums so received by and paid to the said deponent were so received on account of the sums secured by the said four judgments; and that on or about the 3d of February, 1804, the said deponent received a sum of £1000 on account of the said four judgments; and that the said sum was of the late Irish currency; and that he lodged the said sum of £1000 in the banking house of Messrs. Beresford and Company, to the account and for the benefit of the said banking house of Noel and Company; and that he did not transmit the said sum of £1000 to the said Messrs. Noel and Company, but lodged the same with the banking house of Beresford and Company, for account of the said Noel and Company; and that he received on account of the said four judgments, by different payments (including said £1000), a sum of £8890, of the late Irish currency; and he said that, to the best of his recollection, he did, on or about the 26th of September, 1804, receive a sum of £4000, and on the 15th of December, in the said year, he received a further sum of £2500; and in the month of July, 1805, he received a further sum of £530; and he said that, as well as he recollected, one other payment was made to him on account of the said four judgments of £860, some time in the year 1804; and the deponent further [494] said, that on or about the 27th of September, 1804, he remitted the said sum of £4000 so received by him on account, on the 26th, by a bill drawn by Roe and Company on B. Trench and Company, for the sum of £3539 16s. 3d. British, enclosed, to Noel and Company, and which at the then course of exchange, being, as he believed, 13 per cent., was equal to the said sum of £4000 Irish; and he further said, that on the 2d of December, 1804, he remitted to the said Noel and Company Bank of England notes to the amount of £2250 British, which, at the then course of exchange, being, as he believed, 10 per cent. exchange, is equal to the sum of £2475 of the late currency; and he said that in the month of August, 1803, he also remitted to Messrs. Noel and Company his draft or bill of exchange on B. Trench and Company for £500 British, which, at the course of exchange, being, as the deponent believed, 12½ per cent., is equal to the sum of £562 10s. 6d. of the late Irish currency; and he said, that in or about the month of July, 1805, he received from the said Gustavus Rochfort, or some person for him, on account of the said four judgments, a sum of £530 Irish currency, and did, in the month of August in the same year, remit a sum of £500 British to the said firm of Noel and Company, and which at 12½ per cent., being, as the deponent believed, the rate of exchange when the same was so remitted, is equal to the sum of £562 10s. Irish.

The Master made his report, bearing date the 31st of May, 1833, and thereby (amongst other things) certified that the said Gustavus Rochfort, on the 3d of August, 1801, executed his four several bonds with warrants of attorney for confessing [495] judgment thereon to Richard Johnson, of Stratford Place, in the county of Middlesex, banker, in trust for himself and the other persons in the firm of Edwards, Templer, and Company, each in the sum of £5000 sterling, lawful money of Great Britain, conditioned for the payment of £2500 of like lawful money, and which bonds he certified were executed in Ireland; and he certified that the said Richard Johnson did, in or as of Trinity Term, 1801, obtain four several judgments on the said bonds, in his Majesty's Court of King's Bench, in Ireland, against the said Gustavus Rochfort, deceased, each in the penal sum of £5000; and the said Master thereby certified that the sum of £10,000, secured by the said four bonds, was advanced and paid by the said Richard Johnson, as one of the partners in the said banking house of Noel, Templer, and Company, to the said Gustavus Rochfort, or for his use, in British currency; and that there was due to the Appellant the sum of £8441 13s. 6d., being principal and interest at £5 per cent.; but on the part of the Defendant (the Respondent, Gustavus Rochfort,) it was contended that the said bonds and warrants having been executed in Ireland, and the judgment thereon entered in the Court of King's Bench, in Ireland; and also, as it appeared from an account furnished by Robert Burrowes, esquire, as attorney for the said banking house, in the year 1804, proved in the said cause that the said Robert Burrowes, as such attorney and authorised agent of the

Appellants, in that account treated the said sum so advanced as Irish currency, and charged interest at the rate of 6 per cent.; he should consider the sum secured as principal money Irish currency, and certify ac-[496]-cordingly; and that on the part of the Appellant it was contended that he should treat the sum so advanced as British currency, and payable with British interest at 5 per cent.; and after he had prepared the draft of his report, in which he treated the advance as British principal and British interest, the same counsel contended that he should report that the sum advanced being British principal on Irish security, should be liable to 6 per cent. interest; and also that he should report that the Appellant was entitled to the exchange on the payments made by the Defendant at the rate of the day; but the Defendant insisted that, under any circumstances, he was not liable to any exchange, but was entitled to make the payment without reference to any remittances to London; and that the Master therefore certified that he had taken the account in five different ways, making due to the Appellant,—firstly, as British principal, at 5 per cent. interest, exchange at par £8441 13s. 6d.; secondly, as Irish principal, at Irish interest, £7835 10s. 11d.; thirdly, as British principal, at English interest, with exchange on the payments by Defendant at the rate of the day, £9197 16s. 2d.; fourthly, as British principal, at Irish interest, as on securities executed in Ireland, exchange at par, £10,390 1s. 2d.; fifthly, as British principal, at Irish interest, with exchange, on payments made by the Defendant at the rate of the day, £11,241 19s. 8d.

The Appellant excepted to the report, for that the Master, in his said report, stated that Robert Burrowes was the authorised agent of the Appellant, and as such, in the account between the Appellant and his partners with the said Gustavus [497] Rochfort, deceased, treated the sum of £10,000, advanced by the said banking house, as advanced in Irish currency: whereas he alleged that the said Robert Burrowes was merely the attorney-at-law of the said banking firm, and was not authorised as their agent, otherwise than as such attorney, to recover the amount of the said four judgments, and had no power, by any act as such attorney, to change the nature and character of the transactions between the said parties, and because no evidence of his being such authorised agent was laid before the said Master to justify such finding.

The Respondent also took exceptions to the report, for that it was stated by the said report that the sum of £10,000 British was secured by the said bonds, warrants, and judgments: whereas he alleged that the Master should have stated that the sum so secured was the sum of £10,000 Irish; secondly, for that the report stated that the Defendant contended only upon one ground that the sum secured by the said securities should be considered as Irish currency, whereas the Defendant contended, upon various grounds and reasons, that the currency should be considered as Irish, and not British currency; thirdly, for that the said Master, by his said report, had credited all the payments made by the said late Gustavus Rochfort to the Appellant and his co-partners (save one), in discharge of the four judgments, whereas he should have credited each payment as made in discharge of one judgment only, and so on until each judgment was paid.

The cause came on for hearing upon the exceptions, and for further directions, upon the 24th of June, 1833; when the Lord Chancellor of [498] Ireland, amongst other things, decreed that the Appellant's said exception should be overruled, and declared that the account, as taken by the Master, treating the sums secured by the four bonds in the report mentioned as Irish currency, and bearing interest at the rate of 6 per cent., be adopted, and that the sum of £7835 10s. 11d., found to be due on that account, with interest at the rate of 6 per cent., on the sum of £3182 16s. 4d., being the principal sum remaining due on foot thereof, are charges on the land and premises in the pleadings mentioned, with interest on the principal sums.

The appeal was against this decree.

For the Appellant, Mr. Pemberton and Mr. Wigram.

The only reasons for the order are, 1st, that the judgments are entered up in Ireland, that the bonds merge in the judgment, and that the debt is converted from an English into an Irish debt. 2dly, That the solicitor for the creditor accepted payments in part of the debt, and in carrying them to account treated them as Irish currency.

As to the first proposition, it is difficult to conceive upon what argument it is founded: the judgment is to secure £5000 sterling, and it matters not where it is en-

tered up. The judgment, in fact, is for the penalty in the bond. Suppose it had been for dollars; how could that have been converted into Irish currency? As to the second ground, the conduct of the legal agent, with only a special authority, cannot alter the terms expressed in the contract. If the language had been ambiguous, it might have given a construction to that which was doubtful. But no communication **[499]** of these unauthorised acts was made by the agent to the principal.

The only question is, whether sterling money and lawful money of Great Britain, in these instruments, can mean any thing but English currency. This question is decided in the case of *Lansdown* v. *Lansdown* (2 Bligh, O. S. 60). The argument in that case was, that lawful money of Great Britain, in Ireland, meant Irish currency. The decision was, that it meant sterling money, that is, English currency. It was held, indeed, in that case, that the party was not entitled to the cost of remittance, because the power did not extend to raise more out of the estate than £3000, and there were no means of paying the cost of exchange. The abstract of that case made by the reporter shows the principle. The settlement was executed in England. The parties are all described as being resident there; and the power created by the instruments was to raise the sum in question by a charge upon lands in Ireland. The whole argument and principle of the judgment is strictly applicable to the case now before the House. Lord Eldon says (p. 85.), "How would they deal with a recital that a man had advanced £12,000 *sterling*, and it is provided that he shall receive £12,000? Would they contend that he must receive so much less?" As to the cost of exchange, *Lansdown* v. *Lansdown* [2 Bli. 60] has no application. There the money was to be paid where the power was to operate, and where it was to be raised. This is the case of a creditor, and the loan is to be repaid in the place where he lent it. If there is a failure of payment, and he is desirous to recover his debt by **[500]** process of law, he must be placed in the same situation as if the debt had been paid under the contract without compulsion.

It is the duty of the debtor to follow the creditor. If the money is remitted, the creditor is entitled to the expense of remittance. If the action had been brought in England, the amount recovered would have been £10,000; but the person of the debtor and the property being in Ireland, the creditor is obliged to proceed there: *Scott* v. *Bevan* (2 Barn. and Ad.; and see 5 Mo. and P. [443]). Lastly, the security being Irish, and the contract operating in Ireland, the creditor is entitled to interest at 6 per cent. This is so upon the ground that the security is worse and the risk greater (*Connor* v. *E. Bellamont* (2 Atk. 381)); and the contract would not be illegal. Here the judgment recites the bond, and the decree is for what shall be found due upon the bond.

The original contract for loan of £10,000 to Gustavus Rochfort, by the house of Noel and Company, having been made and entered into by the parties to it in London, it must be presumed that an advance in English sterling money, and not in Irish currency, was intended by both parties. The operative parts of each of the four bonds executed by Mr. Rochfort as a security for such advance or loan express him to be bound "to Richard Johnson, of etc., in the City of London, in the sum of £5000 sterling, good and lawful money of Great Britain," and the respective warrants of attorney to confess judgment accompanying such bonds, authorise any attorney of the Court of Exchequer, or of any other of his Majesty's Courts of Record "in Ireland, Great **[501]** Britain, or elsewhere," at the suit of Richard Johnson, to confess judgment in such Court of Exchequer, and also in any other of his Majesty's Courts of Record "in Ireland, Great Britain, or elsewhere," by acknowledging the action upon a declaration to be filed upon a bond of £5000 sterling, "good and lawful money of Great Britain;" thereby showing, that the authority to enter up judgments on such warrants of attorney was not confined to the Courts of Ireland, and that English sterling money could alone be intended to be secured by such judgments, and not the currency of Ireland.

The advance made to Mr. Rochfort, or on his behalf, in pursuance of the contract, and on the security of the four bonds, was made in English money by bills drawn in Ireland on the house of Noel and Company in London; and by the custom of merchants, bills of exchange drawn in Ireland upon England are always paid in English money, and *vice versâ*, unless otherwise expressed; and as the dates and amounts of such bills are specified in the general books of account of Messrs. Noel

and Company (which have been used in evidence by the Respondent) without any expression to denote that the same were paid in other than English money, it is manifest that such bills were, in fact, paid in English money; there is the admission of the Respondent, and direct evidence, for all these facts.

If, by any usage or practice in Ireland, the words "sterling good and lawful money of Great Britain" may at any time have been treated as meaning Irish currency, when the contract relates to Irish estates or property, and all the parties to [502] the contract are domiciled in Ireland, such usage ought not to be held to affect parties to a contract who are not domiciled in Ireland, and still less for the purpose of reducing to the value of Irish currency a security given for English money, *bonâ fide* advanced. In contracts between English and Irish parties, the words "sterling good and lawful money of Great Britain" have but one meaning, and imply English money only.

The judgments respectively entered up on the bonds, and in pursuance of the warrants of attorney, purport to be at the suit of Richard Johnson, of, etc.; and after shortly reciting the bonds, are each respectively expressed to be for £5000 sterling and costs; and therefore the construction and amount of such judgments ought to be governed by the recitals, and to imply sterling English money, and not Irish currency. And even if it should be considered that, as the judgments were entered up in Ireland, the sums expressed therein are to be recovered in Irish currency, yet, as the master was by the decree directed to take an account of what was due on foot of the judgments, and as the sums expressed in the judgments are penal sums, the Appellant is entitled under the decree to have an account taken of the sums of English money *bonâ fide* advanced, with interest, to the extent of the penal sums of the judgments.

The bonds having been executed, and the judgments entered up in Ireland, and the late as well as the present Mr. Rochfort being domiciled in Ireland, the *security* is exclusively Irish, although for English money; and therefore the Appellant is entitled to have the account taken according to that rate of interest which the legislature has fixed [503] as the legal price of forbearance on debts upon Irish security; that is to say, at the rate of £6 per annum upon every £100 of English money. In order to place a loan exclusively secured upon estates in Ireland on a par with one upon English security, it is necessary that it should bear 6 per cent. interest, and not five. Can it therefore be presumed, unless plainly expressed, that a debt bearing interest, contracted in England and secured exclusively in Ireland, shall bear less than Irish interest?

Mr. Rochfort having from time to time made payments on account of the loan or advance of £10,000 to the attorney of Noel and Company in Irish currency, the house of Noel and Company ought only to be held liable to credit the estate of Mr. Rochfort with so much on account as such payments would produce in English money at the rate of exchange of the day on which such payments were respectively made, or as if such payments had been made in Bank of England notes, or in good bills on England; for, as Mr. Rochfort contracted for the loan and advance in London, and became bound to parties domiciled in London, and the bills were drawn in Ireland upon England, whereby Mr. Rochfort had the benefit of the rate of exchange of the day on those bills, his estate ought, in justice and good faith, to place Noel and Company in the same situation as when they made the advance, by repaying the value of the money which his estate received; and this can only be done by adopting the 5th mode of taking the account, as found by the Master; that is to say, by treating the principal money as English principal bearing Irish interest, and the payments made on account to be calculated [504] at the rate of exchange of the day when they were respectively made.

For the Respondents, Mr. Knight and Mr. Jacob.

The judgment in this case does not turn upon the conduct of the agent as to the account, nor upon the merger of the bond and warrant of attorney in the judgment; but upon the nature of the instruments themselves, and the absence of any specialty in them. The question is, whether it was the effect of the instruments to establish a contract for English or Irish money. In England, we are accustomed to take it for granted upon such instruments that the contract is for English currency; but in conveyances it has been customary to add for distinction the words "current in

England." In Ireland, by the words "*sterling*" and "*lawful money of Great Britain*," they invariably understand Irish currency. The judgment proceeded upon the common understanding of the country, and the construction of the Courts as to the words in question. In *Lansdowne* v. *Lansdowne* [2 Bl. 60], the question was referred to the Common Pleas for their opinion, as a matter with which they were familiar: but in that case the deed was executed in England; the parties had estates both in England and Ireland; the charge was for £300 "lawful money of Great Britain;" and that was held by the Common Pleas to be Irish currency. When the case came before the House of Lords, the question was not decided on those words taken alone, but upon a view of the whole instrument. The circumstance also that the parties were dealing with English as **[505]** well as Irish estates was taken into consideration, and that in the deed itself a distinction was made in this respect. It appears (page 60) that in the deed itself the Irish currency had been valued in English money, and so it was in the schedule. The parties moreover having in some parts of the deed spoken of "lawful money of Ireland," they could not mean the same thing by "lawful money of Great Britain." The House of Lords do not say in *Lansdowne* v. *Lansdowne*, that the Common Pleas had decided improperly, so far as the general principle was concerned, if they had only those words before them; but seem to think that either the deed was not before them, or that they had not paid sufficient attention to various clauses of the deed. Lord Eldon says (p. 88), "the Court whose opinion was desired, certified that the jointure, being a rent-charge upon lands in Ireland, was payable in Ireland and in Irish currency. The reason of this opinion is to be collected only from the certificate, namely, that it is a charge upon lands in Ireland. We are not informed of any other reason. If that were the simple case, the matter is clear according to settled principles of law. But in this case," he added, "the meaning is to be collected from all parts of the instrument" not disaffirming the general proposition, but relying upon the specialty of the case; and he says (p. 94), afterwards, "In this case the decision must be grounded upon the instrument before us. *Lansdowne* v. *Lansdowne* is an exception to the rule, and an authority for the Respondent, as shewing what is the general understanding in Ireland as to such words. **[506]** In *Sprowle* v. *Legge* (1 Barn. and Cres. p. 16), it was the case of a contract by note to pay £161 sterling. It appeared to have been made in Ireland, and it was stated by a witness, that Irish currency was called *sterling* in Ireland. The Court held that there was a variance between the declaration and the proof, because the declaration was for *sterling* money generally, which in English pleading is held to be of the currency of England. The decision in *Ladbroke* v. *Biggs* (Batty's Rep. 619; see *Kearney* v. *King*, 2 B. and A. 301) was to the same effect. The jury there found that sterling meant Irish currency, and upon looking at the stamp, it appeared to be only sufficient to cover £500 Irish currency. In the judgment of the Court below in this case, Chief Justice Bushe, observing upon *Lansdowne* v. *Lansdowne* [2 Bli. 60], says, "the argument that the word '*sterling*' always means English currency would go much too far;" and Judge Burton says, "*Lansdowne* v. *Lansdowne* was decided on special grounds on a view of all parts of the instrument; that it was a contract to pay in British currency." This shews the common apprehension and the understanding of the Courts of Justice, as to the import of these words in Irish transactions.

Burrowes, the agent of the Appellant, must have been well acquainted with the transaction; he receives payments on account, and treats it as Irish currency; and according to the fourth reason of the Appellant's case, it seems that those who advised the Appellant apprehended that "*sterling*" upon an Irish contract means Irish currency, and their argument, that the residence of one of the parties **[507]** in England creates a distinction admits the general rule. In the bill filed in Ireland, the debt is stated simply at £10,000, which must in Irish pleading mean Irish currency. The word "British" does not occur in the bill; there is no distinction, and no case is made by the bill for any such distinction; the prayer is for an account of what is due under the judgment, making no case for an account in English currency, which the Court below held that the Plaintiff was bound to make specially in his pleading if he meant to insist upon an account in a currency different from that of the country and jurisdiction. It is contended that the Appellant desired the money raised upon the bonds to be paid into the Irish Bank by the lenders,

who were in England; but that leaves open the question what was to be paid; and if the bond was for Irish money, it cannot be a security for any thing more.

As to what was paid beyond that amount, if the Respondents are liable, it is only for a simple contract debt. If the question had been put in issue by the pleadings, we might have met the special case which is first raised upon the hearing and the appeal.

As to the claim of exchange, it is to be observed, that there might be a distinction between what is paid and what remains to be paid. But there is no ground for the claim. The creditor has an election to sue the debtor when he pleases. In this case he has obtained judgment on a bond in Ireland. The bond therefore and the debt merges in the judgment. The Defendant might have paid the money into Court, or perhaps to the attorney. Suppose execution had issued on the judgment, could the Sheriff have insisted upon the exchange? **[508]** It is argued, that the action might have been brought in England upon the judgment in Ireland. The case might then have been different, and it might have been contended that the rule in *Scott* v. *Bevan* (2 Barn. and Ad. 78) applied. But what shall satisfy a judgment cannot depend on variations in the residence of the parties. Execution cannot issue or be levied for more than the sum entered up and secured by the judgment.

As to *Delagal* v. *Naylor* (5 Moore and P. 443), it was in effect a question how to value Peruvian bonds in English money, and it was rightly held that it should be estimated as upon a bill of exchange. But such a decision does not bear upon a question as to what is to be paid upon a judgment.

The bonds and warrants of attorney, bearing date respectively the 3d of August, 1801, were executed in Ireland, where Gustavus Rochfort the obligor resided, upon Irish stamps, and according to the usual form of Irish securities; and the judgments were entered up thereon respectively in the Court of King's Bench, in Ireland, in all respects as Irish judgments, to secure the sums therein mentioned as of late Irish currency.

Robert Burrowes, acting on behalf of Richard Johnson and his co-partners, was the attorney on record who entered up the judgments upon the bonds and warrants at the suit of Richard Johnson; and Robert Burrowes, by an account subsequently furnished to Gustavus Rochfort, the conusor of the judgments, and bearing date the 31st of November, 1804, treated the same as Irish securities, and the sums secured thereby, and the payments made on foot thereof as Irish money, and therefore the Appellant, as assignee of Richard Johnson, is bound **[509]** by the acts of Robert Burrowes, in relation to the bonds and judgments and the sums secured thereby.

The judgments so entered up at the suit of Richard Johnson against Gustavus Rochfort, deceased, are, in form and substance, declarations on record, that the sums of money respectively secured thereby were of Irish currency, and by entry of the judgments the Appellant, as assignee of the same, is estopped from averring that the same were entered up as securities for English money, and not for Irish money, according to the tenor and effect of the records of the several judgments.

If any mistake had occurred in the execution of the bonds and warrants, or in the entry of the judgments, by reason of the same respectively having been executed and entered up for Irish, and not English money, and if proof of such mistake would have altered and extended the effect of those instruments, the Appellant should have put such mistake in issue by his original or amended bills, and prayed relief accordingly: but that not having done so, it was not competent for him, upon the pleadings in this cause, to make such case either in the Master's office or at the hearing of the cause.

Pemberton in reply:

The Respondents have not ventured to argue that the contract is not to be explained by the nature of the transaction; this indeed is the distinction which they take as to *Lansdowne* v. *Lansdowne* [2 Bli. 60]; and even in the answer of Rochfort it is stated, that the agreement was to advance "£10,000 *British*." Upon the authorities cited for the Re-**[510]**-spondent, it is clear that bills are payable in the currency of the country where the acceptors reside. The bills in this case were by the agreement to be drawn on bankers resident in London, as the mode by which the advance was to be made and credit to be given in their books to Rochfort as the borrower:

this also is admitted in the answer. The bonds were to secure the money thus advanced, and the expression contained in them, if ambiguous, is at least applicable to British money, which was in fact advanced. If the contract had been in Scotland, could it have been seriously contended that an advance of £10,000 sterling could be repaid by 10,000 Scotch pounds? As to the argument that the debt may stand for British money, but that the security is only for Irish currency, the judgment might under the warrant of attorney have been entered up in England, how then is it a transaction merely Irish? The language if doubtful must be construed by the context. Even if it were a transaction between Irish parties only, it does not follow, that the loan is to be paid in Irish currency. In *Ladbroke* v. *Biggs* [Batty's Rep. 619], the expression was not "money of Great Britain," but "sterling" only. Great Britain is not Ireland; and what is the substantial difference between "money of Great Britain" and money "current in Great Britain?" There is no authority to shew that "sterling money of Great Britain" has ever been construed to mean Irish currency.

The Lord Chancellor: The bond has the words "money of Great Britain," but the judgment drops these words.

Reply: I am now arguing upon the bond. In *Ladbroke* v. *Biggs*, besides that the word is only "sterling," there was evidence that the **[511]** advance and loan were in Irish currency. In this case what other words could be reasonably required to secure repayment in English currency? England has no separate existence; it is now part of Great Britain. How do the Respondents answer *Lansdowne* v. *Lansdowne*? [2 Bli. 60] how do they deal with the difficulties raised by Lord Eldon in that case? He seems to have thought, and the House of Lords agreed, that sterling money, in that case, could not mean Irish currency; and unless the House will permit the Courts of Ireland to overrule their decisions, that authority must prevail. Lord Redesdale says, "There is no lawful money of Ireland; and upon a large view of the transaction and the securities, the words cannot receive any rational construction but that of English currency." As to *Sproule* v. *Legge* [1 B. and C. 16], the bill there was drawn on a party in Dublin; there was no proof that it was drawn in Ireland. The Court said, that they could not judicially know that Dublin was in Ireland; and as the declaration was for sterling money, they could not receive evidence of any other currency.

Lord Plunket, in his judgment, says, the bill was for Irish currency, and that no case was made by it for English currency; and he observes, that the judgment being for £5000 sterling, it could not be entered up for £5000 British, but it might have been entered up for £5200 as equivalent.

The difference between the language of the bond and judgment shews what the contract was from the additional words in the bond; and the judgment is for the penalty of the bond, which is amply sufficient for the debt. The Lord **[512]** Chancellor of Ireland supposes, in his argument on this point, that the bill was to recover the amount of the judgments. That is not so; the bill is to recover what the judgment was given to secure, namely, £10,000 lawful money of Great Britain, the judgment being for £20,000 of whatever currency. The bill states the whole transaction; the facts and the proofs are all upon the record; for the answer admits the case as stated, and among other facts, that the borrower received the amount of the loan in British money. It is supposed by the Lord Chancellor of Ireland, that the decree was for an account of the debt in Irish currency; but that is misapprehension: the direction of the decree is to take the account upon the footing of the judgment, not as constituting the debt, but as the security. If the security had been for the transfer of stock, how could the decree have been for Irish currency? As to the rate of interest, it is argued, that if the contract is English, the interest upon the loan cannot be Irish: but it appears, from the authority of *O'Connor* v. *Bellamy* [2 Atk. 382], that there may be legally an advance of English money by way of loan with a security for Irish interest. The question is whether such is the meaning of the contract.

As to the rate of exchange, it is argued, that if the creditor sues the debtor in the country where the debtor resides, he must receive his debt in the coin or currency of that country. There is no authority for the proposition, and if it were true, this case ought to be an exception, for the creditor is compelled to follow the

debtor to his domicile, the site of his property. In this case, execution on the judgment would have been staid only upon the terms of doing equity, and that would be upon pay-**[513]**-ing the cost of exchange, and putting the creditor in the same situation as if he had sued in England. In *Scott* v. *Bevan* [2 B. and Ad. 78] the creditor sued in England, and the debt was paid with the expense of remittance. *Delagal* v. *Naylor* [5 Moo. and P. 443] was decided on the same principle. So in the cases where legacies have been given in the currency of a foreign country, the decree has been for payment with the cost of exchange.

As to the supposed inconsistency arising from the payments received on account, and that which now remains to be paid, it is imaginary. The difficulty will easily be solved upon further directions. The question to a certain extent is involved in the exceptions. The money so paid was not received in Ireland, it was paid to the bankers there, and then remitted to the creditor in England *minus* the exchange. The question is, what credit upon these remittances is to be given by the Appellant. If it be an English transaction of loan upon a sound construction of the contract, the creditor is entitled to receive back in London the money advanced there, together with the expense of remittance.

The Lord Chancellor said, at the conclusion of the argument, that he would take time to consider the questions.

The Lord Chancellor (Aug. 19, 1836): My Lords, there was a case before your Lordships some time since, in which Sir Gerard Noel was the Appellant, and Gustavus Rochfort and others were the Respondents. It was an appeal from a decision of the Court of Chancery in Ireland; the effect of which decision was that Sir Gerard Noel, (who now represents the interests of a banking house which had formerly existed in London,) claiming as a creditor **[514]** upon the estate of Mr. Rochfort, deceased, now represented by the Defendant, Gustavus Rochfort, was to have the amount of his debt paid in English currency. The question discussed upon this appeal was whether that direction of the Court of Chancery in Ireland was correct or not.

It appeared that Mr. Rochfort was desirous of entering into a partnership with a mercantile establishment in Dublin, and that, not having the means at command of raising the money which was required for the purpose of paying his portion of the capital, which was the sum of £10,000, an arrangement was entered into by which the banking house in London was to give him credit to the amount of £10,000, and the mode in which that sum of £10,000 was so to be advanced by Mr. Rochfort, as his portion of the capital of the establishment in Dublin, was by the house in Dublin drawing upon the banking house in London.

This loan was of course to be secured to the London house. Mr. Rochfort lived in Ireland. The money was drawn from the banking house in London, as had been proposed, and the securities taken were four bonds, each for £5000, from Mr. Rochfort;—he was residing in Dublin, and the bonds were executed in Dublin. The loan was further secured by judgments to the amount of £20,000, four judgments of £5000 each, under warrants of attorney executed by Mr. Rochfort. The ground upon which the Court of Chancery in Ireland came to the conclusion that Irish currency was to be the measure of the repayment of this loan appears to have been that the bonds were executed in Dublin, and that the debt was secured by Irish judgments.

[515] The bonds were in these terms: each bond was in a penalty of £5000 to secure £2500 of "sterling good and lawful money of Great Britain." In these bonds the obligor was described as of the county of Westmeath: the obligees were described as of London, and, of course, the payment was to be to the obligees so described as residing in London. The warrants of attorney were to enter up judgment "in Ireland, England, or elsewhere;" and the amount of money to be secured by those judgments was expressed in the warrants of attorney in precisely the same terms as the security was expressed upon the face of the bonds. Judgments were entered up under these several warrants of attorney. The judgments were for £5000 sterling: there, therefore, was a security for £20,000 sterling by these four judgments, the prior transaction of the bonds, and the warrants of attorney, proving that the loan was for £10,000, and the payment reserved upon the bonds, and declared to be secured by the warrants of attorney, being each for £2500 "of sterling good and lawful money of Great Britain, with legal interest."

Now, it is proved in this case, by the instruments, by the correspondence, and by the evidence in the cause, that, in point of fact, the £10,000 was advanced in London, by drafts drawn upon a house in London, and paid, of course, in English money, and that the parties, therefore, who advanced the money, parted with £10,000 of lawful money of Great Britain, current in Great Britain. There was a variety of money transactions between the banking house in London and the mercantile establishment in Dublin, the result of which was, that a very large sum became due to the London house, [516] which was secured upon some lands of Mr. Rochfort, in Ireland, which gave rise to a bill of foreclosure; and it is part of the evidence in the cause, that Mr. Rochfort, in his answer to that bill of foreclosure, admitted that the bonds and judgments were to secure the £10,000 advanced by the banking house in London in the way which I have stated. The fact being distinctly admitted, and appearing, indeed, on the face of the instruments, is also proved by various letters and the evidence in the cause; it may therefore be taken as a fact not disputed, and upon which the legal results must necessarily ensue, that the £10,000 was advanced in London, in the currency of this country.

A suit was afterwards instituted for the purpose of administering the estate of Mr. Rochfort. In that suit the ordinary decree was made in the year 1831, by which it was referred to the Master to take an account of what was due to the Plaintiff, upon the "four judgments obtained by Richard Johnson against Gustavus Rochfort, deceased, as of Trinity Term, 1801, for principal, interest, and costs." The Master made his report upon the 31st of May 1833; and in that report he states, that Gustavus Rochfort, on the 3d of August, 1801, "executed his four several bonds and warrants of attorney, for confessing judgments thereon to Richard Johnson," now represented by Sir Gerard Noel, "in trust for himself and the other persons in the firm of Edward Templer and Co., each in the sum of £5000 sterling, lawful money of Great Britain, conditioned for the payment of £2500, of like lawful money, and which bonds" he found "were executed in Ireland;" and he found "that the said Richard Johnson did in or as of [517] Trinity term, 1801, obtain four several judgments on said bonds, in his Majesty's Court of King's Bench in Ireland, against the said Gustavus Rochfort, deceased, each in the penal sum of £5000." He found "that the sum of £10,000 secured by the said four bonds, was advanced and paid by the said Richard Johnson, as one of the partners in the said banking house of Noel, Templer, and Co., to the said Gustavus Rochfort, or for his use, in British currency, and that there is due to the Plaintiff the sum of £8441 13s. 6d., being principal and interest, at 5 per cent., as appears by the second schedule, to be in my report annexed. But, on the part of the Defendant, it was contended that the said bonds and warrants having been executed in Ireland, and the judgments thereon entered in the Court of King's Bench in Ireland, it appears from an account furnished by Robert Burrowes, Esquire, as attorney for the said banking house, in the year 1804, proved in this cause as Exhibit A, that the said Robert Burrowes, as such attorney and authorised agent of Plaintiffs, in that account, treated the sums so advanced as Irish currency, and charged interest at the rate of 6 per cent., and that I should treat the sum secured as principal money Irish currency, and report accordingly. On the part of the Plaintiffs, it was contended, that I should treat the sum advanced as British currency, and payable with British interest, at 5 per cent.; and after I had prepared the draft of my report, in which I treated the sum advanced as British principal and British interest, the same counsel contended that I should report that the sum advanced, being British prin-[518]-cipal in Irish currency, should be liable to 6 per cent. interest, and that I should report that the Plaintiffs were entitled to the exchange on the payments made by the Defendant at the rate of the day; but the Defendant insisted that, under any circumstances, he was not liable to any exchange, but was entitled to make the payments in Ireland without reference to any remittances to London." The Master then says, that he concurred in opinion with the Defendant upon that point, and proceeds thus: "But with a view to save time and expense, I have taken the accounts in five different ways; first, as British principal at 5 per cent. interest; secondly, as Irish principal and Irish interest; thirdly, as British principal and English interest, with exchange on the payments made by the Defendant at the rate of the day; fourthly, as British principal and Irish interest, as on securities executed in Ireland; and lastly, as

British principal and Irish interest, with exchange on payments made by the Defendant at the rate of the day;" and he submitted to the Court which of those several modes of taking the account ought to be adopted. Then the Master states what, according to those different modes of taking the account, would be the sum due to the Appellant.

The Master, therefore, finds the facts which are not disputed. There is no exception to the report as to the mode in which the money was advanced, viz. that it was advanced in London, in British money, and transmitted to Ireland, and there secured by the bonds and judgments, the substance of which I have stated. The Master also reports that Robert Burrowes, the attorney for the Lon-[519]-don banking house, in the year 1804, deposed, in this case, that he, as such attorney and authorised agent of the Plaintiffs in that account, treated the sums so advanced as Irish currency. Upon this point an exception was taken to the Master's report, founded upon a supposed statement in the report, that Mr. Burrowes had been the attorney and authorised agent for the purpose of settling this account. That exception was overruled, and I think correctly overruled, not because there was evidence that Mr. Burrowes had been an agent authorised for that purpose, but because the Master did not find in his report that he was such authorised agent. He merely stated that he acted as such authorised agent, and, in that character, had settled the account; whereas the proposition raised in the exception was, that the Master had found that he was the authorised agent for the purpose of settling the account. But that is not very material for the purpose of deciding the merits of this case. The exception raised a point which was not raised upon the face of the report; and, I think, there is no ground of complaint on account of the exception having been overruled. That, however, leaves the question between the parties entirely open upon the facts, as to this point, stated and proved in the cause.

The real and substantial ground of appeal is the declaration and direction of the order that the account as taken by the Master, treating the sum secured by the four bonds as Irish currency, and bearing interest at 6 per cent., should be allowed. The effect of that decision is, that the debt of £10,000 advanced in London, in English money, in a suit in which the debts of the borrower are to [520] be paid is to be considered as satisfied by £10,000, Irish currency being of much less value.

The first question which occurs is, what must have been the intention of the parties at the time when this transaction took place? It is no unusual thing to lend money in this country upon Irish or colonial securities; is it necessary that the lender should guard himself by a special contract from a conclusion in law, that the debt is to be repaid, not in the currency according to the value at which it was advanced, but that it is to be repaid in the money of the country where the borrower may happen to live, or in the country where the instrument is executed for the purpose of securing the debt?

Two grounds were principally relied upon by the Respondents. First, that the securities, the bonds, and the judgments, were Irish. Secondly, that Mr. Burrowes, the attorney in Ireland for the Plaintiff's house in England, had settled accounts in which he had treated the loan as payable in Irish currency. As to the securities, the question hardly arises, the bonds and the warrants of attorney being in their terms to secure "sterling good and lawful money of Great Britain." The judgments indeed are for sterling money only, which, it is said, is a term used in Ireland to denote the currency at that time prevailing in Ireland. But the judgments in this case do not constitute the debt. If they did, the £20,000, and not the £10,000, would have been the sum to be recovered. But the judgments are mere securities for the debt really due; and if it be true that the debt would have been satisfied by the payment of £10,000 Irish currency, which is one of the arguments insisted [521] upon, it only proves that the security was of less value than was supposed; not that the debt secured was to be discharged by a payment of less money than was advanced. A security may be taken in goods, in lands, or in judgments for Irish money, or French francs, or any other description of money, and the amount of the debt to be secured remains the same. The question is, what is due upon the security, not what is the value of the security itself. But the question of what is due upon the security can only be answered by looking at the origin of the transaction and the contract between the parties. The origin of the transaction was the advance of £10,000 English money, and the contract

established by the bond was to repay the sum in "sterling good and lawful money of Great Britain." How can such a debt under such a contract be satisfied by a payment in Irish currency?

In support of the Respondent's claim, no case was cited which really supported their proposition; but on the part of the Appellant, the very important case of *Lansdowne* v. *Lansdowne*, in the third [?] volume of Mr. Bligh's reports (2 Bli. 60), was cited. In that case, the marriage settlements of English and Irish estates contained a power to charge the Irish estates with a jointure of £3000 "*of lawful money of Great Britain:*" the power was executed by a charge of £3000 of lawful money of Great Britain. In a suit to recover that jointure a question arose in the Court of Chancery in Ireland, as to whether that jointure was to be paid in English or in Irish money. A case was sent by the Court of Chancery in Ireland, to the Court of Common Pleas in that country, which Court certified that the jointure **[522]** was payable in Irish currency, and the Court of Chancery so decreed; but upon an appeal to this House, that decree of the Court of Chancery in Ireland was reversed, and it was declared, that the jointure was payable in English money, and not in Irish currency. In that case a rent-charge issuing out of an Irish estate, which was described as £3000 of lawful money of Great Britain, was, by the force of those words, connected with the history of the transaction, held to be payable in English money. Must not then the same words have at least an equal effect upon a loan contracted in England, not charged by the contract upon any Irish property, but secured by a bond executed indeed in Ireland, and by a judgment in that country, but the bond being so executed in Ireland, and the judgment obtained there, probably only because it happened that the Defendant was living in that country; the warrants of attorney, moreover, enabling the party to enter up judgment in Ireland, in England, or elsewhere.

It appears to me, therefore, upon principle and the authority of that case of *Lansdowne* v. *Lansdowne* (2 Bli. 60), that the £10,000 was payable in English money, and not in Irish currency; and this which I consider as proved to be the contract between the parties, cannot be affected by what Mr. Burrowes, the Irish attorney of the London House, appears to have done. It is not pretended that he had any authority to alter the contract, or to enter into any new contract between the parties. It is natural enough, that he, an Irish attorney settling the account in Dublin, should have treated the money as money to be estimated in Irish currency; but that cannot alter the rights of the parties.

[523] The next question is as to the interest; and it must, in the first place, be observed, that this is not the case of a debt secured upon Irish property. The opinion which I have expressed, as to the former part of the case, proceeds upon the ground of the transaction, and the contract having been altogether English. It follows from that, that the meaning of the parties must have been to secure legal interest; that is, legal interest according to the law of the country in which the contract was made, and in which the money was advanced. In the case of *Connor* v. *Lord Bellamont* (2 Atkins, 382), which is but imperfectly reported, and which was cited in order to shew that Irish interest ought to be allowed, there was upon the fact of the contract, according to the report, a reservation of 7 per cent., and that was a charge upon lands in Ireland.

The only remaining question is, whether the money is to be paid as if payable in Ireland, or whether it is to be calculated as if payable in London; that is, whether the exchange existing at those periods between the two countries is to be taken into the account. The contract is silent as to the place of payment. But it cannot be supposed that London bankers, advancing money in the course of their business, look to payment in any other place than where they are carrying on their business, that is in London. Had the borrower happened to be in England the bonds would have been English, and the judgments would have been English. Here the whole transaction was English, and in such a case, the lenders have a right to re-**[524]**-ceive payment where the money is advanced. Such was the principle of the decision in the case of *Phipps* v. *Lord Anglesea* (5 Viner's Abridg. 209. pl. 8), although there was a charge in the bonds upon lands in Ireland. In the case of *Lansdowne* v. *Lansdowne* (2 Bli 60), indeed, Lord Eldon thought that the jointure, though payable in English money, was not payable in England: but in that case, there was no

contract for payment, the right existed only in the charge. It was a charge that affected property in Ireland. Lord Eldon, in that case, alludes to the case of *Phipps* v. *Lord Anglesea* and several other cases with approbation.

I am therefore of opinion, that the account must be taken upon the footing of money to be paid in London; that the repayment is to be with interest at 5 per cent.; and that the calculation must be made with allowance according to the rate of exchange at which the several sums of money were remitted from Ireland to this country. If that should be your Lordships' opinion, the object will be carried into effect by substituting a declaration in lieu of that which now appears in the decree: as the decree now stands, it "declares that the Master in calculating the sum secured by the four bonds ought to consider them as Irish currency, bearing interest at the rate of 6 per cent." The substitution which I would submit to your Lordships is this, that the Master in making his calculation should consider the debt as English money, bearing interest at 5 per cent. and payable in London, that is, with the value of the exchange at the rate of the day, and that the **[525]** interest of 5 per cent. should be calculated upon such a sum as shall appear to be due, consisting of principal and interest. I therefore move your Lordships, that the decree of the Court of Chancery be varied accordingly.

Decree affirmed with the variations proposed.

[526] ENGLAND.

(COURT OF CHANCERY.)

The Right Honourable JOHN GEORGE, Earl of DURHAM,—*Appellant:* JOHN WHARTON and SUSAN MARY ANN, his Wife, and THOMAS BARRETT LENNARD,—*Respondents.*

[S. C. 3 Cl. and F. 146; 3 My. and K. 472; 5 Sim. 297. Commented on and followed in *Powys* v. *Mansfield*, 1836, 3 My. and Cr. 359, 374; *Chichester* v. *Coventry*, 1867, L. R. 2 H. L. 76; and *Dawson* v. *Dawson*, 1867, L. R. 4 Eq. 515; and see *Leighton* v. *Leighton*, 1874, L. R. 18 Eq. 472.]

W. L., by will dated in 1772, devised all his lands, subject to a term of 1000 years, to his brother J. L. in fee. The trusts of the term were to raise £15,000 in augmentation of the portions of his nephew R. and his nieces J. D. and S. M. A. L. daughters of J. L., to be divided equally between them. The estate having vested in J. L., he by his will, dated in 1788, gave to his daughter J. D. a sum of £10,000. He also gave in trust for his daughter S. M. A. L. £10,000, half to be paid three years after his death, and the remaining half six years after his death, with interest at 4 per cent. from the time of his death, unless his son W. H. L. should cease to pay the same sooner; the interest of this legacy to be paid to his said daughter during her life, and after her decease to pay the principal among her children, according to her appointment, etc. By the will it was declared that the legacies of £10,000 so given in trust for his daughters, were over and above the legacies of £5000 given to them by the will of his brother W. L.; and subject to the charge of legacies, etc., he gave all his freehold estates, etc. to W. H. L. for life; remainder to his first and other sons, etc. in tail.

By articles of agreement made upon the marriage of S. M. A. L., and dated 1790, J. L. agreed to give to J. W., the intended husband, £15,000 as her marriage portion; in consideration of which, J. W. agreed to make provision for pin money, jointure, and portions for the wife and the children of the marriage by a settlement to be thereafter executed; and it was agreed and declared that the portion of £15,000 was in full satisfaction and discharge of all sums of money which S. M. A. L. was entitled to, or could claim by virtue of any **[527]** gift, bequest, or devise under the will of W. L. The marriage having been solemnised, a settlement pursuant to the articles was executed in 1793, and £15,000, the marriage portion, was paid by J. L. to J. W.

In 1794, J. L. died; and his will, having been proved by W. H. L. his sole executor, was read in the presence of many members of the family, and, among others, the trustees of the marriage articles and settlement. In 1795, W. H. L. made his will, and died in 1797, when the Appellant became, under the will of J. L., tenant in tail of the lands, etc. charged by the will of J. L. with the legacy of £10,000 in favour of S. M. A. L.

In 1826, for the first time, J. W. and his wife (S. M. A. L.) claimed the said legacy to be paid with interest according to the trusts created by the will of J. L., and, in 1829, filed a bill in Chancery against the Appellant and others to compel the payment. In 1832, a decree was made by the Vice-Chancellor according to the prayer of the bill, and in 1835, this decree was affirmed by the Lord Chancellor. But on appeal to parliament the decree was reversed, on the ground that the settlement was an ademption and satisfaction of the legacy.

William Lambton, by his will duly signed and attested, as by law required for devising freehold estates, and bearing date the 13th April, 1772, devised his real estates, to certain trustees therein named, for the term of one thousand years, in trust, to raise the sum of £15,000, for or in augmentation of the portions of his nephew, Ralph John Lambton, and his nieces, Jane Dorothy Lambton and Susan Mary Ann Lambton (now the Respondent, Susan Mary Ann Wharton), equally to be divided between them, the shares of the said nieces to be paid to them respectively at their respective ages of twenty-one years, or days of their marriage, which should first happen, so as such marriages should be with the consent and approbation of the testator's brother, John Lambton. [528] And upon this further trust, that the said trustees should in the meantime, and until the respective shares of his said nephew and nieces should respectively become payable, levy and raise for the maintenance and education of his said nephew and nieces respectively, such yearly or other sum, not exceeding one year with another the interest of their respective portions thereby provided for them, at the rate of 3 per cent. per annum, as his said brother, John Lambton, should from time to time in his discretion think fit and appoint. And he devised his real estates, charged as aforesaid, unto his said brother, John Lambton, and his heirs, in fee simple.

William Lambton (the above-named testator) died in 1774, without having revoked or in any manner altered the said devise; and his brother, then General John Lambton, thereupon entered into, and thenceforth during his life continued in possession of, the real estates charged with the legacy, and the receipt of the rents and profits thereof.

General John Lambton being at the time of making his will, hereinafter in part set forth, and thenceforth up to and at the time of his death, seized in fee simple of divers freehold estates, including the real estates devised and charged as aforesaid, and being possessed of personal estate of considerable amount, made his will, signed and attested so as to pass freehold estates, bearing date the 17th November, 1788, which was (so far as it is material to be here stated) as follows: "I give unto Thomas Lyon and William Loraine the further sum of £10,000, to be paid to them, the said Thomas Lyon and William Loraine, their executors or administrators, in manner following; [529] (that is to say,) the sum of £5000 at the end of three years next after my decease, and the remaining £5000 at the end of six years next after my decease, with interest after the rate of £4 for each £100 by the year from the time of my decease; unless my son, William Henry Lambton, should choose to pay the same sooner, which it is my mind and will that the said William Henry Lambton may do, if he shall think fit, giving to the said Thomas Lyon and William Loraine six calendar months' notice in writing, in trust that they, the said Thomas Lyon and William Loraine, their executors or administrators, shall from time to time, by and with the consent of my said daughter, Susan Mary Ann Lambton (the Respondent), to be signified in writing under her hand, place out the said sum of £10,000 in the funds, or upon Government or real securities, at interest, and also from time to time with the like consent, to call in the principal money so to be placed out, and again to place out the same at interest on new or other securities of the like nature, and shall apply the interest, dividends, and proceeds thereof, and the interest thereof, until the same shall be paid to them the said Thomas Lyon and William Loraine,

their executors or administrators as aforesaid, to my said daughter, Susan Mary Ann Lambton during her life; and after her decease, then upon trust that they, the said Thomas Lyon and William Loraine, their executors or administrators, shall pay and apply the said sum of £10,000 unto and amongst all and every the child and children of my said daughter lawfully to be begotten, at such time or times, and in such parts, shares, and proportions, [530] and under and subject to such restrictions, as my said daughter shall, notwithstanding her coverture, and whether covert or sole, by any deed or writing executed in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing purporting to be her last will and testament, to be executed in the presence of and to be attested by the like number of credible witnesses, direct, limit, declare, and appoint; and in default thereof shall pay and apply the same equally and amongst all and every the child or children of my said daughter, share and share alike, the share and shares of such of them as shall be a son or sons, to belong to and be an interest vested in him or them, at his or their respective age or ages of twenty-one years, and in such of them as shall be a daughter or daughters, at her or their respective age or ages of twenty-one years, or day or days of marriage, which shall first happen; but to be paid at the respective times hereinafter mentioned; (that is to say)," etc.

Then followed provisions as to the times of payment and trusts for maintenance and for advancement.

The will concluded as follows: "Provided always, that in case there shall be no child or children of my said daughter lawfully begotten, or, being such, all of them, being sons, shall happen to die before they shall attain the age of twenty-one years, and all of them, being daughters, shall die before they shall attain that age or marry, then it is my mind and will, that the said sum of £10,000, or so much thereof as shall not have been advanced and paid for the advancement of any of the children of my said [531] daughter, as aforesaid, shall become a part of my personal estate, and to be disposed of with the same as hereinafter mentioned. And I do hereby declare, that the sum of £35,000 given to the said Thomas Lyon and William Loraine to be laid out, as in the former part of my said will mentioned, in trust for my son, Ralph John Lambton, and the said £10,000 and £10,000 so given to the said Thomas Lyon and William Loraine, as aforesaid, in trust for my said daughters, is over and above the several sums of £5000, £5000, and £5000, devised to them in and by the will of my brother, William Lambton. And I devise all the residue of my freehold and copyhold estates whatsoever, charged and chargeable with the payment of all my just debts, legacies, and funeral expenses, or so much thereof as my personal estate is not sufficient to discharge, unto my son, William Henry Lambton, and his assigns, for his life, with remainder to trustees, to preserve contingent remainders; with remainders to the first, second, third, fourth, fifth, and sixth, and all and every other the son and sons of the said William Henry Lambton, severally, successively, and in remainder, one after another, in order and course as they respectively shall be in priority of birth, and to the several and respective heirs male of their bodies, the elder of such sons, and the heirs male of his body, always to be preferred: with divers remainders over. And I bequeath all the residue of my personal estate (except certain colliery stock) charged and chargeable with the payment of my debts, legacies, and funeral expenses, to my son, William Henry Lambton. And I appoint my [532] said son, William Henry Lambton, sole executor of my said will."

General John Lambton subsequently made several codicils to his will, but he did not by any of such codicils revoke, or in any manner alter the bequest in favour of the Respondent, Mrs. Wharton, and her issue; and in some of such codicils he ratified and confirmed his will.

By articles of agreement, dated October 9, 1790, in contemplation of the marriage of John Wharton and Susan Mary Ann Lambton, and made "between John Wharton, of the first part; Susan Mary Ann Lambton, of the second part; General John Lambton, of the third part; and William Henry Lambton and Ralph John Lambton, of the fourth part;" reciting, among other things, that "on the treaty for the said intended marriage it was agreed that in consideration as well of the said intended marriage, as of the sum of £15,000, which John Lambton had agreed to give to John Wharton, as the marriage portion of Susan Mary Ann Lambton, John Wharton should secure

to Susan Mary Ann Lambton, during the joint lives of herself and John Wharton, the payment of the annual sum of £500, by the year, for her separate use during the coverture, for pin money; and also that John Wharton should secure to Susan Mary Ann Lambton yearly, during her life, in case she should survive John Wharton, the payment of the clear annual sum or rent-charge of £1200 as in the nature of a jointure, etc.; and should also secure such portions for the daughters and younger sons of the marriage as thereinafter mentioned. And it appearing, from the present **[533]** situation and circumstances of the said John Wharton's property, that it would be inexpedient to make an actual settlement to the effect agreed upon, till after the respective deaths of Mrs. Margaret Wharton and Mrs. Ann Farquharson, two of the aunts of John Wharton, it has been further agreed that the said John Wharton should enter into such covenants as thereinafter mentioned, and that the payment of the sum of £15,000, the intended portion of Susan Mary Ann Lambton, should be postponed in manner thereinafter mentioned, and that, in the meantime, the said sum of £15,000 should remain and be subservient to the purposes of such intended settlement in manner thereinafter particularly mentioned: it was witnessed that in consideration of the said intended marriage, and of the sum of £15,000, thereinafter covenanted to be paid by John Lambton, as the portion or fortune of his said daughter, and to the intent that the said agreement might be carried into effect according to the true intent and meaning thereof," etc. Then followed the agreement for making provision for pin money, and for the jointure of the wife, and portions for the children of the marriage, by a settlement to be executed after the death of the parties before mentioned. The articles then contained a covenant by John Lambton to pay to John Wharton £15,000 as a marriage portion, in such manner, and upon such conditions and consideration, as therein mentioned; and concluded as follows: "And lastly, it is hereby agreed, and declared by and between the parties to these presents, and particularly the said John Lambton, John Wharton, and Susan Mary Ann **[534]** Lambton, do severally agree and declare that the said portion or sum of £15,000, hereinbefore by these presents covenanted and agreed to be paid by the said John Lambton, as aforesaid, is in full satisfaction and discharge of all and every sum and sums of money, which the said Susan Mary Ann Lambton is entitled to, or can or may claim, or be entitled to, by virtue of any gift, bequest, or devise, in or under the will of William Lambton, late of Lambton Hall aforesaid, Esquire, the late uncle of the said Susan Mary Ann Lambton."

Immediately after the date and execution of the marriage articles, the marriage between the Respondents, Mr. and Mrs. Wharton, was solemnised.

The real estate of Mr. Wharton shortly afterwards having fallen into possession, by the deaths of the two preceding tenants for life, an indenture of settlement, bearing date the 21st of August, 1793, was, in pursuance and in execution of the articles, made and executed by General John Lambton and the Respondents, Mr. and Mrs. Wharton, and other parties. The settlement was in strict conformity with the articles, and contained a clause in the words following: "And lastly, the said John Wharton, for himself, his heirs, executors, and administrators, and for the said Susan Mary Ann, his wife, doth covenant, promise, and agree to and with the said John Lambton, his executors, administrators, and assigns, by these presents, that he the said John Wharton, his executors or administrators, shall and will, at any time hereafter, at the request and expense of the said John Lambton, his executors, administrators, or assigns, do or execute any act that **[535]** shall be necessary for releasing or discharging all and every, or any sum or sums of money, which the said Susan Mary Ann, his wife, or the said John Wharton in her right, is or are entitled to, by virtue of any gift, bequest, or devise, in or under the will of the said William Lambton, her uncle."

On the execution of this settlement, the sum of £15,000 was paid by General John Lambton to the Respondent, Mr. Wharton, according to the agreement.

General John Lambton died in March, 1794, without having revoked or altered the bequest of £10,000 contained in his will. He left two sons, namely, William Henry Lambton, his eldest son, and Ralph John Lambton, and two daughters, namely, Jane Dorothy Lambton and the Respondent, Susan Mary Ann Wharton, him surviving; and shortly after his death, William Henry Lambton proved his will, together with the several codicils thereto, in the proper Ecclesiastical Court, and

possessed the personal estate, and entered into the receipt of the rents and profits of the real estates of the testator, General John Lambton. The will was read in the presence of many members of the family, including the trustees of the marriage settlement of Mr. and Mrs. Wharton.

William Henry Lambton died in November, 1797, leaving the Appellant, then a minor (since created Earl of Durham), his only son, who thereupon, under the will of General John Lambton, became entitled, as tenant in tail in possession, to the real estates thereby devised, and which had been charged with the sum of £10,000 and interest, in favour of the Respondent, Mrs. Wharton, and her children. **[536]** The Appellant, upon attaining his majority, accordingly entered into the receipt of the rents and profits thereof.

There was issue of the marriage between the Respondents, Mr. and Mrs. Wharton, two children only, namely, Susan, born on the 1st of April, 1792, and Margaret, born on the 3d of August, 1794. Both of these daughters attained their ages of twenty-one years, and the former (Susan) died unmarried and intestate in May, 1820, and letters of administration of her goods, chattels, rights, and credits, were granted by the proper Ecclesiastical Court to her father, the Respondent, John Wharton, who thereupon became entitled to all the share and interest which Susan Wharton might have in the said sum of £10,000, and its interest. Miss Margaret Wharton, on the 3d of August, 1815, intermarried with the Respondent, Thomas Barrett Lennard, and in 1818 died; whereupon Mr. Thomas Barrett Lennard procured to be granted to him by the proper Ecclesiastical Court, letters of administration of the goods, chattels, rights, and credits of his late wife, Margaret Lennard, and he thereby became entitled to all her share and interest (if any) in the said sum of £10,000, and its interest.

In 1824 Mr. and Mrs. Wharton claimed the legacy of £10,000, with interest, and in 1829 filed a bill, etc. against the Appellant to compel the payment; alleging that they had not been present at the reading of the will, and were uninformed and ignorant of the bequest until application was made to them, on behalf of the Appellant, to release the legacy, in order that he might make a good title to the estate, under a contract for sale of it to Lord Eldon.

[537] The Appellant, the Earl of Durham, by his answer to the bill, admitted that no part of the legacy of £10,000, or of the interest thereon, had been raised or paid, and that the trusts for raising and paying the same had never been performed or executed; and, by way of defence, he insisted (notwithstanding the articles and marriage settlement and the trusts created by the General's will) that the £10,000 bequeathed by the General was satisfied by the £15,000 paid on the marriage of the Respondents, Mr. and Mrs. Wharton.

The other Defendants also put in their answers to the bill, and the cause being at issue, witnesses were examined. The agent of Lord Durham proved that upon application to Mr. and Mrs. Wharton, on behalf of Lord Durham, to obtain a release of the legacy, they appeared to be, and said that they had been, ignorant that such a legacy had been bequeathed by the will. Publication having passed, the cause came on to be heard before his Honour the Vice-Chancellor, on the 21st of November, 1832; and on the 26th of the same month his Honour was pleased, by his decree, to declare (*inter alia*), that the Plaintiffs (the Respondents, John Wharton and Susan Mary Ann, his wife, in her right, and the Respondent, John Wharton, as the administrator of the goods, chattels, and credits of the said Susan Wharton, deceased, and the Defendant, Thomas Barret Lennard, the administrator of the goods, chattels, and credits of his late wife, the said Margaret Lennard, deceased) were, under and by virtue of the will of the said John Lambton, deceased, the testator in the pleadings named, entitled to have the sum of £10,000, together with interest thereon, after the rate of **[538]** 4 per cent. per annum, from the same testator's death, raised out of the same testator's freehold, copyhold, and personal estates: and it was ordered that it should be referred to one of the Masters of the Court to take the usual accounts consequential on such declaration (5 Simons, 305.).

The Appellant being dissatisfied with the decree, presented a petition of rehearing and appeal to the Lord Chancellor, praying that the decree might be reversed; and this petition coming on to be heard before the Lord Chancellor on the 29th of July, 1834, he, on the 5th of August following, ordered and decreed, that the

petition should be dismissed, and the decree of the Vice-Chancellor affirmed with costs (3 M. and K. 472).

After the decree of the Lord Chancellor, John Edmond Dowdeswell, the Master to whom the cause was referred, made his report, finding a large sum of money to be due from the Appellant in respect of the principal and interest of the legacy of £10,000, and which report was afterwards confirmed absolutely.

From the decree and subsequent orders in the cause, the Appellant presented his petition of appeal to the House of Lords, praying that the same might be reversed.

For the Appellant, Mr. Bickersteth and Mr. Pemberton.

It is a settled rule in a Court of Equity, that a legacy given by a father to a child is adeemed by a portion subsequently advanced by the father to or upon the marriage of such child; and the **[539]** propriety of applying such rule to this case is confirmed by the identity of the sum advanced on the marriage with the amount of the sum which the testator showed, by his will, he intended to be the amount of his daughter's portion. And although it was supposed in the Court below that the sums did not precisely correspond, because there might have been an arrear of interest on the £5000 due to Mrs. Wharton at the time of her marriage, yet when it is recollected that, under the will of William Lambton, no interest was payable in respect of the sum of £5000 until Mrs. Wharton attained the age of twenty-one years, or, if payable at all, was payable to her father, John Lambton, for her maintenance, and that after she attained that age, and until her marriage, she resided with her father, it cannot be presumed that any arrear of interest was due to her at that time.

Supposing the legacy not to have been adeemed, all claim to the interest, which belongs exclusively to Mr. Wharton, is barred by the length of time which he has permitted to elapse without bringing it forward; it being, as it is submitted, under the circumstances, impossible to attribute ignorance to him of the fact of such bequest having been made.

For the Respondents, Sir W. Horne, and Mr. Knight, (and Mr. W. Pole).

The language of the marriage articles and subsequent settlement, to each of which General Lambton was an executing party, is inconsistent with the existence of any intention on his part that the portion of £15,000, expressed as it was to be in satisfaction of his daughter's claims under the uncle's will, **[540]** should be also in satisfaction of a legacy under General Lambton's own will.

The legacy of £10,000 in question was given for the benefit of the children of the Respondent, Mrs. Wharton, as well as herself, and not of herself only.

The trusts of the marriage articles and subsequent settlement, so far as they are for the benefit of any issue of the Respondent, Mrs. Wharton, are materially different from the trusts created by General Lambton's will of the legacy in question, for the benefit of Mrs. Wharton's issue.

The question of satisfaction is concluded by the authority of *Baugh* v. *Read* (1 Ves. jun. 257, and 3 Bro. C. C. 192).

If the delay of the suit could be material in a case where the non-payment of a legacy sued for is admitted, as it is in this case, and where all presumption of payment is necessarily excluded, the delay is here sufficiently accounted for and explained.*

Lord Lyndhurst (Aug. 19. 1836): This case was heard before Lord Brougham, myself, and other noble lords. The facts of the case are shortly these:—William Lambton by his will bequeathed to his niece, Susan Lambton, a legacy of £5000 charged with other legacies upon his real estate, which he devised to his brother General Lambton, the father of Susan Lambton. General Lambton by his will, **[541]** bequeathed £10,000 to his daughter, Susan Lambton, who after the date of that will married the Respondent, Mr. Wharton. Upon the occasion of her marriage, General Lambton gave a marriage portion of £15,000 to his daughter; and in

* The argument here given consists only of the reasons in the printed cases. The full argument and authorities (to which little was added in the House of Lords) are to be found in the reports of the case in the Court of Chancery. The only material cases cited in addition were *Platt* v. *Platt*, 3 Sim. 503, *Weall* v. *Rice*, 2 R. and M. 251.

the instrument executed upon that occasion, it is agreed and declared that the marriage portion was given as satisfaction of all sums to which Susan Lambton was entitled under the will of her uncle, William Lambton. The question is, whether that marriage portion is to be taken as a satisfaction not only of the sum to which she was entitled under the will of her uncle, but also as a satisfaction or ademption of the legacy bequeathed to her by the will of her father—whether in addition to the marriage portion of £15,000 Mrs. Wharton is entitled to the legacy of £10,000 under her father's will.

It appears that General Lambton died in the year 1794, and no claim to this legacy was made until the year 1826, a period of 32 years. It is alleged, on the part of Mr. and Mrs. Wharton, that they were wholly unacquainted with the fact, that any legacy had been bequeathed to Mrs. Wharton, or that she had any claim to any legacy under her father's will. Now it is proved that, immediately after the death of General Lambton, his will was read in Lambton Hall, in the presence of William Henry Lambton, Mrs. Wharton's brother, the sole executor of General Lambton; in the presence of Ralph John Lambton, another of her brothers, and who was one of the trustees of the settlement made upon her marriage; and also in the presence of Dorothy Lambton, her sister, who took a legacy of £10,000 under the will. Under these circumstances it appears to me extraordinary that Mrs. Wharton **[542]** should have had no knowledge of any legacy having been bequeathed to her by her father's will. It is the more extraordinary as, upon a recent occasion, she stated, that she considered herself the favourite child of her father, and thought it probable that she should have a legacy under his will. This would naturally have led her to enquiry; and it appears highly improbable under such circumstances (this family living on good terms together, and Dorothy Lambton herself taking a legacy of £10,000) that it should never have come to the knowledge of Mrs. Wharton, a sister of the parties, that she had been mentioned in the will, and that a legacy of £10,000 had been bequeathed to her.

But there is some evidence which has been insisted on for the purpose of leading to the conclusion, that, in truth, Mrs. Wharton had no knowledge of this legacy. It appears that Lord Durham was desirous of selling a part of the property on which this legacy was charged, and he entered into a treaty for that purpose with Lord Eldon. Lord Eldon required an indemnity against any claim which might arise to this legacy; in consequence of which, Mr. Ward (who was the solicitor of Lord Durham) waited upon Mr. and Mrs. Wharton, at Morton House, and had a conversation with them on the subject of the legacy, and in the course of that conversation, Mrs. Wharton stated, that she had never heard that she was entitled to a legacy under her father's will. Now this statement of Mrs. Wharton has been insisted upon as evidence in this cause, that Mrs. Wharton was ignorant of the fact in question: but after having considered the point fully, I cannot bring myself to the conclusion that any thing stated by Mrs. Wharton, who **[543]** is a claimant and party in the cause, can be made use of as evidence in her favour, although addressed to the agent of Lord Durham, for that is the circumstance which, as it has been argued, makes it evidence. But the fact is immaterial. The declaration of a claimant and party in the cause, to whomsoever made, cannot be received in evidence, nor influence the judgment of the Court, and all the presumptions are most strongly in favour of the conclusion, that it must have been known to Mrs. Wharton at the time or recently after the time of the death of General Lambton, that she had been mentioned in his will, and that a legacy of £10,000 had been bequeathed to her by that will. Whatever inference therefore in point of law can be drawn from the facts as proved, must, in my apprehension, be adverse to the claim of Mr. and Mrs. Wharton.

Another point made in the argument was, that the amount of the two sums given by the wills did not correspond with the portion given by the settlement. The legacy left by William Lambton amounted to £5000, the legacy bequeathed by General Lambton to Mrs. Wharton amounted to £10,000, those two sums together making £15,000: on the other hand, the marriage portion amounted to £15,000. But then it was argued that in addition to the legacy of £5000 there was an arrear of interest due upon it at the time when the marriage portion was given, amounting to upwards of £2000, so that the sum on the one side would have been in the whole £17,000 and upwards, and the sum on the other side £15,000. Now, assuming those facts to be

as it is alleged and argued, still it does not appear to me that they at all affect this case. It is **[544]** not necessary, in order to raise the question of ademption, that the sums should exactly correspond. There are many cases in the books, some of which were cited in the course of the argument at the bar, where the proportional difference was much greater than it is contended that it was in the present case. But in truth there is no evidence in this cause to show that any arrear of interest was due; and after a lapse of 30 years we cannot, under the circumstances of the case, presume that any such arrear existed at the time.

But then it was further argued, that the limitations under the will are widely different from the limitations under the settlement, and that such difference would prevent the application of the principle of ademption to this case; and, indeed, that doctrine was alluded to in the judgment of the Vice-Chancellor; but I apprehend that such a circumstance will not prevent the application of the principle of ademption, and that the authorities are all the other way. In the case of *Trimmer* v. *Bayne* (7 Ves. 508), which was cited in the course of the argument, Lord Eldon expresses himself in these terms: "The Court does not enquire whether the portion by the will is entirely and absolutely to the child; or what is afterwards advanced in this form, a settlement upon marriage, which not being a performance of a covenant or satisfaction of a debt, yet is a presumed satisfaction of the intended portion." And in another case of *Baugh* v. *Reid* (3 B. C. C. 191; 1 Ves. jun. 257.) (which was cited for another purpose), this point having been insisted on in the argument, Lord Thurlow expressed himself in these **[545]** terms: "Upon the marriage of his daughter he transfers part of that specific sum so mentioned. I agree to different uses; yet I doubt whether, though not to the same uses, it will not operate as an ademption, if not a satisfaction, being given as an advancement upon marriage."

But there is a case of *Monck* v. *Lord Monck* (1 Ball. and Be. 298), decided by Lord Redesdale, which is directly in point. Lord Redesdale says, "It was pressed upon me by the counsel for the Plaintiff that the variance in the provision by the settlement and the will distinguished this case. That is a circumstance which may avail to prove it not to be in satisfaction of a debt or covenant, but never of a legacy given as a provision. This distinction was taken by Lord Hardwicke in the case of *Clarke* v. *Sewell* (3 Atkyns, 98); and in *Trimmer* v. *Bayne* (1 Ball and Be. 298), this doctrine is recognised by Lord Eldon, wherein he states the question to be whether, the limitations being different, it was an ademption, and lays down this rule, that where a parent or person in *loco parentis* gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, advances in the nature of a portion to that child, that will amount to an ademption of the gift by will; and this Court will presume he meant to satisfy the one by the other."

The same point was expressly decided in *Platt* v. *Platt* (3 Sim. 503) by the present Vice-Chancellor, who observed, "although there is a material difference between the provision made by the will and the provision under the settlement, still the one is a satisfaction of the other." So that the question **[546]** was raised and presented to the mind of the Vice-Chancellor, and the Vice-Chancellor decided in favour of the ademption. I conceive, therefore, that the circumstance of the limitations being different does not in this instance prevent the application of the principle of ademption.

Another point raised was this,—that by the terms of the settlement the £15,000 was to be in satisfaction of all that Mrs. Wharton was entitled to under the will of her uncle William Lambton; and it was therefore contended, that as this provision was stated to be in satisfaction of a debt due by General Lambton, that it could not also be taken to be in satisfaction or ademption of what she otherwise would be entitled to under the will. I have never felt the force of that argument. It was necessary, as far as related to the debt, that the provision in satisfaction of it should be in terms expressed; but as far as related to the provision by the will it was not necessary, because that effect is produced by the operation of law.

But the case of *Baugh* v. *Read* (Ante, p. 544) was cited as an authority for this doctrine distinctly in point. That case is reported both in Brown's Reports and in Vesey; the best report is in Vesey. It does not appear however to me, after carefully considering that case, that it supports the position for which it was cited. In that case, by the terms of the will, the legacy given was in satisfaction of a debt due under

the settlement made on the marriage of the testator. As far as related to the portion, a portion of £5000, and in the instrument by which the portion was created, there was a covenant on the part of the daughter, that she would, when she **[547]** came to the age of twenty-three, assign the sum that she was entitled to under the will of her grandfather. These circumstances are widely different from those of the present case. But it was not with reference to these circumstances, as I collect from the different parts of the report, that Lord Thurlow decided that case; he decided that case with reference to the nature of the fund out of which the legacy was to be paid. That is to be collected from many parts of the report, and is also confirmed by the concluding passage, in which Lord Thurlow says, "it is impossible to say this is either a satisfaction or an ademption. It is not express enough. I think the father intended to give this right to a sum expected to accumulate before his death by the addition of all these sums at least, if not of others; therefore it does not come up to that point which I should have thought it reached," (that was with respect to the ademption,) and perhaps have been wrong in so thinking, if it had been a certain sum distributed in certain proportions." Such are the grounds on which that case was decided. They have no application to the present question.

I have now stated the various objections urged at the bar for the purpose of leading your Lordships to the conclusion that the general rule of ademption could not be applied to the present case. It appears to me that none of them are sufficient for that purpose, and that the general rule of law ought in this instance to prevail.

I am, therefore, of opinion that the judgment ought to be reversed.

Judgment reversed without costs.

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[548] ENGLAND.

(COURT OF CHANCERY.)

EDWARD OAKELEY,—*Appellant;* SARAH HAUGHTON PASHELLER, and others,—*Respondents.*

[Mews' Dig. vi. 1529: x. 605; xi. 1241, 1247. S. C., 4 Cl. and F. 207. Discussed in *Rouse* v. *Bradford Banking Co.* (1894) A.C. 586, where the principal authorities are collected.]

In 1810, R. and S., who carried on business in co-partnership under the firm of R. and Co., borrowed of O., the father-in-law of R., £10,000, for which sum O. accepted four bills drawn by R. and S. in the name of their firm; and to secure the repayment of the monies which should be paid by O. upon the acceptances, R. and S. in 1811 and 1812 executed to O. four joint and several bonds in the penal sums of £5000 each, with conditions to be void, if R. and S., their heirs, etc., should pay to O., his executors, etc., as to two of the bonds on or before the 15th of October 1817, and as to the remaining two of the bonds on or before the 15th of January 1818, all such sums of money as O., his executors, etc., should have paid on account of the bills, with interest, etc. The amount due upon the bills was afterwards paid by O., to whom credit in account for £10,000 was given by R. and S., and the interest paid thereon.

In November 1814, S. died, having made his will and appointed executors. In May 1815, according to a provision in the articles of partnership, the accounts were made up, the stock, etc., valued, and the partnership dissolved, of which notice was given in the London Gazette; and shortly afterwards R. contracted a new partnership with K., another son-in-law of O., which was carried on and continued in the firm of R. and Co.

In June 1815, a deed between the executors of S., and R. and K. his new partner, was executed, by which it was recited that it had been agreed that R. should be entitled to all the outstanding debts and effects of the late firm of R. and S., upon paying to the executors of S. £3085, and securing the further payment of £49,622 with interest from the 1st of May last, and indemnifying them against all outstanding debts and engagements of the firm specified in

a schedule; and thereupon R. covenanted to assign the debts of the old firm to trustees to secure the payment of promissory notes given by R. and K. to the executors of S.; and R. and K. covenanted to execute **[549]** and deliver to the executors of S. a bond in the penalty of £150,000 conditioned for the payment of the outstanding debts of the old firm of R. and Co., and to indemnify the executors against all claims. Among the debts contained in the schedule was the one due to O. of £10,000. The sums, as stipulated by the deed, were afterwards paid to the executors, and R. and K. carried on the business in partnership, under the name of the old firm, from that time until 1826, delivering accounts annually to O., in which they credited him with the debt of £10,000 and paid the interest upon it, with which he was debited in the accounts. These accounts included, also, and without distinction, a loan of £17,000 stock, which had been made by O. to R. and K., with the dividends thereon, and payments made in respect of the dividends.

In 1817 O. agreed with R. and K. to leave the £10,000 in their hands for three years longer. Towards the expiration of this term of three years, O., in a letter dated in 1820, addressed to R. and K., expressed himself as follows: "The bonds of the house which were granted to me in 1811 and 1812, payable in six years, and the payment of which was suspended for three years longer, in consequence of my engagement in 1817, will become due on the 15th of October and 15th January next, at which period I hope it will be convenient to the house to discharge them." Upon application by R. and K. for further time, O., by letter on the 5th October 1820, replied, "that it would not be convenient to him to enter into any new engagement for continuing the advance of £10,000 beyond the term of his former agreement." But upon a renewed application, O., by letter on the 14th October 1820, after noticing a proposal made on behalf of his son (a clerk in the house of R. and K.) says. "I shall be happy to wait twelve months (the time you require) in order to receive such a proposal," etc. It appeared also by the correspondence that the firm of R. and K. were occasionally under pecuniary embarrassment.

In 1823, O. having required further security for his debt, it was suggested by his solicitor that notice should be given to the executors of S.; but upon the representation of R. and K., that such notice would have the effect of bringing an immediate demand upon them, and an opinion given by counsel, that the taking a collateral security from R. and K., provided no further time were given to them, would not discharge the estate of S., the security was effected accordingly on the 18th December 1823, and no notice was given.

[550] In 1826 R. died, not leaving (as his executors alleged) assets to pay the debt. K. also alleged that he was unable to pay it. Under these circumstances, held, that the estate of S. was discharged.

By articles of agreement, dated the 1st of January, 1810, George Reid, and the Reverend Philip Castel Sherard, agreed to carry on the business of West India merchants in co-partnership together, under the firm of George Reid and Company, for a term of seven years, determinable on the 1st of May which should next happen after the death of either of the partners during the term; and it was by the articles stipulated that if such event should happen the accounts of the co-partnership business should be made up to that day, and the co-partnership stock and effects should be valued as therein mentioned.

On the 12th of July, 1811, Sir Charles Oakeley, Baronet, who was the father-in-law of George Reid, accepted four bills of exchange for £2500 each, drawn upon him by George Reid and Philip Castel Sherard, under the firm of George Reid and Company, and payable to their order three months after the dates thereof; and for the purpose of securing to Sir Charles Oakeley the repayment of all such sums of money as he should become liable to pay, and should actually pay in respect of the said four bills of exchange, George Reid and Philip Castel Sherard, on the same day, executed to Sir Charles Oakeley four joint and several bonds, in the penal sum of £5000 each, with conditions for making the same void if George Reid and Philip Castel Sherard, their heirs, executors, or administrators, should pay or cause to be paid to Sir Charles **[551]** Oakeley, his executors or administrators, as to two of such

bonds, on or before the 15th of October, 1817, and as to the other two of such bonds, on or before the 15th of January, 1818, all such sums of money as Sir Charles Oakeley, his executors or administrators, should have paid in honour and discharge, or on account of the said bills of exchange so drawn upon and accepted by him as aforesaid, or in honour and discharge, or on account of any renewed or other bill or bills, note or notes (if any), which should be drawn upon and accepted by Sir Charles Oakeley, at the request or on account of George Reid and Company, in lieu of the said bills of exchange, or any of them, together with interest on such sum or sums of money at the rate of 5 per cent. per annum, to be computed from the respective times of paying the same.

The four bills of exchange were negotiated, and Sir Charles Oakeley paid or satisfied them, as they respectively became due, to the amount in the whole of £10,000, whereby that sum became due to him from George Reid and P. C. Sherard, upon the security of the bonds, payable at the times therein mentioned, and George Reid and P. C. Sherard gave Sir Charles Oakeley credit in account for the sum of £10,000, and paid him the interest thereon.

In November, 1814, P. C. Sherard died, having previously made his last will and testament, dated the 24th of August, 1809, and thereby appointed his three brothers therein named executors thereof; but the testator, by two codicils to his will, revoked the appointment of two of his brothers, and appointed his widow, the Respondent, and Sir Simon **[552]** Haughton Clarke, in the stead of two of his said brothers, to be trustees and executors of his will and codicils, together with his brother, the Rev. George Sherard; and the Respondent, and Sir Simon Haughton Clarke, and George Sherard, shortly after the death of the testator, Philip Castel Sherard, proved his will and codicils in the proper Ecclesiastical Court.

George Reid, as the surviving partner of the firm of George Reid and Company, continued to carry on the co-partnership business until the 1st of May, 1815, when, by the articles, the same became determined, notice whereof was published in the London Gazette. Shortly afterwards, and before either of the bonds became payable, George Reid entered into co-partnership in the said business with Roger Kynaston, who was also a son-in-law of Sir Charles Oakeley. The accounts of the co-partnership between George Reid and the testator, Philip Castel Sherard, were, pursuant to the articles of agreement, made up by George Reid to the 1st of May, 1815, and the partnership stock and effects valued in manner prescribed by the articles.

By articles of agreement dated the 8th of June, 1815, and made between George Reid of the first part, and the Respondent, then Sarah Haughton Sherard, Sir Simon Haughton Clarke, and George Sherard, as such executors as aforesaid, of the second part, and Roger Kynaston of the third part, after reciting that it had been agreed that the said George Reid should be entitled to all the outstanding debts and effects of the co-partnership of Reid and Company, (except certain debts therein mentioned), upon paying to the Respondent, and **[553]** Sir Simon Haughton Clarke and George Sherard, as the executors of Philip Castel Sherard, the sum of £3805 5s. 8d., and securing to them the sum of £49,622 16s. 6d., with interest from the 1st of May then last, and indemnifying the said executors from all the outstanding debts and engagements of the co-partnership specified in the first schedule thereunder written, by the joint and several bonds of George Reid and Roger Kynaston, in the penalty of £150,000: It was witnessed that George Reid did thereby covenant and agree with the Respondent, and Sir Simon Haughton Clarke and George Sherard, that he would, as soon as conveniently might be, assign, transfer, and set over all the debts specified in the second schedule to the said agreement, unto two trustees, to be named by both parties as therein mentioned, for securing the payment of the promissory notes therein mentioned to be given by George Reid and Roger Kynaston, for the payment so to be made to the Respondent, and Sir Simon Haughton Clarke and George Sherard, as such executors as aforesaid, and after payment thereof, in trust for George Reid, his executors, administrators, and assigns; and George Reid and Roger Kynaston did thereby covenant and agree with the Respondent, and Sir Simon Haughton Clarke and George Sherard, as such executors, that they would, after the execution of the said agreement, execute and deliver to the Respondent, and Sir Simon Haughton Clarke and George Sherard, as such executors, a good and sufficient bond in the penalty of £150,000, conditioned for the payment and satisfaction of

the outstanding debts and engagements of the co-part-[554]-nership of Reid and Company, specified in the first schedule to the agreement, and also against all debts due in respect to the ships belonging to the co-partnership, and for indemnifying the Respondent, and Sir Simon Haughton Clarke and George Sherard, as such executors, against all claims in respect thereof.

The first schedule to the agreement contained, amongst other particulars, the following entry, " Sir C. Oakly, £10,000."

The promissory notes agreed to be given by George Reid and Roger Kynaston were accordingly given, and afterwards paid and satisfied, but the bond of indemnity from George Reid and Roger Kynaston was never given to the executors of Philip Castel Sherard, nor was any other instrument prepared or executed in pursuance of the provisions of the agreement.

George Reid and Roger Kynaston continued the business under the same firm of George Reid and Company, in partnership together, until the year 1826, when George Reid died. They adopted the debt of £10,000 due to Sir Charles Oakeley (which they had by the last mentioned articles of agreement undertaken to bear), and gave Sir Charles Oakeley credit for it in account, and paid him interest thereon.

Sir Charles Oakeley was in frequent communication with George Reid and Roger Kynaston, and his son the Appellant, Edward Oakeley, was a clerk in their house. Annual accounts were made out by George Reid and Roger Kynaston, and transmitted to Sir Charles Oakeley, in which he was credited with the sum of £10,000, and the [555] interest thereon, and debited with payments which they made for the interest. He accommodated them with a further loan of about £17,000 stock, and the same annual accounts comprised this sum and the dividends which became due to him in respect thereof, and the payments which they made for such dividends.

In October, 1817, John Pasheller and the Respondent intermarried.

In the year 1818 George Sherard died, leaving the Respondent and Sir Simon Haughton Clarke, his co-executors, him surviving.

In the year 1815 a suit in Chancery (*Sherard* v. *Sherard*,) was instituted by some of the legatees of Philip Castel Sherard, against his representatives for the administration of his estate, and on the 26th of February, 1818, a decree was pronounced in that suit, referring it to the Master to take the usual accounts of his assets and of his debts; and advertisements were published in the usual manner, calling upon his creditors to come in and prove their debts under the decree.

In the year 1817 some arrangement, or understanding, took place or was proposed between Sir Charles Oakeley, and George Reid and Roger Kynaston, with reference to the Appellant becoming a partner in, or forming some other connexion with their house of business. The particulars of this arrangement appear only from occasional passages in the correspondence. It appears also from the correspondence, that about the same time Sir Charles Oakeley agreed with George Reid and Roger Kynaston, or engaged and consented, at their request, to allow the sum of £10,000 to re-[556]-main in their hands, and not to call on them for payment thereof for a period of three years. This agreement or engagement was not communicated or known to the executors of Philip Castel Sherard.

Towards the expiration of this term of three years, Sir Charles Oakeley, in a letter to Roger Kynaston, dated the 18th day of September, 1820, expressed himself as follows: " The bonds of the house which were granted to me in 1811 and 12, payable in six years, and the payment of which was suspended for three years longer, in consequence of my engagement in 1817, will become due on the 15th of October and 15th January next, at which period I hope it will be convenient to the house to discharge them."

Roger Kynaston, on behalf of himself and George Reid, requested Sir Charles Oakeley to allow the sum of £10,000 to remain longer in their hands; and he at first declined so to do, and in a letter to Roger Kynaston, dated the 5th of October, 1820, after mentioning to the effect that he was desirous of placing his property on real or Government securities, he expressed himself with reference to the sum of £10,000 as follows: " Under the circumstances above stated, I must candidly confess to you that it would not be convenient to me to enter into any new engagements for continuing the advance of £10,000 beyond the term of my former agreement."

Further applications were made by Roger Kynaston, on behalf of himself and George Reid, to Sir Charles Oakeley, and he proposed or suggested some arrangement for the benefit or advancement of the Appellant, and with reference thereto, requested [557] Sir Charles Oakeley to allow further time for payment of this sum of money; and he consented thereto, and in a letter to Roger Kynaston, dated the 14th of October, 1820, he expressed himself as follows: "I expressed in my last letter that it would not be convenient to me to enter into any new engagement for continuing my advance; but this arose from the circumstances explained in the former part of my letter, and not from any desire to subject the house to the smallest inconvenience, or a wish to receive payment of my loan without waiting any further proposal on Edward's behalf. On the contrary, I shall be happy to wait twelve months (the time you require), in order to receive such a proposal, trusting it will be of a nature calculated as much as possible to meet the wishes I have communicated respecting the final arrangement of my pecuniary concerns."

Other letters and communications passed from time to time between Sir Charles Oakeley, and George Reid and Roger Kynaston, in which the sum of £10,000 was mentioned and referred to; and in such letters and communications the sum was treated and spoken of as being in the hands of George Reid and Roger Kynaston, and as a loan to them, and as being due from them to Sir Charles Oakeley.

The correspondence between Sir Charles Oakeley and Roger Kynaston contained many intimations, on the part of the latter, showing that the partnership of George Reid and Roger Kynaston was occasionally under some degree of pecuniary embarrassment.

[558] It appears that in the year 1823, Sir Charles Oakeley having pressed George Reid and Roger Kynaston to give him some security for the sum of £10,000, it was proposed and arranged that they should for that purpose assign to him certain policies of insurance, and a draft of the proposed assignment was prepared. Mr. Burfoot was on that occasion the solicitor of Sir Charles Oakeley, and not being aware of the engagements entered into for continuing the loan to George Reid and Roger Kynaston, and therefore supposing that the estate of Philip Castel Sherard was still liable on the bonds, Mr. Burfoot proposed that such intended security should be communicated to the executors of Philip Castel Sherard, and that they should be requested to assent thereto, in order that the estate of Philip Castel Sherard might not be discharged from the bonds. George Reid and Roger Kynaston, or their solicitor on their behalf, thereupon represented that, if such proposed security were communicated to the executors of Philip Castel Sherard, they would call upon George Reid and Roger Kynaston to pay the bonds, and indemnify the estate of Philip Castel Sherard therefrom, and requested that the proposed security might not be communicated to the executors; and Sir Charles Oakeley being desirous of accommodating George Reid and Roger Kynaston, and of preventing them from being called on by the executors of Philip Castel Sherard to pay the bonds, consented to such request; and Mr. Burfoot, as Sir Charles Oakeley's solicitor, consulted with counsel about the mode in which such security could be framed, without discharging the estate of Sherard.

[559] This transaction appears in a letter from Mr. Burfoot to Sir Charles Oakeley, dated the 18th of December, 1823, where it is said, that "As to the assignment of the policies, and giving notice to Mr. Sherard's executors, some difficulties had arisen," etc.; that the solicitor of Reid and Company had objected to applying to Mr. Sherard's executors for their consent to taking the collateral security, inasmuch as that would have the effect of their insisting on Messrs. Reid and Company immediately discharging the bonds, which would not be convenient for them to do," etc.; that a different mode of proceeding had been proposed; "and he submitted that taking a collateral security from one of the obligors would not discharge the estate of the other."

Sir Charles Oakeley having received this letter, in answer thereto says, "With respect to the application to Mr. Sherard's executors, I am certainly not disposed to take any step which might embarrass the house; and I am glad to find that my abstaining from the application at this time, will not effect any claim on the executors, since there is no stipulation in the bonds for postponing payment to a future day."

An assignment was accordingly executed, bearing date the 18th of December, 1823, and made between George Reid and Roger Kynaston, of the first part, Sir Charles Oakeley, of the second part, and Edward Oakeley (the Appellant) of the third part: it recited (amongst other things) that there was then due and owing to the said Sir Charles Oakeley, on the said bonds, the principal sum of £10,000, all interest having been paid up to the **[560]** date thereof: And that Philip Castel Sherard had died, and that George Reid had subsequently formed a partnership with Roger Kynaston, under the firm of George Reid and Company; and that such last-mentioned partnership had, since its formation, as between themselves and the executors of Philip Castel Sherard, assumed the debt of £10,000, and paid the interest of the same to Sir Charles Oakeley, but that Sir Charles Oakeley had not in any manner discharged the estate of Philip Castel Sherard from the payment of the several sums secured by the bonds; and that, in order collaterally and further to secure the payment of the principal sum of £10,000, and interest thereafter to grow due in respect of the same, but expressly without prejudice to the four several bonds, or to any remedies which Sir Charles Oakeley might possess against either of the parties sealing the same, or against their estates, and in particular against the estate of Philip Castel Sherard, George Reid and Roger Kynaston had agreed to assign to Edward Oakeley, his executors, administrators, and assigns, the benefit of the policies of insurance therein mentioned; and George Reid and Roger Kynaston thereby assigned to Edward Oakeley, his executors, administrators, and assigns, several policies of insurance therein mentioned to have been effected on the life of Horace William Beckford, for sums making together £10,000 and the benefit thereof, upon the trusts therein mentioned, for further and collaterally securing the sum of £10,000 therein mentioned to be due on the said bonds: And George Reid and Roger Kynaston thereby jointly and severally covenanted for the payment of the said sum of £10,000 and interest.

[561] This indenture, and the treaty and arrangement about the same, were not communicated to the representatives of Philip Castel Sherard.

In the year 1826, George Reid died, having appointed J. E. Hammet, and the Appellant and William Oakeley, executors of his will, who duly proved the same: but, as they alleged, his assets were insufficient for the payment of his debts. The interest on the sum of £10,000 was paid by George Reid and Roger Kynaston till the death of George Reid, and afterwards Roger Kynaston for some time continued the payment. His affairs by degrees became more embarrassed, and by his answer in this cause he stated himself to be unable to pay the debt.

By indenture dated the 5th day of September, 1826, Sir Charles Oakeley, for the purpose of making some family arrangements, assigned and transferred (amongst other property) the said four several bonds unto his sons the Appellant and William Oakeley, and the Defendant Thomas Hinckley, and granted to them the usual powers and authorities for recovering and receiving the same: shortly after the execution of the indenture Sir Charles Oakeley died, having made and executed his last will and testament in writing, and appointed his sons and Thomas Hinckley, executors thereof, who proved the same in the proper Ecclesiastical Court.

In May, 1827, Sir Simon Haughton Clarke received a letter from Thomas Hinckley, intimating that the trustees or executors of Sir Charles Oakeley had found amongst his papers his said four bonds, all interest whereon, it was by the letter **[562]** stated, had regularly been paid to that time; and that so long as the interest continued to be regularly paid the trustees of Sir Charles Oakeley would not probably wish to call in the principal, but that in consequence of the recent death of George Reid, they deemed it proper to apprise the representatives of Philip Castel Sherard of their liability.

In January, 1829, the Appellant, and William Oakeley and Thomas Hinckley, brought a state of facts and charge into the Master's office, under the decree in the suit of *Sherard* v. *Sherard*, whereby they claimed the sum of £10,000, with interest thereon from the 1st of November, 1828, as a debt due to them from the estate of Philip Castel Sherard, by virtue of the four bonds. The proceedings upon this state of facts and charge were suspended in consequence of the suit next hereinafter mentioned, and to await the decision thereof.

On the 16th of April, 1829, the Respondent and her husband, and Sir Simon Haughton Clarke, exhibited their bill in the Court of Chancery against James Esdaile Hammet, the Appellant, and William Oakeley, Thomas Hinckley, and Roger Kynaston, which bill was afterwards amended; and the amended bill, after stating (amongst other things) to the purport or effect hereinbefore stated, prayed that it might be declared by the Court that the estate of the testator, Philip Castel Sherard, was discharged and exonerated from the payment of all sums of money due and to become due, or alleged to be due in respect of the bonds, or either of them: and that the Defendants, the Appellant, and William Oakeley and Thomas Hinckley, might be restrained as well by the *interim* as by the perpetual order and **[563]** injunction of the Court, from taking any proceeding or proceedings to obtain payment of the sums due or to become due in respect of the four several bonds, or either of them, out of the assets of the testator, Philip Castel Sherard; and that, if necessary, the said bonds might be delivered up to the Plaintiffs to be cancelled; or in case the Court should be of opinion that the estate of the testator, Philip Castel Sherard, was not so discharged, then that the Defendants, the Appellant, and William Oakeley and James Esdaile Hammet, as the executors of George Reid, and the Defendant Roger Kynaston, might be decreed to take up and pay the said several bonds, or so much as might be due thereon, and to exonerate and indemnify the estate of Philip Castel Sherard from the payment thereof: and to pay to the Plaintiff what, if any thing, they might be compelled to pay out of the assets of Philip Castel Sherard, in respect of the said bonds, together with all costs, charges, and expenses which had been or might be incurred by the Plaintiffs in respect of the said bonds: and that it might in that case also be declared, that the Plaintiffs had a lien upon the said policies of insurance, for indemnifying them against the said bonds: and that the said policies of insurance might, if necessary, be sold, and that the proceeds thereof might be applied in payment of what, if any thing, was due upon the said bonds, or to indemnify the Plaintiffs against the said bonds, and such costs, charges, and expenses as aforesaid; or that the said policies of insurance, and the benefit of the said indenture of the 17th of December, 1823, might be assigned to them, and that they might be at liberty to com-**[564]**-mence such proceedings as they might be advised, upon the covenants therein contained, against the estate of George Reid, and against Roger Kynaston, in the names of the other Defendants, the Appellant, and William Oakeley and Thomas Hinckley.

The several Defendants appeared to the bill, and put in their answers thereto. The answers were replied to, and the cause being at issue, the parties entered into admissions, and agreed that certain documents and facts should, at the hearing, be considered and treated as proved in the cause. These admissions comprised numerous letters which passed in a correspondence between Kynaston as partner in the house of Reid and Co., Sir Charles Oakeley, and Burfoot his solicitor, relating to the question as to the loan raised in the pleadings, and extending from 1819 to 1823.

The following are letters and extracts from some of the letters bearing most materially upon the points in question:

"Lichfield, Sept. 18th, 1820.

"My dear Friend: I thank you for your letter of the 15th, which contains all that I could wish, at present, respecting Edward (the Appellant). I am fully aware of your good dispositions towards him, but not at all anxious that any thing should be done to advance his interests before the time when your own views and circumstances may perfectly accord with your inclinations in his favour; in the meanwhile it will afford him great pleasure to continue his service on the terms you mention.

"**[565]** The bonds of the house, which were granted to me in 1811 and 1812, payable in six years, and the payment of which was suspended for three years longer in consequence of my engagement in 1817, will become due on the 15th October and 15th January next, at which periods I hope it will be convenient to the house to discharge them. I am always, most affectionately, yours, CHAS. OAKELEY."

"Roger Kynaston, Esquire."

"Lichfield, October 5th, 1820.

"My dear Friend: You will recollect, that in my communication to you in April

last, as well as in my letter of the 11th September, I adverted to the particular circumstances which called upon me to draw in all my concerns with as little delay as possible. This call arises from the advanced age at which I am now arrived, and the necessity I feel of placing what property I have upon real or Government securities, so that it might become available at my decease, without loss of time. It was on this account that I proposed the continuance of Edward's services, simply on the ground of mutual convenience, supposing the long employment he had had might render his assistance useful, and requiring only such a salary as might afford him a just and reasonable compensation for his trouble.

" Under the circumstances above stated, I must [566] candidly confess to you that it would not be convenient to me to enter into any new engagements for continuing the advance of £10,000 beyond the term of my former agreement. I am always, yours affectionately, CHAS. OAKELEY.

" Roger Kynaston, Esquire."

" Lichfield, October 14th, 1820.

" My dear Friend: I am truly sorrow that my letter of the 5th instant has given to the house any cause of dissatisfaction whatever; nothing, certainly, could be further from my intention, since it has been my invariable study through life to act with the utmost regard to fairness and consistency in all my transactions.

" I was well aware that it could not be expected in the ordinary course of events, that Edward should advance in his profession without a sum of money at his command. It was on this account that I regretted my inability to assist him in the way I wished, or to the extent which might be deemed necessary; and I confined my views for the present, therefore, to his continuance in employment upon such a footing as might enable him to live with comfort upon the fruits of his own labour.

" What may be the value of his services I do not pretend to judge: if what he now receives is more than he is justly entitled to from his standing and experience, or the duties he has to [567] perform, it would be unreasonable to expect it; and what is unreasonable could not be at all satisfactory to myself. All I can say is, that his necessary expenses upon an average of the last three years (and no young man can be more prudent) has been more than £240 per ann.

" I expressed in my last letter that it would not be convenient to me to enter into any new engagements for continuing my advance; but this arose from the circumstances explained in the former part of my letter, and not from any desire to subject the house to the smallest inconvenience, or wish to receive payment of my loan without waiting any farther proposal in Edward's behalf. On the contrary, I shall be happy to wait twelve months (the time you require) in order to receive such a proposal, trusting it will be of a nature calculated as much as possible to meet the wishes I have communicated respecting the final arrangement of my pecuniary concerns.

" With regard to my son William, as his covenants will expire in June next, and as I am fully aware of the impracticability of advancing the interests of two sons in the mercantile line, I shall endeavour to procure for him some other employment. I am ever yours most affectionately, CHAS. OAKELEY.

" Roger Kynaston, Esquire."

[568] " Lichfield, January 24th, 1821.

" My dear Friend: You have not wanted proofs of my disposition to accommodate both yourself and the house, and it would afford me particular satisfaction to meet your wishes on the present occasion to the fullest extent, if I were not under considerable embarrassment myself, in consequence of the large portion of my property now locked up, and the very heavy advances which I have been obliged to make from time to time, for the relief of my son Charles, whose imprudence has already cost me about £20,000, and subjected me to still further engagements on his account: under these circumstances, I am, in truth, so straitened, that I cannot, however anxious, assist the concern in any other way than by allowing some further time for the payment of their bonds, under such an arrangement as must necessarily take place in the course of a few months, when my son William's time expires. I was in hopes that it might have suited the inclinations of both my sons to continue in the mercantile line, but

William's mind appears so decidedly against it, that I must endeavour to fix him in some other employment as soon as his term of service is at an end.

"My son Herbert speaks highly of his young namesake's qualification, and thinks he will make a figure at Westminster. I am, with kindest love to all your family, my dear friend, yours most affectionately, CHAS. OAKELEY.

"R. Kynaston, Esq."

[569] "March 28th, 1821.

"My dear Friend: I sincerely congratulate you upon the favourable issue of your cause. Relying upon your assurance that no call will be made upon me for payment of the bills you wish me to accept for £5000, at four months after date, I will cheerfully comply with your request; but as the little money I have now at command is destined for another purpose connected with my will, it would be highly imprudent in me to give such an acceptance under the possibility of disappointment in my expectations.

"My anxiety to close the concerns which I have at present outstanding daily increases, as William's engagement is on the eve of expiration, and Edward's very nearly terminated. I wish to hear from you on the subject of the advances on their account, and the proposals you may have made respecting Edward, so you will probably by this time have been able to give your attention to these points.

"Amelia is still with Mr. Blandy, but we expect her and the two boys in a few days. I am quite delighted to hear such good account of Charles, to whom I send my blessing. I am ever yours affectionately, CHAS. OAKELEY.

"Roger Kynaston, Esquire."

To the last letter, Kynaston, in a postscript, replies:

"P. S. I hope in a few days to write to you respecting Edward; our minds are completely made up as regards him, but I should like to [570] have a little conversation with him previously to my communicating with you. I shall be anxious to hear when any thing turns up for William."

In a letter to Kynaston, dated February 13, 1822, Sir C. Oakeley says,

"Being anxious, as you know, to meet your wishes on every occasion to the utmost of my power, I readily consent to what you propose. With respect to my own claims upon the house, I shall not touch on them at present, but trust as soon as Mr. Reid returns from Jamaica this point will receive the earliest consideration, with a view to a settlement of the account."

In a letter to Kynaston, dated December 26, 1822, he says, "From the account you give of the disappointments and losses which the house has already experienced, and of the unpropitious state of West India concerns in general, I am led to apprehend disappointment myself, and that at a period of life when I shall be least capable of surmounting it; under this impression I feel confident, however, that the house is fully disposed to secure me as far as their means will permit, and that if they see no very near prospect of reducing my claim, some assignment and stipulations like those which I received from Mr. Reid, may be granted for my satisfaction."

In a letter to Kynaston, dated January 1, 1823, he says, "I never entertained a doubt of the ultimate security of my claims on the house; but from the account you gave me of the heavy loss sustained by Mr. Wildman's failure, and the depressed state of West India concerns in general, I saw little probability of your being able for some time to clear my account. I felt anxious, there-[571]-fore, to obtain such a provision as might secure the gradual payment by instalments; and this kind of provision I certainly thought it might not be inconvenient to the house to give. For the reasons you assign I am perfectly content to wait Mr. Reid's arrival for the further consideration of the subject; and upon this understanding I shall, with great pleasure, renew my acceptance for another year.

"I trust, from the proofs I have already given, that you are well apprised of my disposition to accommodate the house as far as my own circumstances will permit."

The next letter from Sir Charles Oakeley, materially bearing upon the points in issue, is as follows:

"Lichfield, July 24, 1823.

"My dear Friend: I am happy to hear that Reid is returned safe and in good

health, and trust his arrival will enable you soon to accomplish your wish of visiting the Continent.

"As your departure must now be near at hand, I am anxious to bespeak your earliest attention to my claims on the house, and to propose something on my own part in order to facilitate a settlement which may correspond, as far as circumstances will permit, with the views I have already explained to you.

"I am sorry to learn from Edward (to whom you referred me for information respecting the affairs of the house) that your situation at present will not allow of any very early payment of my loans. Under these circumstances it becomes **[572]** indispensably necessary, on behalf of my family, that I should take the best security that the house can provide for me; and this caution, indeed, seemed so reasonable to yourself, that in your letter of the 29th December last you observe, that 'you can have no objection to join in the assignment to me of any of the securities which the house possesses.' I learn from Edward that you have policies of insurance to offer for £10,000, which I am willing to take as a security for my first loan to that amount in 1811. For the other loan of £17,096 5s. 8d. 3 per cent. stock, I am willing to allow time for replacing this stock by annual instalments.

"I trust that what I have now proposed will appear reasonable as well as convenient to the house, and that at no distant period we shall mutually feel the gratification of an entire discharge of these claims.

"I am with the utmost fervent wishes for your health and happiness, and love to all the dear children, my dear friend, yours most affectionately, CHAS. OAKELEY.

"Roger Kynaston, Esq."

In a letter to Sir Charles Oakeley from Burfoot his solicitor, he says, "I have obtained the four bonds from Messrs. Goslings and Co., which I find are executed by Mr. Reid and Mr. P. C. Sherard, who jointly and severally engage to indemnify you against certain bills you had accepted for George Reid and Co. I suppose that you paid the bills, and that the principal sum of £10,000 is now due to you upon them. Is it **[573]** your intention to give up your claim upon Mr. Sherard, or his estate, by virtue of the bonds? If not I must advise with my conveyancer how far taking another security from his co-obligor will have the effect of releasing him, Mr. S., or rather his estate."

To this Sir Charles Oakeley, in reply, says:

"Lichfield, Aug. 13th, 1823.

"I always considered Reid and Sherard jointly and severally responsible for the bills amounting to £10,000 which I had paid; but, thinking myself quite secure without calling upon Mr. Sherard's executors after his death, I have yet taken no steps for that purpose. Whether anything can now be obtained from Mr. Sherard's estate, by virtue of the bonds, you can perhaps easily ascertain. But the matter seems more immediately to concern his co-obligor, Mr. Reid, who has undertaken for the security of the whole demand."

In a letter from Mr. Burfoot to Sir C. Oakeley, dated the 8th November, 1823, he says, "I think that it will be advisable, if you mean not to discharge the estate of Mr. Sherard from the liability to pay the bonds, to procure his executors' assent to your taking the proposed security, to which they cannot object, as it is for their benefit, and I will apply to them for the purpose, on receiving your sanction."

This letter was indorsed thus, "1823. Burfoot, 8th Nov. Advises an immediate call on Mr. Sherard's executors, in consequence of the liabi-**[574]**-lity of Mr. Sherard to the payment of the joint and several bond of himself and Mr. Reid.

"If such a notice is necessary for my security, it should, I apprehend, be made in time, and before the trust expires. The house can have no wish injurious to my real interest, in an affair of such moment."

Sir C. Oakeley in answer, says, "You have my sanction for the application you propose making to the executors of the late Mr. Sherard.

"Would it not be proper to fix a period of three or five years, at most, for the payments for the bonds, in order that you might have recourse to Mr. Sherard's estate if the proposed security fails?"

In a letter dated 18th of December, 1823, from the house of Burfoot to Sir C. Oakeley, they say, "As to the assignment of the policies, and giving notice to Mr.

Sherard's executors, some difficulties have arisen: when the draft assignment was sent to Mr. Le Blanc for perusal, on the part of Messrs. Reid and Co., he informed us that they had already assigned the debt due from Mr. Beckford to Messrs. Woodbridge, Dyer, and Co. as a running security for certain advances; consequently that they could not assign any portion of that debt, as we had proposed, but only the policies to you, and he objected to applying to Mr. Sherard's executors for their consent to taking the collateral security, inasmuch as that would have the effect of their insisting on Messrs. Reid and Co. immediately discharging the bonds, which would not be convenient for them to do; and he submitted that taking a collateral security from one of the obligors would not discharge the estate **[575]** of the other. Upon this latter point we have seen Mr. Preston this morning, who considers that provided no time be given for the payment, that is, that the payment is not by express words in the deed postponed to a future day, it will not operate as a discharge to Mr. Sherard's estate."

In a letter dated December 20, 1823, from Sir C. Oakeley to Messrs Burfoot, he says, " With respect to the application to Mr. Sherard's executors, I am certainly not disposed to take any step that might embarrass the house, and I am glad to find that my abstaining from the application at this time will not affect my claim on the executors, since there is no stipulation in the bonds for postponing payment to a future day."

The admissions also comprised the accounts delivered by Reid and Co. to Sir Charles Oakeley, and the bond from Reid and Sherard to Sir Charles Oakeley, the agreement of 1815, between Reid and Kynaston and the executors of Sherard, the assignment of 1823, from Reid and Kynaston to Sir Charles Oakeley, of the policies and the indenture of 1823, by which the collateral security was given by Reid and Kynaston, to Sir Charles Oakeley.* The correspondence proved that time for payment of the debt was given by Sir Charles Oakeley to Reid and Kynaston; the debt was therein generally spoken of as a debt of that firm; and upon the transaction for further security, it appeared, that upon a suggestion that notice should be given to Sherard's executors, and Reid and Kynaston objecting to this, because it would **[576]** bring a demand upon them, the assignment of 1823 was executed without such notice. The accounts were rendered annually by and in the name of the firm to Sir Charles Oakeley, and comprised a debt of £17,000 stock advanced to them by Sir Charles Oakeley, crediting him with the principal and interest upon both debts, and debiting him with interest paid upon both without distinction.

On the 13th June, 1832, the cause came on to be heard before his Honor the Master of the Rolls, when, after hearing the arguments and proofs, his Honor declared that the estate of Philip Castel Sherard was discharged and exonerated from the payment of all sums of money due and to become due, or alleged to be due in respect of the four several bonds, bearing date respectively the 12th of July, 1811, or any or either of them; and that the Appellant and Thomas Hinckley should be restrained by the perpetual injunction of the Court from taking proceedings either at law or in equity to obtain payment for the sums due or to become due in respect of the said four several bonds, or any or either of them, out of the assets of the testator, Philip Castel Sherard; and his Honour did not think fit to give costs on either side.†

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* The deeds, letters, and accounts being very long and numerous, the effect of them only is given above. They are contained in an appendix to the Respondents' case.

† The judicial argument was as follows (June 13th, 1832):

The Master of the Rolls: If at the time of the transaction of 1823 the estate of Mr. Sherard remained liable to the estate of Sir Charles Oakeley upon the bond, I am of opinion, contrary to the ingenious arguments that have just been addressed to me, that the estate of Sherard is not discharged by that transaction.

The principle upon which the creditor releases the surety by giving time to the person who by contract between the two payees has become the principal debtor, and the other party contracting has become a surety, the principle upon which the creditor releases the surety by dealing with such principal is not with regard to the interest of the surety, but it is with regard to the interest of the principal debtor who is so dealt with, because if after releasing or giving time to the person who is the real principal debtor, then the creditor should proceed against the surety, the

[577] After the hearing of the cause Sir Simon Haughton Clarke died.

[578] On the 8th of October, 1832, the Appellant and William Oakeley preferred their petition of appeal [579] from the decree to the Lord Chancellor, and prayed his Lordship to re-hear the cause.

On the 25th and 26th days of February, 1834, the appeal came on to be heard

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surety paying the demand has a right to proceed against that principal debtor who is released or to whom time is given so as to defeat altogether the benefit of that indulgence which this arrangement with the creditor has afforded him; that that is the true principle, is not only apparent upon the consideration of the true equities of the case, but is apparent upon the consideration of the case of exparte Glendinning. Why should it be, that in this arrangement, if the creditor stipulates with the principal debtor that he will still proceed against the surety, why should it be that in such a case the surety is not released, but because the interest of the principal debtor is that interest which induces the rule? It is perfectly plain therefore that in the transaction of 1823, nothing was done which would have discharged the surety.

Mr. Pemberton urges, and urges truly, that if notice had then been given by the creditors to the executors of Sherard, that it would have relieved them from any demand in respect of this £10,000, because the other partner was then solvent, and if notice of that demand had been given they might then have proceeded against the other partner to give effect to their demand; that is extremely true, but the creditor was not bound to give such notice to the surety. Supposing that he remained liable, he was not bound to claim against him, and therefore not bound to give notice, and this delaying his claim would not have released the surety. The transaction of 1823 appears to me therefore to be out of the case; but it is not so with respect to the other transactions.

In 1817, Sir Charles Oakeley enters into an agreement with the two persons who had become, as between themselves and the estate of Sherard, the principal debtors; he enters into an arrangement with them to give three years' time for the payment of the demand, and I am of the opinion, to be collected from what I have already stated, that Sir Charles Oakeley could not either proceed within these three years against the principal debtor or against the surety in respect of that demand, and if he could not proceed against either of them in respect of that demand, then the surety is released; and the surety is released for this reason; because whatever the surety pays, he has a right to call on the principal debtor to repay the sum which he has so advanced; but if there be a delay for three years he may be extremely prejudiced by that delay, because in the *interim* the solvent principal debtor may become an insolvent principal debtor, and then by the act of the creditor the surety would have lost his remedy against the principal debtor.

I am therefore of opinion that the giving the time for three years in 1817 did discharge the estate of Philip Castel Sherard: I consider that it did discharge him, being of opinion that Sir Charles Oakeley well knew in 1817, that by the arrangement between the two partners Reid and Kynaston, they had become the principal debtors, and Sherard's estate surety only. It appears to me that that conclusion is irresistible from the form of the accounts, and from the letters of Sir Charles Oakeley.

Knowing therefore that Sherard's estate was to be charged as surety only, he enters into an engagement which prevented the demand for three years, and consequently discharges the surety.

The estate of Sherard is discharged from all obligation upon these bonds: and an injunction must issue to restrain the Defendant from proceeding on these bonds against the executors.

I cannot give costs, because I consider the executors of Mr. Sherard have been guilty of great negligence and inattention: they were not aware of this circumstance by which they were discharged from the payment of this bond; they ought, if they had used reasonable diligence, to have compelled the payment of this bond: the case, therefore, having arisen from their own negligence, though I am bound to give them relief in consequence of the conduct of Sir Charles Oakeley, I cannot give them the costs.

Mr. Wigram: The executors of Reid are brought here to settle the dispute; there is another suit depending to administer the estate, in which this question might have been decided.

before the Lord Chancellor: and on the 8th of March following, his Lordship ordered that the decree should be affirmed, without costs.

After the hearing of the petition of appeal, John Pasheller died.

The appeal was from the decree of the 13th of June, 1832, and the order affirming the same.

For the Appellants, Mr. Wakefield and Mr. Simmons.

The bonds given by Reid and Sherard to Sir Charles Oakeley made them both principal debtors. Upon the death of Sherard, Reid, by agreement with the executors of Sherard, took the debt upon himself; but this transaction could not affect Oakeley; he was no party to that agreement, there is no proof that he had notice of it, and even notice could not operate to release the debt. An extension of time was given by Oakeley, to Reid and Kynaston, for the payment of the debt; but the terms of that arrangement do not appear. If any conjecture is to be made upon the subject, it ought to be presumed that the time was given upon the same terms as in the transaction of 1823, when Kynaston gave a further personal security, and the [580] responsibility of the old firm, including Sherard's executors, was expressly reserved. Transactions between debtors cannot alter the situation and rights of the creditor; *Heath* v. *Percival* (1 P. W. 682), *David* v. *Ellice* (5 B. and C. 196), *Gough* v. *Davis* (4 Price, 200). In 1815, when Reid took upon himself the debts of the firm, Oakeley could not have demanded payment of the bonds. The executors of Sherard, if they desired to obtain a release from Oakeley, should have made him party to the arrangement with Reid. But they are content to take an indemnity from Reid; a fact which of itself imports an acknowledgment of the continuing responsibility of the estate to the demands of the creditors of their testator. A large sum being due from Reid to the estate of Sherard, they secure the payment by a transaction which tends to prevent sudden demands by the creditors of the firm, and they withdraw assets from the surviving partner with which he might have paid the debt upon the bonds. They had in their hands partnership assets, out of which the debt ought to have been paid; *Rees* v. *Berrington* (2 Ves. jun. 542). If those assets had remained under the control of the surviving partner, the necessity of asking the indulgence of further time for payment would never have arisen.

A creditor may agree to release one of two joint and several debtors; but there must be evidence of such agreement. There is no such evidence, directly or indirectly. The accounts cannot shew this; they could only raise by inference a debt by simple contract; can it be contended that this is a substitute for a bond debt? The payment and [581] receipt of interest could not operate as a discharge; *Daniel* v. *Cross* (3 Ves. 277). In *Heath* v. *Percival* the interest was altered from 5 to 6 per cent. In all other respects it is precisely the present case; *Thomson* v. *Percival* (3 Nev. and M. 167); *Kirwan* v. *Kirwan* (4 Tyr. 491).

The bonds were not payable until three years after the death of Sherard. The interest was paid during that time by one of the principal debtors, and the accounts after his death were made up and transmitted in the same form as before.

Lord Lyndhurst: In those accounts the money which he lent to the new firm was blended with the old debt; a circumstance on which the Respondents rely.

For the Appellant: Not till 1823. There is no direct agreement in evidence, nor any thing in the mode of dealing between the parties to apprize the creditor that there was to be a change of security. There was nothing in the form of the accounts to excite the creditor to inquiry.

As for the argument that the principal debtor was converted into a surety, it is difficult to deal with or to apprehend it. How can an obligor become surety for his own debt? As soon as the acceptances were paid by Oakeley, the joint and several

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The Master of the Rolls: I cannot give them their costs; they ought to have seen to the payment of this demand.

Mr. Wigram: There is a suit pending in which this question might have been settled, without having a new suit for that purpose.

The Master of the Rolls: It was absolutely necessary to come to the Court.

Mr. Wigram: But not to have brought them before the Court.

The Master of the Rolls: Yes, it was necessary, because there was an alternative relief.

debt upon the bonds took effect. It is argued, that being indemnity bonds payment ought to have been demanded: but money bonds have equally a time of payment fixed. It is the duty of the obligor, not the obligee, to see to the discharge of the debt by effecting the payment. This should have been done by Sherard's executors; but they remained content with the indemnity of Reid against the responsibility of their estate, which they **[582]** knew to be continuing, or the indemnity would have been useless.

Even supposing that it were the case of a surety, time was not given so as to discharge the debt. There was no binding agreement. The creditor says in a letter, "that he should be happy to wait a twelvemonth;" could this have been enforced by any proceeding in equity? If not, there could be no discharge.

It is argued that the conduct of the creditor has operated as a fraud. How is that proposition established? It is not necessary to tell the debtor that his obligation continues. The transactions of Oakeley with the new firm, left the executors of Sherard in possession of all their rights and remedies against them. If the dealings of the parties amount to an extinguishment of the debt, it must be by implied contract. There is none such in this case. The judgment of the Master of the Rolls did not proceed on that ground; but assumed that one of the debtors was converted into a surety, and decided the case upon that principle ([10 Bli. N. S.] p. 576).

For the Respondents, Mr. Pemberton and Mr. Jacob.

This case falls under the rule of equity which has established the doctrine that if time be given by the creditor to a principal debtor, he releases the surety; or if that proposition were untenable, it is at least a case of fraud in equity where the creditor has so conducted himself as to extinguish his claim against the estate of one of two principal debtors.

In the settlement of accounts between Reid and **[583]** Sherard's executors, the debts of the firm were undertaken by Reid, and the executors received so much the less, and were indemnified against the debt to Sir C. Oakeley. He must have been aware of that arrangement. Reid was his son in law: Kynaston, the new partner, was also his son in law, and his own son was a clerk in the firm. It might be presumed that he must have had some knowledge of the partnership. But the letter in reply to his solicitor, dated in August 1823, furnishes proof that he was aware of the fact. Speaking of his claim upon the bonds, he there says, "whether any thing can now be obtained from Sherard's estate by virtue of the bonds, you can perhaps easily ascertain. But the matter seems more immediately to concern his co-obligor, Mr. Reid, who has undertaken for the security of the whole demand." The reason of his giving time for payment is obvious from the connection of the parties, as well as the correspondence. He knew that if he pressed Reid for payment, it would bring upon him a demand from Sherard's executors.

That Oakeley had notice, appears not only from the correspondence, but from the transfer of the account, the mode of keeping it, and the payment of interest. In the accounts delivered annually by Reid and Co., the new firm, it is treated as their debt. Those accounts include a debt for £17,000 stock advanced by Oakeley to that firm; no distinction is made, the interest on the £10,000 is paid on the same account and in the same manner as the dividends on the £17,000. Upon the question which arose, whether the £17,000 was to be considered as a stock loan or a cash loan, Sir Charles Oakeley, in the letter of August 1823, treats the **[584]** debt of £10,000 on the same footing as the debt of £17,000 upon the stock loan. He cites these as included in the same account as delivered to him by the firm of Reid and Kynaston, and recognizes them as his debtors in respect of both claims: thus adopting and assenting to the account with the new firm of Reid and Co., which comprised the debt of £10,000. This brings the case within the principle laid down in *Gough* v. *Davis* (4 Price, 200) and *Thomson* v. *Percival* (5 B. and Ad. 935).

Lord Lyndhurst: With adoption.

For the Respondent: The effect of the transfer in account received and not objected to by the creditor, operates as if there had been payment by the old firm, and a new loan to the new firm. This may be gathered from the comments of the Judges upon *David* v. *Ellice* [5 B. and C. 196], in *Thomson* v. *Percival*, and so from *Gough* v. *Davis*.

Lord Lyndhurst: The principle of decision might be applicable if the facts were made out.

For the Respondent: Transfer is the usual mode of payment in commerce; debts are so paid in bankers' books, and the party in favour of whom the transfer is directed, might bring an action against the banker for money received to his use; so an action would lie against the banker upon an account stated, which imports a consideration. The transactions with the executors in this case operate as money paid to Reid and Kynaston by consent of Oakeley; and Oakeley might have maintained a joint action against Reid and Kynaston upon the stated and settled account, which must rest upon consideration; Reid and Kynaston having received the money, would be liable to an action [585] of assumpsit by Oakeley; this is the effect of the transfer. With this doctrine all the cases concur except some observations in *David* v. *Ellice*, and there was a failure for want of proof; here credit was given on special grounds, the debt has become that of Reid and Kynaston, by the effect of the transaction and conduct of the parties.

As to the concealment, the reasons were obvious; the new firm were in some degree of pecuniary embarrassment, not insolvency, but such as would have induced the party liable for the debts to take measures for his security. Sir Charles Oakeley, in his letter of the 24th July, 1823, says he is sorry to hear that their situation will not allow of an early payment of the loan. If the executors of Sherard had known of this state of things, they would have taken measures to enforce the payment of the debt; but the arrangement of the new firm is, that they shall not be informed, for that reason, and Oakeley is cognizant of this fact, and colludes with them in the concealment. It is argued that the creditor is not bound to give notice to the surety that the principal debtor is embarrassed: possibly he may not be under such legal obligation, but it may be a circumstance to shew a fraudulent dealing between the creditor and the principal debtor, to the prejudice of the surety: here was a bargain between the debtor and creditor that the transaction should be concealed from the surety; when Oakeley is afterwards about to take a farther security from the new firm, he is advised by the solicitor to give such notice. By a letter to Oakeley, from his solicitor (*ante*, p. 573), it appears that Reid and Kynaston objected to the application to [586] Sherard's executors, for their consent to taking the collateral security, " inasmuch as that would have the effect of their insisting on Messrs. Reid and Co. immediately discharging the bonds, which would not be convenient for them to do;" these are the very words of the letter, and they furnish direct inference of a corrupt bargain between the parties to conceal the transaction from Sherard's executors, and to deprive them of or endanger their remedy against the principal debtors; such a transaction cannot be disregarded in a Court of Equity. That Oakeley on a former occasion agreed with the new firm, to delay the time of payment for three years, cannot be disputed, and the agreement between the executors and Reid that he should pay the debt.

Lord Lyndhurst: How will an arrangement between debtors affect a creditor, unless he adopts it? Can the parties alter their situation with respect to the creditor without his assent? Can you cite any authority to show that joint debtors, by their own act, can alter their situation after the contract has been concluded?

For the Respondent: If the creditor in effect has notice that one of his debtors is the principal, and the other by the effect of a transaction between them is placed in the situation of a surety, or made liable only in default of the principal; his conduct towards the parties so situated ought to be regarded in equity. He ought not to deal with one of the parties so as to affect the other. If he gives time to the principal, he cannot sue the surety. In this case time was given for the benefit of the principal, and to the injury of the surety, or party who had become liable only on default of the principal. If he had known of the transaction, he would have [587] sued the principal debtor; and this was concealed by collusion of the creditor, who was apprised of the relation in which the two debtors stood to each other. The reasoning and the principle which applies to the case of principal and surety, applies equally to this case; there is no substantial difference.

It is argued on the other side, that the debt upon the bond remains unaffected by the transaction between the debtors. But Oakeley by his own acts consented to accept Reid and Kynaston as his principal debtors, and the executors of Sherard as liable only on default. This state of circumstances is established not merely by the transaction between the parties so liable, but partly by the knowledge, acquiescence, and

adoption of the creditor. The sureties by his conduct have lost their remedy: can he now, after long acquiescence, resort to his original rights upon the bond, as if no time had been given, no concealment practised, and the principal debtors were still solvent? The notice of the transfer of the debt affects the creditor, although the transaction occurred before the debt was payable; for by his own letters it appears that time was given to the principal debtors after the debt was payable, and that he concurred in a transaction with the principal debtor, which was concealed from the surety for the express purpose of preventing the forced liquidation of the debt.

Lord Lyndhurst: Kynaston became a new debtor.

For the Respondent: In *David* v. *Ellis* [5 B. and C. 196] it was argued, that there was no discharge, because a new debtor was not acquired. *Thomson* v. *Percival* [5 B. and Ad. 935] shews the distinction arising out of that fact.

[588] In one of his letters to the new firm, (p. 566.) Oakeley says, (no arrangement having been made for the benefit of his son) "that it would not be convenient for him to enter into any new engagement for continuing the advancement of the £10,000 beyond the period of his former engagement:" and by his letter of March, 1821, after speaking of his anxiety to close the concerns then outstanding, he again urges Reid and Kynaston upon the subject of a proposal which he expects them to make for the advancement of his son Edward, then their clerk and now the Appellant in this appeal. It appears, therefore, that the creditor had agreed not to call for payment of the debt within three years, and the debtor perhaps not to pay it off. This is an agreement binding upon the parties in law. He might then have compelled payment from the executors; but he either releases them or treats them as sureties, and the case was decided upon that principle by the Master of the Rolls. (Here the judgment was read by the Respondents' counsel.)

The Lord Chancellor: That judgment assumes that Sir C. Oakeley had notice of the arrangement. This is alleged in the Respondents' case, and denied in the Appellants' case. I see no evidence of it.

For the Respondents: It is to be inferred from the letters and accounts, in which the new firm are treated as his debtors. They pay the interest on the debt, and he gives them indulgence, being his sons-in-law.

The Lord Chancellor: Does it go farther than this, that he treated the House as his debtors?

For the Respondents: The letters shew that he did not look to Sherard's executors. In one [589] letter he says, "he hopes it will be convenient to the house to discharge." This must mean the firm of Reid and Kynaston, to whom the letter is addressed.

The Lord Chancellor: Your case is that he knew it in 1817. In 1823, he provided against the consequences.

Lord Lyndhurst (Aug. 20.): The question in this case arose out of a transaction upon which the Appellant claimed, in a suit of *Sherard* v. *Sherard*, a sum of £10,000, with interest thereon for a certain period. It appears that the late Sir Charles Oakeley advanced a sum of £10,000 to the firm of Reid and Sherard, who were at that time in partnership, and the repayment of that sum of £10,000 was secured by four several bonds of £2500 each. Sherard died before any part of the money was repaid, and a new partnership was formed between Reid and another person. Reid and his partner entered into an arrangement with the personal representatives of Sherard, by which they agreed to take upon themselves the payment of the debt, in consequence of certain considerations which they received, and to indemnify the representatives of Sherard against it. The name of the new partner was Kynaston, and he was connected with Sir Charles Oakeley. After some considerable time an arrangement was made between Sir Charles Oakeley and Kynaston, without any communication with the representatives of Sherard, to extend the time of payment for a period of three years; the time was accordingly extended, and the question is, what was the effect of the extension of that time, whether it discharged the representatives of [590] Sherard from their liability? Now, in consequence of an arrangement which took place between the representatives and the new partnership, they stood in the character of sureties, and the principle of law is this, that where a creditor gives time to the principal, there being a surety, without any communication with the surety, and without the consent of the surety, it discharges him from liability, because it places him in a new situation, and exposes him to risk and

contingencies which he would not otherwise be liable to. That being the fact in the present instance, and as the facts bring home the knowledge of all the circumstances of the transaction to Sir Charles Oakeley, it is my opinion, in this case, that the representatives of Sherard were discharged from their liability. That was the opinion of the Master of the Rolls, and that was the opinion of the late Lord Chancellor upon appeal; and I think, under these circumstances, your Lordships will be of opinion that their opinions with respect to this point, and their decisions, were correct. Under these circumstances I should advise your Lordships that the judgment be affirmed; and I think under the circumstances, as the question appears to me to be very clear and distinct, and unembarrassed, and as there have been two successive judgments against the Plaintiff, that in this case, the judgment ought to be affirmed with costs.

The Lord Chancellor: It was my fortune to be counsel for one of the parties when this cause was in the Court of Chancery; and I am extremely glad, therefore, that I had the assistance of my noble and learned friend, who attended the hearing **[591]** of this appeal, because I was desirous of abstaining from expressing any opinion of my own upon the question in dispute between the parties, until my noble and learned friend had expressed his; and I shall no further enter into the case than to say that I entirely concur in the opinion which he has expressed.

Decree affirmed with costs.

See pro: *Andrew* v. *Boughey*, Dyer, 75, a chattel given in lieu of debt, a discharge. *Evans* v. *Drummond*, 4 Esp. 89; *Reed* v. *White*, 5 Esp. 122; *Wyatt* v. *M. of Hertford*, 3 East, 147; *Strong* v. *Hart*, 6 B. and C. 160; *Smith* v. *Ferrand*, 7 B. and C. 19; *Exp. Ruffin*, 6 Ves. 119; *Exp. Harris*, 1 Mad. 583.

Con: *Jacomb* v. *Harwood*, 2 Ves. 265; *Waugh* v. *Carver*, 2 H. B. 235; *Devaynes* v. *Noble*, Sleech's case, 1 Mer. 539; and see *Exp. Kendal*, 17 Ves. 514, *dict.* of Lord Eldon, as to discharge of estate of deceased debtor. *Bedford* v. *Deakin*, 2 B. and A. 210; *Lodge* v. *Dicas*, 3 B. and A. 611; *Robinson* v. *Read*, 9 B. and C. 449; *Orr* v. *Chase*, Note to *D.* v. *N.* 1 Mer. 730.

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[592] ENGLAND.

(COURT OF EXCHEQUER.)

JOHN SCARLET, EDWARD SCARLET, and JAMES PROUDMAN,—*Appellants*;
THE GOVERNORS OF THE FREE SCHOOL IN LUCTON, and KEDGWIN HOSKINS and THEOPHILUS LANE,—*Respondents*.

[Mews' Dig. v. 23; vi. 773. S.C. 4 Cl. and F. 1; and in Ex., *sub nom.* *Pierrepoint* v. *Scarlet*, 2 Y. and J. 330.]

By a charter of Hen. I., Reading, Chelsea, and Leominster, with their appurtenances, churches and chapels, oblations and tithes, were granted to the abbot and convent of Reading. The church or rectory of Eye was an appendage to the church of St. Peter, Leominster, comprehending the vicarage of Eye, and the manor and township of Lucton, which was part of the lordship of Leominster. Upon the attainder of the abbot of Reading, 30th Hen. 8., the abbey was dissolved, and the possessions of the abbey and convent, including the church and rectory of Eye, with all tithes thereto belonging, vested in the Crown.

By letters patent of 10th James I., the king granted to M. and P. in fee, 'All those our tithes yearly, and from time to time coming, growing, or renewing in Lucton, etc. and in the manor of Lucton, etc. including tithes of hay of etc. (particular lands specified as being in the occupation of tenants named;) and all tithes of lands in Lucton in the occupation of etc. all which are within the lordship of Leominster, and were formerly parcel of the possessions of the late cell or priory of Leominster, being a cell annexed to the late monastery

of Reading, excepting advowsons of rectories, etc.; to hold the aforesaid rectories, tithes, etc."

From the time when the possessions of the abbey had vested in the crown, leases had been from time to time granted of the tithes of Lucton; but no mention was made in these leases of the rectory of Eye.

[593] The occupiers of lands in Lucton had usually paid to the grantees and those who claimed under them, tithes of corn and grain, and every other species of tithe, except of hay and agistment, the right to which they disputed, on the ground that the grantees were not to be considered as rectors of Eye, but as grantees of portions of tithes; that in the ministers' accounts detached portions only of tithes were stated, and not the tithes generally of the rectory of Eye; and that tithes of hay and agistment had never within memory been paid in respect of such lands, and that it ought to be presumed, that there had at some time been a conveyance of those tithes to the owners of the lands. On the other hand, it was proved, that there had been various suits on behalf of the grantees claiming all the tithes, and decrees in some of those suits against the occupiers, who did not set up the defence of exemption from the tithes of hay and agistment. It also appeared, that the grantees under the crown, had repaired the chancel of the parish church.

Held under these circumstances, that although it might be doubtful upon the construction of the grant, whether it passed the rectory, yet that it was sufficient to carry all tithes; that they were entitled to the common presumption in favour of rectors, and that a grant of the tithes of hay and agistment could not be presumed in favour of the occupiers.

The Respondents, the governors of Lucton Free School, founded by John Pierrepoint, claimed to be owners of the tithes within the chapelry of Eyton, and the township of Luston, and the manor of Luston, within the rectory and parish of Eye, in the county of Hereford, other than and except the tithes payable to the vicar of Eye, and the curate of Eyton.

The Respondents, Kedgwin Hoskins and Theophilus Lane, were the personal representatives of Philip Pymble, who, at the date of the decree from which this appeal was brought, was lessee of these tithes, under the first-named Respondents.

[594] The Appellants were occupiers of land within the rectory, and within that part of the vicarage of Eye, which is within the manor of Luston.

The rectory or parish of Eye, comprehends the vicarage of Eye, and the several chapelries of Eyton, Lucton, Yarpole, Orlton, Bromfield, Middleton, Kymbolton, and Hope Mileton or Miles Hope, and extends over the manor of Luston, and the township of Eyton is included in the chapelry of Eyton, and the township of Lucton is included in the chapelry of Lucton, and the townships of Birchor and Yarpole are included in the chapelry of Yarpole, and the township of Luston is included in the manor of Luston.

The vicarage of Eye and the several chapelries before mentioned, are all endowed.

The church or rectory of Eye was originally an appendage to the church of St. Peter, Leominster. The manor of Luston was parcel of the lordship of Leominster.

By a grant of King Henry I., Reading, Chelsea and Leominster, with all their appendages, with woods and arable lands, and pasture lands with meadow lands and water, with mills and fisheries, with churches and chapels, and churchyards, and oblations and tithes, with a mint and moneyer at Reading, were granted to the abbot and convent of Reading; and by the same charter King Henry I. decreed, that no person should hold any of the said possessions of the said abbot and convent and their successors, in fee, but only at a yearly rent and services to be reserved to the abbot and convent.

Before, and at the time of the dissolution of the monasteries by King Henry VIII., the abbot and convent of Reading, in right of their cell or **[595]** priory of Leominster, were seised of an estate of inheritance, in fee simple, of and in the lordship of Leominster, and the manors and mesne manors thereunto belonging, and particularly of and in the manor of Luston, and its demesne lands, which, at the time of such dissolution, were in the hands or manurance of the prior of Leominster.

The property of the abbey of Reading having, like that of other abbeys, been transferred to the crown on the dissolution of the monasteries, King Henry VIII.,

by letters patent, dated 27th February, 1540, demised the "Firme of the scite of the manor of the Bury in Luston, in the county of Hereford, with all land, meadows, feedings, pastures, and tithes of grain, hemp, bees and apples, to the same manor and township of Luston belonging, and small tithes there," to one Robert Brothat, for a term of twenty-one years, at the rent of £27 7s. 10d.

In the year 1549, King Edward VI. demised the "Manor of Luston, and the scite and soil of the same," to Sir James Croft, to hold as tenant at will, and in the general words, "tithes" are included.

By letters patent, of the third and fourth of Philip and Mary (A.D. 1556,) Queen Mary granted a reversionary lease of the manor of Luston, to one John Goodinge, for twenty-one years. The description of the property demised by this lease is the same as that in the lease to Brothat, omitting the words, "and tithes of grain, hemp, bees and apples, to the same manor and vill of Luston belonging, and the small tithes there."

By letters patent, of the first of Queen Elizabeth, dated the 5th of August, 1558, (being still prior to [596] the expiration of Brothat's term), her Majesty granted a lease for twenty-one years, at the rent of £40 1s. 4d., to Sir James Croft, of tithes alone, by the following description: "Divers our tithes arising or growing in Luston, Eyton, Lucton and Byrchor, in the county of Hereford, to the manor of Luston, with the members in the said county belonging or appertaining, and the tithes of divers lands there, now or late in the several tenures or occupations of John Evans, Thomas Shotter, John Wind, John Hereford, John Shepherd, Margaret Jones, William Winde, Walter Hickman, Robert Pates, Richard Winde, Thomas Buble, William Engle, Thomas Rocke, and John Smith, and certain other our tithes of divers lands, of a certain mill in Eyton aforesaid, now or late in the several tenures or occupations of Elizabeth Stephens, Edmund Burthope, John Canope, John Engle, Nicholas Debden, George Moneze, Richard Coren, and Hugh Pell, also certain other our tithes, in the marsh of Leominster, to wit, the tithes of hay of Reading Hall, the tithes of lands there of Albo Birche, the tithes of hay, there, now or late in the tenure of John Morice, and the tithes of lands in Yarpole, now or late in the several tenures or occupations of Edward Cooper, Robert Philippes, Thomas Mylward, William Malyn, John Barthope, Richard Blysse, and Thomas Colyns, and also divers other tithes of lands in Birchor and Yarpole aforesaid, now or late in the several tenures or occupations of William Noblett, Thomas Wall, Richard Awall, the aforesaid Jacob Crofts, knight, Richard of Waswall, John of Waswall, Walter Wenmore, John Gold, [597] Thomas Higgins, Thomas Dyrrye, and Philip Barnes, and certain other tithes of lands in Lucton aforesaid, now or late in the several tenures or occupations of John Galthe, John Wigmore, John Galthe, John Crubbe, Richard Clee, Thomas Davies, and Thomas Marshe, and our tithes in Orlton, arising from Bennett's farm, now or late in the tenure or occupation of Agnus Atferton; all and singular the tithes aforesaid, with their appurtenances, were late parcel of the possessions late of the priory of Leominster, in our said county of Hereford, to the late monastery of Reading, in our county of Berks, belonging or appertaining, and to the said manor of Luston, with its members, parcel of the lordship of Leominster, in the said county of Hereford, belonging and appertaining."

Queen Elizabeth having granted this last mentioned lease of tithes to Sir James Croft, subsequently by other letters patent of the 10th of January, in the same year, granted to him the manor of Luston by the same description as is used in the demise to Goodinge, to be held by him as tenant at will to her, and ultimately by other letters patent dated the 4th of September, 1572, being the fourteenth year of her reign, after reciting the lease to Goodinge, and the lease at will to Sir James Croft, and after determining the tenancy at will, Queen Elizabeth again granted the same property by the same description to Sir James Croft, for life, with remainder to his son and the heirs male of his body.

In the twenty-first year of her reign (Sir James Croft having previously surrendered the lease of the 5th of August, 1558,) Queen Elizabeth, by let-[598]-ters patent, dated the 14th of May, 1579, reciting the lease of the 5th of August, 1558, granted another lease to Sir James Croft for twenty-one years, of tithes, by a description which commences, "All those our aforesaid tithes yearly from time to time growing, arising, or accruing in Luston, Eyton, Lucton, and Byrchor, or in any or

either of them, in our county of Hereford; and our manor of Luston, with its rights, members, and very appurtenance to the same: and all those our tithes, of all those our lands with appurtenances, there, now or late in the several tenures or occupations of John Evans, (and the fourteen other persons whose names follow that of Evans in the description in the lease of August 5th, 1558,) or any or either of their assigns." The description then proceeds to specify tithes of particular lands in Eyton, Birchor, Yarpole, and Lucton, by the names of the occupiers, which also correspond with the names used for the same purpose in the lease of August 5th, 1558, and concludes with an enumeration of lands and tithes in the manor and rectory of Orleton. The rent reserved by this lease differs from that reserved in the lease of August 5th, 1558, only as it consists in two sums of £30 2s. 4d. and £10, instead of in one sum of £40 1s. 4d. the former of the two (the £30 2s. 4d.) being stated to be reserved in respect of the tithes within the lordship of Leominster, and the latter (the £10) in respect of those in Orleton, which from that circumstance would rather appear not to have been within the lordship of Leominster.

In the year 1583, (the lease of the 5th of May, 1579, having been surrendered,) Queen Elizabeth by letters patent, dated February 2d, 1583, being **[599]** the twenty-fifth year of her reign, granted the property comprised in the lease of the 5th of May, 1579, to Lady Catherine Croft for life, with remainder to Edward Croft and Herbert Croft, successively for their lives, at the same rent and by the same description as in that lease.

In the year 1602, being the forty-fourth of her reign, Queen Elizabeth made another grant (appearing in fact to be merely an addition of fresh lives to the lease of 1563,) to Herbert Croft, for the lives of himself, his wife, and his son William, of those tithes within the lordship of Leominster which are comprised in the former grants to the Croft family, and are subject to the exact rent apportioned on them by the lease of 1579, namely, £30 2s. 4d.

James I., by a grant dated the 24th of March, in the tenth year of his reign, to Francis Morris and Francis Phelips, their heirs and assigns, after enumerating and describing different manors, lands, etc., and also several churches and rectories intended to be granted, (among which neither the churches nor rectories of Leominster or Eye are included,) describes the tithes granted within the lordship of Leominster in the following words: "All those our tithes yearly and from time to time coming, growing, or renewing, in Luston, Eyton, Lucton, Birchor, and Yarpole, or in any or either of them, in our county of Hereford, and in or within the manor of Luston, with all their rights, members, and appurtenances, in the said county of Hereford: And all those our tithes of all those lands with the appurtenances there, now or late in the several tenures or occupations of John Evans, Thomas Shorter, John Winde, **[600]** Thomas Hereford, John Shepherd, Margery Jones, William Wilde, Walter Hickman, Robert Pales, Richard Winde, Thomas Bubb, William Engle, Thomas Rocke, and John Smith, or of any or either of them, or of their assigns, or of the assigns of any or either of them; and also all those our tithes yearly, and from time to time coming, growing, and renewing from all those lands, tenements, mills, and hereditaments whatsoever in Eyton, in our said county of Hereford, now or late in the several tenures or occupations of Elizabeth Stephens, Edward Birthope, John Conope, John Engle, Nicholas Debden, George Monox, Richard Corewe, and Hugh Poll, or of the assigns of them, or any or either of them; and all those tithes in the marshes of Leominster, in the aforesaid county of Hereford, (that is to say) all those tithes of hay yearly, and from time to time coming, growing, or renewing, in Readinge Hall, and the tithes of all those lands there now or late of Albou Birche, or his assigns; and also all those tithes of hay there now or late in the tenure or occupation of John Morice, or his assigns, and also all those our tithes of all those lands in Yerpole aforesaid, in the said county of Hereford, now or late in the several tenures or occupations of Edmund Cooper, Robert Phillips, Thomas Milward, William Malin, John Birthope, Richard Bliss, and Thomas Collins, or of any or either of them, or of the assigns of them, or of either or any of them: And all those our tithes of all those lands in Birchor and Yerpoll, or in either of them, in our aforesaid county of Hereford, now or late in the several tenures or occupations of William Noblett, Thomas Wall, Richard Awalle, **[601]** Sir James Acrofte, knight, Richard Dewaswall, John de Waswall, Walter Wenmore, John Gole, Thomas Higgins, Thomas Dirry, and John Barnes, or of any or either of them or of their assigns, or of the assigns of any

or either of them. And all those our tithes of all those lands in Lucton, in our aforesaid county of Hereford, now or late in the several tenures or occupations of John Galthe, John Wigmore, John Galthe, John Grabbe, Richard Clee, Thomas Davies, and Thomas Marsh, or of any or either of them, or of their assigns, or of the assigns or any or either of them; all and singular which premises are situate, lying, growing, and being within the lordship of Leominster, in the aforesaid county of Hereford, and are of the yearly rent or value of £30 2s. 4d., and were formerly parcel of the lands and possession of the late cell or priory of Leominster, in the said county of Hereford, being a cell annexed to the late monastery of Reading, in our county of Berks."

The title of the Respondents was deduced through several mesne conveyances from Morris and Phelips, to one John Pierrepoint, in the year 1707, and from him derived by means of a conveyance in the year 1708, to certain persons as trustees for charitable purposes, and of an act of the 7th of Ann, constituting these trustees and their successors a corporation by the style of "The Governors of the Free School in Lucton."

In the year 1824, the Respondents, the governors, and the testator of the other Respondents, filed a bill in the Exchequer against the Appellants and other Defendants (against whom it was dismissed by an order dated May 1st, 1826), stating, among **[602]** other things, the grant of James I., the conveyance by Pierrepoint, and the act of the 7th of Ann, an agreement between the Respondents, the governors of Lucton Free School, and Philip Pymble, the testator of the other Respondents, dated November 8, 1820, for a lease to him of the tithes of the townships of Yarpole, Bircher, and Luston, and also the occupation by the Appellants of lands within the township of Luston, and the chapelry of Eyton, in the manor of Luston, and the perception by them of titheable matters, charging payment to have been already made by the Appellants, of all tithes of corn and grain, and praying an account and satisfaction for the tithes of hay and grass, calves, lambs, colts, milk, potatoes, turnips, garden stuff, and fruit, since the 25th of December, 1820, and for the value of the tithes of agistment, in respect of unprofitable sheep, and other barren and unprofitable cattle fed by the Appellants, upon their farms or lands, within the township of Luston, or within the manor of Luston, or the chapelry of Eyton.

In Hilary term, 1825, the Appellants put in their answer, by which, among other things, they admitted an occupation within so much of the vicarage of Eye as is within the manor of Luston, and the perception of titheable matters, but did not admit the title of the governors of Lucton School, and they set up certain moduses in lieu of the tithes of milk, calves, colts, lambs, and gardens, and stated that they had set forth the tithes of all clover of the first year's vesture, and apples, and pears, not being the produce of gardens, since the year 1820, and that they had been taken away by Philip Pymble, and that they were ready to pay **[603]** the moduses; the Appellants then proceeded to state:

"That no tithes of hay or agistment, or of any other titheable matters and things, or any satisfaction in lieu thereof, except the tithes of corn and grain, hemp, flax, clover of the first year's growth or vesture, hops, apples, pears, pigs, geese, and eggs; and the aforesaid moduses and customary payments in lieu of the tithes of milk, calves, colts, lambs, wool, and gardens, or the produce thereof, had ever within the memory of any person living been rendered or paid within such parts of the said rectory of Eye as were within the said vicarage of Eye, and within the said manor of Luston; and insisted that at some former periods or period some body corporate or person or persons having good right, title, and power so to do, executed some grants or grant, releases or release, by virtue whereof the tithes of hay agistment, and of all other titheable matters and things within such parts of the said rectory of Eye as were within the said vicarage of Eye, and within the said manor of Luston as aforesaid, except as aforesaid, were granted or released unto, or became vested in the owners of the several farms and lands situate within such parts of the said rectory of Eye as were within the said vicarage of Eye, and within the said manor of Luston, and have ever since been enjoyed therewith."

The cause being at issue, witnesses were examined on both sides, and by the testimony of those for the defence, and by the cross-examination of one of the witnesses for the Plaintiffs, the moduses insisted on were established, and it was

also proved [604] that no tithes of hay of agistment, or any satisfaction in lieu of them, or tithes of any other titheable matters, or any satisfaction in lieu of them, except tithes of corn and grain, hemp, flax, clover of the first year's vesture or growth, clover, and hops, apples, pigs, geese, and eggs, and except the moduses in lieu of the tithes of milk, calves, colts, wool, lambs, and gardens, had within the memory of man ever been paid to any one within such parts of the rectory of Eye as are within the vicarage of Eye and the manor of Luston.

In addition to the parole testimony, a large mass of documentary evidence was also adduced (see the Appendix to the printed cases).

The cause having been brought to a hearing, the Appellants, by the first part of the decree, dated the 31st of November, 1827, were ordered to account with and pay to the Respondents, the governors, and the testator of the other Respondents, the tithes of hay, grass, potatoes, turnips, and fruit, not the produce of gardens, and also the tithes of the agistment of all sheep not producing wool or lambs, and of other barren, dry, and unprofitable cattle and horses, which had arisen, grown, renewed, and increased on the several farms, lands, and tenements in their respective occupations within the township or vill of Luston, and manor of Luston, and rectory of Eye, since the 25th of December, 1820, with costs; and the usual directions were given for taking the accounts.

With respect to the tithes of calves, milk, lambs, colts, and garden stuff and fruit, being the produce of gardens, the Respondents declining to try issues on the validity of the moduses set up by [605] the Appellants, their bill as to those was by the latter part of the decree dismissed with costs.

The suit by the Respondents, the governors, and Philip Pymble, against the Appellants, and the proceedings under it, becoming abated after the passing and entering of the decree, by the death of Philip Pymble, the Respondents, the governors of the Free School in Lucton, and the Respondents, Kedgwin Hoskins and Theophilus Lane, as the executors of Philip Pymble, exhibited their bill of revivor in the Court of Exchequer, against the Appellants, in Hilary term, 1833, to which the Appellants appeared, and the Court of Exchequer made an order on the 14th of February, 1833, that the suit and proceedings should be revived against the Appellants.

The appeal was against that part of the decree of the 31st of November, 1827, by which it was ordered, adjudged, and decreed, that the Defendants should severally account with, satisfy and pay to the Respondents, the governors, and the testator of the other Respondents, the tithes of hay, grass, potatoes, turnips, and fruit, not the produce of gardens, and also the tithes of the agistment of all sheep not producing wool or lambs, and of other barren, dry, and unprofitable cattle, and horses, which had arisen, grown, renewed, and increased, on the several farms, lands, and tenements, in the respective occupations of the Appellants, within the township or vill of Luston, and manor of Luston, and rectory of Eye, in the pleadings of the said cause mentioned, since the 25th of December, 1820, with costs, and whereby it was ordered, that it should be referred, etc.

[606] For the Appellants, Mr. Boteler and Mr. Wigram.

The Respondents, the governors of the Free School in Lucton, are entitled to the tithes, (whatever they may be,) to which they are entitled in the chapelry of Eyton, and the township of Luston, and in the manor of Luston, as portionists or grantees of particular tithes only, and not as rectors, and consequently are entitled no further than their grant is supported by usage.

The evidence in the cause clearly proves the non-payment of the tithes for which the Appellants were ordered by the decree to account, or any composition or modus in lieu thereof, to the governors of the Free School in Lucton, or their lessees.

Under the circumstances, it ought to be presumed that the tithes, for which the Appellants were ordered by the decree to account, have at some former period been granted or released to the owners of the lands, out of, or upon which they are claimed, by some person or persons competent so to do.

For the Respondents, Mr. Tinney and Mr. Loftus Lowndes.

From the evidence produced, it appears that the abbot and convent of Reading, before the time of legal memory and up to the dissolution, were entitled as rectors to the tithes in question in this appeal.

The grant from the Crown in the 10th James I. conveyed all the tithes of which

the said abbot and convent had been possessed, and the Respondents have proved themselves to be entitled to all the tithes conveyed by such grant.

[607] The evidence of the different suits, and the other parol and documentary evidence in the cause, is consistent with and supports the claim of the Respondents to the said tithes; and no claim, except that of the Respondents, has ever been set up to the said tithes or any part of them.

The defence set up in the cause by the Appellants is unsupported by evidence, and is no legal ground of discharge from the payment of the tithes claimed by the Respondents.

The Lord Chancellor (19th Aug.): This was a bill filed to recover tithes, by the trustees of Lucton School, against certain persons occupying lands within a district called Lucton, which Lucton formed part of the rectory of Eye. There was no question as to the right of the Plaintiffs to receive the tithes of corn, grain, and a great variety of other tithes; but the Defendants insisted that they were not liable to pay tithes of hay or agistment.

The history of this property and the origin of the Plaintiffs' title is involved in considerable obscurity. It appears that by a charter, Henry I. had granted to the monastery of Reading what is described as the priory of Leominster, and that part of the possessions of that priory consisted of the rectory of Eye.

The fact, that the rectory of Eye was the property of the monastery of Reading, was further confirmed by the judgment in *quare impedit* in the 11th of Edward I., by which it is found that the church of Eye, belonged to the abbot of Reading. In Pope Nicholas's Taxation, in the year 1291, there is this entry, "*Ecclesia de Eya cum capellis suis prior. Leomen.*," which priory of Leo-[608]-minster, as I have before stated, is proved to have been part of the possession of the monastery of Reading.

It appears that in the 3d of Edward VI., the possessions of this monastery of Reading having come to the Crown, upon their dissolution in the reign of Henry VIII., there was a demise from the Crown to Sir James Croft, of the manor of Lucton, part of the possessions of the late cell of Leominster, and to the late monastery of Reading belonging, and all and singular messuages and tithes, etc. situate, renewing in Lucton, etc. to the said manor of Lucton belonging, tithes of corn, grain, and hay, etc. and other tithes whatsoever in Lucton, etc. late parcel of the possession of the cell of Leominster, which the lessee was to hold in as ample a manner as the monastery of Reading had held the same. From this short statement of the early history of this property, no doubt whatever can exist, and no question was made at the hearing, but that the rectory of Eye had been part of the possessions of the monastery of Reading, as part of the cell of Leominster; that that rectory came to the Crown upon the dissolution of the monastery; and the Crown being in possession, the question arises upon the mode in which the Crown dealt with it in the tenth of James I., in a grant to two persons of the names of Morris and Phillips.

Now the terms of that grant are, "all those tithes renewing in Lucton, formerly part of the possession of the cell of Leominster, annexed to the priory of Reading, and all tithes of sheaf, blade, grain, and hay, etc. and all other tithes, etc. and all payment for tithes, or in satisfaction of tithes, [609] etc. to the aforesaid rectories, churches, chapels, prebends, messuages, and other the premises belonging, etc. except the advowsons of the rectories to the premises belonging; to hold the same to those two persons. The whole question turns upon that grant. In the extract from it which I have stated, your Lordships observe, that there is a grant of the rectories, and also of the tithes of hay. It was matter of contest at the bar, and matter of observation which is undoubtedly founded in fact, upon a minute examination of that grant, that there are other rectories in respect to which no question arises comprised also in that grant, and the argument therefore was, that though the term rectory is found in the grant, there are other rectories to which that term might be found to apply, and it does not therefore necessarily follow that there was a grant of the rectory of Eye; but that part of the grant with respect to which there was no dispute, and which is not qualified by any other part of the grant, is the grant of all tithes in Lucton.

It appears that the rectory of Eye was much more extensive than the district of Lucton, which may explain why it was that this grant from the Crown, if it was

intended only to comprise the tithes of the particular district called Lucton, did not include the rectory of Eye, and undoubtedly there is no portion of that grant which in terms professes to convey the rectory of Eye.

From these two persons who are the grantees under this instrument, the title is regularly derived by a person of the name of Pierrepont, who endowed the school, and the title is now vested in trustees under a conveyance from Mr. Pierrepont.

On the part of the Defendants, the ground of **[610]** defence is this:—They say the Plaintiffs are not proved to be impropriate rectors; that if they are not impropriate rectors, they are not entitled to those presumptions of law which belong to lay as well as ecclesiastical rectories: if therefore they cannot prove perception of the tithes, they are not entitled to call upon the Defendants to make payments which have not hitherto been made by the Defendants. It is true, that there is no proof of payment of tithe by these particular Defendants, in respect of these particular lands; but there is proof of the Defendants being liable to tithes, which is receivable evidence for the purpose of shewing that the grant comprised all the tithes within that district; namely, that the grantees had been in the habit of receiving tithes and of compelling payment of the tithes in question, from lands in Lucton.

Now if there were any ambiguity in the phraseology used in the grant, as to whether tithes in Lucton were or were not intended to be comprised in it, the fact of the title resting upon that instrument only, having been considered as available for the purpose of entitling those who held under that grant to receive tithes in Lucton, would be very legitimate evidence for the purpose of putting a construction upon doubtful words to be found in that instrument.

It happens that there are no less than five suits, three of which are applicable to the present case: the suit of *Penny* v. *Hoper*, in the year 1721, in which persons claiming under this title demand tithes of hay from certain occupiers in Lucton, and by decree of the Court of Chancery, in England, they were decreed entitled to those tithes. Another **[611]** suit, *The Attorney General* v. *Keysall*, was instituted in the year 1734, in which also parties claiming under a similar title recovered tithes of hay, against persons occupying lands in Lucton. Another suit, *The Attorney General* v. *Stephens*, was instituted in 1743, but which does not appear to have ever led to a decree. The pleadings however are produced, and the depositions of witnesses, in which the dispute is not raised as to the title of the Plaintiffs to tithes of hay, in Lucton: but moduses are set up, and the Defendants seek to escape, not by proving a defective title in the Plaintiffs, but by an adverse title set up by themselves.

The Plaintiffs' case is this; namely, that although the Defendants dispute the title to the rectory and to the tithe of hay and agistment, they do not dispute the right of the Plaintiffs to receive tithes from lands in Lucton, for they pay on account of the tithes of corn and grain, and every other description of tithes, with the exception of tithes of hay and agistment: and they set up certain moduses. Now when the question, therefore, is, what is the effect of the grant? did or did not the grant operate to convey the title to tithes in that district of Lucton? and we find that the parties claiming under that instrument have not only obtained decrees against other persons for the payment of tithes of hay in Lucton, but that these very Defendants account for all the more valuable description of tithes to the Plaintiffs holding under that very title, it appears to me that no reasonable question can be raised as to the effect of that grant being to convey to the grantees, and those who now claim under them, a right to receive such tithes as were payable out of the lands in Lucton.

[612] It appears that in the year 1707, there was a lease from this Mr. Pierrepont to one Sir Herbert Croft, of the tithes in Lucton, with a covenant for the lessee to repair the chancel of the church; and parol evidence was given, that the Plaintiffs had in fact repaired the chancel of the church. Now if it were necessary for the purpose of establishing the Plaintiffs' rights, to shew that they were rectors; the terms of the grant being ambiguous, and it being extremely difficult at this time of day, not knowing the exact situation of the property as it existed at the date of the grant, to ascertain whether the terms used were intended to convey the rectory or not: the fact of their having received the tithes, and their having repaired the

chancel of the church, and which obligation upon the receiver of those tithes appears to have existed so late as 1707, would undoubtedly be very strong and cogent evidence.

Now in this case, the Defendants admit that the monastery of Reading was, before the dissolution, possessed of the rectory of Eye, that it came to the Crown, that tithes of corn had been paid ; and they set up moduses for various other titheable matters. But then their defence is this, they say in the first place, the Plaintiffs do not hold the rectory, and therefore that they are not entitled to the benefit of any presumption. And as another defence, although they have no deed to produce, and do not profess to shew evidence of the transaction, which they ask your Lordships to imply, yet it appearing that the manor and lands were in the possession of the Crown, they say that it must be presumed that at some time or other, when the **[613]** lands were conveyed to that party through whom they claimed, the tithes were conveyed with it.

That mode of defence it has not been very unusual to adopt where parties claim exemption from tithes altogether ; but it is a very singular defence where the title set up is insisted upon not as applicable to all tithes, but as applicable to a particular description of tithes. The conveyance would be not of the lands with the tithes, the supposition being that the grantor of the lands was also owner of the tithes, and therefore, that it was competent to him to grant the lands and tithes together, or not, as he pleased ; but the presumption must be, that the person the owner of the lands, and the owner of the tithes, conveyed the lands and a particular description of tithes only.

The Defendants were in possession of their own title-deeds, and they, if there had been any grant of any particular description of tithes, would have been bound to produce that document. They have not produced any such evidence. They only ask your Lordships to infer, that such may have been the origin of their title, from the fact of the tithes of agistment and hay not having been paid.

In order to raise the defence so set up, not of a title in themselves but of a defect of title in the Plaintiffs, the Defendants have endeavoured to prove, from various old documents, that the Crown had not the tithes in question, but that they had only certain portions of tithe in Lucton ; and to make out this proposition they produce the minister's accounts, which, so far as they are capable of being understood, certainly bring into account not the tithes generally of the rectory of Eye, but certain detached portions, as they are called in the **[614]** minister's account, certain distinct sums as one account of the rectory of Eye : and in the minister's account it is headed " Ecclesia de Eya cum capellis," and then there is an abbreviation which is considered to mean portions. The obvious and common meaning of a portion of tithes, is where the rector of one parish is entitled to a portion of tithes in another parish ; but the construction which the Defendants would put upon this instrument is this, that whereas the rector was not entitled, as they say, to all the tithes in the parish, he was partially interested in the tithes of the parish ; they call that a portion of tithes. That undoubtedly would not be considered as a legitimate use of the word, at the present time.

Whether the Plaintiffs be entitled to the rectory or not, is, undoubtedly, a question of very considerable doubt ; and, if it were necessary to come to any conclusion upon that subject, it might lead to considerable embarrassment in the discussion of this case ; but one thing is quite clear upon the evidence, that they derive a title from the person who was rector, namely the Crown, and that they take under a grant of all the tithes of Lucton.

Now if the rector were suing for tithes in Lucton, it is not disputed but that, under the evidence as it appears in this case, he would be entitled, although there never had been such a tithe paid, to demand payment of every tithe which the Defendants, the occupiers of the lands, could not prove to have been properly and legally discharged. So it would be if the rector grants a lease of his tithes : the lessee suing in his right, and under a grant so obtained from the rector, is invested with all the rights and is entitled to all the presumptions **[615]** that would belong to the rector : they are not presumptions in favour of the lessee as lessee, but they are presumptions belonging to the rector : and the lessee, suing in right of the rector, is entitled to the benefit of all such rights as he can show that the rector is entitled to.

Here, then, we have a plain case, at all events, without discussing the question further as to whether the Plaintiffs were rectors or not. Beyond all question they are the purchasers or grantees of the tithes of the impropriate rector; and I apprehend, therefore, that it is incumbent upon those who are resisting the claim of the parties, so claiming under the right of the rector, to shew, if they can, a legal discharge, and that they are not entitled to ask your Lordships to reverse the direction for taking account of the tithes, merely upon the ground of the tithes not having hitherto been paid. An attempt was made to shew that there was some claim and title in the vicar. That would obviously be quite inconsistent with the other part of the case which the Defendants set up; but the answer to that objection is, that they have not made that defence: they have not said, we are to pay tithe of hay, but we do not believe that you are entitled to it. If they had set up that defence, it would have been the duty of the Plaintiffs to bring before the Court the vicar so identified with them, and their duty to shew his title to the tithe of hay. But their defence is, that they have paid no tithe of hay to anybody, that tithe of hay is not payable, and not that another party (the vicar) may come and attempt to shew that it is payable to him and not to the rector.

It appears that there is considerable evidence to [616] shew the general title of the Plaintiffs, and to negative the ground set up by the Defendants, that the Crown had only a portion of tithes of the land; for it appears that the Plaintiffs have been used to repair the chancel, and to receive the tithes of hops and potatoes, which did not exist at the date of the grant, and could only be derived under a particular grant at the particular time. But, however that may be, the ground upon which I am of opinion that the Plaintiffs are entitled is this: they have proved the rectory, within which Lucton is situated, to have been in the Crown; they have proved a grant from the Crown of all the tithes that the Crown had in Lucton; and they have proved that, under that grant, they have received the tithes of various titheable matters from the Defendants; and the Defendants have not established any ground of defence to shew that, by any legal means, their lands have become discharged from the tithe of hay.

When this case came on to be heard in the Court of Exchequer, after a very long argument, and after the Court had taken time to consider it, the then Chief Baron Sir William Alexander gave a very long, elaborate and learned judgment, in which he went through the whole of the facts of the case, and came to the conclusion that the Plaintiffs were entitled, as against the Defendants, to have payment of tithes of hay upon the lands in question. "I have very carefully looked through all the authorities referred to, and I have very attentively considered the arguments adduced at the bar by the Respondents, and in support of the Appellants' case; and I am of opinion, upon a clear conviction in my mind, that the Chief Baron came [617] to a right conclusion, and that the Judgment in the Court below is correct; I therefore move your Lordships to affirm that Judgment.

This being a case in which the Defendants have had a very full hearing in the Court below, turning upon a question of title, and the Court below, as is usual in such cases, having made a decree with costs, I think your Lordships will be of opinion that the costs ought to follow the result of the appeal.

Decree affirmed with costs.

APPENDIX.

[618]

SCOTLAND.

(COURT OF SESSION.)

M'TAGGART,—*Appellant:* ROBERT WATSON,—*Respondent.*

[Mews' Dig. xi. 1262; S.C. 3 Cl. and F. 525. Commented on in *Guardians of Mansfield Union* v. *Wright*, 1882, 9 Q. B. D. 685, 686; and *Durham (Mayor of)* v. *Fowler*,

1889, 22 Q. B. D. 105; *Mayor of Kingston-upon-Hull* v. *Harding* (1892), 2 Q. B. 508.]

A. was bound jointly with B., the trustee of a bankrupt estate in Scotland, to the extent of £1000. The condition of the bond was, that B. should faithfully discharge his office, account, etc. The creditors of the bankrupt, according to the practice in Scotland, choose three commissioners to act for them, and superintend the proceedings of the trustee. B., by various contrivances amounting to fraud against the estate, was found in arrear to the amount of £1000. Whereupon the bond being put in suit against A., he pleaded that the commissioners, by neglect and connivance, had caused and permitted the default, or knowing it had concealed it from him. Of this imputation there was no distinct proof. It was held that even on that supposition A. was not discharged.

Lord Brougham: In this case the Respondent had become surety for W. Jeffery the trustee, on the sequestrated estate of the Gorbal's Spinning Company, and had given the usual bond for Jeffrey's conduct, and accounting as such trustee. By the Scotch forms of proceeding the bond is not given to any individual as obligee, but **[619]** it is an obligation to the extent of £1000 by the trustee and his cautioner jointly, and in which both are principal obligors. As the condition is, that W. Jeffrey shall faithfully and regularly discharge his office of trustee; and as the creditors afterwards choose three commissioners to act for them, we may say, in a sense, to represent them in their dealings with the trustee, and in some sort to control, or, at least, to superintend, his proceedings, we may allow it to be held that those creditors, and, it is said, the commissioners thus appointed by them, and acting on their parts, are the obligees, and that their acts, for example, in releasing the principal obligor, W. Jeffrey, would discharge Mr. Watson his surety; that any connivance at Jeffery's misconduct, and any act otherwise injurious to the rights and equity of the surety Watson, and done behind his back, would release him, as much as if the bond had been given to them instead of being left indefinite as to the person of the obligee. We are thus making the most favourable suppositions possible to the Respondent; for we are not only assuming the creditors to be represented and bound by the commissioners, but we are allowing Watson to be a surety only, whereas he is a principal, being a joint and several obligor.

W. Jeffery by a series of irregular proceedings and by various contrivances amounting to fraud, in respect to the sequestrated estate, was found in arrear in his accounts to the amount of £1000; and the Appellant, the trustee who succeeded him, put the bond in suit against Watson, who defended himself by accusing the commissioners of great neglect in their superintendence of Jeffery, of conniving at his misconduct, of concealing from him (Watson) **[620]** the several matters which they knew, and of generally failing to discharge their duties under the Bankrupt Act towards the creditors, which the Respondent considers as also their duties towards him in his capacity of W. Jeffery's surety.

Almost all of these charges, in point of fact, are denied by the Appellants, the trustee, and the commissioners. They deny all knowledge or suspicion of Jeffery's frauds, which were indeed, for the most part, so cunningly devised as to escape even a pretty close scrutiny; they deny all *laches* or negligence in the discharge of their own office. They only admit that their meetings were not held as often or as regularly as the act directs; and they also allow, that a sum lodged in the Royal Bank by Jeffery, as the act requires, was with their privity and consent transferred to a Glasgow bank, of which one of themselves, a large creditor of the bankrupt, was a partner; but which was perfectly solvent, and by which no loss whatever has accrued to the estate.

Upon this latter fact admitted, I have to observe that it was most irregular in the commissioners to allow the transfer of the fund from one of the three banks expressly named in the statute, without the consent of their constituents, the creditors; and the more to be blamed, that one of themselves, or his banking-house, was to profit by the operation. Had any loss occurred by the proceeding, not only would Watson have been discharged from all liability in respect of it, but the commissioners would have been accountable for the whole amount of it to the body of the creditors at large. But no loss having occurred, and W. Jeffery having done no act of malversation or

even of neglect, up to [621] the date of that transaction, I am clearly of opinion that Watson is not, at least by the transfer, discharged from his obligation in respect of Jeffery, as regards his subsequent proceedings.

The Court below having assoilzied the Defender in respect of the neglect and irregular conduct of the commissioners, which their Lordships held to operate Watson's discharge, the present appeal is brought from that decree, and we are now to see upon what grounds it rests.

And first of all I have to remark, that here, as in so many of the Scotch cases, we find extremely little attention paid to the facts; hardly any care being taken to ascertain what these are by examining which of the statements on either side is admitted, and which denied, or not admitted, by the other. The matter of fact is thus too often passed over as of little moment, in order to get at the matter of law, on which all the pains both of the bar and the bench are bestowed. But on the fact every thing must depend; and it is to be noted in this case that the fact is assumed—assumed too all one way and against the Appellants in the face of their positive denial and in the absence of proof. The Court take for granted, that the commissioners acted with gross negligence in the performance of their duty, though this is denied; and they assume that out of their negligence arose the malversations of Jeffery, or the opportunities for committing them; opportunities which but for the *laches* of the commissioners, he could not have had; and yet not only is this denied, but upon all the circumstances, as they appear in the case, I really do not think even, morally speaking, and to say nothing of legal evidence, that the fact is so.

[622] But another thing, if possible still more important, has been equally overlooked, the frame of the bond itself, the whole ground of the action. The obligation is, "that W. Jeffery shall manage the estate, in all respects conform to the statute under which the sequestration was awarded," as well as that he shall "hold just compt and reckoning, and make payment to the creditors according to their several claims." Compt and reckoning for what? "for my whole management, receipts, and intromissions, as trustee with the whole estate."

Now the main reliance of the Respondent, and in which view the Court fully shared, is upon the supposed fact of the commissioners having been careless in calling on W. Jeffery to render accounts, and in other respects to perform his duty under the statute. They say that it was the office of the commissioners to see that he did perform his duty; that the cautioner, Watson, relied on their performing that office; and that their non-performance creates a case which he never contemplated, and to which his suretyship cannot apply. Was it of no moment to observe that the performance of the statutory duties by Jeffery was one of the very things for which the obligation bound his surety? Assuredly it is no argument against my being answerable for a man's doing a certain thing, that the party to whom I gave this obligation did not see that he did the thing. I had myself undertaken for his doing it; and it is no discharge of my voluntary obligation that the other party, the obligee, did not see to his proceedings. The statute and the bond in truth have the very object of giving the creditors a double security against malversa-[623]-tion, the superintendence of the commissioners, and the obligation of the surety. The argument for the Respondents, and which has swayed the Court below, at once cuts off one of these securities, and leaves the creditors only protected by the other. The duty incumbent on the commissioners as a pledge to them continues; but that security they had without the bond, and I do not see how the bond can avail them at all, or why it was to be taken if this argument prevails.

The defective state of the facts in this case to support Watson's defences renders it unnecessary for me to enter upon many of the legal questions raised on little or no foundation, and discussed with no profit, because with no application to the case at bar. I may however observe, that very dangerous doctrines on suretyship obligations appear to be ventilated in some of the cases in Scotland (cases which have never been appealed to your Lordships). The language of the learned Judges is calculated perhaps to convey, as reported in the books, a meaning far stronger than their Lordships intended. They are really made to speak more of the obligee's duties than of the obligor's covenants—of the duties towards the surety which a person indemnified and guaranteed is bound to perform, rather than of the obligation which that surety has incurred towards him. A closer watch is thus kept over the conduct of the party who has taken an indemnity, than over the liability of him who has given it.

Now, that the obligee may by his conduct release a surety in certain cases, no one can doubt. The holder of a bill giving time to the acceptor discharges the indorser from his suretyship [624] liability, even at law, and so in any other guarantee by simple contract; and in equity the obligee in a specialty may do so, by giving time, or otherwise injuring the recourse of the surety or co-obligor; and all this upon the ground that the surety has a right to stand in the place of the creditor, holder, obligee, or other party indemnified, and must not have his rights or equities voluntarily cut down by the acts of that party. But while at law the surety in a bond is not at all discharged, even by a long neglect of the obligee to demand payment or account from the principal; nay, where the latter has become insolvent during the time thus suffered to elapse, as was decided in the *Trent Navigation Company* v. *Hardy* (10 East, 34. See *Oakeley* v. *Pasheller* [10 Bli. N. S., p. 548]); the Courts of Equity have never, to my knowledge, given a discharge to the surety merely on the ground of the creditor, the obligee, not having called on the debtor so early as he ought, or not having given early notice of his failure or non-payment to the surety. The case of Mr. Law, Mr. Tierney's surety in Calcutta, at the Rolls in 1799, gave rise to much discussion and an elaborate judgment by Lord Alvanley. It is reported 4 Vesey, 824; but there were other circumstances very different from such *laches* to govern that judgment, and especially the payment of a balance to the representatives of the debtor by the party's (East India Company's) servants, which was justly held to be an acknowledgment to the benefit whereof the surety was well entitled. It is however undeniable, that the Courts of Equity will look narrowly to every thing in the conduct of the obligee which has a direct tendency to wrong the surety, and worsen his rights and [625] equities; and will, as Lord Loughborough said in *Rees* v. *Berrington* [2 Ves. Jun. 542], "lay hold of such errors to release him." The error however in the present case arises in supposing that any want of care on the party's side in making the trustee do that which the surety had covenanted that he should do, was like a postponement of the surety's equities, or diminution of his rights at law.

However, we need not discuss such questions in this case, nor deal with the English decision in Vernon of *Montague* v. *Tidcome* (2 Vern. 518), which was that of a positive and express covenant given to the surety by the obligee. Neither are we called upon to dispute the doctrine of the Court below here laid down, and in *Main* v. *Hardy*, that where any one gives security for the conduct of another in a certain office which brings him in contact with persons also in the office, he has a right to expect that these persons will, in all things affecting the surety, conduct themselves according to law and discharge their duties. All this may be generally true, and yet it cannot avail to discharge a surety who has expressly bound himself for a person's doing certain things, unless it can be shown that the party taking the security has, by his conduct, either prevented the things from being done, or connived at their omission, or enabled and clearly enabled the person to do what he ought not to have done, or leave undone what he ought to have done, and that but for such conduct this omission or commission would not have happened. The present is any thing rather than such a case. The facts are not here to ground any such conclusion, and therefore I am of opinion that the surety Robert Watson was not discharged.

[626] I have, therefore, to move your Lordships, that the Decree appealed from be reversed; and that you remit to the Court below, with instructions to decree, in terms of the second conclusion of the libelled summons, *i.e.* the conclusion relating to Watson, the only party here before your Lordships.

Judgment reversed.

[627] SCOTLAND.

(COURT OF SESSION.)

SWAN,—*Appellant:* The GOVERNOR and COMPANY of the BANK of SCOTLAND,—*Respondent.*

[Mews' Dig. iv. 150, 224; xiii. 1919. S. C. 2 Mont. and Ayr. 656.]

M. with S. and others, were joint obligors in a bond conditioned to answer for any balance which might become due from M. to a bank in Scotland, with whom he had obtained a credit according to the Scotch system of banking. M. in the course of his dealings, drew upon the bank by written orders for sums made payable to bearer, and issued at a place more than ten miles distant from the bank; but dated (contrary to the fact) at a place within that distance, and also post dated; being in both respects contrary to the statute 55 Geo. 3. c. 184. s. 13. which not only imposes a penalty upon the parties to such drafts, but makes the transaction void. The mode of drawing was known by the bankers. M. having over-drawn the bank to the amount of £4378; an action upon the bond was brought against S. by the bank, to recover the amount. Held that no debt had been incurred, and therefore that the parties were not liable upon the bond.

Lord Brougham: The Scottish banks, both public and private, have for more than a century past been in the practice of granting accommodation to their customers by way of what is called *cash credits*—a mode of conducting business which may almost be said to have become classical from the description and commendation given of it by Mr. Hume, in one of his most celebrated poli-[628]-tical essays. It consists in the opening an account to a certain limited amount with the customer on his finding good security for any balance which may at any time of settlement be found due. Upon this credit he operates by drafts on the bank, and these are honoured up to the specified amount during the whole period of the party's occasion for this accommodation. Interest is charged on the sums drawn, and thus the party only pays for what he actually uses, while he runs no risk of keeping money by him beyond the occasions of the day; and the bank runs little or no risk, because, beside the surety's liability, it has constant means of knowing the nature of the customer's dealings, and of inferring from thence the state of his circumstances.

These credits are used not only by traders, but by persons in any other occupation or profession requiring supplies of money to a moderate amount, as cattle-dealers, agents, and writers: and sometimes even by private individuals living on their means.

W. Martin, writer, of Lockerbie, obtained a credit of this description with the Bank of Scotland, in June, 1819, and gave a bond for securing the latter, in which he was joined by Mr. Swan, the present Appellant, and others, formally and nominally as principal co-obligors, but, in reality, as his sureties. In September, 1825, this was extended to £10,000, and the sureties joined in a second bond, whereby they became liable in the same manner with W. Martin, but to the extent of £5000 for "all such money as should be drawn out from the said bank, or its agency-office at Dumfries, or as may be resting over, due, paid, payable, or [629] claimable, on any drafts, orders, bills, notes, receipts, guarantees, letters, documents, or obligations whatever, drawn, accepted, granted, indorsed, or any how signed by W. Martin, or by procuration, or liable on him by any legal construction, and chargeable to the said account." And it was further stipulated by the bank, that any "account or certificate signed by their principal accountant, or by their agent at Dumfries, should be sufficient to ascertain, specify, and constitute the sums or balance to be due on principal and interest, and should warrant all execution of law against the obligors, jointly and severally, for such sums and balances."

W. Martin continued to operate upon this credit until he became insolvent, and was sequestered, when a balance of £4378 0s. 11d. principal, and £326 10s. 2d. interest, was due upon the account. The sureties or cautioners were sued upon the

bond, and it was stated in the defence that the manner of drawing had been chiefly in two ways. W. M. had sometimes sent letters from Lockerbie, where he resided, to the bank agent at Dumfries, directing him to send him money to a specified amount by the bearer; and sometimes he had discounted bills, and entered into other transactions with various persons at Lockerbie, and given them drafts on the bank, or bank agent. In order to save the stamp, it is alleged, he made them payable to bearer; but as Lockerbie is said to be beyond the distance of ten miles, then specified by the stamp act, he dated the cheques at Dumfries, and generally post-dated them, as if drawn the day when the holders might present them for payment at the bank office.

Dockets and balances certified by both the ac-**[630]**-countant and agent were regularly made and produced, and the cause was reported upon cases by the Lord Ordinary to the Lords of the second division, who directed a hearing in presence, and then decided that the suit being brought only on the second bond, that of 1825, the pursuer could not recover on the bond of 1819 in this action; but their Lordships decreed in his favour upon the former instrument.

Nothing here turns upon the form of the action, which was a suspension of a charge given by the bank on the bond. The matters before stated as to the transaction were averred, and the facts alleged by the parties being in many, indeed in most, particulars, denied on either side, nothing is to be taken for concluded or ascertained by the proceedings; but the Respondents, the chargers, were sufficiently confident in their grounds of law to let the case be determined upon the foot of admitting, for argument's sake, the allegations of the Appellants, the suspenders. And as it was on this assumption that the Court decided, so it is upon this that the appeal is brought, and that your Lordships are called upon to determine here.

It is to be regretted that some steps had not been taken to ascertain the facts; the more especially as the matter of law was, in the estimation of the Court below, sufficiently difficult to require cases and a hearing in presence. It does not seem that any difficulty could have attended this settlement of the facts, for nothing material was in dispute except the fact of the drafts having been such as the Appellants contend they were—namely, payable at Dumfries, and drawn at Lockerbie —of their having been issued to parties whom W. Martin **[631]** was paying money to—of Lockerbie being beyond the legal distance—and of the bank agents being aware of all this—facts, in all likelihood, only denied for form's sake, and which probably would have been admitted, or at least, if denied, easily substantiated. What part of the balance was made up of, money obtained on such drafts, and what part of money obtained on letters sent for cash to be transmitted from Dumfries, by W. Martin's messenger, could probably have been ascertained with equal ease;—and these are the only facts in the case. The consequence of settling these things would have been that, should the point of law be decided against the Respondents, the cause would have been at an end: whereas if your Lordships reverse this decision, a new litigation will be necessary in case the chargers deny the suspenders' allegations. However, we have to deal with the case as it is now before us; and I regret to find that I cannot come to the conclusion at which the learned Judges below have arrived. On the contrary, I really hold it to be, without any reasonable doubt, clear, that upon the facts which the case for the Respondents assumes to be those of the cause, the bank could not recover upon this bond.

The whole question arises out of, and turns upon the Stamp Act 55 Geo. III., c. 184, sec. 13; and we may at once lay out of view all that portion of the alleged balance or debt which arose from letters or orders such as those set forth in the cases, namely, directions given at Lockerbie in writing to the bank agent to send W. Martin sums of money. I do not consider that these are drafts or orders for the payment of money at all. They are directions to send money to the party who either has it in the **[632]** bank, or takes it on credit from the bank;—they are not negociable instruments, and they are not issued. Therefore they do not come within the description of instruments requiring a stamp, and they do not fall in any way within the provisions of the 13th section. But we are to consider the point argued and decided below—whether or not, upon a balance arising out of sums paid by the bank to the bearers of unstamped cheques issued at Lockerbie, beyond the privileged distance, the agent who honoured those cheques being conusant of the

distance and place of issue, the co-obligors or sureties in W. Martin's bond of 1825, were liable to make good W. M.'s deficiency, in other words, to pay the debt found due, and arising out of such dealing.

Now it must first of all be observed that it seems mainly though not exclusively to be the ground upon which the Respondent rests his case, and the Court below their judgment, that the bondsmen had bound themselves by the certificate of the accountant or agent of the bank, and that whatever balance those persons should certify was to be regarded as the true balance for which they were liable to the bank. This argument seems to admit that, but for such a special provision between the parties, the want of a stamp would be fatal. But certainly something has been said of a more general nature respecting the difference between enactments for protecting the revenue, and other statutory provisions. We shall therefore begin by considering the question in its more general shape, and then inquire if the special obligation just adverted to makes any difference in the present case.

1. There seems no reason at all to doubt that if, for the purpose of protecting the revenue, any-**[633]**-thing is forbidden to be done under a penalty, this does not necessarily make void the thing done, or prevent a right of action from arising out of it: thus, if dealing in tobacco without a licence, as in *Johnson* v. *Hudson* (11 East, 180), is prohibited under a penalty, this will not prevent the person who so deals from maintaining an action for goods sold and delivered in such dealing, although the unlicensed dealer will be liable to the statutory penalty. But how would it have been if the legislature had, besides the penalty, provided that all dealing of the forbidden kind should be absolutely void? It is clear that, in this case, no action could arise from such void dealing, not because the law forbade the transaction for revenue purposes, but because it deprived the transaction of all legal force and effect by making it void; and even if it had only been forbidden, with or without penalty, provided the prohibition was for other than revenue purposes, no action could arise. Where there was no provision avoiding the transaction, but a prohibition framed to protect the buyer, an action was held not to lie when that prohibition was disobeyed. *Law* v. *Hodgson* (11 East, 300). So no action was held maintainable for printer's work where the act requiring the printer's name to be given had not been complied with—the not following a direction being held equivalent to disobeying a prohibition. *Bensley* v. *Bignold* (5 B. and A. 335).

But a provision making void the transaction is quite as clear a ground of nullity, and quite as strong to defeat all legal remedy as any such prohibition. Be it so, that the provision is to protect **[634]** the revenue, still if it operates not by penalty, nor yet by mere prohibition, but by declaring void what is prohibited, surely this is as immediate and direct a defeasance of all legal remedy as can be conceived. It is not as in *Law* v. *Hodgson*, a consequence drawn by argument from the statutory enactment, but it is the very enactment itself. It stands in the place of penalty. It is in truth the penalty denounced. The wrong-doer, the person breaking the law, forfeits £100, and forfeits also the validity of his contract. He incurs two penalties, the fine and the nullity.

Now what does the Stamp Act provide with reference to the present case? The 13th section is precise. "And for the more effectually preventing of frauds and evasions of the duties hereby granted on the bills of exchange, drafts, or orders for the payment of money under colour of exemption in favour of drafts or orders upon bankers, or persons acting as bankers, contained in the schedule hereunto annexed; be it further enacted, that if any person or persons shall, after the 31st day of August, 1815, *make and issue*, or cause to be made and issued, any bill, draft, or order for the payment of money to the bearer on demand upon any banker or bankers, or any person or persons acting as a banker or bankers, which shall be dated on any day subsequent to the day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not, in every respect, fall within the said exemption, unless the same shall be duly stamped as a bill of exchange according to this act, the person or persons so offending shall for every such bill, draft, or order, forfeit the sum of £100. And if **[635]** any person or persons shall knowingly receive or take any such bill, draft, or order in payment of, or as a security for, the sum therein mentioned, he, she, or they, shall, for every such bill, draft, or order, forfeit the sum of £20. And if

any banker or bankers, or any person or persons acting as a banker, upon whom such bill, draft, or order shall be drawn, shall pay, or cause, or permit to be paid the sum of money therein expressed, or any part thereof, knowing the same to be post-dated, or knowing that the place where it was issued is not truly specified, and set forth therein, or knowing that the same does not in any other respect fall within the said exemption, then the banker or bankers, or person or persons so offending, shall, for every such bill, draft, or order, forfeit the sum of £100." Thus far all is description and penalty and statement of the purpose, viz., to prevent frauds and evasion of the duties. But there follows a clear declaration of nullity or avoidance, for it goes on to provide that "*moreover*," that is, over and above forfeiting the penalty, the banker or other person shall "not be allowed the money so paid, or any other part thereof, in account against the person or persons by or from whom such bill, draft, or order, shall be drawn, or his, her, or their executors or administrators, or his, or her, or their assignees, or creditors in case of bankruptcy or insolvency, or any other person or persons claiming under her, him, or them."

To say that a party shall not be allowed in account any money paid in a particular way, is equivalent to saying that the party shall have no claim against the payee or person on whose [636] account or for whose behoof the money was paid, or, in other words, that no credit should arise to the party, and, which is the same thing, no debt should be incurred towards him by the other person. The statute has therefore in terms said that no debt shall arise from dealings contrary to the stamp provisions, and in all but express terms that whatever is done shall be void *quoad* creating a demand or claim by the party paying against the party receiving. This is any thing, then, rather than a mere penalty protecting the fiscal regulation, or a mere prohibition with a view to such protection. It is a further and an additional protection given to the stamp revenue, by declaring that payments upon unstamped instruments made by parties knowing that the instruments do not come within the exemption shall not be valid to the effect of charging the payee with a debt to the party paying.

2. Now what is the ground of the bank's action,—of the charge given against W. Martin's co-obligors, or sureties? It is the debt alleged to be due from him to the bank, in respect of his drafts upon the bank agent, honoured by him at Dumfries. But if no debt is due, if the wrong-doer is forbidden from having any claims against his customer in account, there is no liability incurred by the co-obligors, or indeed by W. Martin himself. That is the immediate and direct consequence of the statutory provision. It is as if the statute had made void the bond to secure the balance from time to time due; for if there is nothing due, no balance, the obligation to make that nothing good amounts itself to nothing. The operation of banking is this: We speak of deposits by customers, and of their keeping money at a banker's; but, both [637] in fact, and in contemplation of law, they give their money, or securities for money, to the banker, who becomes their debtor, and is bound to repay it on demand. So the operation of a cash credit is the reverse of this. The customer becomes the debtor to the bank by so much as the bank advances on his drafts, and the surety becomes bound to pay that debt if the customer fails. Then if the statute says no debts shall arise or become due upon money drawn out by the customer, or paid by the banker in a particular way, it also says that no bondsman shall be liable on such security given. It is as if the cash credit stood, and the bond for securing the balances stood, but nothing had been done under the credit, and so no balance had arisen, or could arise, which the bondsman could have to make good.

But the peculiar form of the bond is relied upon. It is said, that whatever the accountant or agent should certify as the balance is to be taken as that balance. How can this alter the case? They are to ascertain the quantum; the quantum of what? Of balance or debt due to the bank. But the act of Parliament has said, that there can out of transactions of this kind arise no debt whatever. Then there is no balance of a debt for the certifier to ascertain. The words taken even most literally will not bear out the contention of the Respondents. "Any account or certificate, signed as provided, shall be sufficient to ascertain, specify, and constitute"—What? Not how much the obligors shall be bound to make good or pay, but "the sums or balances, *such as aforesaid*, to be *due hereon* in principal and interest, and shall

warrant all executorials for *such sums or balances.*" [638] Now what are *balances such as aforesaid?* They are plainly balances in the transactions aforesaid, the drawing money out and paying it in—in a word, the balance of debt due from Mr. Martin to the bank: and how are they further described?—as "*to be due hereon* in principal and interest." This plainly means,—due on this bond by reason of the claims arising to the bank for money advanced on W. Martin's cash credit. So that the obligation is to pay the balance or debt arising and due. If there is no debt, no claim, there is no obligation. The statute has taken away the debt and the obligation vanishes with it.

It is quite impossible to avoid regarding what it is that constitutes the obligation in the instrument, what is the main purpose of it, and to which all besides is accessary and ancillary. It is, that the obligors are bound to pay any debt incurred by Mr. Martin to the bank on his cash credit. Now if there could be no debt, there must be an end of the obligation to pay.

Nothing can be more plain than that if such decisions as the present could be supported, the 13th section of the statute would become at once a dead letter, as far as the nullity goes. Parties would only have to frame their securities like these bonds of June, 1819, and September, 1825, and then the unstamped cheques would constitute a balance available to the one party and payable by the other. For then it would always be contended, and with success, that the party was not suing for money paid by unstamped drafts,—*that* would be admitted to be impossible by virtue of the 13th section,—but he would be represented as suing on the balance declared by the account, and the par-[639]-ties would thus be concluded, and the Court precluded from going into the fraudulent and illegal dealing which had rendered the whole transaction void by prohibiting any claim or debt from arising out of it. All drafts, whether within 10 or beyond 400 miles, whether payable to bearer or not, whether on demand, at sight, or at six or twelve, or eighteen months date, would become valid, because a single bond executed would make the party drawing and receiving liable; without even paying for a bond stamp, a written memorandum agreeing to pay, and with an agreement stamp, and that only affixed to it when it was to be put in suit, would suffice to legalize the whole transaction. As far as efficiency in law and equity is concerned, the statutory protection to the revenue of the nullity declared would be gone and the penalty alone remain.

A recent case in the Exchequer, *Owens* v. *Denton* (1 Crompton and Roscoe, 711), was relied on for the Respondent. But it is in no respect repugnant to the opinion which I have been giving. There, a settlement of accounts had taken place upon a selling of malt by an illegal measure. The Court admitted explicitly that such a sale could not either be enforced by action or set off in defence against a claim, but they held that the settlement was equivalent to payment, and could thus be set off. It is quite unnecessary to say whether this was or not a correct view of the law, and whether it let in or not plain evasion of the revenue. At all events, it does in no way conflict with the grounds of the present case, which stand wholly separate and apart.

I am therefore of opinion, that the interlocutors [640] appealed from must be reversed, and that the case must be remitted with a declaration to this effect: That no obligation arises upon this bond to pay any balance alleged to be due to the bank on Mr. Martin's drafts, in so far as these were drawn and issued beyond the statutory distance, or wrong dated in point of time or place, and were known by the agent of the bank to be drawn beyond such distance, or to be wrong dated in point of place, or to be wrong dated in point of time; and in so far the Court will be directed to suspend the charge, and to find expenses due according to the result of the inquiry touching the manner in which the balance is constituted.

Judgment reversed.

REPORTS OF CASES heard in the House of Lords, upon Appeals and Writs of Error, and decided during the Session 1837. By RICHARD BLIGH, Barrister-at-Law. Vol. XI.

IRELAND.

(COURT OF CHANCERY.)

The Right Honourable JOSEPH LEESON Earl of MILLTOWN, and BARBARA Countess of MILLTOWN, his Wife, *-Appellants;* The Honourable WILLIAM LE POER TRENCH, and Others,—*Respondents.*

[Mews' Dig. xv. 1732; S.C. 4 Cl. and F. 276. See *In re Blackford*, 1884, 27 Ch. D. 676, 678.]

C. by his will devised to trustees all his real estates for a term of 500 years, upon trust, if there should be issue of his marriage, to raise and pay to his wife during her life an annuity of £2000, in addition to a provision of £400 a year made for her by the will of his father, but in satisfaction of dower. The further trusts of this term were to raise portions for younger children, with provisions for maintenance; and in case of a deficiency of personal estate to pay debts and the legacies given by the will, to raise after the death of his wife, by sale, etc. of the term, such sum as should be sufficient to discharge the legacies, etc.; and subject to the term, he [2] limited the estates to his first and other sons in tail male, remainder to his daughters in tail general; and in default of such issue, to his wife for her life in lieu of dower, and in satisfaction of all provision by his own or his father's will; with remainders over. The testator then gave to M. his wife's sister £4000, to be paid within one year after his death, with interest at 5 per cent. until paid; and £3000 to be laid out in the public funds upon trust, to pay the interest to the separate use of O., a married sister of his wife, and the principal to the use of her children at her death. He then bequeathed to divers persons, his kinsmen and others, a great number of pecuniary legacies of various amounts, but only in the event of his dying without issue living at his death; and many of these legacies were limited for life interests to parents, with remainder to children. Finally, the testator by his will gave a legacy of £2000 in trust for a charity, and £2000 to his wife, which he directed should be paid to her in any event, and in preference to all other legacies (except the charitable bequest), with interest from his decease, at 5 per cent. He then directed "that all the legacies by his will bequeathed, should from the time when they should respectively become payable, bear interest at the rate of 5 per cent., and be raised and paid accordingly: that his funeral and administration expenses, and the charitable bequest, should be paid out of the produce of his personal estate: that the residue thereof should be applied in payment of his debts, and the other legacies which should take effect and become payable under his will; and in case his personal

estate should be insufficient for that purpose, he charged the lands, etc. comprised in the term, with the payment of such debts and legacies, and directed the trustees to raise the same, pursuant to the trusts vested in them for that purpose;" and subject to the payment of such debts and legacies, the testator bequeathed the residue of his personal estate to his wife.

The testator died without leaving issue. The personal estate was deficient, and after application of the rents, etc. of the real estates comprised in the term to supply the deficiency, including interest upon the legacies, there would be a surplus of rents amounting to £3400, to which the widow as tenant for life under the will would have been intitled.

Held (affirming the decree) that the interest upon the legacies was payable out of the real estate, during the life of the wife.

[3]CharlesHenryBaronCastlecoote, by his will, bearing date the 14th of September, 1822, devised to the Honourable William Le Poer Trench, the Plaintiff in this cause, and to Hulton Smith King, since deceased, and to John Sealy Townsend, Esq., one of the Defendants in this cause, and the survivors and survivor of them, all his government stock and stock in the government English and Irish funds, which he was then possessed of or entitled to, and all sum and sums of money, stock, long annuities, or other personal or funded property to which he was or should be entitled in possession or reversion under the will of his late uncle, Oliver Tilson, with all interest and dividends due and to grow due thereon respectively, in trust that they should stand and be possessed thereof, and should take and receive the interest, dividends and annual produce of said stock and securities from and after his decease, and pay the same to his son, Eyre Tilson Coote, in the said will called Eyre Coote, or permit and suffer or duly authorize and empower him to take and receive the same yearly and every year as the said interest and dividends or proceeds should accrue during his natural life, to and for his own use and benefit; and from and after the decease of his said son, in case his said son's then present wife, Barbara Coote, should survive him, in trust out of the said interest, dividends and annual produce of the said stock and securities, yearly and every year during the natural life of the said Barbara Coote, to pay to the said Barbara Coote one annuity or annual sum of £400 sterling, over and above all deductions during her life:

[4] And after various bequests and devises of personal property and lands, and of certain specific and pecuniary legacies in his will particularly mentioned, the testator directed that all his debts, legacies, funeral, and administration expenses should be paid out of his personal estate, not thereby otherwise bequeathed, (of which arrears of rent would form a considerable part), and if the same (subject to the charges and trusts thereinbefore mentioned,) should be insufficient for that purpose, he thereby charged and incumbered all his real and freehold estates with the payment thereof: and subject to the payment thereof, the testator gave, devised, and bequeathed all the rest, residue, and remainder of his estate and effects, real, freehold, and personal, of what nature or kind soever not therein disposed of unto his son, Eyre Tilson Coote, his heirs, executors, administrators, and assigns, to and for his and their own use and benefit. And the testator thereby nominated, constituted, and appointed his brother Sir Eyre Coote, and the testator's agent John Hawkesworth, Esq., executors of his will, and thereby revoked all former wills and codicils by him made, and declared that to be his last will and testament.

On the 22d of February, 1823, Charles Henry Lord Baron Castlecoote died, without altering or revoking his will, leaving Eyre Tilson Coote, his only child him surviving, who thereupon entered into the receipt of the different properties in the will mentioned.

William Le Poer Trench and Hulton Smith King, two of the trustees named in the will, filed their original bill in the Court of Chancery in Ireland, on the 26th of January, 1825, against Eyre [5] Tilson Lord Baron Castlecoote, the son of Charles Henry Lord Castlecoote, and several others, to carry the trusts of the will into execution, and thereby prayed that the will might be decreed to be well proved, and that the trusts thereof might be carried into execution, by and under the authority and directions of the Court of Chancery; and that for that purpose all necessary accounts might be ordered and directed to be taken, and particularly an ac-

count of the real and freehold estates of Charles Henry Lord Baron Castlecoote, deceased, and of the incumbrances and charges thereon; and also an account of the personal estate of the said Charles Henry; into whose hands the same had come, and how the same had been applied; and an account of his debts, legacies, and funeral expenses, and the expense of taking administration and proving the will; and, if necessary, that an account might also be taken of the personal estate of John Hawkesworth, the executor of the said Charles Henry; into whose hands the same had come, and how the same had been applied; and that the debts and legacies might be directed to be paid out of the said funds, and in such manner as should be fit and proper according to the rules of equity; and that, if necessary, the assets should be marshalled for that purpose; and that such parts of the personal estate as might be necessary for the purposes expressed in the will might be set apart, assigned, transferred, or invested, etc.

Eyre Tilson Lord Baron Castlecoote, and Barbara Castlecoote, his wife, on the 8th of April, 1826, filed their answer to the original bill, and upon the 4th of November, 1826, filed a further answer thereto.

[6] Eyre Tilson Lord Castlecoote died, without issue, on the 24th of February, 1827, leaving Barbara Lady Castlecoote his widow. By his will, bearing date the 23d of October, 1826, he devised unto Francis Gore and George Frederick Brook, their heirs, executors, and administrators, among other properties, the several estates devised to him by his father Charles Henry Lord Castlecoote, together with all his real, freehold, and leasehold estates, messuages, lands, tenements, and hereditaments, whether for lives or years, situate, lying, and being in the counties of Dublin and Kildare, in the Queen's County, in the counties of Kilkenny, Tipperary, Clare, and Limerick, and elsewhere in Ireland; and also the impropriate tithes which formerly belonged to the Earl of Thomond, in the county of Clare;

To the uses, upon the trusts, and for the intents and purposes, and under and subject to the powers, provisoes, conditions, and limitations thereinafter expressed concerning the same; (that is to say,)

To the use of William Furlong, and John Smith Furlong, barrister at law, and the survivor of them, and the executors, administrators, and assigns of such survivor, for and during the term of 500 years, to commence and be computed from the time of his decease;

Upon trust, that they the said William Furlong and John Smith Furlong, and the survivor of them, and the executors and administrators of such survivor, should and might out of the rents and profits of the hereditaments and premises comprised in the said term, or by mortgage, sale, or disposition thereof, for all or any part of the said term, or by any other lawful ways or means they should think fit, [7] levy and raise, during the natural life of his wife, Barbara Lady Castlecoote, in case there should be issue of his said marriage, who should be living at his death, an annuity or clear yearly sum of £2000, clear of all deductions whatsoever, in addition to the provision made for her by the will of his said late father, but in lieu, full satisfaction, and discharge of any dower or thirds which she might claim or be entitled to out of his real or personal estate, and might and should pay the same annuity or yearly sum, as the case might be, unto his said wife or her assigns, for her own proper use and benefit during her natural life, by equal quarterly payments, on every 1st of January, 1st of April, 1st of July, and 1st of October in every year; the first payment thereof to be made on which ever of the said days should next happen after his decease; with powers of distress and entry in case any quarterly payment of the said annuity or yearly sum, or any part thereof, should at any time be in arrear and unpaid, by the space of twenty-one days next after any of the said days appointed for payment thereof.

And upon further trust, that in case there should be one or more child or children of his body by his said wife Barbara Lady Castlecoote, other than and besides an eldest or only son, living at the time of his decease, or born in due time thereafter, they the said William Furlong and John Smith Furlong, and the survivor of them, and the executors and administrators of such survivor, might and should, after his the testator's decease, and after the decease of his said wife Barbara Lady Castlecoote, by demise, mortgage, or sale, or other disposition of all or any of the said messuages, [8] lands, hereditaments, and premises comprised in the said term of 500 years, or any part or parts thereof, for all or any part of the said term, and by and

out of the rents, issues, and profits thereof, or by all or any other ways or means they should think fit and reasonable, levy and raise such sum and sums of money, for the portion and portions of all and every such younger child and children, be the same a daughter or daughters, younger son or sons, as are thereinafter mentioned; that is to say, if there should happen to be but one such child besides an eldest or only son then the sum of £10,000 for the portion of such younger child, to be paid and payable at such time and in such manner as his said wife Barbara Lady Castlecoote, in case she should survive him, by any deed or instrument in writing, to be sealed and delivered by her in the presence of two or more credible witnesses, or by her last will and testament in writing, to be by her signed and published, in the presence of three or more credible witnesses, should direct or appoint; and in default of such direction and appointment to be paid to such younger child, being a son, at his age of twenty-one years; or being a daughter, at her age of twenty-one years, or day of marriage, which should first happen: And if there should be two or more such children, other than and besides an eldest or only son, then the sum of £20,000 for their portions, to be shared and divided between them in such parts and proportions, and to vest in and be paid to such children respectively, at or upon such ages, days, or times, and to be subject to such charges, conditions, and limitations, (such charges and limitations being for the benefit of some or one of them,) and in such manner as [9] his said wife Barbara Lady Castlecoote in case she should survive him, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, to be signed and published by her in the presence of and attested by three or more credible witnesses, should direct and appoint; and in default of such direction and appointment, to be equally divided between or amongst such younger child or children share and share alike.

And the said testator, by his said will, directed that the share or shares of such of the said children as should be a younger son or sons, should be paid to him or them at his or their age or respective ages of twenty-one years; and the share or shares of such of them as should be a daughter or daughters, to be paid to her or them, at her or their respective ages of twenty-one years, or day or days of marriage, in case the same should happen after the decease of his said wife; but in case any of such younger children, being a son or sons, should attain the age of twenty-one years, or being a daughter or daughters, should attain her or their age or respective ages of twenty-one years, or be married as aforesaid in the lifetime of his said wife, then the share or shares of such younger child or children should be a vested interest or vested interests in him, her or them respectively; but the payment of their share or shares should be postponed until after the decease of his said wife, unless she should signify her consent, that the same should be raised and paid in her lifetime: And upon further trust, that they the said William Furlong and John Smith Furlong, and the survivor of them, his exe-[10]-cutors and administrators, might and should, out of the rents, issues and profits of the premises comprised in the said term of 500 years, levy and raise such yearly sum as would be equivalent to the interest of the said sum of £10,000, or of the said sum of £20,000, as the case might be, at and after the rate of £5 for every £100 by the year; and also might and should pay and apply such sum for the maintenance and education of such child or children, until such child or children should become entitled to his or their portion as aforesaid.

Provided always, and he thereby declared, that in case of the death of any such children (if there should happen to be more than one) before his or her respective portions should become payable as aforesaid, then and in such case, and in default of, and subject to such appointment by his said wife as aforesaid, the portion or share of the child or children so dying, should accrue and belong to the survivor or survivors, and other or others of such children, and should vest in and be paid to her or them, if more than one, in equal parts or shares, at the same time and in like manner as their original portion or portions.

And upon the further trust, that in case his personal estate should be found insufficient for the payment of his debts, and the several legacies and charitable bequests which should, under the provisions of his said will, take effect and become payable: then the said William Furlong and John Smith Furlong, and the survivor of them, and the executors and administrators of such survivor, might and should,

after his decease, and after the decease of his said wife, by demise, sale or mortgage, or other disposition of all or any of the messuages, [11] hereditaments and premises comprised in the said term of five hundred years, or a competent part thereof, for all or any part of the said term, or by and out of the rents, issues and profits thereof, or by all or any other ways or means they should think fit and reasonable, levy and raise such sum and sums of money as should be sufficient to discharge the said bequests or legacies, or such of them respectively as should take effect and become payable under his said will, and for discharge whereof his personal estate should be found insufficient as aforesaid:

And the said testator declared it as his will, that when and if the said trustees or trustee for the time being of the said term, should proceed to raise or levy the several sums of money for the purposes and pursuant to the trusts aforesaid, by sale or mortgage of the premises therein comprised, the trustees or trustee of the inheritance should if required by the trustees or trustee of the said term, convey either absolutely or in mortgage, the fee of the premises to be then sold or mortgaged; and all and every the messuages, lands and hereditaments so sold or mortgaged should be and remain thenceforth and for ever (subject only to the proviso or condition of redemption in any such mortgage or mortgages contained) freed and discharged of and from all and every the uses, trusts, limitations, charges, powers and provisoes thereby limited, declared or expressed of or concerning the same, and then and from thenceforth the direction, limitation or appointment thereby made, should be and enure, as to so much of the premises as should be so sold or mortgaged, to the only proper use and behoof of the purchaser or purchasers, mortgagee or mort-[12]-gagees thereof, and their heirs, executors or administrators.

And the said testator by his said will declared, that when the trusts of the said term of five hundred years should be respectively executed and performed or satisfied, or should have become unnecessary or incapable of taking effect, and the expenses of the said trustees or trustee, his executors or administrators, in and about the execution of the said respective trusts, should have been fully paid and satisfied, then and immediately thenceforth the said term of five hundred years of and in the premises therein comprised for the purposes aforesaid should cease, determine and be utterly void, to all intents and purposes, any thing therein contained to the contrary in anywise notwithstanding; but without prejudice to any sale, mortgage or other disposition which should be made, if any should be made, of the premises comprised in the said trust term, in pursuance of the respective trusts aforesaid.

And from and after the expiration or other sooner determination of the said term, and in the mean time subject thereto, and to the trusts thereof respectively, to the use of his first and other sons successively of his body, on the body of his said wife Barbara Lady Castlecoote, begotten or to be begotten, in tail male, with remainder to the use of all and every the daughter or daughters of his body, on the body of his said wife Barbara Lady Castlecoote, begotten or to be begotten, equally to be divided between or amongst them, if more than one, share and share alike, to take as tenants in common, and not as joint tenants in tail general, with cross remainders between them in tail general; [13] and for default of such issue of his body by his said wife, Lady Castlecoote, sons or daughters, who should be living at the time of his decease, the said lands and premises are limited to the use of his said wife Barbara Lady Castlecoote and her assigns, for and during the term of her natural life, without impeachment of or for any manner of waste, in lieu, full discharge and satisfaction of any dower, jointure or other provision theretofore made or provided for, or settled upon her by the testator's late father, or by his the said Eyre Tilson Lord Castlecoote's will, or in any other manner; and from and after the determination of that estate, to the use of his kinsman Eyre Coote, of Westpark, in Hampshire, esquire, for life, without impeachment of or for any manner of waste; with remainder to trustees to preserve contingent remainders; and from and immediately after the decease of the said Eyre Coote, to the use of the first and other sons of the said Eyre Coote successively in tail male; and for default of such issue, to the use of all and every the daughter and daughters of the said Eyre Coote, equally to be divided between or among them, if more than one, share and share alike, to take as tenants in common, and not as joint tenants, in tail general, with cross remainders between them in tail general; and for default of such issue of the body of the said Eyre Coote, to the use of the testator's own right heirs.

And the testator, by his will, gave and bequeathed to his sister-in-law Maria Meredyth the sum of £4000, to be paid one year after his decease, with interest at the rate of £5 for every £100, by the year until paid; to be paid and payable to trustees, if she should be then married, to and for **[14]** her own sole and separate use, free from the debts, control and intermeddling of her husband.

And the testator, by his will, gave and bequeathed to his executors thereinafter named, the sum of £3000, upon trust to lay out and invest the same in the purchase of parliamentary stocks or funds, in the names of his executors, and to alter and vary the same as and when they should think proper, in trust to pay the yearly interest, dividends and other proceeds of the funds and securities upon which the monies should be invested, to his sister-in-law Frances O'Reilly, otherwise Meredyth, the wife of Philip O'Reilly, esq., during her natural life, to and for her own sole and separate use, upon her own receipt, and free from the debts, control or intermeddling of her said husband; and upon and after the decease of said Frances O'Reilly, in trust by sale or transfer of said stocks, funds and securities, or by any other ways or means as might be necessary, to raise and pay the said sum of £3000 to and amongst the children of the said Frances O'Reilly, in such shares and proportions, and at such time or times, as she should by deed, or by her last will and testament, attested by two or more credible witnesses, direct and appoint; and for want, and in default of such appointment, then in trust to pay and apply the same to and amongst such children, if more than one, equally share and share alike, and if but one, then the whole to such one child.

And in case it should happen that there should be no issue of his body by his wife, Barbara Lady Castlecoote, begotten or to be begotten, living at the time of his decease, or born in due time afterwards, then and in that case he gave and be-**[15]**-queathed unto his executors, thereinafter named, the sum of £2000, upon trust to lay out and invest the same in the purchase of parliamentary stocks or funds, or upon other real and sufficient security, in the name of his executors, and to alter and vary the same as and when they should think proper, in trust to pay the yearly dividends and other proceeds thereof to his kinsman, Major-General James Bathurst, son of the Lord Bishop of Norwich, and his assigns, during his natural life; and from and after his decease, in trust by sale or transfer of such stocks, funds or securities, or by such other ways or means as might be necessary, to raise and pay the said sum of £2000 for and amongst the children of the said James Bathurst, in such shares and proportions, and at such time or times, as he should by deed or writing, or by his last will and testament, attested by two or more credible witnesses, direct and appoint; and for want or in default of such appointment, then in trust to pay and apply the same to and amongst such children, if more than one, equally share and share alike, and if but one, then the whole to such one child.

And in case there should be no such issue of testator's body as aforesaid, he gave and bequeathed unto his executors the sum of £2000, upon trust in like manner to lay out and invest the same in the purchase of such stocks or funds, or such other real and sufficient security as aforesaid, and to alter and vary the same as they should think proper, in trust to pay the yearly interest, dividends and other proceeds thereof to his kinsman, Henry Bathurst, and his assigns, during his natural life; and from and after his decease, in trust by sale or mortgage of such stocks, funds, securities, or by **[16]** such other ways and means as might be necessary, to raise the sum of £2000, and pay the same to and amongst the children of the said Henry Bathurst, in such shares and proportions, manner and form as he should by deed in writing under his hand and seal, or by his last will and testament, respectively attested by two or more credible witnesses, direct or appoint; and for want or in default of such appointment, then in trust to pay and apply the same to and amongst such children, if more than one, equally share and share alike; and if but one, then the whole to such one child.

And if there should be no such issue of testator's body as aforesaid, he gave and bequeathed to his executors the sum of £2000, upon trust in like manner to lay out and invest the same in the purchase of such stocks or funds, or upon such other real and sufficient security as aforesaid, and to alter and vary the same as they should think proper, in trust to pay the interest, dividends and proceeds thereof, to his kinsman, Robert Bathurst, and his assigns, during his natural life; and after his decease, in trust by sale or transfer of such stocks, funds or securities, or by such

other ways and means as might be necessary, to raise the sum of £2000, and pay same to and amongst the children of the said Robert Bathurst, in such shares and proportions, manner and form as he should by deed or writing under his hand and seal, or by his last will and testament, to be respectively attested by two or more credible witnesses, direct or appoint; and for want or in default of such appointment, then in trust to pay and apply the same to and amongst such children, if more than one, equally [17] share and share alike; and if but one, then the whole to such one child.

And also, if there should happen to be no such issue of his body as aforesaid, the testator gave and bequeathed to his cousin german, Mrs. Henrietta Mahon, otherwise Bathurst, the sum of £1000 for her sole and separate use, free from the debts, control or intermeddling of her husband.

And also, in case of no such issue of testator's body as aforesaid, testator gave and bequeathed to his cousin, Caroline De Crespigny, otherwise Bathurst, wife of ——— De Crespigny, esq., son of the late Sir Edward De Crespigny, bart., the sum of £1000 for her sole and separate use, free from the debts, control or intermeddling of her said husband; to his cousin, Tryphinia Bathurst, the sum of £1000, with interest at £6 per cent. by the year until paid; to his kinsman, Arthur Magan, the sum of £1000; then followed divers other pecuniary legacies of different amounts to various kinsmen and others.

And the testator by his will declared that the legacies to his sisters-in-law, Maria Meredyth and Frances O'Reilly; and also the legacies to the said Francis Gore, George Frederick Brooke and Richard Steele Hawkesworth, should in any event, be raised and paid, without prejudice however to the charitable bequest thereinafter mentioned: but that the several other legacies thereby bequeathed in manner aforesaid, should not take effect or be paid or payable unless there should be no such issue of testator's body by his said wife living at the time of his decease or born afterwards as aforesaid; and he also directed that all the legacies thereby bequeathed should, from the time when [18] they respectively became payable, bear interest at the rate of £5 per centum per annum, and be raised and paid accordingly.

And he gave and bequeathed the sum of £2000, to the Rev. Dr. Murray, Roman Catholic Bishop of Dublin, or, in case of his decease, to his successors to said bishoprick, for the use and benefit of the schools for the education of the poor of the united parishes of Sandyford Glancullen and the adjacent parishes in the county of Dublin. And he gave and bequeathed to his said wife, Barbara Castlecoote, the sum of £2000, which he directed to be paid to her in any event, and in preference to all the legacies thereby bequeathed, except the aforesaid charitable bequest: the said legacy to his wife to be paid to her with interest from his decease at the rate of £5 per centum per annum. And he also gave and bequeathed to his said wife Lady Castlecoote, all his jewels, plate, china, linen, furniture, books, carriages, horses, carts, farming utensils, and her own wearing apparel and ornaments of her person.

And the testator thereby directed that his funeral and administration expenses and charitable bequests be paid out of the produce of his personal estate; and after payment thereof, then he directed the residue of his personal estate to be applied in payment of his debts, and the several other legacies which should take effect and become payable under his said will. And in case his personal estate should be insufficient for that purpose, he charged the estates, lands and premises comprised in the said term of five hundred years, with the payment of his debts and of the legacies thereinbefore bequeathed, except and to the exclusion of the [19] charitable bequests, which were to be paid out of his personal estate; and he directed the trustees of the term of five hundred years to raise the same pursuant to the trusts vested in them for that purpose; and subject to the payment of such debts and legacies, the testator gave and bequeathed all the rest, residue, and remainder of his personal estate and effects to his wife, Barbara Lady Castlecoote, for her own use and benefit.

The testator thereby nominated, constituted, and appointed John Hawkesworth, and Richard Steele Hawkesworth, executors of his will.

On the 17th of March, 1827, a bill of revivor and amendment was filed by the Plaintiff William Le Poer Trench, setting forth amongst other things, that Hulton Smith King departed this life, leaving the Plaintiff and John Sealy Townsend, his

co-trustees in the will of Charles Henry Lord Castlecoote named, him surviving; and also setting forth that Eyre Tilson Lord Castlecoote shortly after the filing of his further answer, and before any further proceedings were had in the cause, that is to say, on or about the 24th of February, 1827, departed this life, leaving Barbara Lady Castlecoote, his widow, him surviving, without having had any issue; and stating that by the decease of Eyre Tilson Lord Castlecoote, who was the heir-at-law and personal representative of his father Charles Henry Lord Castlecoote, the suit so instituted by the Plaintiff and Hulton Smith King became abated; and the Plaintiff by his bill also set forth the will of Eyre Tilson Lord Castlecoote.

The bill of revivor and amendment, prayed, that the said suit and all proceedings therein had, which [20] became abated by the decease of Eyre Tilson Lord Baron Castlecoote, might stand revived against Eyre Coote, as the heir-at-law, and John Hawkesworth, junior, and Richard Steele Hawkesworth, as the personal representatives of Charles Henry Lord Castlecoote, and Eyre Tilson Lord Castlecoote, respectively, and be in the same plight and condition as the same were in at the time of the abatement thereof in the manner aforesaid; or that Eyre Coote, and John Hawkesworth, junior, and Richard Steele Hawkesworth, might shew good cause to the contrary, and that the Plaintiff might have the benefit of the said suit, and the proceedings thereon had in such manner as the Court might think proper; and that Plaintiff might have all and singular the relief prayed by the original bill; and that the rights of all parties interested in the execution of the trusts of the will of Charles Henry Lord Castlecoote, might be ascertained by the decree of the Court; and that in the event of the personal estate of Charles Henry Lord Castlecoote, applicable under the provisions of his will, to the payment of his debts and legacies, being found insufficient for that purpose, and in case it should so become necessary for the purposes of carrying the trusts of his will into execution, that a sale of the real and freehold estates, or a competent part thereof, might be directed for the payment of such debts and legacies, as the personal estate should be found insufficient to discharge; and that in that event an account of the prior incumbrances upon the real and freehold estates, and all the necessary accounts might be directed; and, if necessary, that a receiver might be appointed over the real and [21] freehold estates, to collect the rents, issues, and profits thereof, and to apply the same as the Court should think fit; and that Eyre Tilson Lord Baron Castlecoote might be declared to have made his election to take under the will of his father Charles Henry Lord Castlecoote, and that the several persons deriving under Eyre Tilson Lord Castlecoote might be decreed to give effect to all the provisions in the will of Charles Henry Lord Castlecoote contained, so far as they are compellable so to do, and so far as might be necessary for the carrying the trusts of the will of Charles Henry Lord Baron Castlecoote into execution; and that they might be decreed to do all acts necessary for that purpose; and in the event of its being found expedient with a view to the due execution of the trusts of the will of Charles Henry Lord Castlecoote, that the trusts of the will of Eyre Tilson Lord Castlecoote should likewise be carried into execution under the directions of the Court; and that for that purpose an account of the real and freehold estates of Eyre Tilson Lord Castlecoote, and of the debts, legacies, funeral and testamentary expenses, and all other necessary accounts might be directed; and that the rights of all parties under the will of Eyre Tilson Lord Castlecoote might be ascertained; and that the estate and effects, real and personal, of Eyre Tilson Lord Castlecoote might be ascertained; and that the estate and effects, real and personal, of Eyre Tilson Lord Castlecoote might be applied and disposed of pursuant to the directions of his said will, in the discharge of his debts, legacies, funeral and testamentary expenses and otherwise as the Court should think proper; and that the said Plaintiff's [22] bill might be deemed and taken as an original bill against such of the said Defendants as are not parties to the said original bill; and that the same might be taken as an amended bill, or such other bill as the Court should think fit, against such of the said Defendants as were parties to the said original bill.

On the 25th of April, 1828, Barbara Baroness Castlecoote filed her answer to the bill, and amongst other things alleged that she was ready and willing, that the will of Eyre Tilson Lord Castlecoote should be carried into execution, and that an account might be taken of the real freehold and personal property of Eyre Tilson Lord Castlecoote, of his debts, legacies, funeral and testamentary expenses, and that the

properties of Eyre Tilson Lord Castlecoote might be disposed of pursuant to the directions of his will, and that the rights of all parties might be ascertained and adjusted.

In the month of June, 1828, Barbara Baroness Castlecoote intermarried with the Defendant the Right Honourable Joseph Leeson Earl of Milltown, upon which, articles of agreement bearing date the 28th of June, 1828, were entered into and made between Joseph Leeson Earl of Milltown, of the first part; the Defendant the Countess of Milltown, by her then title of Barbara Baroness Castlecoote of the second part; and John Francis Darcy, Esq. and the Right Honourable Baron Cloncurry, of the third part; and which were duly executed.

On the 21st of November, 1828, William Le Poer Trench amended the bill of revivor and amendment, and made John Francis Darcy and [23] Baron Cloncurry parties thereto; and, the cause being at issue, and witnesses having been examined on behalf of Plaintiff, and no witnesses having been examined on behalf of the Defendants, the cause came on to be heard before the Lord High Chancellor of Ireland, on the 1st of August, 1829, when his Lordship was pleased to order, adjudge and decree that the last will and testament of Charles Henry Lord Baron Castlecoote, deceased, in the pleadings mentioned, should be and the same was thereby declared well proved, and that the trusts thereof should be carried into execution; and, accordingly, that it be and it was thereby referred to William Henn, Esq., the Master in the said cause, to take an account of the real and freehold estates and chattels real of the said Charles Henry Baron Castlecoote, and of the rents, issues and profits since his decease, and by whom received, and how disposed of, and of all incumbrances thereon at the time of his decease; and also to take an account of the personal estate of the said Charles Henry Baron Castlecoote (distinguishing the trust funds bequeathed to the Plaintiff and his co-trustees, by the will of the said Charles Henry Lord Baron Castlecoote, from the residue of the said personal estate) into whose hands the same came respectively, and how applied and disposed of; and also to take an account of the debts, legacies, funeral and testamentary expenses of the said Charles Henry Baron Castlecoote, and whether any and which of them had been paid and by whom, and out of what funds, and whether any and which of them still remained outstanding; and to take an account of the real and freehold estates and chattels real of Eyre Tilson [24] Lord Baron Castlecoote, in the pleadings also named, and of the rents, issues and profits thereof since his decease, into whose hands the same came, and how applied and disposed of; and also an account of the personal estate of the said Eyre Tilson Lord Baron Castlecoote, by whom received and how disposed of; and also an account of the debts, legacies, funeral and testamentary expenses of the said Eyre Tilson Lord Castlecoote, and of all incumbrances affecting the real and freehold estates at the time of his decease; and also to enquire and report whether the said Eyre Tilson Lord Castlecoote did in his lifetime make his election to take under the said will of his father the said Charles Henry Lord Castlecoote.

Pursuant to the decree, the Master made his report, bearing date the 11th of June, 1833, whereby he reported the amount of the real and personal estate, and the debts, legacies, and funeral expenses of Charles Henry Lord Castlecoote and Eyre Tilson Lord Castlecoote.

The cause came on to be heard upon the report on the 20th of June, 1833, when the Lord Chancellor decreed, that it be referred to William Henn, Esquire, one of the Masters of the Court, to report the value of the life interest of the Defendant, Eyre Coote, in the trust funds, devised and bequeathed by Charles Henry Lord Baron Castlecoote and Eyre Tilson Lord Baron Castlecoote, applicable to the payment of their debts, legacies, funeral and testamentary expenses respectively, and to report the priorities of the several demands comprised in the report, bearing date the 11th of June, 1833.

[25] On the 31st of May, 1834, the Master made his report.

Shortly after the report had been made, and before the same was confirmed, the Defendant Eyre Coote, the heir-at-law of Eyre Tilson Baron Castlecoote, died, and thereupon a bill of revivor and supplement was filed on the 28th of October, 1834, wherein the Honourable William Le Poer Trench was Plaintiff, and Eyre Coote, a minor, (the son of the said Eyre Coote, deceased,) and Elizabeth Rosetta Massey

Coote, John Kielly, and the Rev. William Johnston Yonge, executors of Eyre Coote deceased, were Defendants, by which it was prayed that Eyre Coote, as remainderman in tail, and Elizabeth Rosetta Massey Coote and William Johnston Yonge, as personal representatives of Eyre Coote, might shew cause why the Plaintiff was not entitled to the benefit of the said suit, and the proceedings had thereon as against them respectively; and that the Plaintiff might have the benefit thereof, and might have the same relief against the said Eyre Coote, Elizabeth Rosetta Massey Coote, John Kielly and William Johnston Yonge, as upon the original bill, and the said amended bill and bill of revivor, he was entitled to against the Defendants thereto respectively; and that the said decree or decretal orders, bearing date the 1st of August, 1829, and the 20th of June, 1833, might be performed and carried into execution against the said Eyre Coote, Elizabeth Rosetta Massey Coote, John Kielly and William Johnston Yonge; and in addition to the aforesaid relief, in case his Lordship should seem fit so to do, that it might be referred to William Henn, esquire, the Master in the said cause, to inquire and report whether it would be [26] for the benefit of the said Eyre Coote (he being an infant), that the accounts and other proceedings taken in this cause, in the interval between his coming *in esse* and the present time, should stand and be decreed binding on him, and, if so, that he might be declared accordingly bound thereby, or whether it would be more for his benefit that such accounts, and other proceedings, should be taken over again as against him.

The original and supplemental causes having been set down for hearing, the same came on to be heard on the 13th of February, 1835, when the Lord Chancellor decreed, that it be referred to the Master to inquire and report if it would be for the benefit of the minor, Eyre Coote, that the proceedings had and taken in the original cause since the said minor came *in esse*, or any and which of them should be adopted on his behalf, or whether it would be necessary for his benefit that the several accounts and other proceedings, or any and which of them should be had and taken as against him; and that the Master should specially state the circumstances upon which he should decide.

Upon the 6th of May, 1835, the Master made his report, and found that the said accounts so taken should be adopted; and that it would not be for the benefit of the said minor that the accounts should be taken over again.

Thereupon the cause came on to be heard on the 16th and 17th of June, 1835, before the Lord Chancellor, who decreed, that the Plaintiff should be entitled to the benefit of the former proceedings and decrees against the Defendant Eyre Coote (the minor), and that the said Defendant was bound thereby. And his Lordship further de-[27]-clared that Eyre Tilson Lord Castlecoote, in his lifetime, made his election to take under the will of his father Charles Henry Lord Castlecoote, the estates thereby devised to him, and that he was bound to give effect to the provisions of the said will. (Then various directions were made pursuant to this declaration and decree.)

And it was referred to the Master to inquire and report whether there were any and what charges and incumbrances then subsisting, which at the time of the decease of the said Eyre Tilson Lord Castlecoote affected the several chattels real by the said report found to have belonged to the said Charles Henry Lord Castlecoote, at the time of his decease, and the sum due thereon respectively for principal, interests, and costs; and that a sale of the chattel interests should be made, and that the proceeds of such sale should be applied in payment of such charges and incumbrances (if any), and that the residue thereof, together with the other funds in the said report mentioned, being the personal estate of the said Eyre Tilson Lord Castlecoote at the time of his decease, was applicable to the payment of his debts and legacies according to the priorities found by the said report, and of the costs of the several parties hereinafter mentioned. And that the said John Smith Furlong, surviving trustee in the will of the said Eyre Tilson Lord Castlecoote, should be entitled to his costs in the suit out of the said funds in the first instance. And in the next place that the said funds should be applied in payment of the debts and legacies of the said Eyre Tilson Lord Castlecoote, together with the costs in the said suit of such of the said creditors and legatees as were De-[28]-fendants therein, according to the priorities found by the said report: and in the event of the said several funds (after payment of the demands and costs of the creditors, and the several legatees of the said Eyre Tilson

Lord Castlecoote, who, by the said report, are found to be entitled to priority in relation to each other,) being insufficient for the payment of the several legatees, whose demands are, by the said report, found to have no priority in relation to each other, together with their costs in this suit, that the costs of the said several last-mentioned legatees in the said suit should be paid thereout, so far as the same should extend. And it was further decreed, that the said several last-mentioned legatees should abate rateably the amount of their demands on foot of their legacies. And his Lordship decreed that the balance which should remain due to them respectively for principal, interest, and costs (after the said several funds should be applied as aforesaid), was well charged on the lands and premises comprised in the term of 500 years, created by the will of the said Eyre Tilson Lord Castlecoote; but that the principal sums which should so remain due, and such portion of the costs aforesaid (if any), as should not have been paid out of the said personal estate, should not be raised or paid until after the decease of the Defendant the Countess of Milltown.

And his Lordship was further pleased to decree, that the said principal sums which should so remain due, and such portion of the said costs (if any) as should not have been paid as aforesaid, be raised by a sale of the said lands and premises, or a competent part thereof, for the residue of the said term of 500 years, upon the decease of the said Defend-[29]-ant the Countess of Milltown, and be paid to the said legatees accordingly.

And his Lordship decreed that in the mean time, and during the life of the said Countess of Milltown, the interest on the said principal sums were well charged on the said lands and premises comprised in the said term of 500 years, and should be paid out of the rents, issues, and profits thereof, during the life of the said Countess of Milltown.

And his Lordship decreed that the Master should proceed forthwith to allocate the personal estates of the said Charles Henry and Eyre Tilson Lords Castlecoote, so far as the same consisted of funds at present available, and so far as such funds should extend among the several persons entitled thereto, according to the rights as thereby declared; and that all parties should be at liberty to apply from time to time as they might be advised.

The appeal was against the decree of the 17th of June, 1835, so far as the same directs that the interest on the unpaid legacies of Eyre Tilson Lord Castlecoote should be paid during the life of the Appellant the Countess of Milltown, out of the rents, issues, and profits of the lands and premises devised by the will to her.

For the Appellants, Mr. Pemberton and Mr. Lynch.

The effect of this will is, that the legacies with respect to which no time of payment is fixed, as far as there is personal estate applicable, would become payable at the end of twelve months from the death of the testator. A suit in which this appeal has been brought was instituted for the [30] administration of the estates of Charles Henry Lord Castlecoote and Eyre Lord Castlecoote, and in the course of those proceedings it has been ascertained that there is a surplus of the estate of Charles Henry Lord Castlecoote, forming a part of the fund of his son Eyre Lord Castlecoote, and that the personal estate of Eyre Lord Castlecoote is sufficient for the payment of all his debts, and also for the payment of certain legacies which, subject to the decree of the Court, entirely in accordance with the intention of the testator, and of which no complaint has been made, are declared to have priority over all others. These were the two first legacies payable at all events,—the charitable legacies, the bequest to Lady Castlecoote, and the legacies to Mr. Gore, Mr. Brooke, and Mr. Hawkesworth. There remains sufficient for payment of the whole of those legacies, but not for the payment of the other legacies; the consequence of which is, that the deficiency of the personal estate for the payment of the other legacies is admitted to be a charge on the real estate. With respect to these legacies they stand thus,—they are charged upon the term of 500 years, subject to such trusts as attach upon that term. Lady Castlecoote, who has intermarried with Lord Milltown, is tenant for life of the lands, etc., subject to that term; it has been so decided in the Court of Ireland; and it is clear, that these legacies are not to be raised until the death of Lady Milltown. On the other hand it has been declared, and it is against that part of the order of the Court below, this appeal is brought; that, during the life of Lady Milltown, interest is to be raised upon those legacies out of the rents, issues, and profits of the premises so

devised, and **[31]** the important question your Lordships are now called upon to decide is this,—not simply whether interest is or is not payable, but whether, if interest be payable upon those legacies, that interest is to be raised out of the reversionary term, or whether it is to be raised during the life of Lady Milltown out of her life estate.

The first question is whether, with respect to that portion of these legacies which is to be raised out of the real estates, any interest is payable at all during the life of Lady Milltown. The rules upon this subject are familiar to your Lordships. Interest is payable for delay of payment and, therefore, it never becomes due until the period of payment arrives, and until that payment is delayed. The case of children and those who take under the will of persons placed in the situation of parents is an exception to the rule. At what period then, in this case, are these legacies payable, so far as applies to the real estates? The decree declaring that both the terms of the will and the intention of the testator have expressed that these legacies shall not be raised until after the death of Lady Milltown. Is there not some inconsistency, if the legacies themselves are not payable until after a given event, in holding that the intention can be to give interest upon those legacies in the mean time? It may be said, in this case, the legacies are payable out of the personal estate: that they are payable therefore, and bearing interest at the expiration of twelve months from the death. This is perfectly true as far as the personal estate is concerned, and if we were dealing with the personal estate there could be no question upon the subject; but it does not follow, that when the real estate is charged **[32]** with the payment of any deficiency of the personal estate therefore the same principles apply to that auxiliary fund.

The rule first established in *The Duke of Chandos* v. *Talbot* (2 P. W. 601), and which has since been adhered to, is that in the case of a legacy payable at twenty-one, charged upon the personal estate, and supposing the personal estate should be insufficient, on the real estate, (the personal estate being sufficient for a part but not for the whole), if the legatee dies before twenty-one; as far as there is personal estate he takes the benefit of the gift, for the legacy does not lapse before the period fixed for the payment; but as far as respects the real estate the legacy fails entirely, and it does not follow because the real estate is the auxiliary fund, that therefore it is subject to the same rules which apply to the primary fund. In this case, therefore, it is not to be contended that interest shall be payable out of the real estate because the legacies, as they respect the personal estate, are payable at the death of the testator. As far as respects the personal estate, they might be payable at his death: there may be, as far as respects the personal estate, a delay of payment, and, upon that ground, interest would be payable upon those sums. But how, as regards the real estate, can this be said to have been subjected to any delay of payment, since, by the express terms of the will, the legacies are not to be raised and not to be paid until after the death of Lady Milltown? even, supposing interest is payable, can it be raised except according to the directions of the testator's will for that purpose? How has he directed that interest to be raised? **[33]** He has charged those legacies, it is true, upon the estates; but how? By directing the trustees to raise the amount of them after the death of Lady Castlecoote. If, on other principles, your Lordships should be of opinion that interest would be payable from the death of Lord Castlecoote, it is not contended that the postponement will defeat the legatees of the payment of this interest. It has been laid down by Lord Hardwicke, and afterwards by Lord Thurlow (but it was supposed erroneously), that if a man gave a legacy out of a reversionary fund, that shewed that no interest was payable in the mean time. But the principle applicable to the case is this,—if the interest is payable at all it is to be raised by the trustees as they are directed to raise it, namely, out of the estate, after the death of Lady Milltown. In this will, where you find that with respect to the interest upon those legacies given to the children, the testator, considering they must not be left without provision, has directed the interest to be raised, during the lifetime of Lady Castlecoote, though he has postponed the payment of the legacy as to her, can there be any doubt of the intention of the testator?

In cases on this point, which have come into controversy in the Courts, the question has been, whether if legacies are chargeable on a reversionary fund you can raise them out of anything but the reversionary fund. But the precise question is,

whether you can infer, from the circumstance of their being charged on the reversionary fund, that they were to take effect before the reversionary fund came into possession. The great case is [34] *Codrington* v. *Lord Foley* (6 Vesey, p. 376), in which Lord Eldon refers to the rule as laid down by Lord Cowper, thus, "That though a term is limited in remainder, to commence after the death of the father, yet if the trust is to raise a portion, payable at the age of eighteen or day of marriage, without question the daughter shall not wait the death of her father, but, at the age of eighteen or marriage, may compel a sale of the term. So it is if the trust of a term for raising daughters' portions be limited to take effect in case the father dies without issue male by his wife, and the wife die without issue male, leaving a daughter, in such case the term is saleable in the life of the father." Then as to the supposed rule, that the Court has leant strongly against directing the payment of a legacy out of the reversionary interest, because it was prejudicial to the reversioner, and that the judges have held that there must be strong circumstances to induce them to decide that the portion was intended to be raised until the reversion vested in possession, Lord Eldon says, he disapproves of that construction; he holds that the intention must be found to decide that it is to be postponed, and that the Court is to hold an equal mind, as he terms it; that it is not because it is a reversionary fund that the payment is to be postponed, and that the inheritance must suffer the inconvenience.

There are many cases in which, where a legacy has been charged on a reversion, and it is to be paid at once, it is raised out of the reversion: *Davies* v. *Davies* (Daniel's Rep. p. 84), *Freeman* v. *Simpson* (6 Sim. p. 73), and [35] other cases. There is no doubt you may raise a charge out of a reversionary interest as well as out of a present interest.

But it is said, that this is not a reversionary term, and that no doubt was the principal distinction relied upon by the Court below in the decision of this case, that this was not a reversionary fund, but a fund created antecedent to the life estate.

Lord Plunkett: The counsel is very right; I have no note of the bearing, but that was the principal point on which the case was decided.

For the Appellants: Then we must see whether, as far as the trusts of that term are concerned, this was a reversionary or a present term. It may be presumed that this decision would have been different, supposing this testamentary settlement had been drawn in the ordinary form in which conveyances are drawn. If there had been a term for ninety-nine years to secure jointures, and subject to that to raise portions for younger children, and in the case of no children at the death of the testator to a tenant for life, subject to that term of ninety-nine years for trustees to raise those legacies, it would then clearly have been a reversionary fund; and in that case, consistently with the authorities, there could be no doubt the legacies could not be raised before the event. When we are dealing with this term, which is a mere creature of equity, it is not to be considered as if it had been the imaginary case I have put. This term of years was to take effect from the death of the testator, because one of the trusts of that term required it should be prior to all other interests, since the testator contemplated that he might leave a child. The estate would be subject then [36] to what? To the payment of £2000 a year to Lady Castlecoote. It was necessary, therefore, to interpose the term in this settlement prior to the first estate of freehold, and therefore it was of necessity that the term should be divided: the testator might have given it to trustees for ninety-nine years to support the jointure, instead of giving a term of ninety-nine years, with remainder to Lady Castlecoote for life, in the event which happened, with remainder to the trustees for another term to raise those charges. What is it the testator has done? He has declared trusts which, to a certain extent, exhaust the interest in that term, and subject to those trusts, to the extent to which they do not exhaust the interests, that term is to attend the inheritance. To the extent, therefore, in which no trusts are declared of that term, the owner of the freehold is entitled. Now to what extent do the trusts declared of this term exhaust the interest? In the event which has occurred it has become unnecessary to resort to the term during the life of Lady Castlecoote: her interest does not require the production or application of that term; but trusts are declared of that term during the life of Lady Castlecoote. Is there a trust declared during the life of Lady Castlecoote, except the trust for the security of her annuity in an event which never happened—a trust to secure charges for younger children—

a charge which never happened! What is the other trust which attaches to that term? First, to raise those charges which by the will are thrown upon the term, but which by the same will it is declared are not to be raised until her death.

This must be considered in equity as if it were [37] a term of ninety-nine years to raise the jointure, with remainder to Lady Castlecoote for life: although legally the term exists, the right will attach only on the death of Lady Castlecoote; and therefore these legacies cannot be raised either as to principal or interest during her life. On these two grounds this decree ought to be reversed,—first, that inasmuch as this is a payment out of the real estate, and that payment not to be made until after the death of Lady Castlecoote, no interest can be payable to the legatees; secondly, that if any interest is payable to the legatees, that, like the principal, must be raised when the individual will come into possession of the fund, and when the fund on which that interest will be payable shall come to be raised.

Prowse v. *Abingdon*, 1 Atk. 482.; *Crickett* v. *Dolby*, 3 Ves. 10.; *Raven* v. *Waite*, 1 Swan. 553.; *Beckford* v. *Tobin*, 1 Ves. sen. 310.; *Lowndes* v. *Lowndes*, 15 Ves. 301.; *Stanley* v. *Stanley*, 1 Atk. 549.; *Brome* v. *Berkley*, 2 P. W. 484.; *Hall* v. *Carter*, 6 B. P. C. 108. 2 Atk. 355.

For the Respondents, Mr. Knight and Mr. Tinney.

There are two great rules to be applied in construing wills: first, that when the sense is doubtful, or technical words are untechnically applied, the intention of the testator should be sought by the aid of common sense, and according to the most probable meaning; secondly, that all the events contemplated by the will should be considered and weighed in deciding upon the intent, not the single event which has happened out of many which have failed.

[38] In this case it might have happened that children of the testator might have been born and survived him, in which event the wife had £2000 a-year; and although the will directs, that the portions of younger children shall not be raised until after the death of the wife, it would have been plainly contrary to the intent that interest upon them should not be paid out of the estate during the life of the widow.

The words "after the death of the wife" in the clause for raising the legacies, are inserted probably by mistake of the copying clerk, as in *Langston* v. *Langston* (8 Bligh, N. S. 167): by a similar mistake the word "first" (of the sons) was omitted, and that mistake was rectified by comparison with other parts of the will. So here it would be useless to postpone the debts and legacies if they were not to bear interest until after the death of the wife. As in the case of Langston it was not adjudged that the word could be supplied, so here we do not contend that the clause can be expunged; but that the inconsistency or absurdity of the provision is a ground for comparing and considering the whole context and scheme of the will to find the intent of the testator. If there had been issue of the marriage this would have been clear: the wife would then have had a fixed annuity, and no benefit would have accrued to her from postponing the payment of interest or raising the fund, but on the contrary, much prejudice; and the intent of the provision seems to apply equally to the event of his death without issue. It is to be observed, that in the clause directing the trustees to raise the legacies after the [39] death of the wife, the word "interest" does not occur, and in the event of there having been issue, she would have suffered great inconvenience for want of maintenance for her younger children, if this clause were construed to exclude the payment of interest during her life. This is a will not framed according to the ordinary forms of conveyancing. It is usual to exhaust the limitations before the trusts of the term are declared. Here the order is reversed. Suppose there had been issue and a succession of infant tenants in tail, would the payment of interest have been suspended during the whole period? This would have operated as a heavy charge on the reversion and no benefit to the wife.

As to some of the legacies, they are expressly given with interest, and in any event, issue or no issue; and the charge on the real estate for interest upon the legacies cannot be construed to apply to some of them and not to others. No time is limited in the body of the gift for the payment of any of the legacies in particular, and therefore different rules cannot be applied to them.

Again, there is no trust declared as to the debts in the gift of the term; yet the testator afterwards says the trustees are to apply the term equally to raise the debts and legacies so far as the personal estate is deficient, and according to trusts which

he erroneously supposes to be declared. How then is any distinction to be made between debts and legacies? It is admitted, that the debts must bear interest from the death of the testator and during the life of the wife. It is admitted also, that the legacies from that time bear interest, so far as the personal estate is applicable.

[40] By the accounts stated in the Master's Report, it appears that if there had been issue of the marriage, the rents of the estate would have been sufficient to provide interest upon the portions of younger children as well as to pay the annuity of the wife. In that event the immediate payment of interest upon the portions would have been beneficial to the wife. Why should the testator be supposed in the other event contemplated to have had a different intent which he has not expressed?—the words operating as a postponement, as it is argued, applying to the one event as well as to the other. To fix a running interest upon the estate of the reversioner would at least be burdensome; it might be destructive of his estate, if the estate of the tenant for life were of long duration: it is unusual, and will not be imputed to a testator without a clear intention. The wife might outlive many of the legatees, who in that case would have no personal benefit of the gift.

It is argued, that interest is given for delay of payment, which is true as a general proposition, but is hardly applicable to legacies upon which interest is so frequently provided, until the legacy itself becomes payable. The case of *Lyddon* v. *Lyddon* (14 Ves. 558) is an instance and authority.

The rule that a legacy shall not be raised in such a case, so far as real estate is concerned, does not apply to the question of the payment of interest. The legacies as to different funds may vest at different times. The allowance of interest is upon a supposed intent which must be the same as to both funds, and here the term is not reversionary, but in possession. How can a reversionary interest be [41] carved out of the term? Upon a mortgage of the term to raise the sum immediately, the legal estate must be assigned to the mortgagees.

The rules applicable to reversionary terms have nothing to do with this case. In those cases the life estate precedes the term, and cannot be affected by it. That is the effect of *Codrington* v. *Lord Foley* [6 Ves. 376]. This is in no sense a reversionary term; but the trustees have a legal estate in it, and an immediate interest and control over it—the very case put by Sir W. Grant in *Lyddon* v. *Lyddon* [14 Ves. 558].

The Lord Chancellor (13th March, 1837): In this case the point which was the subject of appeal was that part of the decree of the Court of Chancery in Ireland, which directed that the interest which should accrue upon the unpaid legacies of Eyre Tilson Lord Castlecoote, should be paid during the life of the Appellant the Countess of Milltown, out of the rents, issues, and profits of the lands and premises devised by the will, to her, (then Barbara Lady Castlecoote,) during her life.

The will which gave rise to this question is exceedingly inaccurately penned, and therefore occasions great difficulty in coming to a sound and satisfactory construction, as to the part of it which constitutes the subject of this appeal to your Lordships. The outline of the will is that the testator created a term of 500 years in certain trustees, to the use of other trustees upon trust, by sale or mortgage, if there should be issue of the marriage, to raise a sum of £2000 per annum, for his wife Lady Castlecoote, with a power of distress and entry for non-payment; and if there should be any younger children at the [42] testator's death, then the trustees, after the decease of his wife, were by sale or mortgage to raise portions for younger children,—£10,000 if there should be but one younger child, to be paid and payable at such time as Lady Castlecoote should direct, and in default thereof to be paid to such child being a younger son at the age of twenty-one, or being a daughter at the age of twenty-one, or marriage. If there should be more than one younger child, then £20,000 was to be raised, to be paid at such time and ages as the wife should direct; and in default thereof, to the sons at twenty-one and to the daughters at twenty-one, or marriage, if the same should happen after the death of the wife, but not in her lifetime; that the portion should become vested at his death; but payment should be postponed until after her death, unless she should otherwise direct; and upon further trust, out of the rents and profits to raise such sum as would be equal to 5 per cent. on the said sum of £10,000 or £20,000 for the maintenance of the children, until such time as their legacies should become payable.

Then comes this direction which gave rise to the question now pending for your

Lordships' consideration: "And upon further trust, if the personalty should not be sufficient for the payment of his debts and legacies, then the trustees, after the death of his wife, were by sale or mortgage, or out of the rents and profits, to raise sufficient to discharge the said bequests and legacies." Then there came an extraordinary direction, inasmuch as it adverted to a state of circumstances which did not exist; namely, that the trustees of the inheritance, (there being none appointed by the **[43]** will,) were to join with the trustees of the term for the purpose of raising those sums of money; and, subject to the term, and to the charges which might be raised upon the term, the limitations of the will were to the sons in tail, then to the daughters in tail; and if no issue should be living at the death of the testator, then to Lady Castlecoote his wife for life, with remainder over to certain other persons.

He then gave certain legacies, some of which were directed to be paid at all events: some were made to depend upon the fact of his having no children at the time of his death; some of those legacies were directed to be paid with interest to commence from the time of his death; some of the legacies were to be invested for the purpose of securing an income to certain persons then in *esse*, etc. He then makes a provision in these terms: "All the legacies hereby granted shall, from the time they respectively become payable, bear interest at 5 per cent., and be raised and paid accordingly." Then he gives a sum of money to a charity, and he gives £2000 with interest at 5 per cent. to his wife Lady Castlecoote; the residue of his personalty he gives in trust to pay his debts and legacies; and if the same should be insufficient, he charged the estates comprised in the 500 years' term with the payment of his debts and legacies; and directed the trustees of the 500 years' term to raise the same pursuant to the trusts vested in them for that purpose. Then he gave the residue of his personalty to his wife.

The difficulty in the case arises from the direction in that part of the will in which he provides for the payment of debts and legacies, that the **[44]** trustees shall, if the personalty is insufficient, raise the same after the death of his wife.

There are three different states of circumstances, which the testator appears to have contemplated; and in order to arrive as far as it is possible at the true intention which the testator wished to be carried into effect, it may be proper to consider what would be the state of the property according to those various circumstances which might have occurred. He might have left several children, which is one of the events against which he provides; or he might have left one only child who would have succeeded to the estate; or that event might have taken place which it is clear he contemplated, and which did take place, namely, that of his dying without any children.

Taking the first of the various suppositions which the testator clearly had in his contemplation, namely, that of his dying, leaving several children, the effect of the disposition in that case would be, that the term of 500 years would be vested in the trustees. The duty imposed upon them in that case would be in the first place to pay £2000 a year to Lady Castlecoote, then to raise the portions after the death of the wife; for the period of raising the portions is postponed until after her death, in the same way as the raising money to pay debts and legacies is postponed until after the death of the wife. These portions for younger children are made payable at such times as the wife should direct, or to be paid at twenty-one, or marriage; but not to be raised until after her death, unless she should otherwise direct. Then there is a provision for maintenance till twenty-one, or marriage; and there can be no doubt, that **[45]** if there had been younger children, the real estate during the lifetime of the widow must have borne the charge of the maintenance, or interest by way of maintenance, for those younger children. Then, subject to those charges, and subject to the question whether the legacies and debts, or the amount necessary for the payment of debts and legacies, would also bear interest, the son was to be tenant in tail.

Now, if your Lordships could look to the result of the account, which, strictly speaking, I apprehend you cannot look to, we are told there would be found a considerable surplus; but your Lordships have a right to look to that which the testator clearly contemplated on the face of his will, namely, there being a surplus beyond those particular charges, for he makes the son tenant in tail subject to those charges. The son is tenant in tail of the estate, subject to the payment of £2000 a year to his

mother, the widow of the testator, subject to the provision for the maintenance of younger children; and also (if your Lordships should be of opinion, that the legacies and debts bear interest) subject to the amount necessary to be raised for the purpose of meeting that charge of interest. Now, either the legacies bear interest payable from year to year, or if interest be chargeable at all, it would be chargeable on the sum necessary for the payment of the legacies and debts, and would accumulate against the inheritance of the estate; but in the case supposed the inheritance of the estate would be vested in the same person who was to be in possession of the surplus rents and profits, subject to the charges: and your Lordships would hardly impute to the testator the intention that his [46] son was to be in possession of the income arising from the estate; but that the interest on so much as was necessary to pay the debts and legacies should not be payable out of that income which the son was to be in possession of, but should be a charge accumulating during the life of his widow, against the inheritance vested in his son, which would be enlarged by the termination of the life annuity which the testator had given to his wife.

It is very important to look at this state of circumstances, although it never arose in point of fact, because we must see how the testator's supposed intention would operate under different circumstances which he appears to have contemplated under his will. If interest was payable at all (a subject to which I shall presently call your attention), I can hardly suppose a doubt to exist that the interest to arise from year to year upon the sum necessary to pay debts and legacies, would be to be paid out of the income of which the son would have been in possession as tenant in tail, and that it would not be a sum to accumulate against the enlarged inheritance at the period of his mother's death: yet upon the face of this will in this part, there is just as strong a prohibition against the trustees selling any portion of the estate, until after the mother's death; as your Lordships find in that part of the will in which he directs the raising a sum of money for the payment of legacies and debts.

I have now called your Lordships' attention to one state of circumstances which the testator contemplated, and which, from the then state of his family, was likely to happen. Another event is that of there being one son. Then there would [47] be this difference, that the estate would not be charged or chargeable with the portions of younger children. The estate which the son would be in possession of during the lifetime of his mother, would be an estate subject to her jointure of £2000 a year, but not to be diminished by any maintenance payable for the younger children.

There is one other state of circumstances which the testator evidently contemplated, which is that which did happen, namely, the event of his dying without any children. Now in the event of his dying without any children, the direction is that the widow shall be tenant for life in lieu of the son. The widow would be tenant for life, but subject of course to such charges as the testator had imposed upon that term, which in the first place he vested in the trustees. The difference then would be this: —the widow by the testator is put in the place of the son, as far as concerns the beneficial enjoyment: there are no portions payable to younger children; therefore there is no interest payable by way of maintenance for their support. The question is, whether the debts and legacies remain the same in all their qualities and incidents? If interest be payable out of the income of the estate for debts and legacies, upon the supposition of there being children, whether two children or only one, is it to be supposed, that the testator intended that when the interest of the widow was enlarged by the failure of those other objects, who, if they had existed, would have taken that which the testator intended for their benefit, the provision, which in the former case was made for the legatees and creditors, should be taken away? [48] This seems improbable. If, therefore, your Lordships are of opinion, that supposing there had been a son a tenant in tail, that son in possession of the tenancy in tail, subject to the jointure to the widow, would out of the surplus rents be bound to pay the interest becoming due upon the amount of the legacies and debts, it appears to me to follow, as an inevitable consequence, that your Lordships cannot impute to the testator the extravagant intention of taking away from the legatees, when the objects of the precedent trusts have failed, that which he intended they should have if there had been children, and younger children who would then have claimed against the estate.

Upon these various views of the testator's intentions, although the words which postpone the raising of the legacies are to be found on the face of the will, which certainly create extreme difficulty, it appears to me that the decree of the Court of Ireland has given the construction which best effects the intention of the testator. If interest is payable upon the amount necessary to pay the debts and legacies, in the other events contemplated, it is surely payable in the event which has taken place, namely, that of there being no children ; and it appears sufficiently clear that it must have been payable out of the surplus rents if there had been any children, for the widow had only a jointure of £2000 a year, the estate tail being vested in the son.

But it is argued, that no interest is to be paid upon these legacies, upon the ground that the period for raising the sum of money for the purpose of paying these legacies and debts being, by the terms **[49]** of the will, directed to be postponed till after the death of the widow.

The ground on which this argument is raised is, that interest is only payable on account of delay in paying that which is due and payable ; and that, inasmuch as there is no personal fund out of which those legacies and debts can be paid, at least no fund adequate to the payment, the period at which they will become payable will, in point of fact, not arise till after the death of the widow ; and that consequently, there being no delay beyond the proper period, no interest is payable upon the amount of the legacies and the debts.

That argument would apply, and would have great force and weight, if there had been no gift of a legacy independent of the direction to raise it out of the estate after the death of the widow ; but there are substantive and distinct and independent gifts of legacies. The testator has given legacies, in the first place, without reference to the fund out of which they are to be paid ; he has given legacies, some of which are in terms directed to bear interest from the day of his death,—others are directed to bear interest from the end of a year. Now all legacies, unless there is a direction to the contrary expressed in the will, are entitled to bear interest from the expiration of one year after the testator's death. All the legatees, therefore, under this will, where no specific time of payment is mentioned, are entitled, under the will, to receive a certain sum of money payable at the expiration of one year after the testator's death. It is part of the legacy. It is part of the bounty which he has given, that interest is to be calculated **[50]** for the benefit of the legatees from the time when the legacies are payable. The legacies were payable by law, from the period of a year after the testator's death ; and interest upon these legacies would constitute as much a part of the legacies as the principal money intended by the testator to constitute the legacy itself.

If that were not so, your Lordships must be aware that, in various cases which have occurred, in which legacies have been raised by the sale of a reversionary term, they never could have interest calculated upon them at all. Now, it is admitted at the bar, and it is clear upon the authorities, that interest is calculated although the term on which they are secured is a reversionary term. And in the case of *Codrington* v. *Foley* (6 Ves. 376), cited at the bar, Lord Thurlow laid down, that it is no objection to interest being calculated upon legacies that the term is reversionary ; that we are always to look at the intention of the testator appearing upon the face of the will : and if it thereby appears that interest is to be calculated upon the legacies, it is no answer to such a construction of the will, that the term, out of which legacies are to be raised, is a reversionary term. But the case of *Lyddon* v. *Lyddon* (14 Ves. 558), which was also cited at your Lordships' bar, appears to me quite conclusive upon the subject, and is directly applicable to the present case. There the legacy was in words directed not to be raised until after the expiration of the life estate. But there was a term out of which the legacy was to be raised. That term, put into the hands of trustees for the purpose of raising the sum necessary to pay the legacies, was not a reversionary term, and Sir William Grant made some observations **[51]** as to what might have been the effect if the term had been reversionary. The case of *Codrington* v. *Lord Foley* (6 Ves. 376) decides that such a circumstance of itself is not decisive against the legacy being chargeable with interest. But in *Lyddon* v. *Lyddon*, the term being vested in the hands of trustees, although there was a direction not to raise the sum necessary for paying the legacy till after

the death of the tenant for life. Sir William Grant decided that interest on the legacies was to be calculated from the end of one year after the testator's death.

Freeman v. *Simpson* (6 Sim. 73) follows the doctrine laid down in *Lyddon* v. *Lyddon* (14 Ves. 558). In the former case, a legacy was directed to be paid out of the real and personal estate; the personalty being insufficient for that purpose, the Vice Chancellor decided that the legacy was to bear interest, although the fund appropriated for the payment, that is, the real estate, was a fund which could not be applied to the payment of the legacy.

Looking, therefore, at the various events which the testator contemplated—looking at the absurdity of holding that the interest is to be raised, and is to accumulate against the inheritance when the remainder-man should be in possession of the estate—and considering the authorities which have been cited upon this subject, though it is not perhaps possible to make every part of this will reconcileable with other parts, so as to do no violence to any other part of it, I think your Lordships will concur with me in the opinion which I have very distinctly formed, that you will be carrying the intention more certainly into effect by affirming the decree of the Court of Chancery below than you **[52]** possibly can do by any variation from that decree; and I therefore move your Lordships that the decree of the Court of Chancery be affirmed.

Lord Brougham: I entirely agree in the view taken of this case by my noble and learned friend. In common with the other noble and learned Lords who heard this cause, I entertained very considerable doubt during one part of the argument, arising from that very remarkable provision, from which, indeed, the whole difficulty arises, that the legacies shall be paid "after the decease of his wife." But, upon further consideration of this case, undoubtedly we felt that that difficulty could be removed, and that, upon the whole, the sound construction of this will, which is so inartificially penned, is that which has been put by the decision of the Court below, and therefore that this judgment ought to be affirmed. At the same time, I take for granted that this is not a case in which your Lordships would at all be disposed to give the costs of the appeal. There is no doubt there is quite difficulty enough to make the step that was taken of appealing justifiable.

Lord Wynford: I agree with both of my noble and learned friends, that the decision of the Court below is a proper one; and it would be a melancholy thing if it was not an accurate decision. If the interest is payable now, but not to be raised till after the death of Lady Castlecoote, who, I believe, is still a young person, the consequence of reversing this judgment would be that this estate, which it was the intention of the testator should be possessed by Mr. Coote for the purpose of supporting him in his dignity, would, in fact, be worth nothing. It would be eaten out by the legacies. **[53]** On the other hand, if the interest was not payable the legacies would be worth nothing, for probably the legatees would not come into the possession of the legacies for fifty or sixty years. It is, therefore, desirable to come to the construction that the interest is payable now, there being a fund out of which it can be paid, namely, out of the rents of the estate; but that the principal sum for the satisfaction of the legacies is not to be raised.

All the cases which have been decided certainly have been to this effect: that where a legacy is given to be paid at a distant period, interest is generally given payable upon that legacy in the mean time. But that is not the case in the present instance, because these legacies are payable in the first instance out of the personal property. Probably the testator might have considered that the personal property was abundantly sufficient to discharge all these legacies. If it had been so, the legacies would have been payable within one year after the testator's death. Then the testator, in this very loose will (for I never saw a will more loosely drawn), says the legacies are to bear interest at the rate of five per cent. from the time when they are payable. When did he consider these legacies to be payable? I say he contemplated, in the first instance, that they would be paid out of the personal property. If there had been personal property sufficient, they would have been payable within a twelvemonth, and interest at five per cent. would have been chargeable in that case from that time. It appears to me, therefore, that the introduction of these words, whether they were introduced by accident or not, that the principal was not to be raised till after the death of his widow, should not postpone **[54]** the payment of interest on these legacies till after the death of Lady Castlecoote.

There is a very important circumstance, which, I believe, my noble friend relied on in giving judgment below; namely, that there is a fund in the hands of the trustees – that there is a power given to pay the interest out of the rents of the estate. The rents of the estate are in the hands of trustees from the moment of the testator's death; therefore I think it must have been the intention of the testator that the interest upon the legacies was to be paid out of that fund. If these words had not been introduced, upon which this question arises, I should have thought that the principal was to be paid within a very short period after his death. These words compelled my noble and learned friend opposite to introduce into his decree that which he was bound to introduce; that, although interest is payable from twelve months after the death of the testator, the principal is not to be paid off, by the express words of the will, until after the death of Lady Castlecoote. It appears to me that this judgment pronounced in the Court below, by my noble and learned friend, is according to the true construction of this will as far as it is possible to find out what is the true construction of a will so ill drawn and so inconsistent. In a case of great doubt, where it is impossible to find out with certainty the testator's meaning, we must adopt that construction which is according to justice, which will preserve the interests of those for whom the testator meant to make an immediate provision, and preserve the estate for him who was to take the benefit of that estate after the death of Lady Castlecoote. I therefore concur in the opi-[55]-nion of my noble and learned friends, that this appeal should be dismissed, but that, from the difficulties of the case and the great obscurity of the will, it ought not to be dismissed with costs.

Lord Plunkett: This case has been so fully discussed by the noble and learned lords who have preceded me, that it is scarcely necessary for me to address any further observations to your Lordships upon the subject. To some of the proceedings in the Court below, however, I think it necessary shortly to call your Lordships' attention. It has been admitted, in the whole progress of this case, that, so far as the personal estate is concerned, the legacies which have been charged upon it do in their nature carry interest, and by the express terms of the will are directed to carry interest from one year after the death of the testator. Whether or not interest was properly payable out of those premises during the lifetime of Lady Castlecoote, it is quite clear that upon the death of Lady Castlecoote the whole arrear of interest which would accrue in the mean time would be a charge upon the inheritance. I advert to this part of the case, because in the course of the argument it was thrown out, upon the part of the Respondent, Mr. Eyre Coote, who is interested in the inheritance, that it now becoming material for him, for the first time, to ascertain whether the inheritance was so chargeable, your Lordships might, perhaps, be disposed to give him the liberty to lodge an additional appeal for the purpose of protecting the inheritance, in order to prevent the possibility of litigation. For this reason I think it necessary to call your Lordships' attention to the decree pronounced in this cause on the 20th of June, 1833.

[56] Mr. Eyre Coote, the father of the present Respondent, was the person, under the will of the second Lord Castlecoote, entitled to a life estate in these premises. His son, the present Respondent, is the person now entitled to the inheritance; but when the cause came to hearing, previous to the final decree complained of in June, 1833, an exception was raised by Mr. Eyre Coote, the then tenant for life, upon this very point; viz., that no interest was chargeable at all. He objected to the decree "that the sum of £31,239 19s. 1d. still remained due on foot of the unpaid debts and legacies of the said Eyre Tilson, Lord Castlecoote, for principal and interest up to and for the 11th day of June instant; whereas, by the terms of the will of the said testator, interest on the said pecuniary legacies, or some of them, could accrue only from the time at which the said testator had by his will provided that the same should be raised and paid out of the real and freehold estates; and the said Master ought to report the principal money only of the said pecuniary legacies to be due to the several persons entitled." That is the very point I find upon reading the first exception taken by Mr. Eyre Coote. Upon which it is resolved "that the said first exception be, and the same is, hereby overruled;" that very point was decided against him.

Now it is true that Mr. Eyre Coote, who raised the exception, was only tenant for life, and, therefore, that would not have bound the inheritance if there was any

ground now for raising this point by Mr. Eyre Coote. The tenant for life having died, the cause being revived against his son, the [57] present Mr. Eyre Coote, it was referred to the Master to see whether it would be for the benefit of the minor that he should be bound by proceedings against his father; and the Master having reported that it would be for the benefit of the minor that the several accounts and proceedings had in the original cause should be adopted on his behalf, the cause then came on to be heard on the 27th of June, 1835, and the decree now appealed from was then pronounced.

Having adverted to these proceedings for the purpose of shewing that no question can be now raised as to the liability of the estates, after the determination of the life estate of Lady Milltown, to the entire interest then remaining due from one year after the death of the testator, I shall only briefly state some of the grounds on which the decretal order now appealed from was pronounced. It appears to me clear that the testator contemplated two different events: the first was his dying leaving issue by his then wife; and the second was his dying without leaving issue by her. In the first event, he gave her an annuity of £2000 for her life, charged on the lands. In the second, he gave her an estate for life in the lands. In both events, he subjected the estates to certain legacies. In both he directed that the estate should not be liable to be sold for the payment of legacies till after the death of his wife. But in both it was evidently his intention, that the legatees should be entitled to interest on their legacies, and that the principal and accruing interest should be charged on the term of 500 years.

It has been argued with much ingenuity, by the counsel for the Respondent, that the postponement [58] of the raising of the principal of the legacies, until the death of the widow, was a mistake arising from the copying, into the part of the will which relates to the event of his dying without issue, the clause which could only have properly been applicable to the event of his leaving issue; in which case all difficulty would have been removed. But, I conceive that I cannot take such a liberty with the express words of the testator. That condition has found its way into the will, and we must take it as we find it. But, though it is clear that the raising of the principal of the legacies was to be postponed till the death of the wife, I do not find any thing in the will which compels, or indeed warrants, the conclusion, that the payment of the interest was to abide the same event. So far as the personal estate was concerned, it is clear the principal, as well as interest, was payable immediately. So far as the real estate is concerned, it has not been alleged in the Court below—(only by the counsel for the Appellants here)—that it is not to be ultimately liable as well for the arrear of interest as for the principal on the legacies. The point has been, it is true, suggested by the counsel for the Respondent Eyre Coote, as one to which he might resort in the event of this decree being reversed; but, for the reason which I have already stated, I am satisfied that such a point is not now open to him. The only real question is, whether the interest, which is clearly a charge on the term, is now payable. If there had been a son who would have become entitled to the estate, upon the death of the testator, subject to the annuity, that son would have been bound, as tenant in tail, to have paid the interest, though he would have been protected from [59] having his estate sold for the payment of the principal, until it was relieved from the annuity. There was a large surplus, as appears from the report in the cause; that surplus appears applicable to the purpose. There could have been no possible advantage to him from leaving the accruing interest to cut into his inheritance; and it would have been unjust to leave the legatees, many of whom had only a life interest in the legacies, to await the death of the widow.

It is further to be remarked that, on the construction contended for by the Appellant, even if there had been younger children of the testator, they would have been left without any provision for their present subsistence, from the time of their attaining twenty-one years, or marriage in the event of their being daughters. The only provision for such children is the provision for their maintenance; and there would be no provision in the event of their attaining twenty-one years, or, if daughters, after their marriage, if the construction contended for by the Appellant is the true construction. Now, if the mere postponement of the raising the principal would not have induced such consequences in the event of there being issue, can it have a stronger effect in the event of his leaving no issue? Is it to be supposed, that he intended a

greater privilege against the payment of the interest in favour of his wife, than he had attached to it in case of his son? or that he meant to deprive the legatees of the benefit of his bounty in the one event, and not in the other? There is nothing, as it appears to me, to shew that the mere postponement of the payment of the principal necessarily induces such a consequence; and the authorities [60] referred to by the noble Lord on the woolsack go to show directly the reverse. There may be a good reason for the one, which would not apply to the other. The falling in of leases, the existence of any circumstances which would produce a personal inconvenience from an immediate sale.

Here is the case of a term for years paramount to the estate devised to his wife, and charges for legacies made on it, in their nature carrying interest, and admitted to be such both as against the real and personal estates. What is to exempt the tenant for life from the ordinary obligation of keeping down the interest of charges affecting the inheritance? This is not like the case of a legacy which is not to vest in the legatees until a certain event happens. It is a legacy given absolutely and directly, and with interest, but the power of levying the principal out of one of the funds charged with it postponed to a future period. The authorities which have been cited on legacies payable in the event of attaining twenty-one, or of marriage, do not apply; nor have the cases, as to the power of raising out of a reversionary term, any application to the subject. This is not a reversionary term, nor could a reversionary term be carved out of it; it is a present and a paramount term, or nothing; and the case is, in my opinion, nothing more than the ordinary one of a tenant for life called on to keep down the interest of a paramount charge on the inheritance, that charge in its nature carrying interest. It would require an intention to the contrary, clearly applying, to counteract this general rule; and there is not, in this case, any thing to warrant an inference that such was the intention of the testator, but, in my opinion, much to the contrary. I agree fully [61] in what has been thrown out by my noble and learned friends, who have gone before me, that this is a case upon which it was quite fit to take your Lordships' opinion. This will is a very inaccurate and ill-framed and perplexed instrument. After hearing the case very fully argued I did not arrive at the conclusion without difficulty and hesitation. I concur, therefore, in thinking that this is a case in which no costs should be given.

Lord Brougham: The other noble and learned Lord who was present at the hearing of the Appeal entirely concurs in the same view of this case. He is prevented being present at this time by the circumstance of his not having heard one portion of the argument. He also entertained some doubts at one period of the argument, but those doubts were afterwards removed.

Judgment affirmed.

[62]

IRELAND.

(Court of Chancery.)

ANNE HODGENS, otherwise WALKER, by O'GORMAN MAHON, Esq. her next Friend,—*Appellant;* THOMAS HODGENS, HENRY WALKER HODGENS, and THOMAS WALKER HODGENS, Minors, by the said THOMAS HODGENS, Esq., their Father and next Friend,—*Respondents.*

[Mews' Dig. vii. 802, 1113, 1365, 1366, 1370, 1428. S. C. 4 Cl. and F. 323: Ll. and G. t. Plunk. 533. Cited on point as to jurisdiction of Court to deal with settlement in *Corrance* v. *Corrance*, 1868, L. R. 1 P. and D. 498. See also *Hartopp* v. *Hartopp* (1899), P. 65; *Dormer* v. *Ward* (1901), P. 20. As to marriage of ward of Court, see 1 Wh. and T.L.C., 7th ed., pp. 473 *et seq.*, and cases there collected.]

H., an Irish barrister, having in the course of business become acquainted with the particulars of the fortune of W., a ward of the Court of Chancery, who was then at school, and of the age of thirteen years and a half, induced her to elope with him from a school where she had been placed, and a ceremony of

marriage between them was performed. Having been attached and imprisoned for this contempt of the Court, H. petitioned the Court, and was released by an order, upon condition of abstaining from all intercourse with W., who was returned to school by order of the Court, and the marriage was declared null and void by proceedings instituted in the Ecclesiastical Court, under the direction of the Court of Chancery. Soon afterwards W. was again induced to elope from school, and passed a day and night in the house of H.; whereupon he was again imprisoned under the order of the Court, and W. was again sent to school. Having been again released upon his petition, under the same conditions as before, H., a third time, and forcibly, took W. from her school attendants, with whom she was walking, and eloped with her to France, where he remained cohabiting with her till she attained the age of twenty-one. After this period H. returned, and was again imprisoned for contempt. He then petitioned the Court, stating that he and W. were desirous of being married, and submitted to [63] settle the property of W. as the Court should direct. W. at the same time petitioned to be discharged from her wardship. Upon this latter petition the Court made no order; but upon the former, ordered H. to lay proposals before the Master, which he did accordingly. A legal marriage was then solemnised, under the direction of an order of Court; and, according to the proposals brought in by H., the real property of W. (then the wife of H.) was to be conveyed in trust for the separate use of W. for her life, remainder to the first and other sons, etc. in the ordinary course of settlement, with a limitation to the use of the appointees by will of the wife, and in default thereof to the use of the wife and her heirs. The residue of the personalty was to be vested in trustees, to pay the proceeds to the wife for her separate use during her life, and, after payment of the costs of the suits pending, remainder to the children of the marriage as the wife should by deed or will appoint, and in default of appointment, equally among them, with a power reserved for the wife to appoint one fifth of the said residue of the personal estate to the husband, etc. These proposals, and a draft settlement pursuant thereto, were approved by the Master's report; but, on application to the Lord Chancellor to confirm the report, he refused to do so, on the ground that part of the property was in litigation and unascertained. In the mean time, by order of the Court, the interest and dividends of the property were paid to the wife on her personal receipt; and upon the termination of the suit respecting the real estate in her favour, and by order of Court, she was admitted into receipt of the rents as her separate estate.

In March, 1834, the wife eloped from her husband; but having returned in April, 1834, she presented a petition, reciting an order, by which her husband had been directed to join her in levying fines of her freehold property, which had been done, and praying that he might execute the marriage settlement (which had been approved of by the Master), with such alterations, in consequence of events which had happened since the proposals were made, as the Master might think necessary, and that such proceedings might be without prejudice to the existing orders as to her receipt of the proceeds of the estates; and thereupon it was ordered that the Master should review his report and amend the draft of the settlement (among other things), limiting the uses of the fine which had been levied, and by excluding the husband from any present, future, or contingent interest in the property, real or personal, except in the one fifth of the personalty; and in [64] the mean time the interest, rents, etc. were, under the order, paid to the separate use of the wife.

Two children were born after the legal marriage. In May, 1834, the wife again eloped from H., her husband, and committed adultery; and he recovered damages, and had judgment in an action for criminal conversation.

In January, 1835, a petition was presented by the husband, on behalf of the infant children, praying that, in proceeding under the order of reference before stated, the Master might amend the draft settlement, by providing out of the income of the property of the wife during her life a competent sum to be paid to the husband for the maintenance, etc. of the children during their minority, and after attaining twenty-one years for their support and advancement in

life; and that in the mean time the order for payment of the interest etc. to the wife should be suspended. The Master of the Rolls made an order of reference to the Master upon this petition; and, upon consent, it was directed that £700 half-yearly should be paid to the wife.

Against this order the wife appealed to the Lord Chancellor (Sugden), who reversed the order of the Master of the Rolls; this last-mentioned order, upon further appeal by the husband to the Lord Chancellor (Plunkett), was reversed.

The appeal to the House was against the last order of reversal, which was reversed.

The Appellant, by proceedings had in 1810, become a ward of the Court of Chancery, in Ireland. In 1820, being at school, and of the age of thirteen years and a half, she was induced, by the contrivances of the Respondent Thomas Hodgens, to elope with him; and on the 19th of March, 1820, a form of marriage was celebrated between the Appellant and the Respondent Thomas Hodgens. Shortly after this transaction Thomas Hodgens, and others, who had acted in collusion with him, were committed to prison by order of the Court, and the Appellant was sent back to school. On the 4th of January, 1821, Thomas Hodgens petitioned the Court, and obtained his release upon [65] entering into his own recognizance with securities in a sum of £2000, upon condition not to hold any intercourse with the Appellant without the leave of the Court. On the 21st of February, 1821, the Appellant was again induced to abscond from school, and to pass a day and night in the house of the Respondent, Thomas Hodgens; and on the 24th of February he was, by order of the Court, again committed to prison for this new contempt. But on presenting a new petition, on the ground of ill health, he was again discharged, by order of the 30th of May, 1821, upon his own recognizance, on condition not to hold communication or correspondence with the Appellant. In pursuance of an order, bearing date the 29th of January, 1821, made in the matter of the minor, a suit was instituted in the Consistorial Court of the Archbishop of Dublin to annul the marriage; and by a decree pronounced in the cause, bearing date the 10th December, 1822, the marriage was declared null and void. Of this proceeding the Appellant was not informed; but, having been again sent back to school, was afterwards forcibly taken from her governess while she was out walking, and eventually carried by the Respondent, Thomas Hodgens, to France, where he lived with her in a state of concubinage until she attained her full age of twenty-one years, in September, 1827.

In November, 1827, the Appellant petitioned the Court to be discharged from the wardship of the Court; and on the 28th of November, 1827, Thomas Hodgens presented a petition to the Lord Chancellor of Ireland, setting forth the circumstance aforesaid; and further stating that Thomas Hodgens was willing to execute such deed of settle-[66]-ment as to the property of the Appellant as the Lord Chancellor should direct, and to submit himself in every respect to the jurisdiction of the Court of Chancery, and praying that the Court would make such order of reference to the Master or otherwise as his Lordship should deem most suited to the honour and interests of the Appellant, he the said Thomas Hodgens undertaking to do and perform whatever should be ordered by his Lordship in that behalf.

The matter of the petition having been heard, and Roderick Connor, Esq., one of the Masters of the Court, and guardian of the fortune of the Appellant, appearing by counsel on the 28th of November, 1827, it was ordered, (Thomas Hodgens undertaking to be forthcoming to abide any order which the Court might see fit thereafter to make relating to the matters alluded to in the said petition,) that Thomas Hodgens should proceed to have a legal marriage duly solemnised between him and the Appellant, then late a minor: and it was further ordered that thereupon Thomas Hodgens should proceed to lay proposals before William Henn, Esq., the Master in the said matter, for a proper marriage settlement to be entered into under the circumstances in respect of the fortune of the said late minor: and it was further ordered that the said late minor's guardian, Roderick Connor, Esq., should take special care as to the due conduct of the matters comprised in the said order: and it was further ordered that the matter of a certain petition of the said Anne Hodgens to be discharged from the wardship of the Court of Chancery, which had been theretofore presented to his Lordship, should stand over till further order.

[67] A marriage was accordingly solemnised between Thomas Hodgens and the

Appellant; and thereupon Thomas Hodgens laid before the Master proposals for a settlement of the fortune of the Appellant.

The Master by his report, bearing date the 8th of February, 1828, found: "That a legal marriage had been, in obedience to the order, duly had and solemnised between the said Thomas Hodgens and the said Anne Hodgens; and he further found that the said Thomas Hodgens had laid before him proposals for a settlement of the fortune of the said Anne Hodgens, whereby he had proposed that the freehold estates of which the said Anne Hodgens was then or should at any time thereafter during her coverture become seised should be conveyed to trustees, in trust to and for the sole and separate use of the said Anne Hodgens, wholly independently of the said Thomas Hodgens, and without the same being subject to his debts; and that the rents, issues, and profits thereof should be paid to the said Anne Hodgens upon her own receipt, notwithstanding her coverture; and that, after the decease of the said Ann Hodgens, the rents of the freehold estates should be settled to the use of the first son of the said Anne Hodgens by the said Thomas Hodgens, and the heirs male of the body of such first son; and, in default of such issue, then to the use of the second, third, fourth, fifth, and all and every other the son and sons of the said Anne Hodgens by the said Thomas Hodgens, severally, successively, and in remainder, one after another, as they and every of them should be in priority of birth and seniority of [68] age; and, for default of such issue male, to the use of the daughter or daughters of the said Anne Hodgens by the said Thomas Hodgens, if more than one, as tenants in common in tail; and, in default of issue of the said marriage, then to the use of such person and persons for such estate and estates, and to and upon such uses, trusts, intents, and purposes as she the said Anne Hodgens (notwithstanding her coverture) by her last will and testament, to be signed and published by her in the presence of and attested by three or more credible witnesses, should limit and appoint; and in default of such appointment to the use of the said Anne Hodgens, her heirs and assigns for ever.

"And as to the personal property to which the said Anne Hodgens was then, or at any time thereafter during her coverture should become, entitled, it was thereby proposed that the same should be vested in trustees, in trust by and out of the said property to pay all such costs as had been or might be necessary for the prosecution of the several suits and proceedings which had been instituted on behalf of the said Anne Hodgens, and were thereinafter mentioned, and such costs (if any) as the Court might decree her or the said Thomas Hodgens to pay in any suit or suits then instituted on her behalf, or in which she was then a defendant, and which are likewise thereinafter stated; but in the mean time, and until such sums should be paid, upon trust to pay the interest, income, and proceeds of the said property unto the said Anne Hodgens, to and for her sole and separate use and benefit, free from the control, debts, or engagements of the said Thomas Hodgens; and after the payment of [69] the said costs, then, as to the residue of the said personal estate, in trust to pay the interest, income, and proceeds thereof unto the said Anne Hodgens for and during her life, to and for her sole and separate use and benefit, free from the control, debts, or engagements of the said Thos. Hodgens; and, from and after the decease of the said Anne Hodgens, in trust for the child and children of the said Ann Hodgens by the said Thomas Hodgens, in such shares and proportions (if more than one) as the said Anne, alone, notwithstanding her coverture, should by any deed, or by her last will and testament in writing, to be executed in the presence of and attested by two or more credible witnesses, direct and appoint; and, in default of such appointment, then in trust for such child and children, equally to be divided amongst them, if more than one, share and share alike as tenant in common; and, in case there should be but one such child, then in trust for such one only child, with power however to the said Anne Hodgens, by any will to be by her executed in the presence of and attested by two or more credible witnesses, to appoint any portion of the said personal property, not exceeding one fifth part thereof, to the said Thos. Hodgens, in case he should survive her; and with power also to the said Anne Hodgens, in case she should survive the said Thomas Hodgens, and leave any issue of the said marriage who should become entitled to any benefit under said settlement, to appoint the interest of a certain proportion of the said personal property, not exceeding £20,000, to and for the use of any after-taken husband, and to appoint the principal [70] to and amongst any children which the said Anne Hodgens should have by any such after-taken husband; but in case the said Anne Hodgens should not leave any issue

by him, who should become entitled to any benefit as aforesaid, then in trust for such person and persons, and in such shares and proportions, as the said Anne Hodgens should, in the lifetime of the said Thomas Hodgens, by her will, or, after his death, either by her will, or by any deed to be by her executed in the presence of and attested by two or more credible witnesses, direct and appoint; and in default of such appointment then in trust for the said Anne Hodgens, her executors, administrators, and assigns."

The Master, by his report, further found, "that he had approved of the proposals, and of a draft of a settlement settling and assuring the said property pursuant thereto, but that he had postponed the engrossment of the said draft until his Lordship's further order should be made upon the said report."

The Master, by his report, further found, "that there was then depending in the Court of Chancery a suit instituted on the part of the said Anne Hodgens, during her minority, against Anne Blake, *alias* Walker, the widow and administratrix of the late Henry Walker, the father of the said Anne Hodgens, in order to ascertain the rights of the said Anne Hodgens as the only legitimate child of the said Henry Walker; and that there was then in Court to the credit of the said cause the sum of £1836 9s. government 3½ per cent stock, and £128 11s. cash; but which said sums were subject to certain [71] claims of creditors of the said Henry Walker, which had not then yet been finally adjudicated upon and decided."

The Master further found, "that there was then likewise depending in the said Court, a suit instituted on the part of the said Anne Hodgens, during her minority, against Elizabeth Wheeler and Lydia Carr, administratrixes of the late Thomas Walker, Esq., the paternal uncle of the said Anne Hodgens, in order to ascertain the rights of the said Anne Hodgens as one of the next of kin of the said Thomas Walker; and that there was then in Court, to the credit of the said cause, the sum of £13,465 16s. government 3½ per cent. stock; the sum of £22,407 12s. 6d. stock of the governor and company of the bank of Ireland; the sum of £538 12s. 2d. government 4 per cent. stock; and £1131 3s. 2d. cash; and that it was admitted by the defendants in the cause that Anne Hodgens was entitled to the said several sums." And the Master further found, "that the said several sums, together with certain freehold property yielding a profit rent of £153 3s. 10d. a year, were to be the subject of the said settlement, and that the same were in the said draft thereof fully recited and set forth."

The Master further found, "that there was also then depending in the said Court of Chancery a suit instituted against the said Anne Hodgens by one Henry Walker, claiming as the heir at law of the said Henry Walker, the father, and Thomas Walker, the uncle, of the said Anne Hodgens, to be entitled to the freehold estates, of which they, the said Henry Walker and Thomas Walker, respectively died seised; and [72] claiming also, as one of the next of kin of the said Henry Walker and Thomas Walker, to be entitled equally with the said Anne Hodgens to a distributive share of the personal estate of which the said Henry and Thomas Walker respectively died possessed: all which several suits, the said Master found, were the suits for the costs whereof it was proposed to provide, as in the said report, and in the said draft of the settlement, is stated and provided."

Upon the report being made, a petition was presented by Thomas Hodgens to the Lord Chancellor, praying that the report be confirmed by an order of his Lordship: but it appearing to his Lordship that several persons had set up claims to the property of Anne Hodgens, which was to be the subject of the settlement, and that the same were then undetermined, his Lordship refused under such circumstances to make any order to confirm the report.

By an order, bearing date the 2d day of August, 1828, made in the said matter, and in the several causes in the title of the said order mentioned, the Accountant-general of the Court of Chancery in Ireland was ordered to draw on the Bank of Ireland in favour of Anne Hodgens, and upon her own separate receipt, for the dividends and interest due and to accrue due on the funds in Court, to the credit of the several causes mentioned in the order, constituting part of the property to which she was entitled, and which was to have been put into settlement pursuant to the proposal made by Thomas Hodgens.

In pursuance of the order, Anne Hodgens continued to receive the interest and dividends of [73] the funds on her own separate receipt until the time hereinafter mentioned.

The claims of Anne Hodgens to the property, which was to be made the subject of the marriage settlement, were, for some years subsequent to the pronouncing of the order, contested, on the alleged ground of her illegitimacy, in several suits instituted in the Court of Chancery in Ireland. But her right to the freehold property of Thomas Walker was ultimately established; and by a final decree, bearing date the 30th day of April, 1833, made in the cause of Thomas Hodgens and Anne Hodgens, otherwise Walker, his wife, against Elizabeth Wheeler and Lydia Carr, Thomas Hodgens and Anne Hodgens, in right of the said Anne, were decreed entitled to one third part of the personal property of the aforesaid Thomas Walker, her uncle, deceased.

By order, bearing date the 10th of December, 1833, made in the several causes in the title of the order mentioned, the Accountant-general of the Court of Chancery was directed to transfer from the credit of the first and second causes therein mentioned to the credit of the third cause therein also mentioned, and to the separate credit of Anne Hodgens, the sum of £5846 12s. 2d. government old 3½ per cent. stock, £538 12s. 2d. government new 3½ per cent. stock, and £22,407 12s. 6d. bank of Ireland stock. And it was further ordered that the Accountant-general should, in execution of the order of the 2d of August, 1828, draw from time to time on the bank of Ireland in favour of Anne Hodgens, on her separate receipt, for the dividends which should accrue due on the said several funds.

[74] By an order made in the cause of Hodgens and Wife against Wheeler and Carr, and bearing date the 13th of February, 1829, it was ordered that the receiver in the said cause be discharged from the receipts of the rents of the freehold estate therein mentioned (and which, pursuant to the Master's report of the 8th of February, 1828, were to be put into settlement, as therein set forth); and that Anne Hodgens be at liberty to enter into the receipt of the said rents as her separate estate; and, in pursuance of the last-mentioned order, Anne Hodgens continued in receipt of the rents as her separate estate.

The Respondents, Henry Walker Hodgens and Thomas Walker Hodgens, were the only issue of the marriage of Thomas Hodgens and Anne his wife, which was solemnised pursuant to the order of the 28th of November, 1827. The Respondent Henry Walker Hodgens was, at the time of the elopement of Anne Hodgens, as hereinafter mentioned, of the age of four years or thereabouts, and the Respondent Thomas Walker Hodgens of the age of three years.

In the month of March, 1834, differences arose between Thomas Hodgens and Anne his wife; and on the 4th of March, 1834, Ann Hodgens eloped from the residence of her husband, and continued absent therefrom until the 18th of March, when, by the persuasion of mutual friends, she was induced to return. But the differences between Thomas Hodgens and Anne his wife still continuing, Anne Hodgens, on the 16th of April, 1834, presented a petition to the Lords Commissioners for the custody of the great seal of Ireland, stating, among other matters, **[75]** that by an order made in the said matter on the 30th of April, 1834, on the petition of Anne Hodgens, it was ordered that Thomas Hodgens should join the said Anne Hodgens in levying fines of the freehold property of Anne Hodgens, and that such fines had been, in pursuance of the order, accordingly levied; and praying that Thomas Hodgens be ordered to execute the marriage settlement whereof the draft had been approved of by the Master, as found by his report of the 8th of February, 1828, with such alterations therein with respect to the amount of the petitioner's property (if any) as the Master might certify to be proper and necessary and in consequence of the orders referred to in the petition or any of them, and that it might be referred to the master to inspect the draft of the settlement and the said orders, and to certify whether any and what alteration should be made in the said draft in consequence of the said orders, and that the Master be also directed to approve of proper trustees to be named in the settlement, and that such proceedings might be had without prejudice to the aforesaid orders of the 2d of August, 1828, 13th of February, 1829, and 10th of December, 1833. Whereby it was ordered that the dividends and proceeds of the personal estate be paid to Anne Hodgens for her separate use, and that she should be at liberty to receive the rents of her freehold property as her separate estate.

The matter of the petition having come on to be moved before the Master of the Rolls, by counsel on behalf of Anne Hodgens, and counsel for Thomas Hodgens and

for the Respondents having been heard on the petition, it was, on the 22d of May, [76] 1834, ordered by his Honour the Master of the Rolls, that the Master in the said matter be at liberty to review his report, bearing date the 8th of February, 1828, and the draft of the marriage settlement therein mentioned; and, in reviewing the same, it was further ordered, that the Master do report the funds to be thereby conveyed to and vested in trustees, having regard to the said orders, bearing date respectively the 2d of August, 1828, the 13th of February, 1829, and the 10th of December, 1833, and to the sum of £265 3s. 5d. old government 3½ per cent. stock, and £51 1s. 2d. specified in the petition, and also in relation to any other funds to be included in and vested in trustees by the said settlement, etc. And that the Master do amend the draft of the said settlement, by declaring thereby and limiting the uses of the fines levied in the then last term of the freehold property mentioned in the said report: And the Court having regard to the contempts committed by Thomas Hodgens, and especially to those mentioned in the orders, bearing date the 1st of April, 1820, the 24th of February, 1821, the 30th of May, 1821, and the 15th of May, 1822, declared that the Master, in settling and approving of the draft of the said settlement, ought to provide, by effectual provisions and limitations, to exclude the said Thomas Hodgens from any present, future, or contingent interest in the property, real or personal, of Anne Hodgens his wife, or any part thereof, save and except so far as the draft of the settlement, as mentioned in the report of the Master, enables Anne Hodgens, by virtue of the power therein contained, to make an appointment in the events therein mentioned in favour of Thomas Hodgens, and in the manner therein pro-[77]-posed, of a portion of the personal property not exceeding one fifth thereof; and it was ordered accordingly: And it was further ordered that the said Master do amend the draft of the settlement, as mentioned in the report, which provides, "That in case the said Anne shall not leave any issue by Thomas Hodgens, who shall become entitled to any benefits as provided in the draft then in trust for such person or persons, and in such shares and proportions as Anne shall, in the lifetime of Thomas Hodgens, by her will, or, after his death, either by her will, or by any deed, to be by her executed in the presence of and attested by two or more credible witnesses, direct and appoint, and in default of such appointment, then in trust for Anne Hodgens, her executors, administrators, and assigns," by providing that, in default of such appointment, the personal property be limited in trust for Anne Hodgens and her next of kin to the express exclusion of Thomas Hodgens, his executors and administrators: And it was further ordered that the Accountant-general do continue to act in pursuance of the order, bearing date the 10th of December, 1833, and continue to draw in favour of Anne Hodgens for the dividends which should accrue due from time to time upon the funds therein mentioned, and thereby ordered to be placed to her separate credit, and on her separate receipt, until further order: And that Anne Hodgens be at liberty to continue to receive the rents and profits of the freehold property as her separate estate until further order.

By the order of the 30th of April, 1834, recited in the petition of Anne Hodgens, whereon the order of the 22d of May, 1834, was pronounced, [78] it was ordered that Thomas Hodgens and Anne his wife should proceed to levy a fine, during the then present term of the real estates of Anne Hodgens, to such uses as should be declared in and by such deed of settlement to be finally settled and approved of by the Court, and to be executed as the Court should order touching the property of Anne Hodgens; and in the mean time, and until such settlements should be executed, it was further ordered, that the fine do enure to the use of Anne Hodgens, her heirs and assigns.

On the 19th of May, 1834, Anne Hodgens again eloped from the residence of Thomas Hodgens, and carried on a criminal intercourse with Anthony Patrick Mahon, with whom afterwards she continued to cohabit.

In consequence of such misconduct, Thomas Hodgens brought an action at law against Anthony Patrick Mahon for criminal conversation with his wife, and obtained a verdict with damages, and final judgment therein.

The interest and dividends of the funds payable to Anne Hodgens, on her separate receipt, under the orders of the 2d of August, 1828, and the 10th of December, 1833, amounted annually to the sum of £2343 3s.; and the rents and profits of the freehold estates which Anne Hodgens received, pursuant to the order of the 13th of February, 1829, amounted to the yearly sum of £154 18s. 6d.

On the 12th of January, 1835, a petition was presented to the Lord Chancellor of Ireland, by Thomas Hodgens, on behalf of the infant Respondents, whereby it was prayed, that in proceeding under the order of reference of the 22d of May, 1834, the Master do amend the draft [79] of the settlement, by providing out of the income of the property of Anne Hodgens during her life a competent sum to be paid to the Respondents' father, Thomas Hodgens, for the maintenance, clothing, and education of the Respondents during their minority, and likewise a competent sum to be paid to the Respondents' children, after they shall attain the age of twenty-one years, for their support and advancement in life; and that he should further amend the said draft, in reference to the disposition of the residue of the income of the property of Anne Hodgens during her life, in such manner as his Lordship should deem meet under the circumstances of the case; and that in the mean time the execution of the orders of the 2d of August, 1828, the 10th of December, 1833, the 22d of May, 1834, and the 13th of February, 1829, so far as the same empowered the said Anne Hodgens to receive on her separate receipt, and as her separate estate, the interest and dividends, rents and profits, of the funds and freehold property respectively, be superseded, and that Anne Hodgens be restrained from receiving the same; "whereupon it was ordered, by the Master of the Rolls, that the matter of the said petition do stand over to be moved on the then next Wednesday: And it was further ordered, that payments under the said orders be stayed in the mean time until further order."

On the 26th of January, 1835, an application was made on behalf of the Respondents in the matter of the said late minor, and in the several causes mentioned in the title of the notice of the said application, that in proceeding under the aforesaid order of reference, bearing date the 22d of [80] May, 1834, the Master might amend the draft of the settlement, bearing date the 8th of February, 1828, by providing out of the income of Anne Hodgens a competent sum, to be paid to Thomas Hodgens the father of the children, for their maintenance, clothing, and education, and a competent sum to be paid them after they should attain the age of twenty-one years; and also in reference to the disposition of the residue of the income of the property of the said Anne Hodgens during her life. Whereupon it was ordered by his Honour the Master of the Rolls, it appearing to the Court that the order, bearing date the 28th of November, 1827, was made by the then Lord Chancellor against the said Thomas Hodgens, then and still in contempt, under the three orders for attachments for distinct contempts, in relation to the said Anne Hodgens as a ward of the Court, bearing date respectively the 1st of May, 1820, the 24th of February, 1821, and the 18th of May, 1822, upon his submission, stated in the said order, to execute such deed of settlement as his Lordship might direct, and to submit himself in every respect to the jurisdiction of the Court, and that the jurisdiction was exercised, and the said order made, in relation to the marital rights of the said Thomas Hodgens in the fortune of the said Anne Hodgens, as against a person liable to the jurisdiction of the Court under the said contempts; and that the said order did not import and could not be deemed to be taken as in the nature of articles of agreement previous to the marriage mentioned in the said order; And it further appearing to the Court, from the affidavit of the said Thomas Hodgens, filed the 7th of January, 1835, that having presented a pe-[81]-tition to confirm the Master's report under the said order, bearing date the 28th of November, 1827, in relation to the draft of the said settlement, the then Lord Chancellor declined to make any order thereon for the reason stated in the said affidavit; and it further appearing that the draft of the said settlement has never been approved of by any order of the Court, and that by order, bearing date the 22d of May, 1834, grounded upon the petition of the said Anne Hodgens, it was ordered that the Master should be at liberty to review his said report, bearing date the 8th of February, 1828, and the draft of the marriage settlement therein mentioned, and therein to make amendments and variations therein specified, beneficial to the said Anne Hodgens and her collateral relatives: And it further appearing to the Court, that the said Henry Walker Hodgens and Thomas Walker Hodgens, the infants and only children of the said Thomas and Anne Hodgens, since their marriage, under the said order, bearing date the 28th of November, 1827, were without any present provision for their education and maintenance, and without any provision after their full age for their subsistence and

advancement, during the lifetime of the said Anne Hodgens: And it further appearing to the Court, that before any draft of the settlement should now be approved of, regard should be had to the state of the facts and family as they then existed, and to the occurrences which had taken place, and especially to the events and circumstances which had occurred since making the said order, bearing date the 22d of May, 1834, it was ordered that it be referred to William Henn, esq. the Master, in proceeding under the said order, bearing date the [82] 22d of May, 1834, further to enquire and report whether the Respondents had been maintained out of the separate estate of Anne Hodgens up to any and what period, and whether in reviewing and approving of a draft of the settlement under the last-mentioned order, it would be necessary and proper, having regard to the circumstances in life of Thomas Hodgens, and to the consideration of his ability to maintain and educate the Respondents according to their future expectations and property, and afterwards to provide for them during the lifetime of the Appellant, that any and what yearly sum should be limited, payable half yearly out of the dividends of the fortune of the Appellant to the Respondent's father, the said Thomas Hodgens during his lifetime, and afterwards to trustees for the Respondents in the event of the Appellant surviving the said Thomas Hodgens, during her lifetime, for the purpose of providing for the maintenance and education of the Respondents during their minority, and afterwards for providing a suitable subsistence and advancement for them during the lifetime of Anne Hodgens, Thomas Hodgens undertaking to enter into and execute the said settlement with such proper covenants as the Court shall approve, for the purpose of binding Thomas Hodgens yearly and every year, to pass and file an account before Roderick Connor, esq., the Master in the third cause, each Michaelmas term, for the yearly sum, so to be paid to him; and after allowing all just disbursements and allowances for the maintenance and education of the Respondents, to vest the balance in government 3½ per cent. stock, and transfer the same to the separate credit [83] in the third cause of the Respondents or of the survivor of them, and also to concur in all necessary acts for the continuing such provision as shall be made during the lifetime of Anne Hodgens, if she shall survive the said Thomas Hodgens: And it was further ordered that the declarations and directions in the order, bearing date the 22d of May, 1834, be varied so far as the same are inconsistent with the said order: And accordingly his Honour was pleased to declare that the Master, in settling and approving of the draft of the settlement, ought to provide by effectual provisions and limitations to exclude Thomas Hodgens from any present, future, or contingent interest in the property, real or personal, of Anne Hodgens, or any part thereof save the provision therein referred to the Master, to report for Thomas Hodgens, for the benefit and in trust for the Respondents, and save and except any benefit which he might derive under any appointment to be executed under the power of appointment, proposed to be reserved to Anne Hodgens, to appoint to Thomas Hodgens, in the manner therein proposed, a portion of the personal fortune not exceeding one-fifth: And Thomas Hodgens, on behalf of himself and the minors, consenting that the order to stay payments be discharged upon the terms of the payments to Anne Hodgens, under the orders bearing date the 10th of December, 1833, and the 22d of May, 1834, being reduced, pending the reference therein mentioned, and until further order; it was further ordered that the order bearing date the 12th of January, then instant, be discharged: And it was further ordered that the Accountant-general of the Court [84] do in execution of the orders bearing date the 10th of December 1833, and the 22d of May, 1834, draw out of the dividends of the funds mentioned in the said orders then standing to the credit of the third cause, entitled in the Accountant-general's books, Thomas Hodgens and Anne Hodgens, otherwise Walker his wife against Elizabeth Wheeler and Lydia Carr (and to the separate credit of Anne Hodgens), as an *interim* provision in favour of Anne Hodgens, or such person as she should appoint by any writing as her separate estate, for the sum of £700 and so half-yearly, for the like sum of £700 out of the dividends when received from time to time, until further order: And it was further ordered, that the residue of the said dividends be half-yearly invested with the approbation of the Master, in government 3½ per cent. stock, and transferred to the credit of the third cause: And his Honour was pleased to reserve further order until the return of the report; and it was further ordered, that the said *interim* consent be without

prejudice to the right of either party to appeal as to the rest of the said order as they might be advised, and to any order which might be made on such appeal as to such *interim* payment.

On the 21st of February, 1835, the Appellant presented a petition to the Lord Chancellor (Sugden) praying that the order of the Master of the Rolls, bearing date the 26th of January, 1835, be set aside, and that the order of the Master of the Rolls, bearing date the 12th of January, 1835, so far as the same would be re-established, by setting aside the order of the 26th of January, 1835, might be also set aside, and that the rights and interests of the petitioner in and to the dividends and all other her property or fortune, real or per-[85]-sonal, be restored to the same condition in which the same were placed before the making of the order of the 12th of January, 1835: Whereupon it was ordered by the Lord Chancellor, that the order of the 12th of January, 1835, and 26th of January, 1835, be set aside, and it was further ordered that the Accountant-General do draw on the Bank of Ireland in favour of Anne Hodgens for the balance of the dividends which became due on the 5th of January, 1835, and which she was restrained from using by the aforesaid orders; and it was further ordered that the Accountant-general do also from time to time draw on the Bank of Ireland in favour of Anne Hodgens on her separate receipt, for the dividends which should from time to time thereafter accrue due on the government and bank stock mentioned in the orders of the 10th of December, 1833, and 22d of April, 1834, pursuant to the directions contained in the said orders respectively.

On the 22d day of April, 1835, the Respondents caused notice to be served of an application to the Lord Chancellor (Plunkett), by way of rehearing of the motion on which the order, bearing date the 21st of February, 1835, was made, "that the said last-mentioned order be set aside or varied, and that the order of the Master of the Rolls, bearing date the 26th of January, 1835, be confirmed." Whereupon by an order bearing date the 1st of June, 1835, it was ordered by the Lord Chancellor that the order, bearing date the 21st of February, 1835, be, and the same was thereby reversed; and it was further ordered that the reference theretofore directed by the Rolls' order of the 26th of January, 1835, be proceeded on; and in [86] proceeding on the reference by the said order directed, it was further ordered that the Master do enquire and report particularly the nature, amount, and value of the freehold properties of Anne Hodgens, and also of the personal property; and it was further ordered that the Master do also enquire and report whether the same, or any and what part thereof had been at any time and when reduced into possession by Thomas Hodgens, her husband, and if so, under what circumstances.

The appeal to the House of Lords was against this order.

For the Appellant, Mr. Wigram and Mr. Shadwell.

For the Appellant, it was argued, that the property of the Ward was under the control of the Court; that the conduct of the husband brought him within the jurisdiction, and being flagrant was a ground for severity; that the order for settlement of the property was made upon the undertaking and proposal of the husband; that the settlement approved by the Master was a gift by the husband to the wife, founded upon the undertaking, and could not be recalled; that subsequent events could not be regarded nor alleged as ground for alteration in the settlement to affect the interests of the wife; that the children could only claim through the marital right which had been surrendered by the undertaking and proposals; that the order of the 2d of August, 1828, could not be discharged, not being made until further order, but as final; that the report adopting the proposals, though not confirmed, had been acted upon. The authorities cited were *Mullet v. Rowse* [87] 7 Ves. 419; *Stackpole* v. *Beaumont*, 3 Ves. 89; *Long* v. *Long* and *Austen* v. *Halsey*, 2 Sim. and S. 119. and 123. note; *Leeds* v. *Barnardiston*, 4 Sim. 538; *Ball* v. *Coutts*, 1 V. and B. 292; *Murray* v. *Lord Elibank*, 10 Ves. 84; *Steinmetz* v. *Hulthin*, 1 Gl. and J. 64; *Like* v. *Beresford*, 3 Ves. 506; *Grey* v. *Kentish*, 1 Atk. 280; *Field* v. *Sims*, *Trevor* v. *Trevor*, 1 P. W. 622; 6 Anne c. 16. s. 1., and 2 Geo. 4. c. 76. s. 23; and see *Chassaing* v. *Parsonage*, 5 Ves. 14; *Sidney* v. *Sidney*, 3 P. W. 269; *Lloyd* v. *Williams*, 1 Mad. 450; *Fenner* v. *Taylor*, 2 Russ. and M. 190.

For the Respondent, Mr. Knight and Mr. Lynch.

No settlement of the fortune of Anne Hodgens has been executed, and the report.

bearing date the 8th of February, 1828, whereby the Master approved of the draft of an intended settlement, has not been confirmed by any order of the Court. The report and the draft of the settlement were varied by the order of the 22d of May, 1834, and that order was obtained on application of Anne Hodgens, who acquiesced in and took benefit under it; and Anne Hodgens thereby admitted the jurisdiction of the Court to vary the report and settlement. It is argued, that subsequent events are not to be regarded. But the rule is not, nor can be so, as in cases of reversions falling in or bankruptcy of the husband.

By the order bearing date the 30th of April, 1834, obtained on application of Anne Hodgens, Thomas Hodgens and Anne Hodgens are directed to levy a fine of the freehold lands therein-mentioned, to such uses as should be declared by the deed [88] of settlement, to be finally settled and approved of by the Court; and Anne Hodgens acquiesced in the order and levied a fine pursuant thereto, and the right of the Court to direct such settlement to be executed as under the circumstances of the case should be deemed fit, notwithstanding the report of the 8th of February, 1828, and the draft of the settlement thereby approved of, and the draft settlement under the order of the Court was sent back to the Master to be reviewed generally.

Thomas Hodgens having intermarried with Anne Hodgens, after she had attained her full age of twenty-one years, without any settlement of the property having been executed, he became entitled by virtue of his marital right to the entire personal estate of Anne Hodgens, and to the absolute ownership thereof; and Thomas Hodgens having on the pronouncing of the order of the 28th of November, 1827, undertaken to execute such settlement as the Court should approve of, and the Court having no jurisdiction over the property of Anne Hodgens, but by reason of the undertaking and by reason of the contempt committed by Thomas Hodgens, in relation to her during her minority—and Anne Hodgens not having, before her marriage with Thomas Hodgens, and after she had attained her full age of twenty-one years, stipulated for any settlement of her property whatsoever, it was competent for the Court under the circumstances to allocate a portion of the property of Anne Hodgens for the maintenance and education of the Respondents during their minority, and for their subsistence and advancement after they should attain their full age, during the life of the Appellant.

The facts and circumstances of the case, and more especially the misconduct of the Appellant, [89] and her desertion of the Respondents her children, called for such an allocation of her property, and the Court exercised a just and proper discretion in making the same.

Stevens v. *Savage*, 1 Ves. jun. 154; *Bathurst* v. *Murray*, 8 Ves. 74; *Pearce* v. *Crutchfield*, 17 Ves. 48; *Huguenin* v. *Baseley*, 14 Ves. 273; *Re* Henry, note to this case in *Lloyd* and *Gould*, p. 142; and see *Birkett* v. *Hibbert*, 3 My. and K. 227; as to misconduct of wife, *Ball* v. *Montgomery*, 2 Ves. jun. 191; *Carr* v. *Eastabrook*, 4 Ves. 146; *Bullock* v. *Menzies*, 4 Ves. 698; see also *Wright* v. *Morley*, 11 Ves. 12.

The Lord Chancellor (14th March, 1837): There was a case argued at your Lordships' bar some time since, in which a person of the name of Anne Hodgens was Appellant, and Thomas Hodgens and Henry Walker Hodgens and Thomas Walker Hodgens were Respondents. It was an appeal from an order of the Court of Chancery in Ireland, which was dated the 26th of January, 1835, which was an order discharging a former order of the Lord Chancellor of Ireland, which former order had reversed an order of the Master of the Rolls in Ireland, by which it was directed that there should be a reference to the Master, to inquire whether it was necessary that any and what yearly sum should be paid out of the dividends of Mrs. Hodgens's fortune to Mr. Hodgens during his life, and afterwards to trustees during her life, in the event of her surviving him, for the maintenance of the children, during their minority, and for their advancement afterwards, and that, in the mean time, until the Master should have made his report, the Accountant-[90]-general should draw in Mrs. Hodgens's favour upon the funds in Court, to the amount of £700 half yearly; and that the remainder of Mrs. Hodgens's separate income should be vested in government securities, and transferred to the separate credit of the infant children.

This is a case that comes before your Lordships undoubtedly under circumstances of great difficulty with regard to authority. In the first place, an order was made by the Maser of the Rolls in Ireland, by which he directed an inquiry to be made by the

Master in the terms, or to the effect, which I have read. The case then came by way of appeal from that order before Sir Edward Sugden, when he was Lord Chancellor of Ireland, and he reversed the order of the Master of the Rolls. That order of the then Lord Chancellor of Ireland, which reversed the order of the Master of the Rolls, then came before the present Lord Chancellor of Ireland, who was of opinion that the order of the Master of the Rolls was correct, and, being of that opinion, he reversed the order of his predecessor, and so, in point of fact, gave effect to the previous order of the Master of the Rolls.

The question raised is, as to the income of a married woman, who had been a ward of the Court of Chancery in Ireland, and who had been married to the Respondent Thomas Hodgens, under very peculiar circumstances, which in the outline, at least, I think it right to state to your Lordships. It appears that the Appellant Anne Hodgens, at the age of thirteen years and a half was taken away from the persons who were her guardians, under the authority of the Court of Chancery, by the Respondent Thomas Hodgens, and that a ceremony of marriage was gone through; a ceremony [91] of marriage which afterwards turned out to be invalid; because, in point of fact, that marriage was afterwards set aside by the Ecclesiastical Court. She was then a ward of the Court of Chancery, and had been so from her earliest infancy. Mr. Hodgens, who had committed this contempt of Court by so marrying an infant ward of the Court, was committed for his contempt; he applied for the indulgence of the Court, and, after some time, he was released from his confinement upon his entering into recognisances, in a very large sum of money, to abstain from any further interference with the infant.

That was in the year 1820, but in the year 1821 it appears that he again got possession of the infant, and he was again committed for his contempt of Court, and he was again unfortunately, upon another application for the indulgence of the Court, released from his confinement, and in the year 1822 a third elopement took place. In the mean time however, namely, in the year 1822, a proceeding in the Ecclesiastical Court having been directed by an order of the Court of Chancery in Ireland to take place under that proceeding, the marriage, which had taken place in the year 1820, was declared to be null and void. From the time of this third elopement, which was in the month of May, 1822, until the year 1827, (at which time the infant having attained her age of twenty-one years, there was a probability that by his submitting to the Court, and doing something like justice to this infant, he might hope to obtain some portion of her property) it appears that the Respondent Thomas Hodgens lived with the infant abroad, without going through the form of any ceremony of marriage, he being perfectly well [92] aware that the former marriage had been declared null and void; but there is a great probability that that fact was suppressed and kept back from the knowledge of the unfortunate child.

A more gross proceeding than this can scarcely be stated or conceived, gross in point of morality, and exceedingly insulting to the Court, of which this person was a ward; and therefore the extremity of proceeding which a Court of Equity is entitled to adopt, to vindicate its authority and to punish the offender against its jurisdiction, and to secure to the Ward all that benefit and all those privileges which it has the means of securing, ought undoubtedly to be exercised against this person, who has violated his duty as a man towards this young lady, and who has been guilty of this gross contempt towards the Court.

The infant having attained her age of twenty-one years, Hodgens returned to Ireland, and submitting himself, in the usual form, to the jurisdiction of the Court, and undertaking to abide by such order as the Court might make with respect to her property, applied to the Court, by petition, praying that he might be at liberty to have the marriage celebrated with the infant.

It appears by an affidavit, which he has brought forward in support of his case, that a course was adopted (which I hope never again to see adopted by a Court of Equity), the Court permitting the marriage to take place before those steps which were proper to secure the interest of the Ward had been taken, and which the Court ought, in the first place, to have done. It is stated, by this affidavit, that the marriage was ordered by the Court to be solemnised, but that, previous to such marriage, an [93] interview took place between Anne Walker, now Anne Hodgens, and Mr. Roderick Connor, who had been appointed a guardian to this infant, at which she

stated her readiness and willingness to have this marriage celebrated, and that, accordingly, it was celebrated: the affidavit then states, that soon after the said interview a ceremony of marriage was duly had and solemnised between this deponent and the said Anne Hodgens, in obedience to the said order; and, thereupon, the deponent, further in obedience to the said order, laid before William Henn, Esquire, a proposal for a settlement of the property of the said Anne Hodgens; which said proposal was in conformity to an intimation, previously given to the said Master, of the terms of settlement, of which, if proposed, he would approve. He then says, that, the Master having approved of the said proposal, a draft of a deed, in conformity with the said proposal, was prepared; and having been perused and amended by the said Master, and submitted to and approved by the said Roderick Connor, Esquire, and his counsel, as guardian to the said Ward, it was fully approved by the said Master, and certified by him accordingly.

It appears that the infant was entitled to some real estate in possession, and to a very considerable personal estate, but that the title both to the real and personal estate was in litigation in three different suits, then pending in the Court of Chancery in Ireland; it was, therefore, obviously very difficult to make an actual settlement of the property being in the state which I have described. The proposals were such as might have been expected, being made in pursuance of an intimation [94] previously given by the Master in a private communication, and in the terms upon which he had expressed that he should approve of the settlement; and, indeed, a person so offending as Mr. Hodgens had offended could not hope that any other terms would be accepted than such as would divest him of all interest in the property of the Ward; and, accordingly, those proposals were, that the real estate should be settled to the use of the infant for her life, and after her death upon the issue of the marriage, and that the personal estate should be settled in the same manner, except only with a power reserved to the wife by will to appoint any portion of the property, not exceeding one fifth, to Mr. Hodgens, in case he should survive her; therefore it was in her power to settle one fifth part of the personal estate upon her husband if she so pleased. It then provided that the children should be entitled to the whole of the personal estate, with the exception of this one fifth if she should so settle this one fifth; and in the event of there being no children then the property was to go, in trust, for such persons as Mrs. Hodgens, either in the lifetime of Mr. Hodgens or after his death, should, by her will or by any deed, direct or appoint, and in default of appointment, in trust, for Mrs. Hodgens, her executors, administrators, and assigns; obviously, therefore, intending to exclude the husband from any direct benefit, in point of right, to any of the property which had been the property of the Ward.

When this report of the Master came before the Lord Chancellor of Ireland for confirmation, it appeared to him that from the state of the property it was not possible, as indeed it was not expedient, [95] to act upon it at that time. It is stated in both the cases, and therefore we may assume it to be the fact, that those were the reasons and the only reasons which induced the Court to abstain from directing the Master to have a settlement actually executed in the terms of the proposal. The property being in litigation, it was impossible to ascertain the exact amount of it: in point of fact, it was in that state in which it could only be put into trust, and it was for those reasons only, which the Court could not disapprove of, that the Master abstained from having the settlement executed according to the proposal.

As these causes proceeded, the title and property of this young lady became ascertained, and three several orders were made in strict conformity with that proposal, which was approved of by the Master in the year 1828. The personal property having by that time, by the decision of the cause, been ascertained to be the property of the Ward, who then had attained her age of twenty-one years, an order was made bearing date the 2d of August, 1828, by which the income arising from the property was directed to be held for the sole and separate use of Mrs. Hodgens. In the month of February, 1829, the title to the real estate having become ascertained, and the title to the real estate being decided in her favour as against the other person who claimed it, the receiver of that estate was discharged, and she was let into possession of the income of the real estate for her own separate use. In December, 1833, another order was made for the payment of the then existing fund constituting her property, for her sole and separate use; and Mr. Hodgens was a party to all [96] these pro-

ceedings, either as petitioning with his wife, or as a party consenting to the order pronounced, and therefore unquestionably he must be considered as being bound by the orders of the Court, in consequence of his being a concurring and consenting party in the directions of those several orders. We have him therefore proposing to divest himself of all interest in the property of his wife, and then we have three several orders applying the property to her sole and separate use, which was in direct conformity with the proposal that was made to the Master for the settlement.

In the year 1834, in order to give effect and as preparatory to the final settlement of the real estate, it became necessary to make an order of the Court of Chancery, to direct Mr. and Mrs. Hodgens to join in levying a fine to such uses as should be finally settled and approved of by the Court, and accordingly an order in that year was pronounced for that purpose.

In the month of May in the same year, the estate of the infant having varied so much from the time that the Master had made his report in the year 1828, a petition was presented to the Court of Chancery by Mrs. Hodgens, praying that the necessary alterations might be made in the proposed settlement, and that measures might be taken for the purpose of carrying that into effect; nothing prayed by that petition appears to have been at all at variance with the proposal that was carried in and approved by the Master. But it appears that the Court interfered: and the Court seeing that in a certain event of there being no children, an event, however, not at all likely to occur, as there were at that time two children—but in a certain possible [97] event happening, there was a provision that the property should go to the executors or administrators of Mrs. Hodgens, and as in the event of her death without children, her husband surviving her might fill the character of her administrator and so become entitled to the property—being of opinion, that in no possible event Mr. Hodgens ought to have the chance of becoming the administrator of the estate, the Court upon its own suggestion, and not upon the application of Mrs. Hodgens, directed the Master to review that part of his report and to provide, that in no possible event should Mr. Hodgens be entitled to any portion of her property. The order is in these terms: "The Court having regard to the contempts committed by the said Thomas Hodgens, and especially to those mentioned in the orders bearing date 1st of April, 1820, the 24th of February, 1821, 30th of May, 1821, and the 15th of May, 1822, did declare that the said Master in settling and approving of the draft of the said settlement, ought to provide by effectual provisions and limitations to exclude the said Thomas Hodgens from any present, future, or contingent interest in the property, real or personal, of the said Anne Hodgens, his wife, or any part thereof, save and except so far as the draft of the said settlement as mentioned in the said report of the Master enables the said Anne Hodgens, by virtue of the power therein contained, to make an appointment in the events therein mentioned in favour of the said Thomas Hodgens, and in the manner therein proposed of a portion of the said personal property, not exceeding one-fifth thereof; and accordingly it was ordered, that the said Master, in [98] settling and approving of the said draft of the said settlement, should exclude the said Thomas Hodgens from any participation, benefit or advantage, right or interest, in the said property of the said Anne Hodgens, real or personal, present, future, or contingent, save under an appointment to be made as aforesaid, by the said Anne Hodgens." And accordingly it was further ordered, that the Master do amend the said draft of the said settlement as mentioned in the said report, which provides, "That in case the said Anne shall not leave any issue by the said Thomas Hodgens, who shall become entitled to any benefits as provided in the said draft, then in trust for such person or persons, and in such shares and proportions as the said Anne shall in the lifetime of the said Thomas Hodgens, by her will, or after his death, either by her will or by any deed to be by her executed in the presence of and attested by two or more credible witnesses, or by any deed, direct and appoint, and in default of such appointment then in trust for the said Anne Hodgens, her executors, administrators, and assigns; by providing that in default of such appointment, the said personal property be limited in trust for the same Anne Hodgens, and her next of kin, to the express exclusions of the said Thomas Hodgens, his executors and administrators."

In the month of January, 1835, a petition was presented in the name of Mr. Hodgens and his two infant children, praying that out of the income which had been

from the year 1828 appropriated to the separate use of Mrs. Hodgens, a provision might be made of a sum to be paid to him for the [99] purpose of maintaining his two children. It was stated, (and of that unfortunately there is now no doubt, that this unfortunate Ward of the Court, who had been so taken from its care and protection at the age of thirteen and a half by this Mr. Hodgens, and with whom he had at least from the year 1822, and till the year 1827, cohabited, knowing that there was no marriage, and she probably not being aware that such was the case,) that this unfortunate connection had ended in adultery committed by the wife; and upon the ground of the adultery so committed by the wife, and of the separation that had then taken place, Hodgens alleged that the two children had been left entirely to his charge, and that he had no means of his own by which he could provide for the children; he, therefore, applied to the Court, and prayed that he might have out of her income a sufficient and proper sum allowed to him for the maintenance of those two children.

That application came on before the Master of the Rolls in Ireland on the 12th of January, 1835. The effect of the first order was to suspend the payment of the income to Mrs. Hodgens, which she had become entitled to under the preceding orders; and on the 26th of January the petition came on for hearing, and an order was made upon that petition by the Master of the Rolls, by which he referred it to the Master to inquire what sum should be allowed to Mr. Hodgens for the maintenance of the children during their continuance in their minority, and for their advancement when they came of age; and in the mean time he directed that the £300 payable every half year out of the income which had been directed by the former [100] order to be paid to Mrs. Hodgens should be continued to be paid to her, and that the rest should accumulate and be carried to the account of the children.

That order was the subject of appeal in the Court of Chancery in Ireland. The appeal came on for hearing on the 21st of February, 1835, and ended in that order being discharged. There was a subsequent rehearing before the present Lord Chancellor, who, being of opinion that the Master of the Rolls had properly exercised his jurisdiction in making the order of the 26th of January, ordered that the order reversing the order of the Master of the Rolls be discharged; in effect, therefore, setting up the order which the Master of the Rolls had made, and reversing the intermediate order.

It is fortunate that the order of the Master of the Rolls recites the various grounds upon which it is supported. It states that the draft of the settlement had never been approved: it states that alterations had been made in that draft of the settlement in the month of April, 1834, upon the application of Mrs. Hodgens; and it states that the children were without provision after 1821 for their subsistence, during the lifetime of their mother. It then states that the subsequent events which had taken place justified the Court in altering the settlement as approved of by the Master in the year 1827.

Now we are to consider those various grounds in the order in which they stand: there are two questions which your Lordships have to consider; first, whether the children have a right, as against their mother, to have any portion of her income [101] appropriated to their maintenance; and secondly, whether Mr. Hodgens, who is the party applying, together with his children, can have any such right as against her separate income.

The order recites that the draft had never been approved. Now it is proved that the Master's report had never been confirmed, but it is proved that it had never been confirmed only on account of the peculiar situation of the property; that the Court had for this reason abstained from directing the settlement to be executed; but the Court had, from the year 1828, when the Master made his report on every occasion when the matter came before it, acted upon the proposition of settling the property as settled by the Master; it had by three successive orders directed the whole income of the property to be paid to Mrs. Hodgens, independently and separately from her husband, to be paid as against Mr. Hodgens, who was permitted to marry this Ward upon the faith pledged by him to the Court that he would abide by such order as the Court might make, and abstain from asking for a participation in her income during his life, which is the only subject that your Lordships have to consider. I apprehend, therefore, that the circumstances which have taken place are

quite conclusive against the right of Mr. Hodgens, and that nothing which might subsequently arise could entitle him to come to the Court and ask for any order giving him any benefit in the estate of his wife which the previous order and the settlement approved by the Master had not given him.

I say that he was bound by the proceedings; but if not, how infinitely more strongly was he bound by the conduct that he himself had pursued. In [102] cases of this description, where men seek to get advantages for themselves by obtaining possession of wards under the jurisdiction of a Court of Equity, and by so doing are guilty of contempts against their jurisdiction, the Court will seldom, if ever, permit them to profit by their misconduct or to enjoy any part of the property, to obtain which has probably been the motive of their proceeding. But here was the case of a person without any property of his own, offering to settle none, guilty of repeated contempts, and guilty of misconduct toward the Ward, which would excite the energies of a Court of Equity against him, to prevent his deriving any benefit from his misconduct; and, therefore, whether we look to the transaction itself or to the individual, I apprehend that nothing could justify the Court in relaxing the order which had been previously made, or to let the guilty party profit from his own wrong.

But it is said that Mrs. Hodgens had herself obtained an alteration in the terms of the proposed settlement by the order of April, 1834. In the first place, it does not appear that the alteration attempted to be made in the order was at the suggestion of Mrs. Hodgens: the question was, whether the husband was not excluded; and the Court might very well, if it found any omission in the Master's report, give more effect to it, and recommend to the Master to take more care in carrying into effect the proposals of the husband to exclude him. It was not for the purpose of altering the settlement, but to carry it more fully into effect, and prevent the possibility of his deriving any benefit from his wife's property. It was consistent with his own proposition and with [103] the intention of the Court, who directed that all the property at that time available should be paid over to the separate use of the wife; but it appears to be the act of the Court itself, seeing that that object had not been sufficiently provided for by the limitations of the settlement as drawn. But supposing that nothing had been erroneous, by no possibility could the alteration of the settlement be considered as a circumstance to support or make it proper that the order for which he applied should be made, unless that order could be properly supported upon its own merits.

The third ground undoubtedly raises a question, I will not say of difficulty, in point of authority, but a question requiring very grave consideration, inasmuch as it is that point which has given rise to these contradictory orders: it is, that the children were without provision; and being without provision, the Master of the Rolls thought that there was jurisdiction in the Court of Chancery to provide for them during the life of their mother, and for their advancement after the death of the mother, out of her income. In cases either where the husband has been guilty of contempt in marrying a ward, or where he has not been guilty of such contempt, if a Court of Equity has jurisdiction over the property of the ward, it undoubtedly, in making settlements, constantly and almost uniformly, I may say, provides for the interests of the children. The case we have now to consider is where the husband has been guilty of a gross contempt, and where the settlement to be made and the objects to be provided for by that settlement are to be considered with reference to the situation in which he, the husband, stands as respects him-[104]-self and the property of the Ward, with regard to whom he has been guilty of an offence by marrying without the consent of the Court.

The equity of the children is not an equity to which they are in their own right entitled. In making the settlement of the wife's property, the interests of the children are always attended to, because it must be supposed to be the object, and it is the duty of the Court in carrying that object into effect, to provide for those whom the mother of the children would be anxious to provide for; but, as between the mother and the children, I know of no authority for saying, that the Court has jurisdiction to take from the mother that which the Court has given to the mother, as against the right of the husband for the purpose of creating a benefit to the

children. That the children have no equity of their own, that it is only the equity that they obtain through the means of the consent of the mother, is sufficiently clear when I call to your Lordships' recollection the fact, that if the mother, having attained the age of twenty-one, comes into Court, and consents that the property shall be paid over to the husband, that the Court will permit it to be paid over without reference to the interests of the children; but in no instance are the children permitted to assert an independent equity of their own; and in no instance has that right ever been permitted against the mother. It is against the father that the Court exercises jurisdiction, to exclude him from those rights which the law would otherwise give him; and then the Court deals with those rights as between the mother whose property it is, and as between the children of the marriage, in such a way as may be thought [105] for the interests of the family. But the question is, whether the children have any right of their own against their mother, to deprive her of that income which is given to her by a settlement, though not actually executed, yet in the hands of the Master at the time when the party thought proper to submit to the jurisdiction of the Court.

I therefore consider the application made to the Master of the Rolls, either as made on behalf of the husband, in which case, I am sure it would not have been attended to by any branch of that Court for a single moment, though he was joined with the children, and claiming on behalf of the children, or on behalf of the children. If made on behalf of the children, it would be much to be desired that such order could be made in the unfortunate situation of the children of such parents: the acknowledged wickedness of the father, and the wickedness of the mother—(whether that is to be attributed to the original misconduct of the husband it is no part of your Lordships' duty to enquire)—but the misconduct of both parents places these children in the most lamentable situation; and one cannot be surprised, that the anxiety of the Courts should have been evinced, if consistent with the rules of the Court of Equity, to secure to these children the means of maintenance, independently of either of their parents. But your Lordships are not at liberty to give way to these feelings, nor to depart from the established rules of Courts of Equity in administering the property of their wards; I do not feel that a Court of Equity has a right, under the circumstances of the case, to interpose on behalf of the children against the decree, which their mother had obtained by means of the [106] exercise of the jurisdiction of the Court, against the marital rights of the husband. The property had by his concession, and by his consent, by arrangement entered into in the year 1828, become the separate property of the mother; the children may want even the necessaries of life: they may want the means of proper education; the law does not throw on the mother the duty, the legal obligation, (the moral obligation we have nothing to do with here) of maintaining, educating, or providing for the children; and I with great reluctance, looking at the situation of those children, feel myself bound to state to your Lordships my opinion, that the order as made by the Master of the Rolls was not consistent with the established practice of the Courts of Equity; and that that order, therefore, and the last order, ought to be reversed, affirming the intermediate order, setting aside the order of the Master of the Rolls.

Lord Wynford: My Lords, I cannot add any thing to the very luminous observations of my noble and learned friend; I entirely concur in what he has stated. Your Lordships have heard of the misconduct of both those parents: it is due to this unfortunate woman to say, that whatever misconduct may be attributed to her now, the original misconduct was with the husband. Your Lordships have heard, that when she was thirteen years and a half old, he was committed for contempt of the Court in having procured possession of her person; he apologised to the Court, and they being unwilling to keep him in confinement, released him on his promising not to have intercourse with her: he afterwards again got possession of her person and carried her out of this country; kept her for [107] five years in France, and there kept her in a manner abundantly sufficient to degrade her mind and to lead her into the misconduct now truly imputed to her. But your Lordships, sitting judicially, have nothing to do with that question. You are called upon to decide whether according to law, as it is administered in Courts of Equity, your

Lordships can take away from a ward without her consent any part of her property for the maintenance of the children of the marriage. I am bound to say, as my noble and learned friend has said already, that by no law existing in this country can a woman be bound to maintain her children, her husband being alive; and if that were not the law, the sort of maintenance which she would be compelled to afford to her children, would not be that which is asked by this application and is conceded by this order; for according to this order, the woman's property is not only to be applied for maintenance suitable to the station of these children of which the law knows nothing, but also to make a provision for them upon their coming of age. The mother is not bound to comply with such an order. The policy of the law of this country has thought it best to leave such provision to the law of nature, to leave both the father and the mother to the free exercise of their own feelings. But it is argued, that you can get at the property in consequence of the contempt of the husband. That would be a strange mode of administering justice, and contrary to common sense as well as to equity. It is argued, however, that the right to the wife's property passed, by the act of marriage, to the husband. That such was the situation in which the property stood the instant the woman married, that [108] the personal property then passed to the husband, unless protected by some settlement. But in this case your Lordships have heard, from the very able statement of my noble and learned friend, that the husband had expressly consented to give up this right, and that consent had been acted upon by the Court, and this unfortunate woman was prevailed upon to consent to a subsequent marriage in consequence of that consent, and to give up her conjugal rights. After the manner in which she had been treated in France, deprived almost of the necessaries of life, constantly beaten and ill-treated, it was not likely that she should consent to marry him if she did not retain the dominion over her property; so that if she had not any controul over his affections, she, at least, might have some over his interests; and there is no doubt that she would not have so married, unless the husband had given his consent, upon which the Court acted. The order, for the reason given by my noble and learned friend, was never perfectly completed, but it was, in part, acted upon by the Court; for the income of the property, which is very large, was directed to be paid over to the separate use of the wife—the husband never, at any after-period of his life, touched a single shilling of it.

I speak with deference upon this subject, because it belongs to a branch of the administration of the law with which I have never been connected, but in which your Lordships have the assistance of my noble and learned friend, eminent for his knowledge in every branch of the law, and particularly in that branch by which this case must be decided. I believe that, in equity, that which ought to be done and that which is agreed to be done is con-[109]-sidered as actually done. Is it possible to say, that this is not actually and completely done in equity, when this man obtained possession under an engagement to assign his interest over, and when, in consequence of that engagement, this woman consented to become his wife, and particularly, afterwards, when orders were made, from time to time, to assign for her separate maintenance the whole property of this fund? Must it not be considered that that arrangement is completely confirmed as much as if the Chancellor had given his solemn sanction to it, and that the husband is completely divested of this property? Your Lordships, therefore, by affirming this decree would be taking from the wife a part of her property to relieve the husband from the burden which, immediately and reasonably by law, belongs to him; at all events, the burden of the maintenance of the children falls, in the first instance, upon the husband: the husband comes forward; he places before your Lordships his own delinquencies, and then says, "Though, in consequence of these delinquencies, you have a right to proceed immediately against me, you should only proceed nominally against me,—you have the power over the property of my wife,—take from my wife her property,—apply that property which is taken from her and which I was prevented from having, in consequence of my contempt of the Court, to relieve me from the burden which is, by the law, immediately cast upon me."

We do not know whether he is or not able to sustain these children without any relief from this property. But the taking the property of the woman to maintain her children is against the [110] law; and it is still further against the law, to apply the property for a maintenance suitable to their condition in life; for the condition

in life of those children is, that they are children of parents, one of whom possesses a very considerable property, but the other has nothing. I say, that the law, under no circumstances, would compel the wife to maintain the children, especially not by taking advantage of the circumstance of the delinquency of her husband.

But I hope that when your Lordships shall have disposed of this case, according to the law, this lady will still recollect that there is another law, by which she is bound —the law of God and nature, which will compel her, suitably, to maintain those children which she has brought into the world. We have to decide this case according to the law, although it might have been desirable that the order could have been in part supported, so that some security for the maintenance of the children might have been obtained. The order must be dismissed altogether, as it appears to me, for the reasons which have been better given by my noble and learned friend than I can hope to give them. It is impossible for this House to sustain that order—nay, I do not wish to sustain it to the full extent. We have heard that "hard cases make bad law." This is an extremely hard case,—but it would be making bad law,—it would be depriving parents of that right of property which, in my opinion, ought ever to be maintained, if your Lordships affirmed this order. It is better to leave that to a Higher Power than even to the power of the House of Lords. I concur, therefore, with my **[111]** noble and learned friend in the opinion that this order must be reversed.

I should state to your Lordships, also, that I am authorised by my noble and learned friend Lord Brougham to say, that he entirely concurs in this judgment.

Judgment reversed.

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[112]

ENGLAND.

(Court of Exchequer.)

EDWARD LATIMER.—*Appellant;* WILLIAM NEATE.—*Respondent.*

[Mews' Dig. v. 759; ix. 1662. S. C. 4 Cl. and F. 570; and in Ex., 2 Y. and C. 257. As to discovery by mortgagor, explained in *Glover* v. *Hill*, 1848, 2 Ph. Ch. 490.]

In 1824, N. sued out execution upon a judgment obtained by him in 1818, in an action upon a bond executed by M. to N. in 1815. The levy was made upon goods in the possession of M. Upon the seizure, the goods were claimed by L. as his property, and he, upon action, recovered a verdict against the sheriff. The goods continuing in the possession of M., in 1833, N. again sued out execution upon his judgment; but the sheriff, at the instance of N., by whom he was indemnified, made a return of *nulla bona*. Whereupon, in February, 1834, M. brought an action against the sheriff for a false return.

In 1835, N. filed a bill in the Exchequer against L. and M., stating the facts beforementioned, charging that the assignments of the goods in question were made by M. to L. since the year 1824, and without consideration, and while M. was indebted to N. upon the bond and judgment, and that M., ever since such assignments, had continued in possession of the goods, and that the defendants had schedules thereof which they ought to set forth. The bill further charged that there had been pecuniary dealings between the defendants M. and L., and that L. had received monies on account of M. for which he had not accounted, and that M. had paid large sums of money on account since 1823, and that the defendants had in their possession, etc. books, deeds, etc. from which the truth of those allegations would appear, and that the Defendants ought to set forth an account of their pecuniary transactions since 1823; that N. was a trustee for M. of the goods comprised in the deeds of assignment; that M. had a beneficial interest of great value in the goods, which was the only property of M. that could be made applicable to the payment of the debt owing to the Plaintiff under the execution. Upon **[113]** these grounds the Plaintiff by his bill prayed a declaration that the assignments as against him were void, and might be cancelled; an account of his debt upon the judgment; an account of dealings between M. and N. since 1823; and if a balance should be found due to L., then

an inquiry whether L. had any lien upon the goods, M. thereby offering to pay to L. the amount of what might be found due to him upon the security of the goods.

The Defendant, by his answer, contended that the deeds of assignment were his title deeds, which were made and delivered to him for a full valuable consideration; and insisted that he was not bound to make further answer as to the particular inquiries of the bill. Exceptions having been taken to this answer and allowed, a further answer was put in by N., to which was annexed two schedules, in one of which he set forth a list and description of the deeds of assignment of the goods; and in the other, an account of dealings and transactions between him and M. Thereupon a motion was made, that the deeds, etc. comprised in the first schedule, might be brought into Court for the inspection of the Plaintiff, and an order made accordingly. Upon appeal against this order, it was confirmed.

The Respondent, in Easter term, 1835, exhibited his bill of complaint against the Duke of Marlborough and the Appellant, in his Majesty's Court of Exchequer, at Westminster; and the Respondent, by his bill, stated and charged, that he, the Respondent, in and prior to the year 1812, occupied a farm and premises, situate, lying, and being at Overton, in the county of Wilts, as tenant thereof to George, then Duke of Marlborough, father of the Defendant the Duke of Marlborough, then Marquis of Blandford: and that in or about the month of January, 1812, the said Defendant, the Duke of Marlborough, applied to, and requested the Respondent to lend and advance to him the sum of £2000 upon the security of his the said **[114]** Defendant's bond; and that at or about the time when he made the said application for money, the said Defendant informed the Respondent, or caused him to be informed, that if he did not find him, the said Defendant, some money, he the said Defendant, would turn him out of the said farm and premises as soon as the father of the said Defendant died; and that the Respondent did accordingly lend and advance to the said Defendant the sum of £2000, and thereupon that the said Defendant executed and delivered to the Complainant his bond, bearing date the day of January, 1812, in the penal sum of £4000, for securing the repayment to the Respondent of the said sum of £2000, and interest thereon, by the said Defendant whenever he should be thereunto requested.

That in the month of January, 1815, and before any part of the principal sum of £2000 or the said interest thereon had been paid, the said Defendant, the Duke of Marlborough, then Marquis of Blandford, again applied to and requested the Respondent to lend and advance to him a further sum of money, and to make up the amount of his said loan £10,000 in the whole, including the said principal and interest secured by his said bond; and that the Respondent complied with the said last-mentioned application in part, and in or about the 21st of January, 1815, he lent and advanced to the said Defendant a large sum of money, which, together with the principal and interest, then due to the Respondent from the said Defendant, upon his said bond, amounted to the sum of £7000; and, that thereupon the said bond, bearing date the day of January, 1812, was cancelled; and that the said Defendant, the Duke of Marlborough, by **[115]** his writing obligatory, bearing date the 21st of January, 1815, sealed with his seal, acknowledged himself to be held and firmly bound unto the Respondent in the sum of £14,000, to be paid to the Respondent, his attorneys, executors, administrators, or assigns, and that the said writing obligatory was made subject to a certain condition, in the words and figures, or to the purport and effect, following, that is to say—The condition of this obligation is such, that if the above-bounden George Marquis of Blandford, his heirs, executors, or administrators, or either of them, shall and do well and truly pay or cause to be paid unto the above-named William Neate, his executors, administrators, or assigns, the full sum of £7000 of lawful money of the United Kingdom of Great Britain and Ireland, with lawful interest for the same, within one year next after the decease of the most noble George Duke of Marlborough, the father of the said Marquis, then this obligation to be void and of no effect, or else to remain in full force and virtue.

That the said last-mentioned bond was prepared by Mr. Pinniger, the attorney of the other Defendant, the Duke of Marlborough; and that Samuel Fellows, the attesting witness to the said bond, at the time of the execution thereof, was, and he still is, in

the service and employment of the said Defendant, the Duke of Marlborough, as house steward, and that he continued in such service and employment until the year 1826 or 1827; and that the said Respondent did not, upon the occasion of the said last-mentioned advance of money, employ or consult any attorney or legal adviser; and that when the said last-mentioned bond was executed and delivered to the Respondent, he [116] believed, that the said bond was in the common form and payable at any time; and that in or about the month of April, in the year 1816, the interest on the said sum of £7000 was in arrear, and that the Respondent shewed the said bond to his then Solicitor, Mr. Tilby, of Devizes, and that upon that occasion, the Respondent discovered, for the first time and to his great surprise, that, by the aforesaid condition of the said bond, the principal sum of £7000, and the interest thereon, were not payable until after the death of the late Duke of Marlborough, the father of the Defendant, the Duke of Marlborough.

That in or about the month of November, 1815, and before he, the Respondent, had discovered, as aforesaid, that the said bond, of the 21st of January, 1815, was not in the common form, and that by the said condition, the said principal sum and interest was not payable until after the death of the late Duke of Marlborough, the said Defendant, the Duke of Marlborough, then Marquis of Blandford, wrote a letter to the Respondent, and requested him to come and see him the said Defendant, and to bring with him the sum of £100, and that the said letter was in the words and figures, or to the purport and effect following—that is to say, "Sir: I shall be very glad if you could come to me directly, at White Knight's, either to-morrow or Sunday.—I have business of importance with you. If you bring me about £100 with you, I should be much obliged to you.—Your humble servant, Spencer Blandford. White Knights, Friday." Addressed, "Down post, Reading, November 10th, 1815. Mr. Neate, junior, Overton, near Marlborough;"—and that after the receipt of [117] the said letter, and on or about the 12th of November, 1815, the Respondent went to White Knights, the then residence of the said Defendant, and had an interview with the said Defendant, who then told the Respondent that he had £5 only in his pocket when he left London the previous day, and that he had not one shilling left for his own use or the payment of his servants that night; and thereupon the Respondent, at the earnest entreaties of the said Defendant, lent and advanced him the further sum of £100; and that the Respondent soon afterwards received from the said Defendant an acknowledgment, upon unstamped paper, in the following words: "November 20th, 1815. Memorandum. I acknowledge to have received of Mr. W. Neate the sum of £100, on account of Baron Blandford."

That George Duke of Marlborough, father of the said Defendant, the Duke of Marlborough, died on or about the 30th of January, 1817; and that immediately upon the expiration of one year after his death, the Respondent caused an action to be brought in His Majesty's Court of King's Bench, at Westminster, against the Defendant, the Duke of Marlborough, upon his said bond of the 21st of January, 1815, to recover the principal money and interest thereby secured, the whole of which was then due and owing to the Respondent from the said Defendant; that the said Defendant, the Duke of Marlborough, for the purpose of harassing and injuring the Respondent, and preventing him from proceeding to trial in the said action, kept the said Samuel Fellows, the attesting witness to the said bond, out of the way, and actually for a long time prevented the Respondent from dis-[118]-covering the place of residence of the said Samuel Fellows, and from serving him with a subpœna *ad testificandum* in the said action; and that the Respondent was, in fact, prevented, by such unfair and improper conduct, and by other contrivances of the said Defendant, the Duke of Marlborough, from proceeding to trial in the said action.

That, nevertheless, on or about the 25th of November, 1818, the said John Pinniger, as the attorney for the said Defendant, the Duke of Marlborough, signed a cognovit in the said action, which was in the words and figures, or to the purport and effect following, that is to say, "In the King's Bench—Between William Neate, Plaintiff, and The Most Noble George Duke of Marlborough, Defendant. I hereby confess the debt in this cause, and that Plaintiff has sustained damages to the amount of 1s., besides his costs and charges to be taxed by the Master; but no execution is to issue unless default shall be made in the payment of the sum of £8180, being the

debt for which this action is brought, including interest thereon up to the time of payment thereinafter-mentioned, together with the costs of this action, to be taxed as aforesaid, on the sixth day of next Hilary Term; but in case of such default, the said Plaintiff is to be at liberty to issue execution and levy the said sum of £8480, together with any subsequent interest that may accrue on the sum of £7000, the principal money for which this action is brought; and the costs to be taxed as aforesaid; and also costs of execution, sheriff's poundage, and all other incidental expenses. And I hereby agree to withdraw the pleas pleaded herein, and that no writ **[119]** of error shall be brought, or bill in equity filed. Witness my hand this 25th of November, 1818."

That on the 25th of November, 1818, final judgment upon the said cognovit was duly filed in the said action for the sum of £14,100 debt, and £158 1s. for damages, as well on occasion of detaining the said debt as for the Respondent's costs and charges by him about his suit in that behalf expended; that the said judgment having been suffered to abate, it was at a subsequent period, viz. in Easter term, 1821, duly revived by *scire facias;* and that the said judgment had been since kept on foot by continuances duly entered according to the practice of the said Court of King's Bench, and that the said judgment still remained in full force and effect, not reversed or satisfied or otherwise vacated; and that the said judgment being in full force, and the said debt and damages so recovered as aforesaid remaining unpaid and unsatisfied, the Respondent, in or about the month of November, 1824, for the obtaining satisfaction thereof, sued and prosecuted out of the said Court of our Lord the King, before the King himself at Westminster, a writ of *fieri facias* directed to the sheriff of Oxfordshire, by which writ the sheriff was commanded, that of the goods and chattels of the said Defendant, the Duke of Marlborough, in his bailiwick, he should cause to be levied the debt and damages aforesaid.

That the writ was made returnable on the day of ; and the said writ was indorsed with a direction for the sheriff to levy besides sheriff's poundage, officers' fees, and all other incidental expenses, and was duly delivered to the sheriff, who, by virtue of the said writ, seized and took in execu-**[120]**-tion divers goods and chattels of which the said Defendant, the Duke of Marlborough, was then in possession at his residence at Blenheim, in the county of Oxford, of the value of £ or thereabouts; and that the Appellant claimed part of the said goods and chattels which were so taken in execution as aforesaid, and brought an action in the said Court of King's Bench, against the said sheriff, for seizing and taking away the said goods and chattels; and that the Respondent indemnified the said sheriff against the said action; and that at the trial of the said action at the Oxford Assizes, in the summer of 1825, the jury found a verdict for the Appellant who was Plaintiff in the said action, and that the Respondent was put to very great and heavy expenses in and about the said levy, and in defending the said action which the Appellant brought against the said sheriff; and that the whole sum of money which he received under the said levy, in part satisfaction of his said debt and damages, had been exhausted in the payment of part of the expenses, which greatly exceeded in amount what the Respondent got under the said levy.

That on the 22d of May, 1833, there was due and owing to him from the said Defendant, the Duke of Marlborough, upon the said judgment, the sum of £12,696 1s. 6d.; and that on or about the said 22d of May, 1833, the Respondent, for the obtaining satisfaction thereof, sued and prosecuted out of the said Court of King's Bench, against the said Defendant, the Duke of Marlborough, a writ of *pluries testatum fieri facias,* returnable on the 1st of November, 1833, directed to the sheriff of Oxfordshire, indorsed to levy **[121]** £12,696 1s. 6d. and interest on £7100, from the 1st of May, 1833, until paid, besides sheriff's poundage, officers' fees, and all incidental expenses; and that the said sheriff, by virtue of the said last-mentioned writ, and before the return of the said writ, seized and took in execution, divers goods and chattels of great value, which then were in and upon the said Defendant's, the Duke of Marlborough's, mansion-house and lands at Blenheim, in the county of Oxford.

That the Appellant, and the Defendant, the Duke of Marlborough, applied to the sheriff, after he had seized and taken in execution the said goods and chattels, and requested him not to levy the monies indorsed on the said last-mentioned writ, or

any part thereof, out of the said goods and chattels, but to allow the said Defendant, George Duke of Marlborough, to continue in the possession and enjoyment of the same to his own use, and to return to the said Court of our Lord the King, upon the said writ, that the said Defendant, George Duke of Marlborough, had not any goods and chattels in his bailiwick whereof he could cause to be levied the said monies indorsed on the said writ, or any part thereof; and that at the same time, when they, the Appellant and said Defendant, the Duke of Marlborough, made the said application and request to the said sheriff, that the said Defendant, George Duke of Marlborough, and the Appellant stated to the said sheriff, or to his officers, that all the goods and chattels which he had so seized and taken in execution as aforesaid, were the absolute property of the Appellant, and that no part thereof was the property of the Defendant, George Duke of Marlborough, legally seizable under and by virtue of the said writ.

[122] That the said Defendant, the Appellant, and the said Duke of Marlborough, undertook and promised to indemnify the said sheriff in the fullest manner against any action that might be brought against him by the Respondent for a false return of *nulla bona* to the last-mentioned writ; and that the Appellant, or some of his friends, did, in the first instance, indemnify the said sheriff, but that the officers of the said sheriff were not withdrawn until the said Defendant, the Duke of Marlborough, and some of his friends did also indemnify the said sheriff; and that at or about the time when the said Defendant, the Duke of Marlborough, and his friends so indemnified the said sheriff, the said Defendant advanced to the said John Pinniger the sum of £200 towards the costs of the defence of any action at law that might be brought against the said sheriff; and that the said sheriff complied with the said application and request of the said Defendants, the Appellant, and the said Duke of Marlborough, and that at the return of the said last-mentioned writ, he returned, at the special instance and request of the said Defendants, to the said Court of our Lord the King, upon the said writ, that the said Defendant, George Duke of Marlborough, had not any goods or chattels in his bailiwick whereof he could cause to be levied the debts and damages aforesaid or any part thereof.

That on or about the 22d of February, 1834, the said Respondent brought an action on the plea side of his Majesty's Court of Exchequer, against the said sheriff for a false return of *nulla bona* to the said last-mentioned writ, and that the said sheriff pleaded a plea of not guilty to the said action which **[123]** was then pending; and that the said Defendant, the Appellant, and the said Duke of Marlborough, or one of them, had by some deed or instrument indemnified fully the said sheriff in the said action; and that they the said Defendants, the Appellant, and the Duke of Marlborough, were, in fact, the real Defendants in the said action, and that no persons or person besides the said Respondent, and the said Defendants, the Appellant and the said Duke of Marlborough, had any substantial interest in the said last-mentioned action.

That the said Defendant, George Duke of Marlborough, on the 22d of May, 1833, resided, and that he had ever since that day resided, and that he then did still reside, at Blenheim, in the county of Oxford; and that the mansion-house at Blenheim is very large, and consists of a great number of rooms and apartments, and offices of various descriptions; and that the park, pleasure grounds, plantations, and gardens, attached to the said mansion-house at Blenheim, are very extensive, and consist of a great number of acres; and that the said Defendant, George Duke of Marlborough, on the 22d of May, 1833, was, and that he had ever since been, in the occupation of the said mansion-house, offices, park, pleasure grounds, plantations, and gardens, and every part thereof; and that at the time when the said last-mentioned writ was delivered to the said sheriff as aforesaid, there was, and ever since had been, and that there then was, in and upon the said mansion-house, estate, and premises, at Blenheim aforesaid, a large quantity of goods and chattels, and personal estate and effects of various kinds and descriptions of very great value in the whole, consisting, amongst **[124]** others, of the following particulars, that is to say, of deer, sheep, horses, cows, oxen, a Spanish ass, hay and straw, and various kinds of agricultural produce, carts, agricultural implements, garden tools, plate, books, pictures, wines, liquors, articles of ornament, household furniture, wearing apparel, microscopes, telescopes, maps, globes, plants, and flowers.

That one Samuel Brindfield then lived, and for many years past had lived, as a

servant with the said Defendant, the Duke of Marlborough; and that the said Samuel Brindfield, and many other servants of the said Defendant, were most material and necessary witnesses for and on behalf of the Respondent in the said action against the said sheriff; and that without the testimony of the said Samuel Brindfield, and the said other servants, he could not with safety proceed to the trial of the said action; and that the said Samuel Brindfield, and the said other servants, were completely under the influence and control of the said Defendant, the Duke of Marlborough; and that the said Defendant, well knowing the value of their testimony as aforesaid to the Complainant in the said action, had hitherto prevented them from attending to give evidence in the said action; and that the said Defendant, the Duke of Marlborough, was able to prevent them, and each of them, from giving evidence in the said action; and that he threatened and intended, in case the Respondent should proceed to trial in the said action, and should subpoena the said Samuel Brindfield, and the said other servants, or any of them, as witnesses in the said action, to hinder and prevent them, as he would be able to do, from attending at the said trial.

[125] That in the years 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, and 1832, several bills of sale, and assignments of part of the goods and chattels, personal estate, and effects, in and about the said mansion-house, estate, and premises, at Blenheim, were executed to the Appellant; and that the bills of sale and assignments were, in fact, executed to the Appellant by the said Defendant, the Duke of Marlborough, or by some other person or persons acting by the orders or under the directions of the said Defendant, the Duke of Marlborough; that two of the said bills of sale are dated the 24th of September, 1824, that another of the said bills of sale is dated the 3d of December, 1825, that another of the said bills of sale is dated the 1st of June, 1829, that one of the said assignments is dated the 18th of April, 1826, that another of the said assignments is dated the 26th of December, 1828, and that another of the said assignments is dated the 8th of August, 1832; and that all and each of the said bills of sale and assignments which were so made and executed to the Appellant in the years 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, and 1832, were made and executed to the Appellant without any consideration having been paid or given for the same by the Appellants; and that the Appellant did not, in fact, at the several times when the said bills of sale and assignments, or any of them, were or was executed as aforesaid, or at any other times or time, pay or give at Blenheim, or at any other place, any good or valuable consideration, or any consideration whatever of any value or to any amount, to the said Defendant, the present Duke of Marlborough, or to any other persons or person, for all or any part of the said goods, **[126]** chattels, personal estate, and effects, comprised in the said bills of sale and assignments or any or either of them.

That no part of the said goods and chattels, personal estate, and effects, comprised in the said bills of sale and assignments, has ever, at any time, been removed or taken away by any person from the said mansion-house, estate, and premises, at Blenheim, but that the said Defendant, the Duke of Marlborough, ever since the said bills of sale and assignments were made, had continued to use, and did then use, the same and every part thereof as his own absolute property; and that at the several times when the said bills of sale and assignments were executed, the said Defendant, the Duke of Marlborough, was in embarrassed circumstances, and indebted to the Respondent upon said judgment to a large amount, and also to several other persons to a very large amount in the whole; and that all the said bills of sale and assignments then were, and always had been, void and of none effect in equity against the Respondent, and that no part of the said goods and chattels, personal estate, and effects, in and upon the said mansion-house, estate, and premises, did belong to any persons or person, as trustees or trustee, under the will of the late Duke of Marlborough; but if any part of the said goods, chattels, personal estate, and effects, in and upon the said mansion-house, estate, and premises, did belong (which the Respondent did not admit) to any persons or person as trustees or a trustee under the said will of the late Duke of Marlborough, that the said Defendants, the Appellant and the Duke of Marlborough, were well able to set forth, and ought to set forth, a correct list or **[127]** schedule of all the goods and chattels in and upon the said mansion-house, estate, and premises, at Blenheim, which did not belong to the said

trustees; and that they the said Defendants, the Appellant, and the Duke of Marlborough, then had in their possession custody or power, schedules of, or a schedule of, all the said goods and chattels that did not belong to the said trustees.

That in or about the year 1823, one Charles Richardson obtained a judgment in the Court of King's Bench, at Westminster, against the said Defendant, the Duke of Marlborough, and issued a writ of *fieri facias* thereon against the said Defendant, under which property of various descriptions, and consisting of household furniture, wine, and farming stock, part of the goods and chattels in and upon the said mansion-house and premises at Blenheim, was seized by the sheriff of the county of Oxford; and that the said Charles Richardson took a bill of sale of the said property which was so seized as last aforesaid from the said sheriff; and that in or about the month of May the Appellant took from the said Charles Richardson a bill of sale of the said last-mentioned goods and chattels, and paid the said Charles Richardson for them the sum of £700, and put a servant into possession; and that although the said Defendant, the Duke of Marlborough, continued in possession of the said last-mentioned goods and chattels after the execution by the said Charles Richardson, and after payment of the sum of £700 by the Appellant, it was decided by the Court of King's Bench, in an action which was brought by the Appellant against the then sheriff of Oxfordshire, in or about the year 1825, that the said sale of the said goods **[128]** and chattels, by the said Charles Richardson, to the Appellant was good in point of law, and vested in the Appellant the property in the said last-mentioned goods and chattels; and that all, or a greater part, of the said last-mentioned goods and chattels then were, and ever since the said sale thereof to the Appellant had been, in and upon the said mansion, estate, and premises, at Blenheim; and that during all the time aforesaid the said Defendant, the Duke of Marlborough, had continued, with the consent of the Appellant, to have the use and enjoyment thereof.

That in or about the year 1826 it was agreed by and between the said Defendants, the Duke of Marlborough and the Appellant, that the Appellant should sell the said last-mentioned goods and chattels to the said Defendant, the Duke of Marlborough, for the sum of £700, and which sum the said Defendant, the Duke of Marlborough, promised to pay to the said Appellant for the same, and at the same time it was further agreed between the said Defendants that until the whole of the said sum of £700 should be paid to the Appellant by the said Defendant, the Duke of Marlborough, the said last-mentioned goods and chattels should remain a security to the Appellant for the said sum of £700 or so much as should remain unpaid; and that upon payment of the said £700 the Appellant should execute to the said Defendant, the Duke of Marlborough, a bill of sale or assignment of the said goods and chattels; and that the whole of the said sum of £700 had been paid by the said Defendant, the Duke of Marlborough, to the Appellant: that the Defendant, the Duke of Marlborough, then was, and for a long time past has been, the only person **[129]** beneficially interested in, and equitably entitled to, the said last-mentioned goods and chattels; and that he became so beneficially interested in, and equitably entitled, by the means and under the circumstances aforesaid, or under and by virtue of some other arrangement with the Appellants.

That since the making of the said last-mentioned agreement there had been pecuniary dealings and transactions, to a large amount, between the said Defendants, the Duke of Marlborough and the Appellant, that various large sums of money had been paid by the said Defendant, the Duke of Marlborough, to the Appellant in satisfaction of the said sum of £700; and that the Appellant had received a large sum of money on account of the said Defendant, the Duke of Marlborough, which was applicable, and ought to have been applied by him to the payment of the said sum of £700; but that the Appellant had not executed an assignment or a bill of sale of the said last-mentioned goods and chattels to the said Defendant, the Duke of Marlborough, and that the legal property of and in the said goods and chattels was still vested in the Appellant; and that nevertheless, when the said Defendants, the Duke of Marlborough and the Appellant, should set forth, as they were able and ought to do, a full, true, and particular account of all and every sum and sums of money received and paid by the said Defendant, the Duke of Marlborough, for or on the account of the Appellant, since the year 1823 inclusive; and of all and every sum and sums of money received and paid by the Appellant for or on account of the said Defendant, the Duke of Marlborough, since the year 1823 inclusive; it would clearly

appear, as the fact was, [130] that nothing was due from the said Defendant, the Duke of Marlborough, to the Appellant in respect of the said sum of £700, and that the Appellant was bound, and ought to be compelled, to execute an assignment, or a bill of sale, of the last-mentioned goods and chattels to the said Duke of Marlborough, in order that the said goods and chattels might become liable to be seized under a writ of execution against the personal property of the said Defendant, the Duke of Marlborough.

That the said Respondent had always been, and then was, ready and willing and thereby offered to pay to the Appellant what, if anything should appear to be due to him from the said Defendant, the Duke of Marlborough, upon the security of the said last-mentioned goods and chattels, and to take an assignment of the said goods and chattels from the Appellant, in part satisfaction of the said judgment debt and damages; and that the said Defendants, the Duke of Marlborough and the Appellant, then had, or lately had, in their possession, custody, or power, divers deeds, bills of sale, assignments, schedules, accounts, or account books, receipts, papers, letters, and writings, relating to the matters aforesaid, and from the production of which the truth of the matters aforesaid or some of them would appear, and that they ought to set forth a list or schedule of the said deeds, bills of sale, assignments, schedules, accounts, account books, receipts, papers, letters, and writings, and to leave such of them as were then in their possession, custody, or power, in the hands of their clerk in Court, and to set forth what had become of such of them as were not then in their possession, custody, or power, and in whose possession, cus-[131]-tody, or power the same then were; and that there was then due and owing to the said Respondent, from the said Defendant, the Duke of Marlborough, upon the said judgment, the sum of £13,375 at the least, and that by reason of the nonpayment of the said debt the said Respondent sustained a great loss; and that although it was true that the greater part of the said goods and chattels in and upon the said mansion-house, estates, and premises, at Blenheim, were comprised in certain bills of sale and assignments to the Appellant, and that the Appellant under and by virtue of the said bills of sale and assignment were the apparent legal owner of the said goods and chattels comprised therein, that the fact was, and that so it would appear, when the said Defendants, the Duke of Marlborough and the Appellant, should have made, as they were able and ought to do, a full and true disclosure and discovery of the several matters and things therein stated, and should have set forth, as they were able and ought to do, a true account of the pecuniary dealings and transactions between them since the year 1823 inclusive, that the Appellant was a trustee of the said goods and chattels comprised in the said bills of sale and assignment, or some of them, for the said Defendant, the Duke of Marlborough; and that the said Defendant, the Duke of Marlborough, had an equitable and beneficial interest of great value in such of the goods and chattels that were in and upon the said mansion-house, estate, and premises, at Blenheim; and that such equitable beneficial interest was the only property of the said Defendant, the Duke of Marlborough, of considerable value, that could, by any [132] means, be made applicable to the payment of any part of the debt so due to the said Respondent; and that the said Defendants, the Duke of Marlborough and the Appellant, had hitherto prevented and that they intended to continue to prevent him by every means in their power from obtaining payment of any part of the said judgment debt out of the said equitable and beneficial interest of the said Defendant, the Duke of Marlborough; and that under all the circumstances aforesaid, he could not safely proceed to trial in the said action then pending against the said sheriff for a false return, or usefully issue any writ of execution upon the said judgment against the said Defendant, the Duke of Marlborough, or by any other proceedings at law obtain payment of any part of the said judgment debt; and that without the assistance of a court of equity, he would be unable to make the said beneficial and equitable interest of the said Defendant, the Duke of Marlborough, applicable to the payment of the said debt, or any part thereof, and that he is entitled to receive satisfaction of his said debt, out of the said equitable interest of the said Defendant, the Duke of Marlborough, in the said goods and chattels; and that if the Respondent should claim to have any lien or security upon all or any part of the goods and chattels, for the re-payment of any debt or debts, due and owing to him from the said Defendant, the Duke of Marlborough, he ought to set forth the particulars of such lien or security, and how he made out the same, and upon which of the said goods

and chattels the said lien or security attached; the Respondent thereby offering to pay to the Appellant, what, if any thing, should be due to him from the **[133]** said Defendant, the Duke of Marlborough, upon the security of the said goods.

The prayer of the Bill was, That it may be declared by this honourable Court that all the said bills of sale and assignments of the said goods and chattels, in and upon the said mansion-house, estate, and premises at Blenheim, made and executed by the said Defendant, the Duke of Marlborough, to the said Defendant, Edward Latimer, are void, as against your orator, and that the same ought to be delivered up, by the said Defendant, Edward Latimer, to be cancelled, and that the same may be ordered to be delivered up and be cancelled accordingly: and that it may be referred to one of the Masters of this honourable Court to take an account of what is due from the said Defendant, the Duke of Marlborough, to your orator, upon the said judgment, and for his debt, damages, and costs: and also to take an account of all pecuniary dealings and transactions between the said Defendants since the beginning of the year 1823 inclusive, and if the said Master, upon taking the said last-mentioned account, shall find a balance to be due from the said Defendant, the Duke of Marlborough, to the said Defendant, Edward Latimer, in that case, that he may be directed, attending to the declarations aforesaid, to inquire and state whether the said Defendant, Edward Latimer, now has any lien or security for the repayment of the whole or any part of the said balance upon all or any part of the goods and chattels in and upon the said mansion-house, estate, and premises at Blenheim, your orator hereby offering to pay to the said Defendant, Edward Latimer, what, if any thing, shall be found **[134]** in manner aforesaid, due to him from the said Defendant, the Duke of Marlborough, upon the security of the said goods and chattels, and that the value of the said goods and chattels, and the particulars whereof they consist, may be ascertained, and that the said goods and chattels may be sold, and the proceeds of such sale applied in the first place in the payment of your orator's costs of this suit, and in the next place in the payment of what shall be found in manner aforesaid to be due from the said Defendant, the Duke of Marlborough, to your orator, and of what, if any thing, your orator shall pay to the Defendant, Edward Latimer, and that the said Defendant, Edward Latimer, if a necessary party to such sale, may be ordered to join therein; or that it may be referred to the said Master to take an account of the goods and chattels in and upon the mansion-house, estate, and premises, at Blenheim, and to ascertain and state the value thereof, and the nature and amount of the equitable interest therein of the said Defendant, the Duke of Marlborough, and that such equitable interest may be applied, so far as it will extend, to the satisfaction of your orator's said debt, and of what, if any thing, your orator shall pay to the Defendant, Edward Latimer, and that all necessary and proper directions may be given for the several purposes aforesaid, and the other purposes of this suit.

The Appellant by his answer, amongst other things, stated, that he believed the Respondent did issue a writ of *Pluries Testatum Fieri Facias*, and that the sheriff did seize some part of the goods and chattels at Blenheim, belonging to the Appellant, and in the possession of Richard Wilson, **[135]** his servant and agent, and that he the Appellant did claim of the sheriff the goods so seized by him under the said writ of *Pluries Testatum Fieri Facias*, and did promise and undertake to indemnify the sheriff for making a return of *nulla bona*, and that, for the purpose of indemnifying the said sheriff, he accordingly gave him the joint and several bond of the Appellant, and of his friends, Trind Cregoe, Esq., and Mr. James Barrack, in a sufficient sum.

That he the Appellant claimed to be the legal owner as against the Respondent of all and every the goods and chattels in and upon the mansion-house and premises at Blenheim, save such of them as are heir looms or belong to the trustees of the late Duke of Marlborough's will; that he claimed to be the legal owner thereof under and by virtue of certain bills of sale, assignments, and legal instruments bearing date as follows; that is to say, the 24th of September, 1824, the 1st of October, 1824, the 10th of October, 1824, the 12th of October, 1824, the 20th of October, 1824, (three) the 3d of December, 1825, the 26th of December, 1828, the 1st of June, 1829, the 8th of August, 1832, the 1st of May, 1833, and 5th of June, 1833, all which said bills of sale, assignments, and legal instruments, were duly executed by all proper parties for a full and valuable consideration. That the said bills of sale, assignments, and legal instruments, were the title deeds of the Appellant; that all

and every one of the said bills of sale, assignments, and legal instruments, now in his possession, were made and delivered to him for a full and valuable consideration, by all proper parties, and that the same are the title deeds of him, the [136] Appellant, and that the Respondent claims the same goods and chattels hostilely to him the Appellant, by his said bill and action at the Common Law.

That the Duke of Marlborough had, ever since all the bills of sale and assignments now in the possession of him, the Appellant, were made, by permission of the Appellant, continued to use all the said goods and chattels remaining in and upon the mansion-house and premises at Blenheim, which are the property of the Appellant; but the Appellant denied it to be true, that the Duke of Marlborough ever since the said bills of sale and assignments, or any of them, were made, or since any time, had continued to use and did then use the same or any part thereof as his own absolute property, for the Appellant said, the same had been ever since the said respective bills of sale, thereof, and were then, in the possession of the said Richard Wilson, the servant and agent of the Appellant.

That the Appellant believed that the Duke of Marlborough was, at the time when the said bills of sale, assignments, and legal instruments, were executed, in embarrassed circumstances, and was indebted to the Respondent. That he the Appellant did not believe that he was a trustee of the said goods and chattels, or any of them, comprised in the said bills of sale and assignments, or any of them, for the Duke of Marlborough, but the Appellant said, that as between himself and the Duke of Marlborough he only claimed in equity to be a mortgagee, or to have a lien on all the said goods and chattels, to secure payment of the debt of £8000, and upwards, due and owing to him [137] from the Duke of Marlborough. That the Appellant, upon payment of the debt of £8000 and upwards, then due and owing to him, into Court, was willing to deposit and bring into Court all and every the bills of sale, assignments, and legal instruments then in his possession or power, and to act as the Court should direct.

The Appellant, by his answer, further said, that the bills of sale, assignments, and legal instruments were his title deeds, and he submitted and insisted he was not bound to answer and set forth, save as in his answer to the said bill of complaint is set forth, whether in the several years in the said bill in that behalf mentioned, or in any or what other years or year, several or any bills of sale and assignments, or bill of sale or assignment, of any or what part of the goods and chattels, personal estate and effects, in and about the mansion-house, estate, and premises at Blenheim, and not belonging to the said trustees, were or was not executed to the Appellant, or any other person, or whom by name, or whether the said bills of sale and assignments, or any, or one, or which of them, were or was not in fact executed to the Appellant by the said Duke of Marlborough, or by any other or what persons or person acting by the orders or under the directions of the said George Duke of Marlborough, or how otherwise, or whether all, or each, or some, or which, of the said bills of sale and assignments, which are in the said bill alleged to have been so made and executed to the Appellant in the years 1824, 1825, 1826, 1827, 1828, 1830, 1831, and 1832, or in some and which of such years, or at some other and what time, were or was not made and executed by the Appellant, [138] without any consideration having been paid or given for the same by the Appellant, or whether the Appellant did in fact, at the several times when the said bills of sale and assignments, or any and which of them, were or was executed, or at any other time, and what times or time, pay or give at Blenheim, or at any other and what place, any and what good or valuable consideration of any and what value, or to any or what amount, etc.

And the Appellant, by way of exception to the Respondent's bill, insisted that he had not so framed his bill as to entitle him to call upon the Appellant to make any further or other discovery than the matters thereinbefore by that, his answer, mentioned and set forth; and the Appellant insisted that the Respondent had not so framed his bill, or so stated his case therein, as to entitle him to the relief prayed by his bill; and the Appellant claimed the same benefit of the said exception, as if he had pleaded or demurred to the relief prayed by the said bill for want of equity: and as against the Respondent, he claimed, under and by virtue of the said bills of sale, assignments, and legal instruments, therein before mentioned, to be the legal owner of all and every the goods and chattels, in

and upon the said mansion-house, estate, and premises, at Blenheim, save such of them as were heir looms, and such of them as belonged to the trustees of the late Duke of Marlborough's will; and as against the said Defendant, the Duke of Marlborough, the Appellant claimed only to have an equitable mortgage or lien upon the said goods and chattels, to secure payment of the said debt of £8000 and upwards, then claimed to be due and owing from the said Defendant, the Duke of Marl-[139]-borough, to the Appellant; and the Appellant submitted and insisted, that the Respondent had not so stated his case, or framed his bill, as to entitle him to redeem the said equitable mortgage and lien of the Appellant, or to have any accounts taken between the Appellant and the said Defendant, the Duke of Marlborough, in the relative characters of equitable mortgagor and equitable mortgagee: And that he, the Appellant, upon payment of the said sum of £8000 and upwards, then due and owing to him, into Court, was willing and ready to deposit and bring into Court all and every the bills of sale, assignments, and legal instruments, then in his possession or power, and to act in the premises as this honourable Court should be pleased to direct;—and that annexed to the said answer was a schedule of farming stock and other effects, removed from Blenheim by the Appellant, during the years 1824, 1825, and 1826.

The Respondent took forty-eight exceptions to the answer, part whereof were allowed, and the Appellant put in a further answer to the bill, on the 21st of April, 1836, whereby he answered the exceptions, and thereby (among other things) admitted it to be true, that, in the several years thereinafter mentioned, such several and respective bills of sale and assignments, as thereinafter mentioned, of such of the goods and chattels, personal estate and effects, in and about the mansion-house, estate, and premises, at Blenheim, and not belonging to the trustees in the bill mentioned, were respectively executed to the Appellant, or to such other persons or person by name, as thereinafter mentioned: And that the bills of sale and assignments, were in fact executed to the Appellant, or **[140]** to such other persons or persons as thereinafter mentioned by the Duke of Marlborough in the said bill, named as a Defendant, or by such other persons or person acting by the order, or under the direction of the Defendant, the Duke of Marlborough, or by such other persons or person as thereinafter mentioned;—and that he, the Appellant, did in fact, at the several times thereinafter mentioned, when the said bills of sale and assignments were severally and respectively executed, as thereinafter mentioned, pay or give, at Blenheim, or at such other places or place, as thereinafter mentioned, some and such goods, or valuable consideration of such value, or to such amount respectively, or such consideration to the Defendant, the Duke of Marlborough, or to such other persons or person, for all and every, and such respective parts or part of the goods and chattels, personal estate and effects, comprised in the said bills of sale and assignments, severally and respectively, as thereinafter mentioned. And that he, the Appellant, had in the first schedule to that his answer annexed, and which, together with the other schedule thereunto annexed, he prayed might be taken as part of his said answer, set forth to the best and utmost of his knowledge, information, remembrance, and belief an account or description of all and every the said bills of sale and assignments, of the said goods, chattels, personal estate, and effects, in and about the said mansion-house, at Blenheim, not belonging (according to the Appellant's belief) to the said trustees, as were or was executed to the Appellant, or to any other person, and whom by name; and of which the Appellant claimed the benefit as against the Respondent, distinguishing what goods, **[141]** chattels, personal estate, or effects, were or was comprised in each and every one of the said bills of sale and assignments, severally and respectively; and that he, the Appellant, had in the said schedule distinguished whether the said bills of sale and assignments, or any or one, and which of them, were or was in fact executed to the Appellant, by the Defendant, the Duke of Marlborough, or by some other and what persons or person, acting by the order, or under the direction of the said Defendant, the Duke of Marlborough, or how otherwise; and that he, the Appellant, had in the said schedule also set forth, whether he did in fact, at the several and respective times, when the said bills of sale and assignments, or any and which of them, were or was executed, or at any other and what times or time, pay or give, at Blenheim, or at any other and what place, any and what goods or valuable consideration, to the Defendant, the Duke of

Marlborough, or to any other persons or person and whom, for all or any, and what part of the said goods and chattels, personal estate and effects, comprised in the said bills of sale and assignments, or any or either, and which of them.

The Appellant, by the further answer, denied it to be true, that since the making of the agreement in the bill mentioned, there had been any pecuniary dealings and transactions to a large or any amount, between the Appellant and the said Defendant, the Duke of Marlborough, inasmuch as the Appellant said, that no such agreement was ever made; but the Appellant admitted it to be true, that there had been since such time as thereinafter mentioned, such pecuniary dealings and transactions as in the Appellant's former answer **[142]** mentioned, to a large and such amount, as thereinafter mentioned, between the Appellant and the Defendant, the Duke of Marlborough, and that he, the Appellant, had in the second schedule to that, his answer annexed, set forth to the best and utmost of his knowledge, information, remembrance, and belief, an account of such pecuniary dealings and transactions, and a full, true, and particular account of all and every sum and sums of money, received and paid by the Appellant for or on account of the said Defendant, the Duke of Marlborough, since the year 1823, inclusive.

Annexed to the answer were the two schedules referred to thereby.

On the coming in of the further answer, the Respondent served the Appellant with a notice of motion bearing date the 29th of June, 1836, and whereby he gave the Appellant notice that his Majesty's Court of Exchequer would be moved that the Appellant might, within a week, leave in the hands of his clerk in Court in this cause the several deeds, bills of sale, assignments, and legal instruments mentioned in the Appellant's answers sworn respectively the 9th of November, 1835, and the 21st of April, 1836, and the first schedule to the said last-mentioned answer, and thereby admitted to be in his custody, possession, or power, and therein-mentioned to bear date as follows, that is to say, the 24th of September, 1824, the same date, the 1st of October, 1824, the 10th of October, 1824, the 12th of October, 1824, the 20th of October, 1824, (three) the 3d of December, 1825, the 26th of December, 1828, the 1st of June, 1829, the 8th of August, 1832, the 1st of May, 1833, and the 5th of June, 1833; and also, upon oath, all **[143]** other deeds, bills of sale, assignments, legal instruments, and other documents and papers then in his custody, possession, or power, under or by virtue of which he claimed to have any title, charge, security, or lien, to or upon all or any of the goods, chattels, personal estate, and effects, in and about the mansion-house, grounds, estate, and premises, at Blenheim, in the county of Oxford, in the pleadings of this cause named; and that the Respondent, his clerk in Court, agent, or solicitor, might be at liberty to inspect and peruse the same, and to take copies thereof or abstracts or extracts therefrom.

The motion came on to be heard, and was argued by counsel, on the 1st of July, 1836, before the Lord Chief Baron of the Court of Exchequer, who was pleased to order that the Appellant should, within a week after service of the order, deposit with, and leave in the hands of his clerk in Court in the cause, the several bills of sale, assignments, and legal instruments in his two several answers filed in the cause mentioned, to be of the respective following dates, viz., the 24th of September, 1824, the 1st of October, 1824, the 10th of October, 1824, the 12th of October, 1824, the 20th of October, 1824 (three), the 3d of December, 1825, the 26th of December, 1828, the 1st of June, 1829, the 8th of August, 1832, the 1st of May, 1833, and the 5th of June 1833, and that the Respondent, his solicitors, or agents, should be at liberty to inspect and peruse the same, and at his own expense to take such copies thereof or abstracts or extracts therefrom as he might be advised.

The order was passed and entered on the 11th of July, 1836.

[144] From this order the Defendant in the suit appealed to the House of Lords.

For the Appellant, Mr. Temple and Mr. Ellison.

This is not a question whether a judgment creditor is entitled to redeem a mortgagee, or to inspect a mortgage security, but whether under such a bill as this the Plaintiff is entitled to the rights of a judgment creditor as against a mortgagee. The Respondent must stand or fall by the case made upon his bill, and he must shew admissions in the answer to entitle him to the inspection which he claims. The whole case substantially proceeds upon the ground, that the security is fraudulent and void. The bill prays a declaration to that effect, and that the deeds may be delivered up to be cancelled. It adds indeed a prayer, that, subject to the declaration

aforesaid, an account of dealings and transactions between the Defendant and the Duke of Marlborough may be taken, and offers to pay the balance which may be found due upon the taking of that account; but this part of the prayer and the offer of payment is essentially connected with the previous part which asks that the securities may be declared void. It is evident from the whole complexion of the bill, that its only object is, not to redeem, but to pick holes in the Appellant's title. It is argued, that the doctrine of Lord Eldon, in *Beckford* v. *Wildman* (16 Ves. 438), is decisive against us; if so, how does it happen that in such a case he should end by saying, that he could only order a production at the hearing? The supposition is inconsistent with the principle of the judg-**[145]**-ment, and also with the doctrine of *Balch* v. *Symes* (Turn. and R. 87), in which he says indeed, "where a deed is sought to be impeached, the Plaintiff is entitled to have it produced, and no lien can protect the Defendant from producing it, for it is the object of the suit that the deed may be declared a nullity." But then he adds, "a considerable question however may arise, at what period of the cause the production can be compelled," or how is it consistent with *Tyler* v. *Drayton* (2 Sim. and S. 309), which, according to the argument, is in contradiction to the former cases. The proposition there stated—that reference to deeds in a schedule gives a right to the production—is read without the qualification, that is, "unless it appear by the description that it is evidence of the title, not of the Plaintiff, but of the Defendant, or that the Plaintiff has otherwise no interest in the production;" and the order in that case was for the production of all the deeds mentioned in the schedule, except the purchase deeds. In *Sampson* v. *Swettenham* (5 Mad. 16), the production of the purchase-deeds was refused, because it was not shewn by the bill, or admitted by the answer, that the Plaintiff was entitled to the production.

The Respondents have relied on a passage in the answer, where it is alleged that the Duke of Marlborough owes £ whereas the debt as stated in the schedule is not more than £ ; but that apparent difference is because interest is not included in the schedule. The argument that the Duke of Marlborough was allowed to continue to use the articles, if any **[146]** thing, is an argument at law, and may be made available in the action. If the possession is such as to give a right to the Respondent, it is a case at law, and equity has no jurisdiction; but this question as to the effect of possession, has been decided in *Latimer* v. *Batson* (4 B. and c. 652), and another case to the same effect, *Martindale* v. *Booth* (3 B. and Ad. 498), *Sparke* v. *Montriou* (1 Yo. and C. 103).

The Plaintiff's right to production of documents is on two grounds:—1. Where by reference they are made part of the Defendant's answer: 2. Where the Plaintiff can shew from the answer that he has an interest in the documents sought to be produced.

This interest may be either direct, in which case the Court orders production with a view to the security of the document; or it may be an interest for the purposes of the suit; *i.e.* the documents may be material to the proof of the Plaintiff's case; thus they become part of that discovery which the Plaintiff in equity has a title to.

Documents, therefore, which *constitute the Defendant's evidence in defence merely*, production ought not to be compelled.

To entitle himself to such production, the Plaintiff must show an interest in the documents in question *for the purposes of discovery in the suit*. The cases where the plaintiff impeaches the instrument are of a distinct character; as *Beckford* v. *Wildman* (16 Ves. 438), *Balch* v. *Symes* (1 T. and R. 87), *Tyler* v. *Drayton* (2 Sim. and St. 309), *Kennedy* v. *Green* (6 Sim. 6).

[147] There are other cases where the instruments are referred to as part of the answer; *Hardman* v. *Ellames* (2 M. and K. 732).

A third class of cases are those like the present, where production of deeds *being merely the Defendant's defence or evidence* has been refused. *Lady Shaftesbury* v. *Arrowsmith* (4 Vesey, 66), *Bligh* v. *Benson* (7 Price, 205), *Wilson* v. *Forster* (1 Younge, 280), *Compton* v. *Earl Grey* (1 Y. and J. 154), *Sampson* v. *Swettenham* (5 Madd. 16).

For the Respondents, Mr. Temple and Mr. Ellison.

The Respondent has an interest in the property comprised in the deeds, and therefore in the deeds themselves. By the schedules to the answer, it appears that

the Appellant is servant and agent of the Duke. In the second schedule, he gives an account of payments. It is objected that the document in question is evidence of the Appellant's title; but there is a clear distinction between title deeds and mortgage deeds. *Ex parte Caldecot* (Mont. 55), *Postlethwayte* v. *Blythe* (2 Swan. 256).

A party claiming as a purchaser for a valuable consideration must make out his character by his deeds; and it must appear that he acted *bona fide* throughout, and that he paid his purchase-money before notice express or implied. As to *Tyler* v. *Drayton* [2 Sim. and St. 309], Lord Eldon says, "A deed impeached on the ground of fraud must at some period be produced. As to *Kennedy* v. *Green*, [6 Sim. 6], it did not appear that the purchase was without notice. The conduct of the party is always a material part of the question. **[148]** Here the Defendant did not at first put in a full answer; whether he gave consideration for the assignments, he did not answer at all; but to screen himself from discovery, insisted that they were his title deeds, and that he was not bound to answer. By such conduct he has forfeited all title to protection. It is one of the great principles of equity to prevent multiplicity of suits; for which purpose alone the Courts will entertain a question, and on the same grounds, will prevent delay and expense in every suit. The consequence of a reversal of this decree would be, that the bill must be amended to put more ample interrogatories; whereas, if the case as represented by the Appellant be true, he cannot be injured by the production of the documents."

The Lord Chancellor (April 25, 1837): My Lords, if in my opinion the case before your Lordships involved the consideration of some of the arguments which have been addressed to your Lordships, I should think it a case of considerable importance; but in my view of the case, of the proceedings which have taken place in the Court below, and the proceedings before your Lordships, it does not appear to me that it is at all necessary to enter into the consideration of some of those most important questions which have been discussed. It has been properly admitted on the part of the counsel for the Appellant, that if it appears from the whole of the pleadings that the title claimed by the Defendant is, in fact, only a mortgage title, and that the Plaintiff has so framed his record as to entitle him to deal with that mortgage title and redeem it, he **[149]** would not, at your Lordships' bar, argue that, under the circumstances, he could resist the right of the Plaintiff to have production of the documents.

The bill is certainly not framed exactly in that form in which one usually sees bills framed which ask to make an absolute conveyance available for the purpose of securing a mortgage debt. The equity to which the Plaintiff is entitled, however, may be determined on this record.

The Plaintiff alleges that he is a judgment creditor of the Duke of Marlborough, that a writ of execution was delivered to the sheriff; that the sheriff has returned *nulla bona* with respect to the property on which the Plaintiff supposed he had a right to have that debt levied. The case made by the bill is, that at various times and by the various deeds, the dates of which are mentioned, the Duke of Marlborough assigned to the Defendant, without consideration, as the Bill alleges, the property in question. It then alleges that by a transaction with Richardson, who had a title to a debt as against the Duke of Marlborough, the Defendant obtained possession and a title to certain property for the purpose of securing a debt of £700. The bill challenges the legal title under assignment, although it does not question the title of the Defendant to stand in the place of Richardson to the extent of that debt, an assignment of which he has obtained from Richardson. Then the bill after so stating the case, alleges "that the Respondent (that is the Plaintiff) now is and has always been ready and willing to pay to the Appellant what, if any thing, is due to him from the Duke **[150]** of Marlborough, upon the security of the said goods and chattels." And then it prays "that it may be declared that all the bills of sale and assignments of the goods and chattels in and upon the said mansion-house, estate, and premises at Blenheim, made and executed by the said Duke of Marlborough to the Appellant, were void as against the Respondent, and that the same ought to be delivered up by the Appellant to be cancelled, and that the same might be ordered to be delivered up and to be cancelled accordingly; and that it might be referred to the Master to take an account of what was due from the Duke of Marlborough to the said Respondent upon the said judgment, and for his debt and damages and costs, and also to take an account of all pecuniary dealings and transactions

between the said Duke of Marlborough and the Appellant since the beginning of the year 1823 inclusive; and if the said Master, upon taking the said last-mentioned account, should find a balance to be due from the Duke of Marlborough to the Appellant, in that case he might be directed, attending to the declaration aforesaid, to inquire and state whether the Appellant then had any lien or security for the payment of the whole or any part of the said balance upon all or any part of the said goods and chattels in and upon the said mansion-house, estate, and premises at Blenheim, the said Respondent thereby offering to pay to the Appellant what, if any thing, should be found in manner aforesaid due to him from the Duke of Marlborough."

Now, I apprehend that if, upon the hearing, it appeared that there were assignments made, without consideration, from the Duke of Marlborough to **[151]** the Defendant, and that there was also an equitable lien existing in the Defendant against the property of the Duke of Marlborough's estate to be affected by the Plaintiff's execution; that although the Court might be of opinion that the assignments were void for want of consideration, that the Defendant having an equitable mortgage on the property, the decree of the Court would be to do away with those assignments so far as they were transfers of the property, but let the Defendant have the benefit of them for the purpose of securing the debt due to him from the Duke of Marlborough. If the record, therefore, is so framed that the Plaintiff, being a judgment creditor, had a right to redeem the Defendant, and to put himself in the place of the mortgagor, the Duke of Marlborough, it is not very material whether the bill is framed precisely in those words, and containing those statements and that prayer which might be the most usual and technical mode of stating such a case.

The Defendant, in his first answer, says that he holds adversely against the Plaintiff; he sets out the several deeds, and says he claims to be the legal owner under and by virtue of several bills of sale, and he gives the dates; all which said bills of sale, assignments, and legal instruments, he says, were duly executed to him for a full and valuable consideration. It is impossible to read that passage in the answer without seeing that the Defendant meant to represent that he was the actual purchaser; he states the deeds to be actual assignments of the property to him, and that they were assignments for a full and valuable consideration. But then in a subsequent part of the answer **[152]** he states, "that the said Duke was then indebted to the Appellant as a judgment creditor and equitable mortgagee to the amount of upwards of £8000, and that all the securities which had been obtained by the Appellant from the Duke of Marlborough, and all of which were then in the Appellant's possession or power, were a very scanty and insufficient security for the payment of the said debt." And then he says, "that as between the Appellant and the said Defendant, the Duke of Marlborough, he only claimed in equity to be a mortgagee or to have a lien on all the said goods and chattels, to secure payment of the said debt of £8000 and upwards, then due and owing to him from the said Defendant, the Duke of Marlborough; and that all the said goods and chattels which were comprised in all the said bills of sale, assignments, and legal instruments, and comprising all the said goods and chattels on the said premises at Blenheim, which were not heir-looms, and which did not belong to the trustees of the late Duke of Marlborough's will, were a very scanty and insufficient security for the payment of the said debt, and that the equitable interest of the Defendant, the Duke of Marlborough, in the said goods and chattels in and upon the said mansion-house, estate, and premises at Blenheim, was not a beneficial or valuable interest."

It was represented at the bar that the meaning of the Defendant was, that although he, the Defendant, was intitled to insist on the absolute ownership of the goods by virtue of the assignments, that he was willing to consider himself as only having a charge to secure the payment of the debt. It is no wonder **[153]** that the Plaintiff, seeing such an answer, was desirous of some further discovery from the Defendant, that he might be able to ascertain whether he had only a mortgage title which would intitle the Plaintiff to come into a Court of Equity and place himself in the situation of the Duke, so as to work out his own debt: and accordingly exceptions were taken, and in the further answer the Defendant refers to a schedule containing a more accurate description of the assignments. He says, "that he (the Appellant), in the first schedule to that his answer annexed, and which, together with the other

schedule thereunto annexed, he prayed might be taken as part of his said answer, has set forth to the best and utmost of his knowledge, information, remembrance, and belief an account or description of all and every the said bills of sale and assignments, or bill of sale and assignment of the said goods, chattels, and personal estate;" and goes on with the enumeration of the particulars which he states he had set out in his answer.

In the first answer, in stating the assignments under which he claims, he sets forth, amongst others, one of June 1829, one of June 1832, May 1833, and one of June 1833. Being called on, by the exceptions, to state more particularly what were the nature, contents, and particulars of these assignments, he, in the second answer, swears he has done so, when it appears that there is no deed stated beyond the date of the 1st of June, 1829. Why he has omitted those three subsequent deeds he does not explain; but it appears, in his second answer, that he has sworn that he has set out all the deeds under which he claims as against the **[154]** Plaintiff, and, therefore, it must be assumed he has no other deeds but those he has so stated in the schedule. Now if the Defendant was entitled to that protection against discovery which he now seeks to enforce at the bar, the order of the Court of Exchequer was clearly wrong in allowing those exceptions: because a Defendant may be bound to state in his answer and describe the documents; he may be compelled to admit he has such documents in his possession, but not compellable to state the contents, if he is entitled to protect himself by any rule which prevents a Plaintiff asking for the production of the document. If he professes to set out the document, the Plaintiff has a right to see whether he has stated it correctly or not. Therefore, to protect himself against the liability to produce the document, he should take his stand on the interrogatory, which asks him to set forth the particulars of the deed under which he claims. The answer would have been proper if it had said, I have the deeds in my possession, but you do not entitle yourself, by the proceedings, to see the contents of the documents. If the Defendant chooses to pretend to give a discovery, the Plaintiff is not bound to take that representation, but is entitled to see the documents.

Now, I find that the schedule is an abstract of all those deeds; it is not a mere statement of such a deed of such a date between such parties, which would leave the Plaintiff entirely in the dark as to the contents; but he sets out what is quite sufficient for ordinary purposes,—whether truly abstracted or not is a point which the Plaintiff has a right to be satisfied of. But when I look to the schedule, which is the most im-**[155]**-portant part of the papers, and which is the only part not printed, I find a statement of the prior deeds, which are immaterial from the mode in which the last deed deals with those prior deeds. The deed of the 1st of June, 1829, recites the prior deeds, and then there is the proviso, as to the property comprised in those deeds, and in this last deed: it seems uncertain, on the face of it, whether it embraces all or not, but, at all events, it is subject to the redemption of certain parts.

The last deed, which is for further security, is of August, 1832; and reciting that the now recited indentures were only "for the better securing the said sum of £1800 and interest, so due and owing to him as aforesaid; It was witnessed, that in consideration of the premises, and for better securing payment of the said sum of £1800 and interest, so due and owing from the said Duke to the said Edward Latimer as aforesaid, and also in consideration of 10s. to the said Duke, paid by the said Edward Latimer at the time of executing these presents, he, the said Duke, had bargained, sold, assigned, transferred, and set over unto the said Edward Latimer, his executors, administrators, and assigns, all the several cattle, wines, books, musical instruments, plants, goods, chattels and effects, in the inventory thereunder written particularly mentioned, being in and about the mansion-house, gardens, stables, grounds, and park of Blenheim, of which the said Duke had delivered to the said Edward Latimer full and actual possession: Proviso, that the now abstracting indenture was only intended for further and better securing the payment of the said sums of £1800 and interest; and that if the said **[156]** Duke, his executors, or administrators, should pay, or cause to be paid, the same to the said Edward Latimer, his executors, administrators, or assigns, on the 8th day of May then next ensuing, that indenture should cease and determine."

There is, therefore, no question but that the title of the Defendant on his title deed is only a mortgage title: and it is equally free from doubt, according to my

view of the pleadings, that the Plaintiff is entitled to redeem that mortgage upon the payment of what may be found due, not being precluded from that right by the mode in which he states his case—the object of the deeds being not to give an absolute title to this property against the Duke, or those who claim under the Duke, but for the purpose of securing a sum of money due from the Duke to Latimer.

On these two grounds, therefore, I think your Lordships may safely affirm the order of the Court below—the first, that this is a case in which the Plaintiff is not only seeking to redeem, but is seeking to have an instrument treated as a mortgage security, which the Defendant has set up as an absolute title; and, secondly, because the Defendant having set out what he states as the contents of the deed, (and most likely fairly) the Plaintiff, under those circumstances, is entitled to see whether the abstract be or not a correct abstract of those deeds of which he asks the production. I therefore suggest that the order of the Court below be affirmed.

Lord Brougham: I entirely agree with my noble and learned friend that there can be no doubt whatever in this case. It is to be regretted **[157]** that the schedule was not printed; if it had been so we should have seen, earlier in the day, the points in the case, and a considerable part of the arguments might have been spared and much time saved. I ought to add that, in the cases which have been cited, there is nothing that goes against this decision. I do not think the points arise to which the arguments in those cases were mainly applied. I cannot help wishing that, in the peculiar circumstances of the case, an application had been made to the House to forward the hearing of this appeal. If this appeal had been heard, (the *venue*, I take it for granted, being in Oxfordshire,) the cause might have been tried at the last Spring assizes. The order was made in July, 1836; the appeal I suppose was lodged as early as possible, and I have no doubt that there would have been no objection on the part of the appeal committee, your Lordships acting on their report, to have so sped the hearing as to have enabled the parties to go on with the action at the last assizes. Probably the parties thought they could not have been in time to have done that, though I have no doubt the application would have been granted if it had been made. Of course your Lordships will dismiss this appeal with costs.

Order affirmed with costs.

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[158]

ENGLAND.

(Court of Chancery.)

The EAST INDIA COMPANY,—*Appellants*; JOHN CAMPION, and DAVID COLVIN, WILLIAM CRAWFORD, and JAMES GATHORNE REMINGTON,—*Respondents*.

[Mews' Dig. viii. 395; S.C. 4 Cl. and F. 616; and, in Ch., 6 L.J. Ch. 37.]

By the statute 54 Geo. 3. c. 36. the East India Company are empowered in certain cases to sell, on account of the owners, merchandize the produce of any place within the limits of their charter, and imported in private trade, and out of the produce of the sale to pay the duties of excise and custom, and the rates, etc. payable to the East India Dock Company; and it is provided that the owners of the vessel from which the merchandize was taken should have the same lien for the freight thereof upon the net proceeds as they would have had upon the goods before the landing, if they should have given notice of their claim before the net proceeds should have been handed over to the consignees or owners of the goods.

Under the authority of this act the East India Company took possession of certain bales of cotton wool, which had been consigned from Calcutta to B. and Co. In April, 1818, a notice was served upon them by C., as the managing owner of the ship in which the cotton had been imported, claiming £5605 for freight due to the owners of the ship. In May, 1818, a notice was served upon the E. I. Company by B. and Co., stating that they held bills drawn for the freight of part of the goods, and requesting them to retain certain funds out of the proceeds, and not to pay them to C. until it should have been decided to whom the freight was due.

The cotton wool was afterwards sold by the E. I. Co., and produced £5577 12s. 3d. Out of this sum the E. I. Co. paid to B. and Co. £2000, and to C. £849 12s. 3d., the amount of the freight of the cotton wool and other goods comprised in the same bill of lading, leaving a balance of £2585 0s. 10d. in their [159] hands. This balance B. and Co. claimed, for advances made to the consignor of the goods by whom the ship had been chartered. On the other hand, C., on behalf of the owners of the ship, claimed a lien on the balance to the amount of £1908 3s. 8d., with interest, for freight; and the E. I. Co. having declined to satisfy that demand, C. brought an action against them to recover it. The E. I. Co. then filed a bill of interpleader against B. and Co. and C. and the assignees of the consignor, who had become bankrupt. The bill stating the facts, and offering to pay the balance into court, prayed an injunction, etc.

C. by his answer admitted the facts stated in the bill, except that the £2000, part of the proceeds of the sale, had been paid to B. and Co. with his consent, which he denied; and as to the balance in the hands of the plaintiffs, he claimed the greater part thereof, viz. £1746, as the balance due to him under the charter-party, with interest and costs. B. and Co. by their answer contended, that by the charter-party of affreightment, under which C. claimed, provision was made for payment of the freight by bills of exchange, and that C. had no lien for freight upon the return cargo. The assignees of the consignor disclaimed.

Shortly after the filing of the bill the balance was paid into court, under an order obtained by the plaintiffs; and by a subsequent order obtained by C., it was invested in the purchase of £2718 14s. 3d. 3 per cent. consolidated bank annuities.

By the decree made upon the hearing of the cause, an issue was directed to try whether C. and his partners, as owners of the ship, had a lien on the cotton wool for freight, beyond the freight due in respect of the cotton wool; and that the costs of the plaintiffs should be paid by sale of a sufficient part of the stock in which the balance had been invested; and all farther directions were reserved. Under this decree the costs were paid to the plaintiffs, and various proceedings at law and in equity were carried on between the co-defendants; to which the plaintiffs were neither parties or privy. (See 8 Bli. N. S. 523.)

In 1836, C. having obtained a verdict upon the issue, and judgment upon a special case at law, brought on the cause for hearing upon further directions in equity; having served the plaintiffs with notice, upon which they did not appear; and upon the hearing before the Vice-Chancellor, it was referred to the Master to take an account of what was due to C. under the charter-party, with interest and costs; and it [160] was declared that C. had a lien for the amount on the sum of £2000 paid by the plaintiffs to B. and Co.: and that the plaintiffs (the E. I. Co.) should pay £2000 into the Bank to the credit of the cause, subject to further order, etc.

Upon appeal by the E. I. Co. against this order, it was reversed.

This was an appeal from part of a decretal order, dated the 23d day of July, 1836, pronounced by his Honour the Vice-Chancellor, on the hearing for further directions, of a suit of interpleader, pending in the Court of Chancery, wherein the Appellants were the Plaintiffs, and Richard Campbell Bazett and John Farquhar, since respectively deceased, and the above-named Respondents, were the Defendants.

By this order it was (among other things) directed that the Appellants should pay into Court, to the credit of the cause, subject to further order, a certain sum of £2000 in the pleadings mentioned. This sum of £2000 formed, however, no part of the subject of interpleader in the suit, which was confined to a sum of £2585 0s. 10d. Both sums were parts of the proceeds of 511 bales of cotton-wool, which came to the hands of the Appellants, and were sold by them at one of their public sales, in the year 1818, under the circumstances hereinafter stated.

By an act of parliament made and passed in the fifty-fourth year of the reign of his late Majesty King George the Third, intituled "An act for amending and enlarging the powers of two acts made in the forty-third and forty-sixth years of his present Majesty, for the further improvement of the port of London, by making docks and

other works at Blackwall, for the accom-[161]-modation of the East India shipping in the said port," the Court of Directors of the Appellants, or some officer or officers appointed by them for that purpose, were required in certain cases therein mentioned, to cause such merchandize, the produce of any place within the limits of the charter of the Appellants, as should be brought into any of the docks or basins therein mentioned, on board of any vessel, to be entered at the custom-house, and to give security for the payment of the duties to which the same should be subject. And it was thereby enacted, that all vessels arriving in the inner dock should be cleared and discharged with all convenient speed, and merchandize imported in private trade, which should be landed therefrom, and which should be bonded by the Appellants, or otherwise howsoever, and which were prohibited goods, should without loss of time, unless in the case therein mentioned, be deposited in the warehouses of the Appellants, and should be sold under the authority of the said Court of Directors on account of the owners; and the duties of custom and excise, and the rates, charges, and expences payable to the East India Dock Company in respect of the same, were to be deducted and paid to the proper officer of his Majesty's revenue, and to the said East India Dock Company, by the Appellants, subject, however, to the proviso therein mentioned: and it was thereby provided that the master and owner or owners of any vessel from which any such goods should have been landed, should have the same lien for the freight thereof upon the net proceeds, as they would have been entitled to upon the same goods before the landing thereof, if he or [162] they should give notice in writing of his or their claim to lien, before such net proceeds should have been paid over to the consignees or owners of such goods.

In the month of May, in the year 1818, the ship *Hero*, then engaged in private trade to and from the East Indies, and of which the Respondent, John Campion, was the managing owner, arrived in the East India Docks, having on board an assorted cargo, the several parts of which had been shipped and consigned by different persons in the East Indies to different persons in England. One of these consignments consisted of the 511 bales of cotton-wool hereinbefore mentioned, which had been shipped at Calcutta, and consigned to Richard Campbell Bazett, David Colvin, John Farquhar, William Crawford, and James Gathorne Remington, who then carried on the trade or business of merchants in London, in co-partnership, under the firm of Bazett, Farquhar, Crawford, and Co.

Under the provisions of the act of parliament the cargo of the ship was landed, and was deposited in the warehouses of the Appellants; and shortly after the arrival of the ship, Richard Campbell Bazett and his partners, as consignees, claimed to be entitled to the 511 bales of cotton-wool; but on the 22d of April, 1818, the Respondent, John Campion, gave notice to the Appellants of a claim of lien upon the cargo, including the 511 bales of cotton-wool, for the freight thereof, and such notice was given by a letter of that date, addressed by the same Respondent to Mr. Charles Cartwright, then accountant-general of the Appellants, and it was as follows: "I, the undersigned, being the managing owner of the ship [163] *Hero*, Price, master, from Bengal, do hereby give you notice, that after the delivery of the cargo of the said ship into your hands, you do not part with or deliver the same out of your possession, to any person or persons whomsoever, without my authority and permission, unless on payment to you for my use, or for the use of myself and co-owners of the said ship, of the freight due to me for and in respect of the said ship's late voyage from Bengal aforesaid, amounting to the sum of £5605 5s., and you are hereby held responsible for the same. And I further give you notice, not to part with the said goods, or the proceeds thereof, until you collect and receive the same freight in the following manner, viz.: First, that you retain the goods as specified in the particular subjoined, marked No. 1, or the proceeds thereof, for payment of the freight of the said last-mentioned goods, and that you retain the said last-mentioned freight. Secondly, that you retain the goods, or the produce of the sale thereof, specified as No. 2, the same goods being the property of John Burton Gooch, the charterer of the said ship, until the whole of the said sum of £5605 5s. is paid to me, or received by you for my use: and Thirdly, if the amount of the said freight under No. 1, and the value or produce of the sale of the said goods under No. 2, shall be insufficient to liquidate the freight due to me, then that you retain and hold the freight of goods specified as No. 3, according to the amounts thereby set forth, until full payment and satisfaction is made

to me of the said sum of £5605 5s. And likewise I give you notice, that in delivering the [164] said cargo into your hands, the right of lien for the freight of the said ship, so insisted on, is not thereby relinquished or waived, and that if you shall sell the same cargo, or any part thereof, you are, out of the proceeds arising from the sale, to retain in the order and course, and for the use and purpose aforesaid, the said sum of £5605 5s. (Signed) JOHN CAMPION."

In the particulars subjoined to the notice, the 511 bales of cotton-wool were among other goods comprised under No. 2: and in the same particular the Respondent, John Campion, stated, that such 511 bales of cotton-wool were among other things "contained in a bill of lading to Bazett, Farquhar, and Co., and for the freights of which no bill has been drawn, although the bill of lading states, freight for the said goods paid by bills on London."

On the 18th of May, 1818, the said accountant-general, Mr. Charles Cartwright, received a letter from Richard Campbell Bazett and his partners, which was as follows: "Sir, understanding that you have received a letter from Mr. John Campion, who as owner of the *Hero*, Captain Price, from Calcutta, requests you to withhold payment of the proceeds of the cargo of that ship, committed by the consignees to the care of the Honourable East India Company, for sale, until he is satisfied for the freight, amounting to £5605 5s., we beg to apprize you, that we hold the bills drawn for the freight of this cargo, and annex you a list thereof, with the particulars of the goods for which the bills of lading are signed by Captain Price, freight for the said goods being paid by bills, amounting in the whole to [165] £2644 1s. 10d., which as far as it goes, will, we believe, correspond with a list annexed to the letter to you signed by Mr. Campion. There are also landed from this shipment to our consignment,

I. B. G., 489 bales, 22 half-bales, Cotton-wool.
I B. G., B. E. G. and Co., Saffir., 21 bales, Safflower.

For the freight of which no bills have been drawn, and the proceeds of which, we conceive, will be much more than sufficient to cover the deficit of the sum claimed by Mr. Campion, beyond the amounts claimed in the annexed lists. These proceeds we are willing should be retained by you, as well as request you to retain the several sums in the annexed list from the proceeds of the sale of the different goods, but not to be paid to Mr. Campion, until it shall have been legally decided to whom such freight is strictly due." The 511 bales of cotton-wool, before-mentioned, were the same bales as in the last-mentioned letter are described as 489 bales and 22 half-bales.

In performance of the obligations imposed upon the Appellants by the act of parliament, the 511 bales of cotton-wool were afterwards sold by them, and produced the sum of £5577 12s. 3d., and the Appellants, after paying thereout the duties and charges incident thereto, on the 19th of September, 1818, paid to the firm of Bazett, Farquhar, Crawford, and Co. the sum of £2000 on account of the said monies; and in or about the month of August, 1821, they also paid to the Respondent, [166] John Campion, the sum of £849 5s. 10d., for or on account of freight; and after such respective payments, the sum of £2585 0s. 10d., residue of the said sum of £5577 12s. 3d., then remained as a balance in the hands of the Appellants.

The Appellants were unable to discharge themselves of this balance, by reason of the conflicting claims of the said several parties. The Respondent, John Campion, claimed as owner of the ship to be entitled to the sum of £1908 3s. 9d., part thereof, for the freight of the cargo, together with interest thereon from the delivery of the cargo to the Appellants in the year 1818, and Richard Campbell Bazett and his partners claimed to be entitled as consignees to the whole of the said balance.

In Trinity term 1823, the Respondent, John Campion, commenced an action at law against the Appellants in the Court of King's Bench, to recover from them the said sum of £1908 3s. 9d., with interest thereon from the year 1818, and declared in such action; whereupon the Appellants, who claimed no interest in the monies in their hands, and who were unable to determine to which of the claimants the same belonged, or in what proportions, filed their bill of interpleader, on the 16th of June, 1823, against the Respondent, John Campion, and the other Respondents hereto, and their partners, Richard Campbell Bazett, and John Farquhar, setting forth the facts before stated, and further stating, among other things, that the sum of £2000 was

paid by the Appellants to Richard Campbell Bazett and his partners, with the consent of the Respondent, John Campion, and that the sum of £849 5s. 10d. was paid by the Appellants to the [167] Respondent, John Campion, with the consent of Richard Campbell Bazett and his partners; and thereby praying that the Defendants thereto might interplead and settle their claims and demands amongst themselves, the Appellants being willing, and thereby offering to pay the sum of £2585 0s. 10d. to such of the Defendants as should appear to be entitled thereto, and to bring such sum of £2585 0s. 10d. into court, subject to the further order thereof; and that John Campion might be restrained by the injunction of the Court from further proceedings in the said action at law, already commenced by him against the Appellants, and from all other proceedings at law against them, touching the matters aforesaid or any of them; and that the other Defendants might be respectively also restrained, by the order and injunction of the Court, from all proceedings at law against the Appellants, touching the said sum of £2585 0s. 10d., or any part thereof, or the matters aforesaid, or any of them.

The Defendants, Richard Campbell Bazett, David Colvin, John Farquhar, William Crawford, and James Gathorne Remington, by their answer to the bill, which was filed in the month of November, 1823, set forth among other things, the grounds upon which they rested their claim to the whole of the sum or balance of £2585 0s. 10d., and admitted that the Appellants did, on or about the 9th of September, 1818, with the consent of John Campion, pay to them, on account of the proceeds of the sale of 511 bales of cotton-wool, the sum of £2000, and that the same Defendants did threaten and intend to commence such proceedings at law against the Appellants as they should be [168] advised, touching the sum of £2585 0s. 10d., unless they should be restrained from so doing by the injunction of the Court; and they submitted that they were entitled to have the said sum of money paid over to them, under the circumstances and for the reasons therein mentioned.

The Respondent, John Campion, by his answer, which was filed on the 3d of January, 1824, among other things, admitted that the ship called the *Hero* sailed from the river Hooghly, destined to the port of London, having on board a cargo consisting of different sorts of goods, wares, and merchandizes, shipped and consigned by different persons in the East Indies to different persons in England, and that the ship arrived at the port of her homeward-bound voyage in the East India Docks some time in the year 1818, and that there were on board of the said ship, at the time of her arrival in the said docks, 511 bales of cotton-wool, which had been shipped on board her at Calcutta, and consigned to Richard Campbell Bazett, David Colvin, John Farquhar, William Crawford, and James Gathorne Remington; which 511 bales of cotton-wool the Respondent thereby stated, he believed were the property of John Burton Gooch, the charterer of the ship. That the said ship was chartered by John Burton Gooch from the Respondent, John Campion, for her said voyage outwards and homewards, by a regular charter-party duly executed, and that a considerable balance was due to him on such charter-party; but that although he, the said Respondent, was alone party to the said charter-party, he was not the sole owner, but that the said vessel belonged to him and his brothers. That the goods [169] which were brought into the docks by the said ship were, under the provisions of the said act of parliament, landed from such ship or vessel, and sent to and deposited in the warehouses of the Appellants, and that shortly after the arrival of the said ship the other Defendants claimed to be entitled to the said 511 bales of cotton-wool, as consignees; that he, and as he believed, the other Defendants to the said bill, respectively sent such notices and letters as in the said bill are mentioned; and that the 511 bales of cotton-wool were afterwards sold at the Appellants' public sale, for such sum of money as in the said bill mentioned.

The Respondent, John Campion, also stated, that he believed the Appellants, on or about the 9th of September, 1818, paid to the other Defendants to the bill, the sum of £2000 on account of the aforesaid sales; but denied it to be true, that the payment was made with his consent: and he admitted, that the Appellants paid to him the sum of £849 5s. 10d., by and out of the proceeds of the said sale, but he could not set forth whether, after making such respective payments as aforesaid, the sum of £2585 0s. 10d. only, or what other sum, remained as a balance in the hands of the Appellants, further than that he supposed that the same was the amount, or nearly

the amount, of such balance; and he denied that the Appellants were ready and willing to pay such sum or balance of £2585 0s. 10d. to the party entitled thereto, for that he, the said Respondent, John Campion, being entitled to the greatest part thereof, as thereinafter mentioned, requested the Appellants to pay the same, or so much thereof as he was entitled to, to him, offering at the same time to give them ample **[170]** indemnity for any loss they might sustain by having paid the same to him, but that the Appellants refused to pay the same to him notwithstanding such offer of indemnity, and that he was informed, on making such application, that they would not pay the same to him upon any indemnity whatsoever: and he stated, that he believed the sum of £2585 0s. 10d., or some much larger sum of money, still remained in the hands of the Appellants; and admitted, that the other defendants to the said bill, as such partners and consignees as aforesaid, claimed to be entitled to the same. And under the charter-party of the said ship, he claimed to be entitled to receive out of the proceeds of the said cotton-wool belonging to John Burton Gooch, so sold by the Appellants as aforesaid, the sum of £1746 13s. 8d., as the balance due under the said charter-party, together with interest thereon from the time that such balance became due, according to the terms of the said charter-party, together with all the costs which he had incurred, and might thereafter incur, both at law and in equity, in respect of such his demand: and he denied that he refused to interplead, or to settle and adjust his claims with the other Defendants, but that he was anxious to recover the said sums of money, which had remained due to him ever since the year 1818. And he admitted, that for that purpose he had, in or as of Trinity term then last past, commenced an action against the Appellants in the Court of King's Bench, for the purpose in the said bill mentioned, and that he had declared in such action, and intended to proceed to trial, judgment, and execution in such action against the Appellants, unless restrained by the injunction of the Court; and he **[171]** submitted, that he ought not to be restrained from proceeding in his said action, but that the said other Defendants ought to be ordered to defend the same.

On the 24th of July, 1823, the Appellants applied for and obtained in the said cause, upon notice, an order of the Court of Chancery, whereby it was ordered, that the Appellants should pay into court, to the credit of the cause, the sum of £2585 0s. 10d., which payment into court the Appellants accordingly made on the 21st of August, 1823; but the order of the Court for laying out and investing such sum, after the same had been paid in, and accumulating the dividends in the usual way, (which order was obtained by the Respondent, John Campion,) was not obtained until the 9th of December, 1824.

On the 31st of January, 1824, the Appellants also applied for and obtained, upon notice, an order of the Court of Chancery, whereby the Respondent, John Campion, was restrained from all further proceedings in his action at law against the Appellants, until further order; and by virtue of such order of the 31st of January, 1824, the proceedings in the action were stayed.

The Appellants brought the cause to a hearing, and by the decree made on the hearing thereof before his Honour the Vice-Chancellor, bearing date the 17th of April, 1826, it was ordered, that the parties should proceed to a trial at law in his Majesty's Court of Common Pleas at Westminster, on the following issue (that is to say), whether John Campion and his partners, or any of them, as owners of the ship *Hero*, in the pleadings mentioned, had a lien on the 489 bales and 22 **[172]** half-bales, for freight, beyond the freight due in respect of the cotton-wool, under the bills of lading thereof: and in such issue John Campion was to be Plaintiff at law, and the Defendants, Richard Campbell Bazett, David Colvin, John Farquhar, William Crawford, and James Gathorne Remington, were to be Defendants at law. And it was ordered, that the Master should tax the costs of the Appellants, and that the same, when taxed, should be paid out of the fund in court, consisting of £2718 14s. 5d. Bank 3 per cent. annuities, as therein mentioned.

Under this decree, the costs of the Appellants were taxed and paid: in the month of April, 1827, a trial was had of the issue directed by the decree, and a verdict was found for the Respondent, John Campion, the Plaintiff at law; on the 26th of June, 1827, an order was made in the cause by his Honour the Vice-Chancellor, upon the application of the Defendants, Richard Campbell Bazett, David Colvin, John Farquhar, William Crawford, and James Gathorne Remington, whereby a new trial was

directed, but by a subsequent order made upon the application of the Respondent, John Campion, and bearing date the 30th of July, 1831, the order for a new trial was discharged, in consequence of the delay of the other Defendants to the bill in proceeding under the same, and on the 15th of February, 1832, the cause came on to be heard upon further directions, on the footing of the verdict, before his Honour the Master of the Rolls; and by the decree then made, it was referred to the Master in rotation, to take an account of what was due to John Campion, under and by virtue of the charter-party in the pleadings mentioned; and it **[173]** was further ordered, that the Master should compute interest thereon after the rate of £5 per cent. per annum, from the 1st of September, 1818, being four months from the day of the arrival of the ship *Hero*, in the charter-party mentioned, in the river Thames, and being the time when the bills of exchange to have been drawn for the amount would have been due. And by the decree, after providing for payment to the Respondent, John Campion, of what should be found due to him on the said account out of certain funds in Court, it was ordered, in case the same should be insufficient to pay the amount found due, that the deficiency should be paid by Richard Campbell Bazett, David Colvin, John Farquhar, William Crawford, and James Gathorne Remington, out of the sum of £2000 received by them out of the proceeds of the sale of cotton-wool, in the pleadings mentioned. The Respondents, David Colvin, William Crawford, and James Gathorne Remington, having survived their partners, the Defendants, Richard Campbell Bazett and John Farquhar, appealed to the House of Lords against the decree on further directions, and also against the order of the 30th of July, 1831, discharging the order for a new trial, and against another order dated the 18th of January, 1832; after the hearing of the appeal, an order was made by the House of Lords, dated the 12th of August, 1834, whereby it was amongst other things ordered and adjudged, that the parties should proceed forthwith to a new trial of the issue. And it was further ordered, that John Campion should have liberty to apply to the Court of Chancery for payment into court of the sum of £2000, or any part thereof, in case the Appellants in such appeal **[174]** should delay proceeding to such new trial. And it was further ordered, that the decree or order of the Court on further directions of the 15th of February, 1832, should be reversed. In pursuance of the order of the House of Lords, the Respondent, John Campion, and the other Respondents, proceeded to a new trial of the issue, and upon the trial thereof a verdict was again found in favour of the Respondent, John Campion, the Plaintiff at law, subject to the opinion of the Court of Common Pleas upon a special case, upon the argument of which, the Court pronounced its opinion and judgment thereon in favour of the Respondent, John Campion.

All the proceedings subsequent to the decree on the original hearing of the cause, including the trials at law, were respectively taken and had in the absence, and without the privity of the Appellants, who had no notice thereof.

The Respondent, John Campion, having obtained the order of the 13th of June, 1836, for setting down the cause to be heard on further directions, served the same on the clerk in court of the Appellants, and the cause came on to be heard before the Vice-Chancellor, upon the verdict and on further directions, on the 6th and 23d days of July, 1836; and it was thereupon, by a decretal order dated the 23d of July, 1836, referred to the Master to take an account of what was due to the Respondent, John Campion, under the charter-party, and to compute interest thereon, at the rate of £5 per cent. per annum, from the 1st of September, 1818, being the time when the bills of exchange in the pleadings mentioned agreed to be given would have been due; and after giving cer-**[175]**-tain directions for the taking of such account, it was among other things declared, that in case any balance should be found due to the Respondent, John Campion, on the said account, he had a lien for the amount thereof on the sum of £2000 in the pleadings mentioned; and it was ordered that the Appellants should pay into the Bank, with the privity of the Accountant-General of the Court, to be there placed to the credit of this cause, subject to the further order of the Court, the sum of £2000, but the same was to be without prejudice to any question of interest or lien on the interest of the said sum of £2000, and the Respondent, John Campion, was to be at liberty to apply to the Court respecting the interest of the said sum of £2000 as he might be advised.

This order was, on the 20th of September, 1836, enrolled in the Court of Chancery, by or at the instance of the Respondent, John Campion.

The appeal was against this order.

For the Appellants, the Solicitor-General and Sir Charles Wetherell.

The suit being a mere suit of interpleader, limited to the sum of £2585 0s. 10d., and the Appellants having been in effect dismissed by virtue of the original decree, it was irregular, and at variance with the universal practice of the Court observed in suits of this description, to give any directions relative to the sum of £2000, which formed no part of the subject of interpleader, or to give any relief as against the Appellants, by a decree made on the hearing for further directions.

Even if consistently with regularity of proceeding and the practice of the Court, it was competent to [176] the Court to give any relief touching the sum of £2000, that relief ought to have been given against the Respondents, Richard Campbell Bazett and his partners, who by their answer admitted that they had received that sum from the Appellants.

The decree on further directions was expressed to be made, and was in fact made, on the footing of a verdict given upon the trial of an issue of fact, between the Respondent, John Campion, and the other Respondents. The declaration and order complained of by the Appellants are respectively founded upon this verdict; and by this means the Appellants are held, contrary to the first principles of justice, to be affected and bound by the result of proceedings taken in their absence, and to which they are perfect strangers.

Even supposing that in this suit, being a mere suit of interpleader limited to the sum of £2585 0s. 10d., any question relative to the sum of £2000 could be properly raised, yet the right of the Respondent, John Campion, to have the sum of £2000 considered and dealt with, as is done by the present decree, as a sum still remaining in the hands of the Appellants, involves the question, whether he did or not, in fact, consent to the payment thereof to the other Respondents in the year 1818. But this question did not form an issue in the cause. The fact of consent has not been, nor could be either proved or disproved therein; and this is a question which, even upon the assumption that the payment was made without his consent, the Respondent, John Campion, ought now to be precluded from raising, after having suffered so long a period to elapse, without taking any effective steps, by cross-bill or otherwise, with a view to [177] obtain any relief against the Appellants in respect thereof.

It appears by the answer of the Respondent, John Campion, that he did not claim even the whole of the sum of £2585 0s. 10d., which was the subject of interpleader, and was paid into court by the Appellants, and that this sum was more than sufficient to satisfy what he stated to be then due to him for principal money, together with interest thereon; and although the delay which has taken place in settling the disputes of the parties, and in establishing the right of the Respondent, John Campion, may have swelled the amount of his claim beyond the sum so paid in, yet that delay is not imputable to the Appellants, and the consequences of it ought not to be visited upon them.

The principle upon which the decretal order complained of was founded, being that the Respondent, John Campion, having ultimately established his right, the injunction obtained against him was wrongfully obtained, is a principle which strikes at the root of all bills of interpleader. The mere fact that there were adverse claims on the fund in the hands of the Appellants, is not displaced by the subsequent success of one, and the defeat of the other of those claims. It was that fact which warranted the course of proceeding adopted by the Appellants, in filing the bill of interpleader and obtaining an injunction thereon. The character of that proceeding cannot be affected, nor can it afterwards become liable to be objected to as an improper course with respect to either of the adverse claimants, by the ultimate issue of the litigation between them.

The decree or decretal order complained of is [178] perfectly unprecedented, and not maintainable by any principle hitherto recognised in courts of equity in interpleading suits: and the injustice and hardship to which the Plaintiffs in this suit must be exposed, if the principle adopted by the Court below, in the present case, be sanctioned, shew the expediency and necessity of adhering to those established rules, which have hitherto strictly confined the proceedings in an interpleading suit to the subject of interpleader.

For the Respondents, Mr. Knight and Mr. Wigram.

The Respondent, John Campion, had a lien on the whole of the proceeds of the cotton-wool for the whole of the freight due to him (beyond the freight of the cotton-wool itself), and for interest upon such freight, and the Appellants having notice of such lien, were not justified in paying over any part of the proceeds to the firm of Bazett, Farquhar, Crawford, and Co., without the consent of the Respondent, John Campion; and the Appellants untruly stated in their bill of interpleader, that they had paid the £2000 in question to the other Respondents, with the consent of the Respondent, John Campion; but the Appellants ought to have stated the case truly, and thereupon ought to have brought that sum into court in the first instance.

The right of the Respondent, Campion, has been established by verdict and judgment at law, and he has suffered loss by acts of the Appellants, for which he might have had a remedy at law, and which ought now to be supplied in equity; *Pulteney* v. *Warren* (6 Ves. 73), *Browne* v. *Newall* (2 My. and C. 558).

[179] The Lord Chancellor: In this case the appeal is on behalf of the East India Company, against an order of his Honour the Vice-Chancellor, by which it is ordered that the Plaintiffs in the interpleading suit should pay into the Bank of England, with the privity of the Accountant-General of this Court, the sum of £2000. But this is to be without prejudice to any question of interest or lien on the said sum of £2000, and the Defendant, John Campion, is to be at liberty to apply to the Court respecting the interest of the said sum of £2000 as he may be advised; and any of the parties are to be at liberty to apply to the Court.

The question arises upon a legitimate subject-matter of a suit of interpleader, the East India Company having, in the execution of a duty imposed upon them by act of parliament, received the proceeds of certain goods. The question appears to be, whether Bazett and Company, who were the consignees, were entitled to receive the money, or whether Mr. Campion, by virtue of a charter-party, was not entitled to a lien upon the proceeds of these goods, to satisfy the amount due for freight.

It appears that part of the proceeds of the goods had been paid to Mr. Campion. It appears that the other part, being a sum of £2000, had been paid to Bazett and Company, whether with the consent of Mr. Campion or without it, depends upon proof of the allegation in the bill, by which it is alleged to have been paid with his consent; and there is an answer of Mr. Campion, not disputing the fact of its having been so paid, but disputing the statement in the bill, of its having been paid with his consent. But that there **[180]** was a sum of £2000, part of the proceeds of the goods, which did not remain in the hands of the East India Company, is a fact with respect to which neither party raise any dispute.

Under these circumstances, the East India Company having parted with so much of the proceeds, and having in their hands the sum of £2585, the balance of money received by them on account of the proceeds of the goods, the contest arises, whether that sum is payable to Messrs. Bazett and Company, the consignees, or whether Mr. Campion has not a lien upon that sum, for the amount which he claimed to be due to him for freight.

Now it appears from his answer, that what he claimed for freight at the time when he put the answer in was the sum of £1746 13s. 8d., together with interest thereon from the time the balance became due. The balance became due, it appears, in the year 1818; he, therefore, was entitled, according to his own statement, to £1746, together with interest upon that sum from the year 1818; the answer having been put in in the year 1824. Now giving the utmost possible allowance for what would become due as interest in that interval, it is impossible that it should amount to the sum of £2585. He stated only that he claimed to be entitled to the greatest part of the sum so remaining in the hands of the East India Company; and at the time when the East India Company held the stake which was the subject-matter of the contest, Bazett and Company made an objection to Mr. Campion's lien. Under these circumstances, the East India Company finding themselves attacked by both parties, not knowing to whom they ought to pay it, exercised the right **[181]** which any person under those circumstances is entitled to, of coming into a court of equity and stating, that money or other property which he holds being in contest, he is ready to make it over to the party who proves that he is entitled to it; but that he is unable to discover who is entitled to it, and therefore he calls upon the Court to exercise its jurisdiction to take from him that which he admits is not his own, to decide between the

contending parties, and to ascertain to whom it ought to be transferred. The money accordingly was, in this case, paid into court, and an injunction granted.

Unfortunately many years' litigation have ensued between the two contending parties before they have been able to settle to which of the two claimants the money was due. In the meantime the East India Company had, on the day specified in the order, paid the money in, and relieved themselves from the whole of the demand made upon them, they not being able to ascertain to whom it was due.

If the principle were ever to be established, which this decree would go to establish, that a party from whom money is claimed by different persons, cannot relieve himself from the obligation by paying the money into court in an interpleading suit, the result would be inevitable, that a party so circumstanced would lose all benefit from an interpleading suit; and, in such a case as this, it is obvious that the debtor had better pay both of the claimants than apply to the Court for its protection, although it is not likely that another instance might occur, in which the litigation would be such as to make the final amount to be paid **[182]** more than equal to the double of the original demand.

Now whose fault is this? Is it the fault of the East India Company, that the successful party has suffered by the delay which has arisen from this litigation? The party bound by the obligation is not the cause of it. He was ready to pay the claimant proving that he was entitled to the matter in dispute. The evil has arisen not from any fault of the East India Company, but from the protracted litigation of the party who ultimately turned out to have no right. No case has been cited at the bar. No case has been referred to in which any such claim as this has been made, as against a party who in an interpleading suit had deposited the subject-matter of the contention in court, and had good reason to suppose, that by so doing, he had relieved himself of the obligation. I am satisfied that no case can be cited, because it appears to me inconsistent with the first principles of interpleader, and goes to nullify the objects which courts of equity profess to have in exercising this jurisdiction, and so it has been treated throughout this cause; because, wherever we find an order upon any party to make good an ultimate loss, it is nowhere made against the East India Company; but it is always made against the party who has been the cause of the litigation and the loss. Accordingly it appears, that the order of the 15th of February, 1832, (which was afterwards reversed, not on account of this provision, but because this House thought there ought to be further enquiry at law) directed the Master "to take an account, and that the deficiency should be paid by the other Respondents, out of the sum of £2000 **[183]** received by them out of the proceeds of the sale of the cotton-wool," another instance shewing that the £2000 had passed from the possession of the East India Company, and was admitted to have been received by the firm of Bazett and Company.

Upon this money being paid into court, Mr. Campion applied to have it laid out, and the matter in contest (which constitutes the loss which Mr. Campion, if he has not a remedy elsewhere, will ultimately sustain) is the difference between the interest of 5 per cent., to which he was entitled under this charter-party, and that interest which the sum paid into court and invested in the 3 per cents., will produce. The order of the 15th of February, 1832, directed that the stock which had been purchased should be sold, and in case it should be insufficient to pay the amount found due, that the whole of the money arising from the sale and the cash, should be paid to Campion. And then it directed, that he should give security, it being then unascertained what would be the amount of his ultimate demand, to refund the same in case the Court should thereafter so direct. And it was ordered, that Messrs. Bazett and Company should give security, to be settled and certified by the Master, to pay the sum of £1154 7s. 4d., being the residue of the money by the decree ordered to be paid by them to Campion, together with the subsequent interest and costs, in case the decree should be affirmed; and the other Respondents should be ultimately ordered to pay the same or any part thereof. It was unascertained what at that time would be exactly the amount of Mr. Campion's claim; he was to receive the money out of the **[184]** Court, he giving security to refund. On the other hand, it having been ascertained, that £1154 would be due to him, Bazett and Company were to give security to pay that sum of £1154 on settling the account, together with the amount of interest and costs which might be found to be due to Campion. I use this only to shew, that

from the commencement of the cause down to the present time, the Court of Chancery has considered that the East India Company were entirely discharged from obligation, by paying the money into court. And the order of the 25th of April, 1832, provides means by which Campion, in the event of his succeeding in establishing a claim beyond the money paid into court, should from Bazett and Company receive not only the amount due at that time from them, but the amount of the subsequent interest and costs.

When those orders came before this House, an order was pronounced directing the course to be adopted for further investigating the title of the parties at law; and that order contains this provision: it was ordered, that Mr. Campion should have liberty to apply to the Court of Chancery for payment into court of the sum of £2000 in case the other Respondents should delay proceeding to a new trial. It is quite clear, that the object of that provision was to secure to Mr. Campion the means of a speedy termination of the question between himself and Bazett and Company. It is also quite clear, that that order was addressed to Bazett and Company; and it is an additional confirmation of the course which the Court adopted of looking to Bazett and Company, as the parties who [185] were bound to pay whatever Mr. Campion was entitled to claim.

The result of the former litigation has been to establish the right of Mr. Campion, and undoubtedly, it would be most unfortunate if Mr. Campion, who has been for so many years kept out of his just rights by the claim set up, and the litigation following that claim on the part of Bazett and Company, should not be indemnified. But it would be equally unfortunate, if an innocent party should be required to make good these losses; if the East India Company, who have been driven by circumstances, over which they had no controul, to the course which they adopted, and who have paid the money to Bazett and Company in the manner which I have stated, should now be called upon to pay it over again; that money being in the hands of Messrs. Bazett and Company, and of course available for all those purposes for which Mr. Campion would be entitled to make use of it, for the purpose of reimbursing him for the loss which he has sustained.

The order of the Vice-Chancellor after the last trial, founded upon the final establishment of Mr. Campion's rights, directs an account to be taken: following, I believe, the terms of the order of the Master of the Rolls, it directs an inquiry to be carried on for the purpose of ascertaining what is now due to Mr. Campion, and then it declares that Mr. Campion has a lien for the amount thereof on the sum of £2000. As far therefore as any declaration of right can establish the title of a party, this decree does establish Mr. Campion's title, because it declares that he has lien upon that sum. Who then is in possession of that sum upon which it is [186] declared he has a lien? All the proceedings admit that this sum of £2000, upon which it is declared that he has a lien, is in the hands of Bazett and Company,—not in the hands of the East India Company. I apprehend, therefore, that although we had not the advantage of hearing the case argued on the part of Messrs. Bazett, that they are substantially parties at your Lordships' bar; and I apprehend that the order, so far as I have now stated it, declares, as against Bazett and Company, that Mr. Campion is the party having a lien upon the fund admitted and proved to be in the hands of Bazett and Company.

But the contest here is not between Bazett and Company and Mr. Campion, but it is between Mr. Campion and the East India Company; and although the declaration of lien is included in the appeal, it does not appear at all necessary for the purpose of relieving the East India Company from that part of the decree, which imposes so great a burthen upon them, to alter the other part of the decree. The part of the decree which affects them is, that which orders them to pay the £2000 into court. If your Lordships are of opinion that the decree ought to be altered by omitting that portion of it directing the East India Company to pay £2000, it leaves the right to Mr. Campion not only untouched, as between him and Bazett and Company, but it leaves standing on the face of that decree a declaration which would be found quite sufficient to enable him to get that relief to which he is entitled.

The case of *Pulteney* v. *Warren* [6 Ves. 73], which was urged at the bar on behalf of the Respondent, and which I had occasion lately to consider, together with [187] several others, established only this principle, that where a party applies to a court of equity, and carries on an unfounded litigation, protracted under circumstances

and for a length of time which deprives his adversary of his legal rights, the court of equity considers that it should itself supply and administer, within its own jurisdiction, a substitute for that legal right, of which the party, so prosecuting an unfounded claim, has deprived his adversary. It was upon that principle that Lord Eldon made the order in *Pulteney* v. *Warren* [6 Ves. 73], because there a party had, by litigation, improperly deprived his opponent of his legal remedy. It is for such reason that a court of equity will give a party interest out of the penalty of a bond, where, by unfounded litigation, the obligor has prevented the obligee from prosecuting his claim at the time when his legal remedy was available. Upon that principle it is that when a party, by unfounded litigation, has prevented an annuitant from receiving his annuity, the Court will, in some cases, give interest upon the annuity. All those cases * depend upon the same principle of equity; a principle which cannot properly be applied to a case of a totally different nature, and one in which the circumstances do not seem to me to justify that which has been done in this case, namely, that an adverse order should be pronounced after the suit has been for many years considered an interpleading suit, upon the application of one of the Defendants, directing the Plaintiff in the suit to pay a sum of money into court, which never was a subject of interpleader, and as to which the Plaintiff in the interpleading suit never asked for any relief. [188] Those cases, therefore, although they establish a perfectly good principle in themselves, are no authority for the order against which this appeal is made. I submit, therefore, to your Lordships, that the order of this House should be so far to vary the order of the 23d of July, as to omit that portion of it which directs the East India Company to pay the money into court.

Lord Brougham: There can be no doubt that the decree of the Court below must be so far varied. It is possible some mistake may have arisen in the Court below with respect to the order made by your Lordships' house in 1834, when the decree refusing a new trial was reversed, and your Lordships directed that a new trial should be had of the issue. The result of the new trial was that the same party prevailed upon the second trial as upon the first, namely, Mr. Campion; and I cannot help stating, that in consequence of all this litigation in the Court below and here, Mr. Campion is subjected to very great delay and to very heavy costs. Considerable difficulty appears to have occurred in discharging that part of the order of the House to which I am about to advert, though I confess I should not have thought there was any thing of obscurity which could have given an opportunity of construing it otherwise than in the mode which will be consistent with your Lordships' present decision. After directing the variation of the decree below as regarded the refusing of the new trial, your Lordships directed the new trial to be had, and then added, "And it was further ordered that the Respondent, John Campion, should have liberty to apply to the Court of [189] Chancery for payment into court of the said sum of £2000, or any part thereof, in case the said Appellants in such appeal should delay proceeding to such new trial." It is quite clear that this could not mean to affect the East India Company, which was no party to the appeal before this House. It appears to be clear, from the very words of the order, that the party against whom the application of it was intended to be directed, and was by the terms of the order directed, was not the East India Company, but Campbell, Bazett, and Company. The liberty was for application to be made, in case the said Appellants in the appeal should delay proceeding to such new trial. Now who were the Appellants? Campbell, Bazett, and Company; and this plainly indicates, therefore, the purpose of the order, to prevent any unnecessary delay in bringing on that issue to a trial. The parties appellant, Campbell, Bazett, and Company, having resisted the new trial, it was apprehended might be slow in bringing it on, and that Mr. Campion might thereby be exposed to still further hardship in obtaining his rights; therefore it is said he shall be at liberty to apply to the Court for a payment into court. The purpose was to insure expedition, if the Appellants should be found dilatory in bringing forward the trial, which the reversal of the order of the Court below had directed. With respect to the costs of this appeal, Mr. Campion cannot, of course, have them from the East India Company. The East India Company have been put to an expence to which they

* See the note at the end of the case. [11 Bli. N. S. 190.]

ought not to have been subjected, in coming here to have the order altered in their favour, but he is subject to the costs. How then will your Lordships deal with these costs? **[190]** The question is, whether there are not the means of giving those costs against Campbell, Bazett, and Company? They are not, in point of fact, before the House, but it is only by their own default that they are not so; they might be here, but they do not choose to appear. It is a question whether it is not possible so to frame this order as to prevent the costs of this appeal falling on Mr. Campion, upon whom or upon the East India Company they must necessarily fall in the first instance As to the Appellants who have prevailed in the appeal, it is quite clear they cannot be given against them, and it is equally clear that Mr. Campion ought not to be subjected to them.

Judgment reversed.

See *Anon.* 2 Ca. in Chancery, 217.; *Pulteney* v. *Warren*, 6 Ves. 73.; *Morgan* v. *Morgan and Jones*, 2 Dick. 643.; *Grant* v. *Grant*, 3 Sim. 340., see p. 364.; 3 Russ. 598., see p. 607. *et seq.*; *Duval* v. *Terrey*, Shower's Parl. Cases, p. 15.; *O'Donel* v. *Browne*, 1 Ba. and Be. 262.

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ENGLAND.

(Court of Chancery.)

ANN MORTIMER,—*Appellant;* PETER TREZEVANT and ELIZABETH WILLOUGHBY his Wife and Others,—*Respondents.*

[Mews' Dig. vii. 570; S. C. 4 Cl. and F. 657.]

In a suit for an account of the outstanding estate of an intestate, and upon a decree of reference to the Master, to inquire what part of the estate was outstanding, and a charge carried in by the Plaintiffs, it was found by the report that there was due from G. M. £20,000, lent by the intestate in April, 1826, £18,000, with interest, under a contract for purchase of part of the real estate of the intestate, £47 for furniture, and £37 for rent received on account of the intestate. A further charge was carried in against G. M. of £6000 and £4000, the amount of two drafts drawn by G. M. upon the bankers of the intestate, £4504 6s. 11d., the price of some wool, £1750, the price of some sheep, £266 by a check, and £664 11s. 9d. in cash, received by G. M., for rent due to the intestate, £1000, value of furniture, the value of a marble statute, and certain timber. With respect to part of these sums and articles, they were claimed by G. M., as gifts from the intestate, under the following circumstances:

In 1821, F., the intestate, gave the following authority to his bankers: "To Messrs. Barnett, Hoare, and Co., London, 2d October, 1821. Gentlemen, I request you will please to advance to G. M. such sums of money as you may think prudent, with the opinion of Mr. D. C., for the purpose of assisting him to pay in ready money the wool with which he manufactures his cloth. (Signed) J. F." In pursuance of this authority, G. M. drew on the bankers for the before mentioned sums of £6000 and £4000. In October, 1822, J. F. delivered to his bankers the following order: "Messrs. B. and Co. Please to honour such cheques as Mr. G. M. may draw for my use." In pursuance of this order G. M. drew on the bankers cheques, which were duly ho-**[192]**noured, to the amount of £20,000. In January, 1826, G. M. purchased from the intestate part of his estate, at the price of £19,700, of which £675 was paid by way of interest upon the purchase money, to the administrator of the intestate. What remained due was matter of dispute as to the amount, but it was admitted by G. M. that £18,000 was due. In April, 1826, the intestate advanced to G. M., by way of loan, the sum of £20,000 through the medium of the mercantile house in which the intestate was a co-partner. G. M. was also supplied with wool to the amount of £7000 by a tenant, and under the authority of the intestate, to whom the tenant was indebted to the same

amount for rent. G. M. was also supplied by the partners of the intestate, and debited in their partnership accounts, with indigo to the amount of £2373 13s. 3d.; and he was also charged in the proceedings before the Master upon the reference, with the possession of various articles of furniture to the value and amount of £18,865 11s. As to the sum of £18,000, part of the sum of £19,700, it was admitted by G. M. that it was due from him to the estate of the intestate; and upon a question made as to the validity of an alleged will of the intestate, a declaration was made by G. M. in an affidavit, that one of the sums of £20,000 advanced to him by the intestate was a loan and not a gift, but this declaration he retracted, as obtained from him by stratagem. As to all the sums and articles of property forming the subject of charge, except as before stated, G. M., by his examination and answer put in to interrogatories, claimed them as gifts to him from the intestate; and, in support of this claim, produced three letters or documents purporting to be signed by, but the body of the documents not being in the handwriting of the intestate, his uncle, in the following words and figures: "Church House, April 30th, 1826. Dear George, To relieve your anxiety about matters concerning money, I tell you that all sums of money you have ever received from me are gifts, and not loans. This I think ought to satisfy your lady, and convince her that I am doing a great deal for the benefit of your family, as I have always told her. (Signed) J. F." As to the transaction respecting the wool, and sheep, and indigo, G. M. produced a letter, which as he alleged was signed and delivered to him on the 20th of December, 1825, as follows: "Fonthill Abbey, September 20th, 1825. Dear George, I agree to give you all the Merino wool and sheep which B. has given for payment of his rent, to be manufactured at the mill for your use and benefit; likewise **[193]** indigo, for which I will give you an order upon the house in Broad-street; and on my arrival in town, I will make arrangements to give you a sufficient capital to carry on the mill to its extent, and it is my wish that the machinery should be upon the latest improvements. (Signed) J. F." As to the plate, furniture, and fixtures, G. M. produced a letter, which as he alleged was signed and delivered to him on the 5th of December, 1825, as follows: "Dear Sir, The plate, furniture, and fixtures, or any of the materials, or glass you may require from the Abbey, to complete your new house, or any description of timber on the Fonthill estate, you are to take away before the remainder of the property is valued. (Signed) J. F."

Held, under these circumstances and upon this evidence, that the advances of money were loans and not gifts; but upon some of the questions the Master was directed to make further inquiries.

On the 10th of February, 1829, the Respondents Peter Trezevant and Elizabeth Willoughby his wife,together with the Respondent Charles Robert Simpson,and Henry Arthur Broughton (who is since deceased), the then trustees of the property to which the Respondent Peter Trezevant and Elizabeth Willoughby his wife were entitled, in respect of the Respondent Elizabeth Willoughby Trezevant being one of the next of kin of Mr. Farquhar, filed their bill in the high Court of Chancery, against the Respondent John Farquhar Fraser, and James Mortimer, George Mortimer, the Respondents Sir William Templer Pole and Dame Charlotte his wife, James Lumsden and Mary his wife, and William Aitken and Charlotte his wife, thereby, amongst other things, stating that John Farquhar was, at the time of his decease, seised to him and his heirs of very considerable freehold and copyhold estates, which he had contracted to sell, and that he was possessed **[194]** of very considerable personal estate, and that he died on the 6th of July, 1826, intestate, leaving the Respondent Elizabeth Willoughby Trezevant his heir at law and customary heir, and also leaving the Respondent Elizabeth Willoughby Trezevant, together with the Respondent James Mortimer, and the said George Mortimer, the Respondent Mary the wife of the Respondent James Lumsden, the Respondent Charlotte the wife of the Respondent William Aitken, the Respondents John Farquhar Fraser, and Charlotte the wife of the Respondent Sir William Templer Pole, bart., his (the intestate's) only next of kin him surviving. And also stating a settlement, whereby the

Respondent Charles Robert Simpson, and the said Henry Arthur Broughton, were appointed trustees for the Respondents Peter Trezevant and Elizabeth Willoughby his wife, and their children, of one seventh share of the personal estate and effects of the said John Farquhar, and of the monies to arise from the sale of his freehold and copyhold estates; and also stating, that on the 15th of December, 1826, the Respondent John Farquhar Fraser obtained letters of administration of the said intestate's personal estate, and that he had possessed himself of the personal estate of the said intestate; and thereby praying that an account might be taken of the personal estate and effects of the said intestate possessed by or come to the hands of the Respondent John Farquhar Fraser, and that an account might also be taken of the debts and funeral expenses of the said intestate; and that his said personal estate might be applied in a due course of administration, and that the clear residue thereof might be ascertained, and [195] that one seventh part or share of the clear residue thereof might be paid by the said Respondent John Farquhar Frazer, to the Respondent Charles Robert Simpson, and the said Henry Arthur Broughton, as such trustees as aforesaid, upon the trusts of the said indenture.

The several Defendants to the bill put in their answers thereto.

Part 2. of schedule A., to the answer of the Respondent John Farquhar Fraser, was entitled as follows, and contained, amongst others, the items following, (that is to say) "Containing an account of all such parts of the personal estate and effects of the intestate as are still remaining outstanding or undisposed of."

Amount due from the Defendant, George Mortimer, one of the next of kin, for money lent to him by the deceased, in October, 1821 £10,000

Ditto, from ditto, ditto, April, 1826 £20,000

Against which this Defendant has retained the sum of £21,337 15s. 5d., the amount of what was distributed in stock amongst the other next of kin, in the month of - - - -

The value of a quantity of indigo delivered to the said George Mortimer, by Messrs. Bazett, Farquhar, and Company, and charged to the account of the intestate - - - - £2373 13s. 5d.

The value of a quantity of wool, delivered to the said George Mortimer, by John Benett, esq., to be accounted for by the said George Mortimer to the intestate

The value of a quantity of linen, china, and curiosities, and certain articles of furniture, belonging to the intestate, in the possession of the said George Mortimer

[196] A marble statue of the late Mr. Beckford, in the possession of the said George Mortimer - - - - - -

The value of a small quantity of furniture, taken at a valuation by the said George Mortimer - - - - - - -

The cause was heard before the Master of the Rolls, on the 30th of March, 1830, when he decreed an account of the personal estate of John Farquhar, the intestate, come to the hands of the Respondent John Farquhar Fraser, the administrator: And an account of the intestate's debts and funeral expenses, and interest on such of his debts as carried interest, with the usual directions in such cases for ascertaining such debts; and the decree also directed that the Master should take an account of the personal estate and effects of the intestate then outstanding: And that he should inquire whether it would be for the interest of the parties beneficially interested, that any proceedings should be commenced for the purpose of getting in the property outstanding, and whether any of the contracts of the intestate, for sale of his real estates, were then subsisting and capable of being, or ought to be carried into effect; and also whether it would be expedient that any of the leasehold property of the intestate, not contracted to be sold, or the contracts for which were not then subsisting, or not capable of being or ought not to be carried into effect, should be sold and disposed of: And it was ordered that the personal estate of the intestate should be applied in the first place in payment of his debts and funeral expenses: And it was ordered that the Master should enquire who was or were the next of kin of the intestate living at his death, and if any or either of them were since dead, and if dead, when they died, and who was or [197] were their personal representative or representatives; and the decree contained the usual directions for the better taking the said accounts and discovery of the matters aforesaid.

Various orders were subsequently made in the cause, with respect to the real and leasehold estates of the intestate, and relating to the sale thereof.

On the 21st of December, 1830, the Respondent Peter Trezevant and Elizabeth Willoughby his wife, and their trustees, carried in before the Master a state of facts and charge, to the following effect:

That for several years previous to the decease of the intestate, the Defendant George Mortimer carried on the business of a wool-broker, merchant, and clothier, in London, and having represented to the intestate that he should derive much greater benefit than he then derived from his business, if he was enabled to pay ready money for his purchases, which he was then unable to do for want of the requisite capital, the Defendant prevailed on the intestate to give him an authority addressed to his (the intestate's) bankers, for the advance of such sums of money as he would require for the purpose aforesaid, out of his (the intestate's) monies from time to time in their hands, which was in the words and figures following, (that is to say) "To Messrs. Barnetts, Hoare, and Co., London, 2d of October, 1821. Gentn., I request you will please to advance Mr. George Mortimer such sums of money as you may think prudent, with the opinion of Mr. David Colvin, for the purpose of assisting him to pay in ready money the wool with which he manufactures his cloth. I am, Gentn., your most obedient servant, John Farquhar." And at **[198]** the same time the Defendant offered and undertook to pay the intestate £5 per cent. per annum upon each of such advances from the time they should be respectively advanced. That in pursuance of the said authority, the Defendant in the lifetime of the intestate drew various drafts on the said bankers, for various large sums of money, and amongst the rest of the said drafts he drew one on the 15th of October, 1821, for £6000, and another on the 9th of November, 1821, for £4000. That none of the said drafts were ever repaid to the intestate in his lifetime, or to the administrator since his decease, but the same and all interest, according to the undertaking of the Defendant, remained then due from the Defendant to the estate of the intestate.

That in October, 1822, the intestate contracted with William Beckford, of Fonthill Abbey, esquire, for the purchase of certain large real estates at Fonthill, and other parishes, and places adjoining, together with a great quantity of household furniture, plate, china, books, pictures, curiosities, and other valuable personal property and effects, in Fonthill Abbey aforesaid, and was soon after his said purchase induced by the persuasions of the said Defendant, to build a factory on part of the said estate at his (the intestate's) expense, but under the superintendence and direction and for the use of the Defendant, the said Defendant undertaking to pay the said intestate interest at the rate of £5 per cent. per annum upon such sums as should be advanced; and in order therefore to provide for the expenses of the said building, the said intestate wrote and delivered to his said bankers the following order: "Messrs. Barnetts, Hoare, and Co. Gentn., please to honour **[199]** such cheques as Mr. George Mortimer may draw for my use. I am, gentn., your most obedt. servt. J. Farquhar. Fonthill, the 28th of August, 1824." That in pursuance of the last-mentioned order, the Defendant in the lifetime of the intestate, drew a great many cheques on the bankers, exceeding altogether in amount the sum of £20,000, all of which were duly honoured by the said bankers out of the monies of the said intestate then in their hands.

That the said intestate entered into an agreement bearing date the 2d of January, 1826, whereby he agreed to sell to the said Defendant certain large freehold, copyhold, and leasehold estates, in the parishes of Fonthill Bishop, Fonthill Gifford, Tisbury and Chilmark, in the said county of Wilts, (part of the estates purchased by the intestate of Mr. Beckford) and including the factory hereinbefore mentioned, with the timber and other trees, on the freehold and copyhold parts thereof, at the price of £19,700, and which estates, or the greater part thereof, the said Defendant had recently contracted to sell for £40,000 or some larger sum; and although it is expressed in the said agreement that the intestate in consideration of the sum of £1700 paid to him by the Defendant on the 5th of December then last past, in part payment of the said purchase-money, and of the remainder being secured on the said estate by way of mortgage, as thereinafter also mentioned, yet the said Plaintiffs charge that in fact the sum of £1700 was never paid by the Defendant to the intestate, and that the intestate never gave to the Defendant any receipt or acknowledgment for the same, other than what is expressed in the said agreement, which the said Plaintiffs submitted was not in law a sufficient **[200]** proof of the payment of

the said sum of £1700, and the said Plaintiffs therefore charged, that the whole of the said £19,700 is still remaining due thereon from the Defendant, together with interest thereon at the rate of £5 per cent. per annum, from the 11th of October, 1826, according to the terms of the said agreement, except the sum of £675 paid to the said administrator by the said Defendant on account of the said interest.

That the intestate on the 22d of April, 1826, through the medium of Messrs. Bazett, Colvin, and Company, with whom he was a partner, lent the Defendant the sum of £20,000 at £5 per cent. per annum, and the same, with interest at the rate aforesaid, was then due from the Defendant.

That John Benett, of Pythouse, in the county of Wilts, esquire, being indebted to the intestate in £7000 for rent of various parts of the estate purchased by the intestate of William Beckford, esq., the Defendant prevailed upon the intestate to allow Mr. Benett to supply him with wool, for the purposes of his factory, to the amount of his said rent, to which the intestate and Mr. Benett consented, and Mr. Benett accordingly supplied the Defendant with wool to a large amount, and the Defendant undertook to account to the intestate for the same, and to pay him the value thereof, with interest at £5 per cent. per annum.

That the intestate and his partners being in the year 1825 possessed of a large quantity of indigo, the Defendant in the month of November in the same year, induced the intestate to prevail on his said partners to consent to the same being delivered to him the Defendant, to be used in his said factory, the said Defendant undertaking at the same time **[201]** to pay the intestate the value thereof, with interest at £5 per cent. per annum, and the said Defendant accordingly received a large quantity of the said indigo from the intestate and his partners, for which his partners have debited the intestate in the partnership accounts with the sum of £2373 13s. 5d., and which the Plaintiffs presume was in fact the true and just value thereof, but the said Defendant never paid the sum of £2373 13s. 5d., or any part thereof, to the intestate or to the said administrator since his decease.

That the Defendant in the lifetime of the intestate and also since his decease, without the consent of the intestate or the administrator since his decease, received various sums of money from the tenants of the intestate of his estates in Wiltshire and in Middlesex, but hath never come to any account for the same or paid any part thereof, either to the intestate or to the administrator since his decease, and there was then a large sum of money due from the Defendant in respect of the same.

That soon after the intestate purchased the estates, and the household furniture, plate, china, books, pictures, curiosities, and the other valuable personal property and effects of William Beckford, Mr. Phillips, of Bond Street, auctioneer, was put in possession of the same, and was employed by the intestate to make an inventory and appraisement thereof, with a view to a sale, and accordingly part thereof was sold by auction, and delivered to the respective purchasers, and when Mr. Phillips quitted possession of the unsold parts thereof, he left the same, which the Plaintiffs believed amounted in value to the sum of £18,865 11s., with a marble statue of Alderman Beckford, the father of **[202]** William Beckford, of very considerable value, at Fonthill Abbey: all of which were taken possession of by the Defendant, and appropriated to his own use.

That in addition to the before-mentioned properties, there was also due from the Defendant, to the estate of the intestate, the sum of £45, being the amount of a small quantity of furniture belonging to the intestate in Church House, taken by the said Defendant at a valuation.

The Plaintiffs Peter Trezevant and Elizabeth Willoughby, his wife, and their trustees, therefore charged that the Defendant ought to be examined upon interrogatories to be settled by the Master, touching the several matters aforesaid: and in case the Defendant should refuse to make a full disclosure and discovery of the said matters, then (no witnesses having been examined in the cause) that the Plaintiffs might be at liberty to exhibit interrogatories for the examination of witnesses respecting the same, as they should be advised or might think fit.

On the 19th of February, 1831, the Respondents Peter Trezevant and Elizabeth Willoughby his wife, and their trustees, exhibited interrogatories for the examination of George Mortimer, as such alleged debtor to the estate of the intestate, and on the 3d of May, 1831, George Mortimer put in his answer and examination thereto,

and thereby in substance denied the allegations in the Respondents' state of facts, and that any of the sums of money therein stated to have been advanced by the intestate to him were advanced as loans at interest, and on the contrary stated, that the same were absolute gifts to him, and were always so considered by the [203] intestate in his lifetime, as well as all the other property and effects, consisting of the wool and sheep, the indigo, and the household furniture and effects: and he further stated, that the intestate had always treated him in every respect as a parent, and as such always expressed himself most anxious and desirous to further his prospects in life, and to provide for him and his family: but George Mortimer by the examination admitted, that the sum of £18,000, the remainder of the purchase-money for part of the Fonthill estate purchased by him as before mentioned, together with interest thereon, at £5 per cent. per annum, the sum of £37 the amount of rent received by him on account of the intestate, and the sum of £45 for a small quantity of furniture taken by him at a valuation, were then still due and owing from him to the estate of the intestate.

After George Mortimer had put in the above examination, and on the 29th of August, 1831, the Respondents Peter Trezevant and Elizabeth Willoughby his wife, (as Plaintiffs in the suit,) carried in before the Master an amended state of facts, and thereby, after stating an agreement that had been entered into by George Mortimer with Mr. Benett, for the purchase of the before mentioned wool and sheep, it charged more explicitly the amount then due from George Mortimer in respect of the said wool and sheep.

On the 21st of June, 1832, the Respondents, Peter Trezevant and Elizabeth Willoughby his wife, and their trustees, exhibited interrogatories for the examination of witnesses in support of their amended state of facts, and several witnesses were accordingly examined on the part of the said Respondents.

[204] George Mortimer died on the 3d of December, 1832, having by his will appointed the Appellant and two other persons his executors, of whom the Appellant alone proved the will.

On the 21st of April, 1833, the Respondents, Peter Trezevant and Elizabeth Willoughby his wife, and the Respondent Charles Robert Simpson, together with the Respondent Robert Edwards Broughton, who had been appointed a trustee in the place of Henry Arthur Broughton, filed their bill of supplement and revivor against the Appellant, and against the Respondents John Farquhar Fraser, Sir William Templer Pole, Baronet, and Dame Charlotte his wife, the said James Lumsden and Mary his wife, William Aitken and Charlotte his wife, William Aitken, Lilas Aitken and Charlotte Aitken, infants, the children of the said William Aitken, and against the Respondents William Buckland, William Henry Merle, James Mortimer, Lauchlan Aitken, James M'Hardy, and James Aitken, (the Respondents William Buckland, and William Henry Merle, being the trustees of a settlement made by the Respondents Sir William Templer Pole and Dame Charlotte his wife, of what they were entitled to, in consequence of the death of John Farquhar, the intestate,) and the Respondents James Mortimer, Lauchlan Aitken, James M'Hardy, and James Aitken, being the trustees of a settlement made by the Respondents William Aitken and Charlotte his wife, of the property or part of the property to which they were entitled in respect of the Respondent Charlotte Aitken, being one of the next of kin of the intestate: and thereby, amongst other things, stating the first mentioned suit and the proceedings had there-[205]-under, and also stating that on the 3d of December, 1832, George Mortimer died, having made his will, dated the 2d of July, 1829, whereby he appointed the Appellant and Thomas Todd and Patrick Campbell executors of his will, and that the said Thomas Todd and Patrick Campbell had renounced probate of the said will, and that probate thereof had been granted to the Appellant, and also stating, that Henry Arthur Broughton had died, and that the Respondents Peter Trezevant and Elizabeth Willoughby his wife had appointed the Respondent Robert Edwards Broughton a trustee in his stead, and also stating an indenture by which the Respondents William Buckland and William Henry Merle were appointed trustees of the share of the fund belonging to the Respondents Sir William Templer Pole and Dame Charlotte his wife, for them, and also stating another indenture, dated the 15th of January, 1830, whereby the Respondent William Aitken assigned to the Respondents John Farquhar Fraser, James Mortimer, Lauch-

lan Aitken, and James M'Hardy, the sum of £25,000, part of the seventh share to which the Respondent Charlotte Aitken, or the Respondent William Aitken, in her right, became entitled in the residuary estate of the intestate, for the benefit of the Respondents Charlotte Aitken and William Aitken and their issue, and also stating that the Respondents William Aitken, Lilas Aitken, and Charlotte Aitken, were their children, and also stating another indenture dated the 14th of February, 1833, by which the Respondent William Aitken appointed the Respondent James Aitken to be such trustee instead of the Respondent John Farquhar Fraser; [206] bill prayed, that if necessary, an account might be taken of the personal estate and effects of the late Defendant George Mortimer, possessed by the Appellant, and that the Respondents, the Plaintiffs in the suit, might have the benefit of the said suit against the new Defendants.

The Appellant, and the Respondents, the Defendants to the suit appeared, and put in their answers to the last-mentioned bill, and the supplemental cause came on to be heard before the Master of the Rolls on the 12th of March, 1834, when a decree was pronounced by him, by which it was ordered that the decree of the 30th of March, 1830, should be prosecuted.

Afterwards the Appellant caused witnesses to be examined in support of the case of the late Defendant George Mortimer and of the Appellant.

The Respondents Peter Trezevant and Elizabeth Willoughby his wife, and their trustees, appeared before the Master by their counsel, and supported their case, and the Respondent John Farquhar Fraser appeared as counsel for himself, and also supported before the Master the case of the last-named Respondents, and the Appellant appeared by her counsel before the Master, and supported her case, and the Respondents Sir William Templer Pole and Dame Charlotte his wife, and their trustees, and the Respondents William Aitken and Charlotte his wife, and the Respondents, their trustees and children, and the Respondents James Lumsden and Mary his wife, did not take any part in the proceedings before the Master upon the aforesaid inquiry.

The Master made his report and a schedule [207] thereto in the said causes, bearing date the 9th of February, 1835, by which he found that the outstanding personal estate of the intestate, then unreceived by the Respondent John Farquhar Fraser, consisted of the said sum of £20,000, which in or about the month of April, 1826, was advanced and lent by the intestate to the late Defendant George Mortimer, through the mercantile house of Bazett and Company, and that the sum of £18,000, being the residue of the sum of £19,700, the purchase money agreed to be paid by the late Defendant George Mortimer, for certain parts of the real estate of the said intestate, together with interest thereon, at £5 per cent. per annum, from the 11th of October, 1826, and also the two several sums of £45 and £37; and that it did not appear to him that it was necessary at present to take any proceedings at law or in equity, other than the proceedings in that suit, for the purpose of getting in the said sums of money respectively.

The Respondents Peter Trezevant and Elizabeth Willoughby his wife, and their trustees, and the Respondent John Farquhar Fraser, took exceptions to the report, in regard to that part of the decree made on the hearing of the original cause, whereby it was directed that the Master should take an account of the personal estate and effects of the intestate, then outstanding and unreceived by the Respondent John Farquhar Fraser; by the first of the exceptions they insisted that the Master ought to have certified that the sum of £10,000 was due from George Mortimer, by the second of the exceptions they insisted that the sum of £6254 6s. 11d. was due from the estate of the Defendant George Mortimer, by the third of the [208] exceptions they insisted that the outstanding personal estate of the intestate unreceived consisted of a further sum of £266 1s. 4d., received by George Mortimer, as agent of the intestate: by the fourth of the exceptions, they insisted that the outstanding personal estate of the intestate consisted of the further sum of £664 11s. 9d. paid by John Benett to George Mortimer, as agent to the intestate: by the fifth of the exceptions they insisted, that George Mortimer became accountable for the sum of £2375 13s. 5d.: by the sixth of the exceptions they insisted, that the outstanding personal estate of the intestate consisted of the further sum of £1000, the value of certain furniture and effects, the property of the intestate, which in or about the month of December,

1825, were taken possession of by the late Defendant George Mortimer, and appropriated to his own use: by the seventh of the exceptions they insisted, that the outstanding personal estate of the intestate further consisted of the value of seventeen oak trees, which as appeared were growing upon part of the Fonthill estate, the property of the intestate, and were cut and carried away by George Mortimer. The first and second of the exceptions of the Respondent John Farquhar Fraser corresponded with the Respondents the Plaintiff's first exception: the third and fourth of the exceptions corresponded with the Respondents the Plaintiff's second exception: the fifth of the exceptions corresponded with the third and fourth of the Respondents the Plaintiff's exceptions: the sixth of the exceptions corresponded with the fifth of the Respondents the Plaintiff's exceptions, and the seventh of the exceptions corresponded with the sixth of [209] the Respondents the Plaintiff's exceptions, except as to the sum charged, the Respondent John Farquhar Fraser, in his seventh exception, having insisted that George Mortimer's estate should be charged with the sum of £1500 instead of £1000: by the eighth of the exceptions of the Respondent John Farquhar Fraser, he insisted, that the outstanding personal estate of the intestate consisted of a further sum of money and interest due from the estate of George Mortimer, in respect of the value of a marble statue of the late Alderman Beckford; and the ninth of his exceptions corresponded with the seventh of the Respondents the Plaintiff's exceptions.

On the 11th of January, 1836, upon argument of the exceptions before the Master of the Rolls, his Honour held * the first, second, fifth, and sixth [210] exceptions taken by the Respondents the Plaintiffs to the report, and the first, second, third, fourth,

* The judgment (11th Jan. 1836) of the Master of the Rolls, which embodies and analyses the material parts of the evidence produced before the Master, is as follows:

The Master of the Rolls: This case comes before me on several exceptions to the Master's report, taken by different parties; and I shall take them in the order in which they have been classed, and address myself, first, to the exception which raised the question as to the £10,000, which consists of two sums of £6000 and £4000. These are sums, which the party who opposes these exceptions, Mr. Mortimer, or those who now represent him, state to have been gifts from the intestate, Mr. Farquhar, to him; and this claim first rests on the authority of an order addressed by Mr. Farquhar to Messrs. Barnett, Hoare, and Company, the bankers of the intestate. The question is, whether the proposition contended for by Mr. Mortimer can be supported, namely, whether that evidence of gift is to be found in the document. The authority is in these words: "I request you will be pleased to advance Mr. George Mortimer such sums of money as you may think prudent, with the opinion of Mr. David Colvin, for the purpose of assisting him to pay in ready money for the wool with which he manufactures his cloth." Now the contents of that document entirely negative the idea of gift at that time: whether the advance of money thereby directed was afterwards converted into gift is another question, which is hereafter to be considered; but as to the question arising out of this document, whether this was originally a gift or loan, it is to be observed, there is no limit in amount to the licence of borrowing. As a gift, it amounts to the whole fortune of the giver; but he refers it entirely (supposing it to be a gift) to the discretion of Mr. David Colvin, to what extent the gift should go. If he meant loan, it is very natural to suppose, that having plenty of money, it is very natural to suppose that he should wish to restrain the advances to what the situation and circumstances of the party borrowing might render expedient; and therefore he referred it to an individual in whose discretion he could trust, as to how far it would be safe to make the advances. It is hardly possible to contend on this document that this is evidence of gift, and not evidence of loan. Then it is said, that at a subsequent period, other documents from the intestate confirmed George Mortimer's representation of this being a gift; and particularly, the question having arisen between George Mortimer and James Mortimer, his brother, with whom he had been in partnership, in order to settle the partnership accounts, it was referred to arbitration, to ascertain whether the sums drawn by George Mortimer under this authority were to be carried to the account of the two, or whether they were to be carried to the account of the individual who claimed

[211] sixth, and seventh exceptions taken by the Respondent John Farquhar Fraser to the report, to be [212] good and sufficient, except so far as the first and second exceptions of the Respondent John Farqu-[213]-har Fraser sought to charge interest on the sums therein mentioned, and except so far as the seventh [214] exception of the Respondent John Farquhar Fraser stated the value of the household furniture, plate,

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them as a gift; and that on that occasion Mr. Farquhar wrote a letter, which is in these terms: "The money advanced by me to Mr. George Mortimer, was entirely for the benefit of his own family, as far as regards the profits in trade." Now the question then being, not whether it was a loan or gift, but whether, as between the two brothers, the money was to be considered as the money of George, or the money of the two, Mr. Farquhar says, I advanced it entirely for the benefit of George; leaving it just as it was before, whether, as between Mr. Farquhar and Mr. George Mortimer, it was a gift or loan; for on that occasion the only question was, whether, as between the partners, it was to be considered as partnership stock, or as property belonging to one individual partner. Now it is not at all necessary to superadd observations upon the obvious results of this document. The most extraordinary feature in the case, if this was an unlimited gift out of Mr. Farquhar's property, which was known to be so very extensive, is, that Mr. George Mortimer should have confined himself to only £10,000. It is, however, stated, that although there is no limit whatever in the order, it was limited by other means to £20,000, yet he takes only £10,000. It is natural that a person borrowing money should limit himself to the sum which was required by his necessities; but upon the proposition that it was a gift, it is rather extraordinary that he should confine himself only to take £10,000.

The question, as far as I have considered it, is upon the construction of documents about which there is no dispute; but the Defendants then produce some parol testimony;—there is the evidence of Mr. Hart Davis, and they rely on the conversation which Mr. Hart Davis states that he had with Mr. Farquhar, as affording evidence of the advance being a gift. The witness states a conversation, in which (speaking of the advance made by Mr. Farquhar to Mr. George Mortimer) Mr. Hart Davis expressed an opinion, that the advance, instead of doing good, would do harm to Mr. George Mortimer, if Mr. Farquhar was to withdraw it; on which Mr. Farquhar said, "he did not mean to withdraw the £10,000." Now the whole of that conversation proves that it was a loan. Did not Mr. Hart Davis consider that it was a loan when he asked that question? What could he have meant, by asking whether he meant to take that back, if it was a gift? If it was an advance of money, which of course he understood it to be when he asked the question, it was extremely natural for him to say, if you withdraw this loan you will do more harm than good; and Mr. Farquhar so assumes it, for he does not speak of it as he would have done if it was a gift; for he would in such case have said he had not the power to withdraw it, but he merely expresses an intention of not withdrawing it. It is not contended that that conversation could constitute it a gift; it was only used as evidence of what the prior transaction was. Then the other evidence produced on this subject is the evidence of Mr. Barnett, one of the bankers, and he says Mr. Farquhar gave Mr. George Mortimer an unlimited power to draw on their banking-house for his use. The terms of that order are, "Please to pay such cheques as Mr. George Mortimer may draw for my use." It is not a very uncommon thing for persons to trust others to draw for their use, but to suppose that that authority operated as a gift to the person to whom that power was delegated, or that it constituted evidence of some other transaction being a gift, is certainly an inference which it is impossible for me to draw from it. Then Mrs. Mary Mitchell is examined by Mr. Mortimer, and she deposes that Mr. Farquhar said he had given large sums of money to Mr. George Mortimer; but there is no date, no particulars, no specific sum referred to, and there is nothing which can connect that conversation with the particular sums in question.

Then papers were produced, which certainly are of a very extraordinary description; they are three in number, and the one which is produced, as applicable to this particular transaction, is dated the 30th of April, 1826: "Dear George, to relieve your anxiety about matters concerning money, I tell you that all sums of

[215] linen, china, and books therein mentioned, to be beyond the sum of £1000; and ordered that the [216] same be respectively allowed: and upon the Respondents the Plaintiff's third and fourth excep-[217]-tions, and the Respondent John Farquhar Fraser's fifth exception to the report, it was ordered that [218] it should be referred back to the Master to inquire and state to the Court, whether the two sums of [219] £266 1s. 4d. and £664 11s. 9d., mentioned in the Respondents the Plaintiff's third

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money you have ever received from me are gifts, and not loans. This, I think, ought to satisfy your lady, and convince her I am doing a great deal for the benefit of your family, as I have always told her. I remain yours truly, J. Farquhar." Now, I do not enter into the evidence, as to whether this document was signed by Mr. Farquhar or not; the body of it certainly was not written by Mr. Farquhar; the contest on the evidence is, whether it received Mr. Farquhar's signature. I will assume that it did, and suppose, therefore, that although this document was not of Mr. Farquhar's signature, composition, or dictation, but that Mr. Farquhar's name appearing at the bottom of it, was, in point of fact, in his hand-writing. Now, whether this is to be taken as evidence of the advance having been originally a gift, or originally a loan, and afterwards made a gift by this instrument, the terms are not sufficiently distinct, exactly to know in what way it was intended to be put. It might be put in this way: "To relieve your anxiety about matters concerning money, I tell you that all sums of money you have ever received from me are gifts." But the conclusive objection to this is, first, that there is no account given when this document was prepared, by whom it was written, or under what circumstances it was written. It was a document in the possession of Mr. George Mortimer, and it was not put forward till long after the question arose as to the sum of £20,000, which sum of £20,000 being in discussion between the parties, was claimed originally by Mr. Mortimer, as a gift, and resisted by those who were interested in the estate, on the ground of its being only a loan; and Mr. Mortimer admits ultimately that £20,000 to be a loan, and to be treated as a loan, and so deals with it in the Ecclesiastical Court. Now that £20,000 was advanced on the 22d of April, 1826, and if Mr. Farquhar had any thing to do with writing, or dictating, or approving of the body of this letter, it must have been very fresh in his recollection on the 30th of April, 1826, when this letter bears date, and yet he is made to say that which Mr. Mortimer admits not to be true; for he must be considered as admitting the fact, when he gave up the £20,000, which otherwise he would be entitled to: he is supposed to sign a paper, which would undoubtedly cover that sum of £20,000 as well as the £10,000, and every other sum advanced, although the £20,000 is now admitted to be considered as a loan, and not as a gift. Looking at the state of the evidence under which Mr. Mortimer has thought proper to produce this document, I cannot pay the least attention to the name of Mr. Farquhar signed to it. He leaves the paper without any explanation of who wrote it, or under what circumstances it was written; and when I find this connected with other transactions, it is utterly impossible Mr. Farquhar could have so expressed himself on the 30th of April, on which day that document bears date. On this exception, I have no doubt that these sums of £6000 and £4000, the sums drawn out under that authority which I have read, are to be considered as loans, and that they were loans from the beginning, and nothing has been brought forward in evidence before me to shew that they have ever ceased to deserve that character of loans up to the time of the intestate's death.

The next subject is the wool, amounting to £4504, and the sheep, at £750, making together £6254. On the 10th of September, Mr. Benett, renting a large portion of the Fonthill estate, of which the rent was very large; the yearly sum payable for rent was about £3000. Mr. Mortimer, managing for Mr. Farquhar, Mr. Benett at that time owing a year's rent, and Mr. Mortimer being authorized by Mr. Farquhar to receive the rent from Mr. Benett, an agreement is made between Mr. Benett and Mr. Mortimer, by which the sum due from Mr. Benett was to be satisfied by Mr. Mortimer's purchasing wool of Mr. Benett, and that the money to become payable for the wool should be set off against the amount of rent due. There is a letter which is set out amongst these exhibits. "Memorandum, the 10th September, 1825. It was agreed between George Mortimer, esquire, and John Benett, esquire, that the said George

and fourth ex-[220]-ceptions, making together the sum of £930 13s. 1d. mentioned in the Respondent John Farquhar [221] Fraser's fifth exception, were ever paid to the late Defendant George Mortimer or not: and his Honour held the Respondents the Plaintiff's seventh exception, and the Respondent John Farquhar Fraser's ninth exception to the report to be good and sufficient, and ordered, that the same should be allowed; but it was ordered that it should be referred back to the Master to

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Mortimer shall purchase all the said John Benett's wool, at the price of 2s. 4d. per pound, for that which is washed on the sheep's backs." Then it goes on enumerating the sums. "And that the said John Benett shall allow the said wool to be paid for by a deduction to the amount being made from his debt due on an acceptance, and to become due in rent to John Farquhar, esquire, of Fonthill Abbey, with his consent, signified by his signature hereto." And that which is signed by Mr. George Mortimer and Mr. Benett afterwards received the signature of Mr. Farquhar. It appears that this wool was ultimately delivered; the delivery of it commenced on the 21st of September, and was completed on the 29th of September. And on the 15th of October, 1825, a further agreement was entered into, relative to the purchase of some sheep, which bears date the 15th of October. The period at which the contract took place is of great importance, and I shall observe upon it presently. "Memorandum, 15th October, 1825. Mr. Mortimer agreed with Mr. Benett to buy 500 ewes, at 46s. each; being considered as the best price at Weyhill fair, and also 500 wether lambs, at 24s. each; 500 ewes, at 46s. each, £1150, 500 lambs, at 24s. each, £600." And the two taken together came to £5750. Now the time at which these sheep were actually purchased is ascertained by the evidence of Mr. Lampard and of Mr. Jay. The 10th of October was Weyhill fair, and the sheep had actually set off for Weyhill fair prior to the contract taking place between Mr. Benett and Mr. G. Mortimer; and Lampard puts the date at the 7th of October, as the time of the contract; and the other witnesses, although they do not actually speak to the 7th, speak to it with sufficient certainty,—they say that the sheep were gone, and that it was a day or two before Weyhill fair, which was on the 10th of October. The price was to be ascertained by the price of the sheep at Weyhill fair, and therefore it is obvious that they could not have concluded the contract till after the day of Weyhill fair had elapsed; and accordingly it was not actually reduced into the shape of a contract till the 15th of October. It appears that after this an account was made out between Mr. Benett and Mr. Mortimer, in which the value of the sheep and the amount of the wool was put on one side, and the rent on the other. Mr. Benett says that Mr. Farquhar's consent was procured to the intended set off; and accordingly we find on the document Mr. Farquhar's signature to it. Now that circumstance, of requiring Mr. Farquhar's signature to the contract, proves, at least, that the rent was in one account, and the price of the wool and the sheep in another account. If Mr. Mortimer had been entitled to the rent, Mr. Benett would only have had to deal with the party entitled to the rent, but as the rent belonged to Mr. Farquhar, and the money to be paid for the wool and the sheep was to be paid on account of Mr. Mortimer, it of course required Mr. Farquhar's consent to set off the money so due from Mr. Mortimer, against the rent so due from him to Mr. Farquhar. That becomes material, when you see the way in which Mr. Mortimer claims it. Mr. Mortimer does not say that Mr. Farquhar gave him the rent, but Mr. Mortimer says, that he was entitled to the wool and the sheep, and that Mr. Farquhar made him a present of the wool and the sheep. Now it does not appear that Mr. Farquhar ever had any thing to do with the wool and the sheep; they were purchased by Mr. Mortimer, for his own use, and all that Mr. Farquhar had to do with it, was to permit the rent he was entitled to receive to go in part payment of what Mr. Mortimer had to pay to Mr. Benett for the wool and the sheep. But, however, one of these three documents is produced for the purpose of establishing Mr. Mortimer's claim to this sum of money, whether it be called wool or sheep, or whether it be called rent. The document is dated September 20th, 1825. It being now in proof that the contract for the sheep was signed on the 15th of October, and had not any existence at an earlier period than the 7th of October. The document runs thus: "Sep. 20, 1825. Dear George, I agree to give you all the Merino wool and sheep which Mr. Benett has given for payment of his rent, [at the date of this document no such transaction had taken place] to be manufactured at the mill for

inquire and state to the Court, what was the value of the timber and timberlike trees in the said exceptions mentioned: and his Honor held the Respondent John Farquhar Fraser's eighth exception to be good and sufficient, and ordered that the same should also be [222] allowed; but it was ordered that it should be referred back to the Master to inquire and state to the Court what was the value of the marble statue

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your use and benefit, likewise indigo, [that applies to another part of the case] for which I will give you an order upon the house in Broad-street: on my arrival in town I will make arrangements to give you a sufficient capital to carry on the mill to its extent, and it is my wish that the machinery should be upon the latest improvements." Now it is impossible to look at this document and not to see that it never could have been written before it was signed. It is obvious that the name is not signed in a place in which any person would have signed it, and it is obvious that the letters are all crowded together, for the purpose of its being completed, without interfering with, and running over the signature of Mr. Farquhar; that is plain upon the face of it, without any information being given as to the body, or under what circumstances it was prepared. Mr. Mortimer, or those who represent him, having the document, and having the means, therefore, as they are parties to it, of explaining all the circumstances to the court, no such evidence has been given, or attempted to be given. We find a document produced, with such observations arising on the face of it, and the facts prove that it refers to, and professes to be founded on a transaction which had not taken place at the time when it professes to bear date. I am, therefore, of opinion, that there is not only no evidence to show a present or gift of the wool and lambs, but that it is quite clear that Mr. Farquhar, although he permitted his rent to be set off, did not make a present of that rent, and that his estate, therefore, is entitled as against Mr. Mortimer to what was coming to him on the taking of that account.

There are two other sums, one of £266, being the amount of a cheque given upon a Mr. Knight, and £664, which is the ultimate balance which appeared to be due on the settlement of the account of the rent and the wool and sheep; with respect to which there must be further inquiry. It rests upon what is stated by Mr. Benett; there is proof by Mr. Benett of the cheque being given, but no positive proof of the cheque being paid; and Mr. Benett, with regard to the balance says, that he believes he paid it, not certainly stating it with that degree of certainty and precision, so as to make it safe to act on his own recollection; there must therefore be a reference back to the Master, to inquire and ascertain whether, in point of fact, it was paid to Mr. George Mortimer or not.

That reduces the case to the question on the furniture and the indigo. With regard to the indigo, I confess I have more doubt and difficulty than I have as to any other part of the case; and I think the conclusion to which I find myself compelled to come, may possibly deprive Mr. Mortimer of that which the intestate intended for him; but I can only proceed on the evidence as it stands, and upon that evidence, I am bound to come to the same conclusion as that which I have already expressed as to the other points. Mr. Mortimer says, he claims the £2375, the price of the indigo, as being a gift to him by Mr. Farquhar. Now that transaction commences with a document (exhibit F.) dated the 24th of October, in which Mr. Farquhar writing to Mr. Bazett about some other matters, and then says, (speaking of Mr. Mortimer) "He is a manufacturer of broad cloth, and will be much obliged to you for any information with respect to the future price of indigo; in the meantime, pray give him any quantity on my account." Now that evidence is again open to the same observation which I made with regard to the authority for the advance of money; that nothing could be more improbable than that a person should give to another an authority to receive indigo to any amount. If it was intended as a present, however liberal men may be, they wish to be masters themselves as to the extent of their own liberality, and not refer it to somebody else to decide to what extent the gift is to go, however they might trust others as to how far it is safe to go by way of loan; but the difficulty I feel arises from the evidence of Mr. Barnett, who is speaking of a transaction which it is clear does not refer to this indigo, but which raises a probability in my mind that Mr. Farquhar might intend to make Mr. Mortimer a present of some indigo. Mr. Barnett speaks to having seen some paper signed by Mr. Farquhar respecting some indigo, following a conversation which he

of the late Alderman Beckford, sold by the late Defendant George Mortimer, as in the said exception mentioned.

The appeal was against this order of the 11th of January, 1836, which had been signed and enrolled.

For the Appellants, Mr. Knight and Mr. Koe.

says took place about the latter end of September, 1825. It cannot be this letter, because the dates do not correspond, and he speaks of that letter as only having been signed by Mr. Farquhar, whereas this exhibit is said to be altogether in his handwriting. The fact is, that the indigo was bought and supplied, not from the stock in the house, for they had not any; but it appears, they authorised a broker to purchase it, and that the money charged as the price of the indigo purchased from another person, was placed to Mr. Farquhar's account by the house, who advanced the money. So far, therefore, the authority is not very strictly complied with, but I think, as far as the present lot of indigo is concerned, it rests upon the document F. attempted to be supported by the evidence of Mr. Barnett, which if he could be considered as speaking of this indigo, would be more important evidence than it is; but it is quite clear that he cannot be speaking of this indigo. The difficulty this evidence raises in my mind is, that it is general evidence of the intention of an advance of some quantity of indigo by way of present. But then again, this rests on one of these documents, the one I last alluded to, and which also includes the indigo. It is unnecessary to repeat the observations which I made upon that document; "I agree to give you all the Merino wool and sheep, which Mr. Benett has given for payment of his rent, to be manufactured at the mill for your use and benefit, likewise indigo, for which I wil give you an order upon the house in Broad Street; and on my arrival in town, I will make arrangements to give you a sufficient capital to carry on the mill to its extent, and it is my wish that the machinery should be on the latest improvements." Now if the evidence to which I have adverted is sufficient to deprive that document of all credit, and to shew that it is a document not entitled to be received as evidence against the estate of Mr. Farquhar, which in my opinion it is not, it applies as much to the indigo as to the sheep, upon the effect of which I have before observed. There is no evidence of the present of the indigo; there is an authority to advance indigo on Mr. Farquhar's credit, for the benefit of Mr. Mortimer, and here the case rests. There is no other evidence but this document, which I think cannot be used in support of Mr. Mortimer's claim.

The next point is as to a sum of £1000 according to one set of exceptions, and the sum of £1500 according to another set of exceptions; which is with regard to the furniture at Fonthill, and which Mr. Mortimer claims as a present. I will take it at £1000. I think the evidence proves it more satisfactorily as to its value being £1000 than £1500. Mr. Coombes states the value to be £1000, there is other evidence which states it to be higher; but nothing could make it more improbable that Mr. Farquhar could intend to give the furniture as a present than the evidence of Mr. Philips: though he does not speak to the particular furniture in question, he speaks to the mode in which Mr. Farquhar dealt with the furniture, and the profit which Mr. Farquhar determined to make out of it, which makes it extremely improbable that Mr. Farquhar could have intended to make a present of any part of the furniture to Mr. Mortimer. Then Mr. Coombes speaks to the value of the furniture removed as being £1000, and Delves also speaks to there being certain plate, which is a very important matter of consideration when we are enquiring whether there is evidence to show that this £1000 worth of furniture was a present to Mr. Mortimer. The plate which was removed was worth £279, and the plate was not claimed; the plate was removed by Mr. Mortimer, but the plate is accounted for. There is the evidence of Mr. Studley for Mr. Mortimer; but although he is examined for Mr. Mortimer, he proves that the furniture was removed, and that it was said to be worth not more than £1000; so that upon this part of the case, I will take the value at £1000 as being the amount: because the witnesses on both sides, Coombes on the one side, and Studley on the other, agree in fixing that as the value of the furniture removed. Now to prove that Mr. Farquhar intended to supply Mr. Mortimer with furniture and money to fit up his house and set up the factory, Mr. Studley is examined, and Mrs. Foxwell is called to speak to a conversation in which she heard Mr. Farquhar say, (but she does not say when) that he wished Mr.

This was the proper subject of an action of assumpsit or some proceeding at law:—such relief could not be administered in equity, especially in a suit for the mere administration of assets; nor could the accidental circumstance, that if it were proved to be a debt owing to the estate, it might be set off against the distributive

Mortimer to repair the Pavilion, and to take furniture for it from the Abbey; that is the whole, with the exception of the evidence of the document to which I am about to refer, and on which the case stands.

It is proved that the plate is not claimed, and the evidence of these parties go to the plate as well as the furniture removed, and they speak to the value.

Now we have the exhibit from which it is contended that this amounted to a gift of the furniture. It is the exhibit of December 6th, 1835. What it originally was is not very easy to ascertain. No account is given who wrote the body of it, when it was written, or under what circumstances; but this is quite clear on the face of this document, that it did not originally contain the words which are now relied on as carrying the gift of the furniture and plate. It begins "Mr. George Mortimer, dear sir," all the former documents being "Dear George," this being "Dear sir," and then in different ink, (whether in a different hand I do not pretend to say, but introduced in a position which shews that it was introduced after the rest of the document was written), come the material words, "Mr. George Mortimer, dear sir. The plate, furniture, and fixtures, or any of them," then there is "mat" part of the word "materials" in the new writing, and the rest of the word in the old writing; and those words are added by somebody or other, at some time or other. If they were added with the sanction of Mr. Farquhar, they would have carried the plate as well as the furniture; but the plate is not claimed, and the document itself on the face of it, is one which it is utterly impossible to give credit to. Mr. Farquhar may have signed that which was originally written; but there is no evidence whatever of his having signed it after these words were introduced; and those whose duty it was to explain the circumstances appearing on the face of the document, have not done that which it was incumbent upon them to do in order to support it. They have given no evidence when it was written, or in whose writing it is. I therefore must reject these three papers as totally unworthy of credit; and then the case stands on evidence which certainly falls very short of proving the gift to Mr. Mortimer by Mr. Farquhar.

There remains, however, one other article of 17 timber trees which were cut. Upon this subject the evidence is very conclusive, because Mr. Benett's evidence is, that he had agreed to purchase part of the estate, and that the timber was to be valued to him; and that a communication was made as to whether he would object to certain trees being cut down; and finding that they were not ornamental trees, and that he was only to pay for those trees that remained, he did not object; that afterwards certain other trees were cut, and then this transaction took place. Mr. George Sewell, to the 13th interrogatory proves, that Mr. Mortimer admitted he was to pay for the timber trees; and that Mr. Mortimer said, that the timber trees were cut to be employed by him in building the house in which he was to live, and that they were to be considered as a present; Mr. Sewell proves, that he admitted that he was to pay for them; but Mr. Benett's is the most important evidence, for he proves that the cutting of the trees was after the 27th of December, 1825, the date of his contract, and that Mr. Mortimer afterwards came to him. Mr. Benett, not knowing that there was any difficulty between him and Mr. Farquhar, had mentioned to Mr. Farquhar the fact of these trees being cut, which excited Mr. Farquhar's surprise and anger against Mr. George Mortimer; and Mr. Mortimer then came to Mr. Benett and expressed regret that he had mentioned this circumstance, and desired that he would communicate to Mr. Farquhar that he was not dissatisfied with the trees being cut; and throughout the whole of that conversation representing the trees as cut by him without Mr. Farquhar's authority, and as timber trees for which he was liable to Mr. Farquhar. It is impossible to consider that these timber trees were given to Mr. Mortimer, therefore it must be considered, that for the value of these trees, Mr. Mortimer is liable to Mr. Farquhar's estate. I make no observation on the statue of Alderman Beckford: that is agreed on all hands. Mr. Mortimer removed, and he must account for the value of it; of course, that must also be included in the charge to Mr. Mortimer.

share of the debtor, give a right to change the jurisdiction. If it were a proper subject for the jurisdiction, great weight ought to be attributed to the oath of the Appellant, and no conclusion upon a question of such a fact as the genuineness or fabrication of documents ought to be decided without the verdict of a jury. It is a question of forgery, and in such cases, a court of equity always directs an issue to try the question of fact at law. *Barnsley* v. *Powel* (1 Ves. sen. 143). Upon the case, even as it stood upon the evidence in equity, the preponderance of proof was greatly in favour of the Appellant. No securities are taken, and no interest paid or demanded. It appears by the evidence given on the part of the Appellant, that Mr. Farquhar had placed himself in the situation of a parent towards Mr. George Mor-[223]-timer, and intended to advance him and promote his interest. It does not appear, that Mr. George Mortimer ever applied to Mr. Farquhar for the loan of any money, or to sell him any goods, and no evidence has been produced to shew, that Mr. Farquhar intended the £10,000 in question as a loan to Mr. George Mortimer, or intended to call upon him to account for, or to pay for the goods that he received by the direction of Mr. Farquhar. Having regard to the magnitude of Mr. Farquhar's fortune, and the affection that he had for Mr. George Mortimer, who was the only one of his family that Mr. Farquhar was desirous of advancing in life, and to the fact, that Mr. Farquhar did not, in his lifetime, in any manner treat the money he had advanced to Mr. George Mortimer as money lent, or as a debt, nor ever call upon him to repay such money or any interest, or to account or pay for the goods he had received, the presumption independently of any evidence is, that Mr. Farquhar considered them as gifts. With respect in particular to the indigo, it is shewn by the Appellant's evidence, that Mr. Farquhar intended to give Mr. George Mortimer some indigo, and there is a total absence of any ground for supposing, that Mr. Farquhar intended to sell any indigo to Mr. George Mortimer, or that the latter intended to buy any indigo from Mr. Farquhar. The judgment ought to be reversed, or a trial at law directed. *Barnsley* v. *Powel* (1 Ves. sen. p. 119). Part of the claim is barred by the statute of limitations.

For the Respondent, Mr. Pemberton and Mr. Wigram.

[224] Inquiries as to the outstanding estate of an intestate are usually directed, under decrees for administration of assets, and not to be dispensed with because one of the next of kin has part of the estate in his hands. As to the operation of the statute of limitations, the contest, as to the will, would prevent its occurring. If a Court of Equity has no doubt upon a question of fact, the case is not sent for the opinion of jury,—for no finding of a jury would alter the facts or the opinion of the Court; a verdict in favour of the claim would be unsatisfactory, and disregarded. *Nicol* v. *Vaughan* [6 Bli. N.S. 104]. The evidence is conclusive in favour of the judgment; and it is applicable to each of the transactions in question, proving that the moneys, and other property, which are the subject of contest between the parties in this cause, were advanced to George Mortimer by the intestate, as loans, or came into his possession under circumstances which rendered him accountable for the same, and his estate is, therefore, properly charged with them by the order of the 11th of January, 1836.

The examination put in by the late Defendant, George Mortimer, has been falsified, and the case made by it wholly disproved by the evidence adduced by the Respondents, and the three pretended letters from the intestate (exhibits P. Q. and R.) stated in that examination, and relied upon as evidence of gifts from the intestate, are proved by the evidence to be false and counterfeit documents, and two of them, namely, the exhibits P. and Q., are obviously, and, upon inspection, forgeries or fabricated writings, and the third, the exhibit R., [225] was falsified by the late Defendant, George Mortimer's own declaration upon oath.

Lord Brougham: My Lords, this a case of very considerable importance in point of amount, but of still greater importance and perhaps interest on the grounds on which it has been argued, if not on which the judgment rested in the Court below, and upon which at all events that judgment has been defended on behalf of the Respondents at your Lordship's bar. For these reasons, I should suggest to your Lordships the propriety of taking some time, some short time, to consider what judgment you will pronounce on the matter now brought before your Lordships.

I take it for granted, that on the question applying to the £10,000, in whatever

way your Lordships dispose of that, if the party now taking the objection on the statute of limitations can satisfy the Court below, that he ought to be let in though he did not take the objection in the Master's office, nothing that could be done here, supposing the order of the Court below should be affirmed, would shut him out from the benefit of that proceeding below.

With respect to the main grounds on the merits of the case, as I stated before to your Lordships, it appears to me the safest course to take would be to let the case stand over for a few days, in order to give an opportunity of looking into the evidence which is undoubtedly conflicting in some particulars, though not much.

Lord Brougham (12th June, 1837): The late Mr. Farquhar returned from India with a very large fortune, which before and subsequent to his return was [226] invested in land, in trade, and securities, in his banker's hands. He died in 1826 intestate, one of the Respondents immediately afterwards administering to his estate by taking out letters of administration, others of the Respondents then filed a bill for the administration of his estate and effects; and the usual decree having been made, the account being taken in the Master's office, a statement,—a charge was given by Mr. and Mrs. Trezevant, two of the Respondents; and Mr. Mortimer, whose widow is the Appellant, was examined on interrogatories, and the Master having made a report on the points chiefly raised by those interrogatories, exceptions were taken to his report, which coming on to be heard before the Master of the Rolls, now the Lord Chancellor, he was pleased to allow several of those exceptions, from which order allowing those exceptions the present appeal has been brought.

The statement, the state of facts and charge, the interrogatories, and Mr. Mortimer's examination upon them, the Master's report, and those exceptions thus allowed to that report by his Honour in the Court below, raised principally the question which has been almost alone argued at your Lordships' bar, whether or not certain considerable sums of money and certain goods, principally a large quantity of indigo of considerable value, which had been under Mr. Farquhar's authority and direction, came into the possession of the late Mr. Mortimer, had been so put into his possession by way of loan only or by way of gift; and whether therefore Mr. Mortimer, to the amount of those sums and for the value of those goods, was or was not accountable to the estate of the late Mr. Farquhar under the administration.

[227] Now, my Lords, both at the time when this case was argued, and since, I have very carefully considered the evidence on both sides, upon which the contention of each party was sought to be maintained, and I have come to the opinion, without any hesitation whatever, that the judgment of his Honour in the Court below was well founded, and that Mr. Mortimer and the present Appellant as representing him, and the estate of Mr. Mortimer, was and is accountable to the estate of Mr. Farquhar, now under administration below to the amount of those several sums of money, and the value of those goods.

I purposely abstain from entering into the evidence in this case: I purposely abstain from giving any opinion upon the nature of that evidence; suffice it to say, that upon the consideration of the whole matter, and of the whole of that evidence, no doubt remains on my mind, that the Court below, in allowing the exceptions, came to a sound conclusion; and that your Lordships ought on this appeal to affirm the order of the Court below, allowing those exceptions.

I move your Lordships therefore, that that order of the Court below, on those exceptions to the Master's report, be affirmed; and be affirmed with costs, to be paid by the Appellant.

The Lord Chancellor: It is a great satisfaction to me, that this case, which was argued before me when Master of the Rolls, has been heard in the presence of my noble and learned friend. Your Lordships have heard the impression which that argument has made on my noble and learned friend's mind; and I can only say, having fully [228] reconsidered the evidence in this case, and the arguments at the bar, I fully concur in his opinion.

Lord Brougham: When I said that I had come to a conclusion in favour of the judgment of the Court below, without any hesitation, I ought to have mentioned that I had come to that conclusion with the exception of that part of it relating to the indigo,—a part on which the Court below itself expressed a doubt; but whatever that doubt below might be, the Court had applied its mind to it. I had at several times

during the argument, and after considering the evidence, certainly been impressed with similar doubts; but upon the whole view of the case, I have come to the opinion, that, in that respect also, the judgment of the Court below was well founded; and that in respect of the value of those goods, as well as the others, the estate of Mr. Mortimer is rightly charged.

Judgment affirmed, with costs.

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[229] ENGLAND.

(COURT OF CHANCERY.)

SAMUEL WALKER, JONATHAN WALKER, VINCENT HENRY EYRE, and RICHARD STANLEY,—*Appellants;* JOHN HARDMAN, THOMAS COOKE, WILLIAM BAKER, and SOPHIA his Wife, CHARLES BAYLIS, and ANN his Wife,—*Respondents.*

[Mews' Dig. v. 392; xi. 1162, 1190. S. C. 4 Cl. and F. 258. Cited in *In re Boys*, 1870, L. R. 10 Eq. 467.]

L. and Co., carrying on trade at S., kept a banking account with W. and Co. bankers at S. The account consisted of bills and cash paid in by L. and Co., and monies advanced on the credit of those payments by the bankers. In 1815, there being a large balance due, the bankers required security for the balance and their future advances, and accordingly a bond,—in the common form, with a penalty of £10,000 to secure £5000, in which W. F. joined as a surety,—was given by the merchants to the bankers. In consequence of certain defects in this bond the bankers applied for an amended security, and a new bond, in a penalty of £20,000 to secure £10,000, was executed by L. and Co., with W. F. as a surety. There was evidence that, upon the treaty for the security, it was understood between the bankers and their customers that the bond was given to secure the floating balance; but the bond being in the common form, with interest from the day of execution, and it not appearing by any evidence that the purpose was explained to W. F., the surety, who was a common farmer, and a man ignorant of business—the merchants having become bankrupt,—Held, in a creditor's suit, for administration of the assets of the deceased surety, that the bond must be taken as a security for the balance actually due when it was executed, subject to an account of subsequent payments made to the bankers by the principals.

[230] In and prior to the year 1815 the Appellants and Thomas Walker carried on business as bankers at Sheffield, in the county of York, in partnership together, under the style or firm of Walkers, Eyre, and Stanley, and they continued to carry on such business in partnership until the death of Thomas Walker.

At the same time Henry Lomas carried on business as a merchant in Sheffield: and in the early part of the year 1815 he formed a partnership with Thomas Fidgeon and Edward Getley, which was to commence as from the 1st of January, 1815, and thenceforward Henry Lomas, Thomas Fidgeon, and Edward Getley, continued to carry on such business in partnership together, under the style or firm of Henry Lomas and Co., until their bankruptcy, which took place in the year 1816.

Previously to the year 1815, Henry Lomas kept an account with Walkers, Eyre, and Stanley, as his bankers; and the new firm of Henry Lomas and Co. continued to deal with Walkers, Eyre, and Stanley, on the footing of the previous account between them and Henry Lomas. The usual mode of dealing between Walkers, Eyre, and Stanley, and their customers, was as follows:—When bills were brought to them by a customer, they did not discount each bill separately, as London bankers do, but carried such bills to the credit of the customer, and advanced money or bills to the amount required, whether more or less than the amount of the bills brought by the customer. Bills so credited

and afterwards dishonoured were carried to the debit of the customer, and at the end of each year an interest account was [231] made out, in which the customer was debited and credited with interest on the different items on the debit and credit side of the account respectively, such interest being computed upon each item from its date to the end of the current year. And the customer was, after the end of the year, debited or credited with the balance of such interest account as the case might be.

In the month of August, 1815, the account of Henry Lomas and Co. being in a state very unsatisfactory to Walkers, Eyre, and Stanley, who held undue bills to a very large amount, for which they had given Henry Lomas and Co. credit, and notwithstanding such credit, the amount of the creditor side of their account falling short by a considerable sum of the debtor side, the Appellant Richard Stanley, and (by his directions), William Dyson (then clerk to Walkers, Eyre, and Stanley), made applications to Henry Lomas, both personally and through Richard Wood (then clerk to Henry Lomas and Co.), calling upon Henry Lomas and his partners, Thomas Fidgeon and Edward Getley, to give security to Walkers, Eyre, and Stanley for the advances which they had already made or might thereafter make to Henry Lomas and Co. To these applications Henry Lomas always replied, that he and his partners were ready to give security to the amount of £10,000 or upwards, to Walkers, Eyre, and Stanley for the advances made and to be made by them to him and his partners; and in the result of such applications a bond was, in the month of August, 1815, executed and delivered by Henry Lomas, Thomas Fidgeon, and Edward Getley, and by William Fidgeon (a brother of Thomas Fid-[232]-geon) as a surety, whereby they became bound to the Appellants and their then partner Thomas Walker, under the partnership firm of Walkers, Eyre, and Stanley, in the penal sum of £10,000, conditioned for payment by Henry Lomas and Co. to Walkers, Eyre, and Stanley of £5000 within six months after demand.

This bond was given as a standing security, to the extent of £5000, for what might be due to Walkers, Eyre, and Stanley from Henry Lomas and Co. on the balance of account.

Shortly after the execution of this bond, the Appellant, Richard Stanley, through the said Richard Wood, applied to Henry Lomas to have the bond altered, in certain particulars not affecting the nature and purpose of the bond as a standing security for the floating balance. To these alterations Henry Lomas consented: and at the same time he proposed that instead of altering the bond, a new one should be executed for securing double the amount; and in consequence the bond in question in this cause was (under Henry Lomas's directions) prepared by the solicitor of Henry Lomas and Co. and executed by Henry Lomas, Thomas Fidgeon, Edward Getley, and William Fidgeon, as surety.

This bond bears date the 26th of August, 1815, and is a joint and several bond by Thomas Fidgeon, Edward Getley, Henry Lomas, and William Fidgeon, to Thomas Walker, and the Appellants (the Appellant Vincent Henry Eyre being therein by mistake called Vincent Eyre) in the common form and in the penal sum of £20,000 conditioned for the payment of £10,000 "*upon demand with lawful interest for the same from the date thereof.*"

[233] On the day of the delivery of this new bond at the banking-house of Walkers, Eyre, and Stanley, or on the following morning, Henry Lomas made out and delivered to Walkers, Eyre, and Stanley, a list of moneys which would be accruing, due to Henry Lomas and Co. from sundry persons in the course of the then ensuing months of September, October, and November, and of the advances, amounting to £12,000 or thereabouts, which they expected they should have occasion for from Walkers, Eyre, and Stanley, in the course of the month of September: and the list exhibited the particular days on which such advances would be wanted.

In compliance with this application, Walkers, Eyre, and Stanley, within a few weeks after the execution of the bond, made further advances to Henry Lomas and Co., to the extent of £12,000 and upwards.

The bond, dated 26th August, 1815, was executed by Henry Lomas on that day, or on the 27th, 28th, or 29th of that month, in the presence of, and attested by Richard Wood, having been previously signed by the other obligors; but it appears that such execution thereof by Edward Getley was not attested, and the execution thereof by Thomas Fidgeon and William Fidgeon was attested only by Mary Fidgeon,

the daughter of Thomas Fidgeon. On the 11th January, 1816, Walkers, Eyre, and Stanley, being dissatisfied with the state of the account of Henry Lomas and Co. with them, instructed Charles Brookfield, as their attorney, to endeavour to obtain from Henry Lomas, and Co. a reduction of the account, and from William Fidgeon a satisfactory security for [234] the £10,000 due on the bond. Charles Brookfield, considering it desirable that the execution of the bond by Edward Getley should be attested, and the execution thereof by Thomas and William Fidgeon be attested by an indifferent witness, had an interview on the 13th January, 1816, with Edward Getley, who then acknowledged his signature, and re-executed the bond of the 26th August 1815 in his presence. At that interview Charles Brookfield told Edward Getley, and Edward Getley admitted, that the balance of the account was upwards of £20,000; and Charles Brookfield told Edward Getley that the obligees were determined to have it reduced, whereupon Edward Getley held out promises of an early reduction of the account. On the same 13th January 1816, Charles Brookfield had an interview with William Fidgeon, and produced to him the bond of the 26th August, 1815, when William Fidgeon acknowledged his handwriting thereto, and re-executed it in Charles Brookfield's presence.

At the same interview, Charles Brookfield told William Fidgeon that the parties were dissatisfied to hold merely a bond as their security; and that understanding that he had considerable freehold property, they expected the £10,000 to be secured either by a mortgage or a deposit of title deeds relating to property of competent value, or he must pay the money. And, after some further conversation, Charles Brookfield having told William Fidgeon, that his instructions were, to have either the security required or the money, William Fidgeon promised to consult a friend on the subject and to meet Charles Brookfield on the following morning; [235] and, accordingly, on the 14th of January, 1816, Charles Brookfield had another interview with William Fidgeon, at Thomas Fidgeon's house. At this interview William Fidgeon at first refused to give any further security, whereupon Charles Brookfield told him, in the presence of Edward Getley, that if he, William Fidgeon, did not give security, he must immediately pay the money, or the obligees would proceed against him on the bond. After some further conversation, William Fidgeon consented to give the security, and promised to bring his title deeds to Charles Brookfield the next morning. But this promise he did not perform.

On the 27th of March, 1816, the Appellant, Richard Stanley, together with Charles Brookfield, had an interview with Edward Getley, when the Appellant, Richard Stanley, peremptorily demanded of Edward Getley, that the account should be reduced; and thereupon Edward Getley gave the Appellant bills of exchange amounting to £10,000, drawn by Henry Lomas and Co. on Alexander Levi, or Alexander Levi and Co., but which, when presented for acceptance, were dishonoured.

On the 3d day of May, 1816, William Fidgeon died intestate, possessed of some personal estate, and seized of or entitled to considerable freehold estate. He left Thomas Fidgeon his brother and heir at law; and, after his death, letters of administration of his personal estate were granted by the Consistory Court of the Bishop of Litchfield and Coventry to the defendant Sam Cave Fidgeon.

On the 30th day of May, 1816, a commission of bankrupt, under the Great Seal of Great Britain, [236] was issued against Henry Lomas, Edward Getley, and Thomas Fidgeon, who were duly found and declared bankrupts under the same. The Respondents, John Hardman, and Thomas Cooke, together with the late Defendant, Peter Kempson, since deceased, were appointed assignees of the estate and effects of the bankrupts under the commission; and the usual assignment of the personal estate of the bankrupts, and the usual bargain and sale of their freehold estates were executed to them by the major part of the commissioners in and by such commission named and authorised. The bargain and sale bore date in the month of July, 1816, and was in due time enrolled in the Court of Chancery; and thereby the freehold estates of William Fidgeon were vested in the assignees, but charged with the bond and the other specialty debts of William Fidgeon.

On the 3d of July, 1816, the Appellants, together with their partner, Thomas Walker, on behalf of themselves and all other the creditors of William Fidgeon, deceased, filed their original bill in this cause in the Court of Chancery, (which was afterwards twice amended,) against the Respondents John Hardman, and

Thomas Cooke, and the said late Defendant, Peter Kempson, (assignees of the said bankrupts Henry Lomas, Thomas Fidgeon, and Edward Getley,) and against the said late Defendant, Sam Cave Fidgeon, (as administrator of the said William Fidgeon deceased,) thereby setting forth (among other things) the facts before stated, the bond of the 26th of August, 1815, and a demand and refusal of payment: and thereby praying, that an account might be decreed to be taken of the personal estate [237] and effects which the intestate William Fidgeon was at the time of his death possessed of, entitled to, or interested in, and which had been possessed by or come to the hands of Sam Cave Fidgeon, and of his application thereof: and also an account of the intestate's funeral expenses, and of the expenses of the letters of administration, and after satisfaction thereof, that the assets might be applied in payment of the debt due to Plaintiffs, and of the other debts due and owing by the intestate at the time of his death, in a due course of administration; and, in case the intestate's personal estate and effects should be found insufficient for the payment of his specialty debts, then that his real estate, or a competent part thereof, might be decreed to be sold, and the money arising from such sale applied in payment of his specialty debts; and that all necessary parties might be decreed to concur in such sale; and in case the money produced by such sale, together with the intestate's personal estate, should be found insufficient for the payment of the intestate's specialty debts, then that an account might be taken of the rents and profits accrued and to arise until such sale, and that the same might be applied in payment of the specialty debts; and that, for that purpose, some proper person might be appointed to prove the amount of such rents and profits received by Thomas Fidgeon as a debt under the commission; and that so much of such rents and profits as should appear to have been received by John Hardman, Peter Kempson, and Thomas Cooke, or any or either of them, might be answered by them or him respectively: and that in the mean time the said John Hardman, Peter Kempson, and Thomas [238] Cooke might be restrained, by the order and injunction of the Court, from selling or disposing of the intestate's real estate, or any part thereof, and for general relief.

All the Defendants appeared, and put in their answers to the bill; and the answer of the Defendants, the assignees, contained the following passage, that is to say: "They believe it to be true that the sum of £10,000, and some interest for the same, hath not been paid to the said complainants, but whether the whole of the said principal sum and interest from the date of the said bond is now due, or the amount of what is now due thereon for principal and interest on the security of the said bond, or whether the said complainants have or have not made such demand as in the said bill mentioned, these Defendants cannot set forth as to their knowledge, information, belief, or otherwise."

The Plaintiffs having replied to the answers, evidence was given, proving the allegations of the bill as before set forth, and examined Richard Wood, Mary Fidgeon, Charles Brookfield, and Robert Neville, to prove the bond and demand.

On the 31st of July, 1819, the original cause was heard before the Vice-Chancellor, when a decree was made, whereby it was among other things ordered and decreed, that it should be referred to Mr. Harvey, one of the Masters of the Court of Chancery, to take an account of what was due to the Plaintiffs, and all other the creditors of William Fidgeon, deceased, the intestate in the pleadings named, and also an account of his personal estate come to the hands of Sam Cave Fidgeon, and of his funeral expenses, with the usual directions: [239] And it was ordered, that the intestate's personal estate should be applied in payment of his debts and funeral expenses, in a course of administration: And it was ordered, that the Master should inquire what real estates the intestate died seised of, and whether the same were subject to any and what incumbrances, and in whom those incumbrances were vested: And it was ordered, that the Master should inquire whether any and what sum or sums of money had been received by the Plaintiffs, or by any other person or persons, for their or either of their use on account of the said bond? And the Court reserved the question, whether the sums to which the estate of the intestate was liable ought to be paid out of his real or personal estate? And it was ordered, that the Master should inquire whether the Plaintiffs held any, and what other securities for the money mentioned in the bond?

Under this decree the Defendants took in no charge or state of facts, but they exhibited interrogatories for the examination of the Appellants and the Plaintiff, Thomas Walker.

To these interrogatories the Appellants and Thomas Walker put in an examination, stating that Thomas Fidgeon, Edward Getley, and Henry Lomas, were, at the time of their bankruptcy, indebted to them in the sum of £28,742 17s. 9d., on balance of the banking account, kept with them by Thomas Fidgeon, Edward Getley, and Henry Lomas, and as a security for which balance the bond was given; and that the sum of £26,975 19s. 3d., or thereabouts, was then due and owing to them on the balance of the said account; and they said they had not received any sum of money on account of the bond; and that they did not hold any securities [240] given to them for securing the payment of the money mentioned in the bond, but that they held sundry bills of exchange, and some other securities given to them for securing the payment of the said balance of account; and which bills and other securities they held, together with the said bond, for that purpose.

The Defendants, the assignees, having obtained an order, referring the examination to the Master for insufficiency, the Master was of opinion that the same was not sufficient, in not setting forth the particulars of the securities held by the examinants. The Appellants and Thomas Walker thereupon put in a further examination to the interrogatories, and thereby stated that the bond was given to the extent of £10,000, for the balance of the banking account in their former examination mentioned; which balance, at the date and execution of the said bond, exceeded, and had ever since exceeded, and did then exceed the sum of £10,000; and that the same bond was not given for any other specific sum of money: And they said, that besides the bond they held sundry bills of exchange as securities for the balance of their banking account, and which were given to the examinants by Thomas Fidgeon, Edward Getley, and Henry Lomas: And they set forth, in a schedule to their examination, the particulars of such bills.

The Defendants laid before the Master no evidence, (except the said examinations), on the matter of the inquiry directed by the decree respecting the bond.

On the 16th of July, 1821, the Master made his general report, and thereby, among other things, certified that a sum of £12,913 7s. 10d. was due to the Plaintiffs from the intestate on the bond, for [241] principal and interest to the date of his report. And as to that part of the decree, which directed him to inquire whether any, and what sums of money had been received by the Plaintiffs, or by any person or persons for their or either of their use, on account of the bond, and whether the Plaintiffs held any other, and what security, for the money mentioned in the bond, the Master, (after setting forth the substance of the original examination, and further examination), certified as follows: "Upon consideration of the said examinations, and no other evidence having been produced before me, I find that no sum of money has been received by the Plaintiffs, or any person, for their or either of their use, on account of the said bond, and that they hold the bills of exchange before mentioned, (being the bills mentioned in the schedule to the further examination) jointly with the said bond as securities for the balance due to them on the said banking account."

The Respondents, John Hardman and Thomas Cooke, and Peter Kempson, took four exceptions to the report.

First, For that the said Master, in and by his said report, has certified that no sum of money had been received by the Plaintiffs, or any person for their or either of their use, on account of the bond in the said report mentioned: whereas he ought to have certified that the Plaintiffs did, after the date of the said bond, receive divers sums of money on account of the balance alleged to be due to them, and that such balance was wholly paid off, or greatly reduced below the sum of £10,000.

Second, For that the said Master, in and by his [242] said report, has certified that the Plaintiffs held the bills of exchange in the pleadings mentioned, jointly with the said bond, as securities for the balance due to them on the banking account in the pleadings mentioned; whereas he ought to have certified that the said bond was not given to secure the balance of their banking account, and that the same was given to secure such balance as was then due, or alleged to be due, to them at the time when the said bond was given, or so much thereof as did not exceed the sum of £10,000.

Third, For that the said Master has received in evidence the examination of the said Plaintiffs, in support of the allegation of the said Plaintiffs, and has founded his report thereon; whereas the said Defendants are advised, and submit, that the same is not evidence against the said Defendants.

Fourth, For that the said Master has not taken an account of what was due to the Plaintiffs, as he was directed to do, by the said Thomas Fidgeon, Edward Getley, and Henry Lomas, at the time of the said bankruptcy, and has certified by his said report that the said bond is a security for such balance; whereas, he ought to have certified that the said bond is not a security to them for such balance, and only for so much, if any, of the said debt, which was due and owing to them at the time when the said bond was given, as now remains unpaid, but which the said Master has declined to inquire into or ascertain.

On the 19th of July, 1822, the exceptions having been argued before the Vice-Chancellor: "It was ordered, that it be referred back to the Master, Mr. Harvey, to review his report, and the Master was to inquire and state to the Court, [243] whether the bond, dated the 26th of August, 1815, in the pleadings mentioned, was to be held as a security for the particular balance due to the Plaintiffs on the banking account, at the date of the bond, or for the general balance which should from time to time remain due to them; and if the Master should be of opinion that the bond was to be held only as a security for the particular balance due at the date of the bond, then the Master was to inquire and state to the Court whether any and what sum remained due to the Plaintiffs on such bond, from the estate of the intestate? And the Master was to state any circumstances specially to the Court, at the request of either party: And, for the better discovery of the matters aforesaid, the parties were to produce before the Master, upon oath, all books, papers, and writings, in their custody or power, relating thereto, and to be examined upon interrogatories as the Master should direct."

The Appellants and Thomas Walker, under this order, examined William Dyson, who deposed as follows:

This Deponent saith that the complainants advanced monies, and discounted bills, to and for the use of the firm of Henry Lomas and Co., though not by taking discount on each bill separately, as is the mode adopted by London bankers, but according to the practice in use with the said complainants, of carrying any bills brought in to the credit of the parties so depositing them, and advancing monies to such parties to the amount required, whether more or less than the amount of such bills, and at the end of the year an interest-account was made out, in which the parties having [244] accounts with the said complainants were either debited or credited for interest, as the case might be: and this deponent further saith, that according to such practice the said complainants, in their account with the said firm of Henry Lomas and Co., gave such last mentioned firm credit for all undue bills of exchange handed to the said complainants, as well as for cash received for and on account of the said firm: and this deponent further saith, that he had, in the month of August, 1815, when he was clerk and book-keeper in the said banking-house of the said complainants, the means of knowing the state of the account between the said complainants and the said firm of Henry Lomas and Co.; and this deponent has recently inspected and examined the books of the said complainants, and saith, that it appears from the account therein contained between the said complainants and the said Henry Lomas and Co., that there were, up to the 26th of August, 1815, sums amounting to £151,763 12s. 10d., to the debit of the said Henry Lomas and Co., and to their credit sums amounting to £149,387 15s. 8d., leaving a balance on the said 26th of August, 1815, of £2375 17s. 2d., in favour of the said complainants: And this deponent further saith, that in consequence of the account of the said firm of Henry Lomas and Co. with the said complainants becoming over-drawn to a considerable extent, in and about the month of August, 1815, this deponent, on behalf of the said complainants, and by the directions of the said complainant Richard Stanley, who was the acting partner to the said complainants said banking-house at Sheffield aforesaid, made several applications to the said Henry Lomas, that [245] he the said Henry Lomas and his partners Thomas Fidgeon and Edward Getley should give security to the said complainants for the advances which they the said complainants had already made, and might thereafter make, to the said firm of Henry Lomas and Co.; and the said Henry Lomas always replied, that he and his partners the said Thomas Fidgeon and Edward Getley

were ready when called upon, to give security to the extent of £10,000 or upwards to the said complainants for the advances made and to be made by them to him the said Henry Lomas and his partners: And this deponent further saith, that, to the best of his knowledge and belief, the said complainant Richard Stanley made similar applications, and about the same period to the said Henry Lomas, and received from him similar answers, as this deponent understood from the said complainant Richard Stanley, who used, about the period aforesaid, frequently to tell this deponent that he was going to apply again to the said Henry Lomas for security, and upon returning from the said Henry Lomas used to communicate to this deponent what had passed between him the said complainant Richard Stanley and the said Henry Lomas: And this deponent further saith, that as the result of the aforesaid applications, it was arranged and agreed that the said Henry Lomas, and his partners Thomas Fidgeon and Edward Getley, should give security to the said complainants to the amount of £10,000, by a bond, for the advances which the said complainants then were or might thereafter be under to or on account of the said firm of Henry Lomas and Co. That sometime in the month of August, 1815, a bond, purporting to be executed by Henry [246] Lomas, Thomas Fidgeon, Edward Getley, and William Fidgeon, to the said complainants, in the penal sum of £10,000, was delivered to the said banking-house by or on the part of the said firm of Henry Lomas and Co.: and this deponent saw such bond amongst the securities belonging to the said banking-house, but cannot now recollect the date or particulars thereof, or the purport and effect of the condition thereof, except that by such condition the sum of £5000 was made payable to the said complainants by the said Henry Lomas, Thomas Fidgeon, Edward Getley, and William Fidgeon: And this deponent further saith, that, to the best of his knowledge and belief, that bond was executed and given to the said complainants as a security to the amount of the said sum of £5000, for what might at any time be due to the said complainants from the said firm of Henry Lomas and Co., on the balance of the account between them, and not merely to cover the actual balance due from such firm at the time when the said bond was executed; for this deponent saith, that it was the uniform practice of the said banking-house to require security (where they required security at all) from persons keeping cash with them for the general balance which might from time to time be due to the said banking-house, to the extent of the sum mentioned in such security; and it was for such a security that this deponent applied to the said Henry Lomas as aforesaid; and this deponent distinctly understood, both from the said Henry Lomas and the said complainant Richard Stanley before the said bond was given, as afterwards, that it was to be a security to the said banking-house for the balance which might at [247] any time be due to the said banking-house from the said firm of Henry Lomas and Co. in the account between them to the extent of £5000, and this deponent always considered and believed the said bond to have been given as such security:

That the said bond mentioned in this deponent's answer to the last preceding interrogatory, was, shortly after the same had been given to the said banking-house, returned by the same complainant Richard Stanley to the said Henry Lomas, or some part of the said firm of Henry Lomas and Co., and, to the best of this deponent's recollection and belief, for the purpose of a new security being given to the said complainants to double the amount of the said bond: And this deponent further saith, that a new bond was shortly afterwards delivered to the said banking-house, purporting to be executed by the said Henry Lomas, Thomas Fidgeon, Edward Getley, and William Fidgeon, to the said complainants, in the penal sum of £20,000, and conditioned for the payment of £10,000: And this deponent further saith, that he has looked upon the partly written and partly printed paper or bond now produced and shewn to him at this the time of his examination, marked with the letter A: and saith, that the same is the new bond or security which was given to the said complainants by the said Henry Lomas, Thomas Fidgeon, Edward Getley, and William Fidgeon, as aforesaid, in lieu of the said former bond, by the condition of which £5000 only was made payable to the said complainants: And this deponent further saith, that he is not aware that the said produced bond differs in any other respect from the said former bond, besides the amount of the penalty and of the sum [248] made payable by the condition thereof: And this deponent further saith, that, to the best of his knowledge and belief, the said alteration of doubling the amount of the

said former bond was made at the suggestion of the said complainant Richard Stanley; for this deponent remembers the said last named complainant telling this deponent, about the time when the said former bond was returned to the said Henry Lomas, that he, the said last named complainant, had been to the said Henry Lomas and expressed his desire that a bond for £10,000, instead of the said bond for £5000, should be given to the said complainants, and that he the said Henry Lomas had agreed to comply with that request; and this deponent believes that the said produced bond was prepared by a Mr. Thompson, as the solicitor of the said firm of Henry Lomas and Co.; this deponent however saith, that he had no conversation either with the said Henry Lomas or the said Edward Getley, with respect to the giving of the said new bond, nor was this deponent the person through whom the directions for preparing the same were conveyed: And this deponent further saith, that the said produced bond having been substituted for the said former bond, was given for the same purposes for which such former bond was given, and as that former bond was, to the best of this deponent's knowledge and belief, and as this deponent doubts not, under the circumstances and for the reasons mentioned in this deponent's answer to the last preceding interrogatory, given to the said complainants as a security for what might at any time be due to them from the said firm of Henry Lomas and Co. on the balance of account between them, this deponent, [249] for the same reasons and under the circumstances, is positive that the said produced bond was likewise intended as a security of the same nature, to the extent however of £10,000, instead of £5000: That he has again looked upon the said produced bond marked A, and saith, that the same appears to have been executed on the 13th of January, 1816, by the said Edward Getley and William Fidgeon; and this deponent further saith, that the following was the state of the account between the said banking-house and the said firm of Henry Lomas and Co. on the 26th of August, 1815, and the 13th of January, 1816, respectively, (that is to say), on the 26th of August, 1815, the balance of such account amounted to the sum of £2375 17s. 2d., and the said banking-house then held undue bills belonging to such firm to the amount of £44,596 2s. 7d.; and on the 13th of January, 1816, the balance of the said account amounted to the sum of £24,731 1s. 4d. against the said firm of Henry Lomas and Co., and the said banking-house then held undue bills belonging to such firm to the amount of £6789 18s. 6d.: And this deponent saith, that the said balances, on the 26th of August, 1815, and the 13th of January, 1816, respectively, are computed by giving the said firm of Henry Lomas and Co. credit for bills not then due: That he recollects that about the time when the said produced bond was given, the said Henry Lomas applied to the said complainant Richard Stanley as the acting partner in the said banking-house, for further advances to be made by such banking-house for the use of the said firm of Henry Lomas and Co., though to what amount this deponent cannot remember; and this deponent further saith, that about the same time the said Henry [250] Lomas, on the part of himself and his partners in the firm of Henry Lomas and Co., delivered to the said complainant, Richard Stanley, a list or statement of monies which the said firm of Henry Lomas and Co. would require from the said banking-house: And this deponent has looked upon the paper writing, now produced and shewn to him at this the time of his examination, marked with the letter L.,* and saith, that the same is a list or statement which was so delivered by the said Henry Lomas to the said complainant, Richard Stanley, as aforesaid: That the said complainant, Richard Stanley, on the part of himself and his said partners in the said banking-house, agreed to make, and did accordingly make, the advances mentioned in the said produced list or statement marked L., to and for the use of the said firm of Henry Lomas and Co.; and this deponent saith, that he knows, from his communications with the said complainant, Richard Stanley, and the said Henry Lomas, upon the subject of the state of the account between the said banking-house and the said firm of Henry Lomas and Co., that the said advances were made by the said banking-house on the faith and security of the said produced bond, and that such advances would not have been made if security to the amount of £10,000, or some such amount, had not been given by the said firm of Henry Lomas and Co. to the said complainants: that before the said produced bond, and the said former bond which was returned, were given to the

* By this document it appeared that about £12,000 was required.

said complainants, this deponent repeatedly heard the said complainant, Richard Stanley, refuse to the said Henry Lomas any [251] further advances, until some security was given by the said firm of Henry Lomas and Co.; and this deponent, by the directions of the said last-named complainant, refused similar applications for money made by the said Henry Lomas; and when this deponent was directed by the said complainant, Richard Stanley, to apply to the said Henry Lomas for security as aforesaid, in the month of August, 1815, the said complainant Richard Stanley repeatedly declared that the said banking-house would make the said firm of Henry Lomas and Co. no further advances, until the required security had been given by the said firm to the said banking-house, and directed this deponent so to tell the said Henry Lomas; and this deponent accordingly did so: That his opportunities of knowing the matters deposed to by this deponent as aforesaid were from his having been clerk and cashier to the said complainants during the period aforesaid; and this deponent saith, that as such clerk and cashier, he kept, or assisted in keeping, the books of the said banking-house, and paid and received the monies paid and received by or on account of the said banking-house, and nearly all the cash and bill transactions between the said banking-house and the said firm of Henry Lomas and Co. passed through this deponent's hands, and this deponent was continually in the habit of communicating both with the said complainant, Richard Stanley, and the said Henry Lomas upon the subject of such transactions.

Richard Wood, who had been clerk to the Plaintiffs, deposed that Henry Lomas, Thomas Fidgeon, and Edward Getley, jointly with William Fidgeon, deceased, executed a bond to the said [252] complainants, under their firm of Walkers, Eyre, and Stanley, sometime about the middle of August, 1815, but what was the precise date thereof this deponent cannot recollect; that by such bond Henry Lomas, Thomas Fidgeon, Edward Getley, and William Fidgeon, jointly and severally bound themselves in the penal sum of £10,000 to the firm of Walkers, Eyre, and Stanley, of Sheffield, bankers, to pay to such last-mentioned firm the sum of £5000, and, as near as this deponent can now recollect the contents of such bond, within six months after demand being made by such firm; and this deponent saith, such bond was executed under the circumstances mentioned in this deponent's answer to the last preceding interrogatory; and, that, to the best of his knowledge and belief, the same was executed as a security to the said complainants for the general balance of the accounts subsisting between the complainants and the firm of Henry Lomas and Co., to the extent of the sum of £5000, made payable as aforesaid by the condition of the said bond; for this deponent saith, that at the time of the said bond being delivered to the said complainants, he this deponent distinctly considered and understood the said bond to have been given by the firm of Henry Lomas and Co. as a standing security for the general floating balance of the account current between that firm and the complainants, to the extent of the sum of £5000, and Henry Lomas, who was the only partner in the firm of Henry Lomas and Co., residing at Sheffield, and with whom this deponent had any communication on the subject of the bond, always so treated, and spoke of, and considered the said bond, in his conversations with this deponent [253] respecting the same, both at the time when the same was given to the complainants and afterwards: That shortly after the bond had been delivered to the banking-house, the complainant, Richard Stanley, expressed to this deponent his wish that the bond should be altered in two or three particulars; in the first place, that the money made payable by the condition should be made payable generally, and without the clause within six months after demand; in the next place, that the partners comprising the firm of Walkers, Eyre, and Stanley, the obligees in the bond, should be named individually; and in the third place, that the execution of such bond by Thomas Fidgeon, Edward Getley, and William Fidgeon, should be attested by some professional person, instead of Mary Fidgeon, because she, being the daughter of Thomas Fidgeon, there might be some difficulty in producing her as a witness to prove the execution of such bond, should circumstances require her evidence; and that the bond was then delivered to this deponent by the complainant, Richard Stanley, for the purpose of being altered as aforesaid; and this deponent communicated to Henry Lomas the alterations therein, which the complainant, Richard Stanley, had desired to be made, and Henry Lomas acquiesced in such alterations, and agreed to procure a new bond in the form proposed by the com-

plainant, Richard Stanley; and this deponent saith, that Henry Lomas had, in the interval between the delivery of the first bond to the complainants and its return by the complainant, Richard Stanley, more than once expressed to this deponent his regret that the first bond had not been conditioned for the payment of £10,000 [254] instead of £5000, as he the said Henry Lomas, had understood that William Fidgeon would not have objected to join in a bond to that amount; and when the first bond was returned by the complainant, Richard Stanley, Henry Lomas proposed that, instead of altering that returned bond, a new one should be executed in the form suggested by the complainant, Richard Stanley, with the additional alteration of doubling the penalty and the sum made payable by the condition, but Henry Lomas desired this deponent not to mention that last-mentioned variation to the complainant, Richard Stanley, until the new bond should have been agreed to and executed by his partners and William Fidgeon, lest either of them should not consent thereto; that by the directions of Henry Lomas, this deponent, on the same day that the former bond had been returned as aforesaid, procured a stamped printed form of a bond in blank, and took the same, together with the bond returned as aforesaid by the complainant Richard Stanley to Mr. Thompson, solicitor, of Sheffield, and instructed him to fill up such blank form according to the form suggested by the complainant, Richard Stanley, and with the additional variation of making the penalty of the new bond £20,000 instead of £10,000, and the sum payable by the condition thereof £10,000 instead of £5000; that the said Mr. Thompson accordingly on the same day filled up and prepared such new bond, in pursuance of the aforesaid instructions conveyed to him by this deponent; that the produced bond was substituted for the said former bond, and was given to the complainants as the same sort of security, and for the same purposes as the former [255] bond, and was at the time of its being delivered to the banking-house, considered and believed by this deponent to have been given to the complainants as a security for the general floating balance which should from time to time be due to the complainants from the firm of Henry Lomas and Co. to the extent of £10,000, and Henry Lomas so spoke of and treated the said produced bond as such security in his conversations with this deponent upon the subject thereof, both at the time when it was given to the said complainants and afterwards. That some time about the 29th of August, 1815, Henry Lomas directed this deponent to make out a statement of the monies which the firm of Henry Lomas and Co. would require in the course of the month of September in the same year, of the amount of bills which would be paid off in the course of September, October, and November, 1815; and this deponent understood from Henry Lomas that he intended applying to the banking-house for other advances of money, and that such statement was for the purpose of being exhibited to the complainant, Richard Stanley, upon such application, in order to shew him that the firm would require but £12,000 to be advanced by the banking-house, whereas there was paper in the course of payment, which in the month of September, 1815, was expected to produce £24,750 or thereabouts, in the month of October £9517 or thereabouts, and in November £5700 or thereabouts: that as subsequent advances were made by the banking-house, to and for the use and benefit of the firm of Henry Lomas and Co., in the month of September, 1815, this deponent believes that Henry Lomas made the intended application for [256] the same to the banking-house; that he has looked upon the paper writing now produced and shewn to him at this the time of his examination, marked with the letter L., and saith that the same is the statement so made out by this deponent as aforesaid, by the directions of the said Henry Lomas; and this deponent believes the same to have been shortly afterwards delivered by Henry Lomas to the complainant, Richard Stanley, for the purpose aforesaid; and from some memorandums thereon, which this deponent has no doubt are in the hand-writing of the complainant, Richard Stanley, the produced paper writing, marked L., appears to have been in the last-mentioned complainants' possession.

Charles Brookfield (who was examined before the hearing) deposed, that on the 11th of January, 1816, the complainants having a very large balance due from Fidgeon and Co., and being dissatisfied at its not being reduced, instructed this deponent, as their attorney, to take a journey to Birmingham, to endeavour to obtain a reduction of the account, and also to obtain from William Fidgeon a satisfactory security for the £10,000 due upon the bond; and one of the complainants, Richard

Stanley, made an affidavit of the debt upon the bond against William Fidgeon, that this deponent might immediately pursue legal proceedings if satisfactory security was not given. That he came over to Birmingham, and on the morning of the 13th day of January, 1816, he saw Edward Getley, and expressed to him the complainants' dissatisfaction at the balance of Fidgeon, Getley, and Lomas's account not being much reduced, the balance being then, as he had been informed, and believes it was **[257]** then admitted by the said Edward Getley, upwards of £20,000, and that the complainants were determined to have it reduced: that the said Edward Getley told him that they were in daily expectation of remittances from Mr. Thomas Fidgeon, who was then on the Continent; and also that they were executing a large order for Mr. Levi, and were in expectation of having his acceptances to a large amount, which should be paid in reduction of the account: that this deponent then took a journey to Tamworth, for the purpose of seeing Mr. William Fidgeon: that he saw him there, and spoke to him on the subject of the bond he had given for Fidgeon, Getley, and Lomas to the complainants, and produced to him the said bond now produced to this deponent, marked with the letter A, and asked if the name "Wilm Fidgeon," thereto subscribed, was not his signature, when he admitted that it was: that he requested the said Mr. William Fidgeon to re-execute the bond in his presence, which he did not hesitate to do; that he, this deponent, ordered a pen and ink, and having cleansed the ink from the pen, the said William Fidgeon re-executed the bond, as stated in this deponent's answer to the second interrogatory, by retracing his name with the pen, and afterwards sealing and delivering the bond. After some conversation, this deponent told the said William Fidgeon, that for so large an amount the parties were dissatisfied to hold merely a bond; and understanding that he had ample freehold property, they expected the £10,000 to be secured either by mortgage, or a deposit of title deeds relating to property of competent value, or that he must pay the money: that Mr. Fidgeon said he was surprised to be called **[258]** upon for payment; that it was impossible for him then to raise so large a sum, and that he supposed that he should only be liable to his fourth part of the £10,000: that this deponent told the said William Fidgeon he was liable to pay the whole sum, and pointed out, or read over to him, that part of the bond which shewed him it was a joint and several bond: that he said he did not understand it in that way: that he this deponent then told him that his instructions were, either to have the security required, or the money: *that he told the said William Fidgeon, if he would give the complainants freehold security, they would give him any reasonable time; and that when Fidgeon, Getley, and Lomas reduced their account, the security might be given up:* that this deponent requested the said William Fidgeon to consult his attorney, and that he might confer with this deponent, but which the said William Fidgeon then declined doing; but the said William Fidgeon promised to consult a friend, and to meet this deponent in Birmingham the following morning; that the said William Fidgeon met this deponent the following morning, at Mr. Thomas Fidgeon's house in Birmingham, when the said William Fidgeon told deponent that his friend advised him to sign nothing more—that he had signed enough already: that this deponent then told the said William Fidgeon, in the presence and hearing of the said Edward Getley, if he did not give security, he must immediately pay the money, or the complainants would proceed against him on the bond: that after some further conversation, the said William Fidgeon consented to give the security, and promised to bring his title deeds to this deponent to **[259]** Birmingham the following morning: And this deponent saith, that in the above statements of the conversations between him this deponent and the said William Fidgeon, he does not mean to set forth the precise words in which the said conversations were held or took place, but that the same were to the effect and full purport and meaning hereinbefore stated by him this deponent: And this deponent further saith, that he waited for the coming of the said William Fidgeon at Birmingham the following morning, and in the course of the forenoon a person whom this deponent did not know, but who, this deponent was told by Mr. Getley, to the best of this deponent's recollection and belief, was the defendant Sam. Cave Fidgeon, came and brought him the note now produced, marked with the letter B., and which is in the words following:

"Sir, I have seen my friend, and he thinks with me, that, as the whole of my estate will not pay the amount of the bond, and consequently I should be as liable to

be sent to prison then as now, I have made up my mind not to sign any thing more, or part with my title deeds, till I have seen my brother. I am your's,

WM. FIDGEON."

And which note is addressed to Mr. Brookfield, Birmingham: that after the receipt of the said note marked B. he this deponent had no further communication with the said William Fidgeon personally: that he this deponent then proceeded from Birmingham to London, for the purpose of seeing Henry Lomas, one of the obligors in the bond [260] named, and on the 17th or 18th day of January, 1816, he saw the said Henry Lomas, and had several conversations with him, and expressed to him how much the complainants were dissatisfied that they had neither had the promised acceptances of Alexander Levi, nor any remittances from Germany, and that they were determined to have the account reduced, and told him that he had applied to Mr. William Fidgeon on the subject of the bond; and Lomas said that Thomas Fidgeon was on the Continent, and that they were going on with the order for Levi, and that he Lomas hoped speedily to reduce the debt by Levi's acceptances and remittances from the Continent: that on or about the 22nd or 23rd day of the same month of January, this deponent returned from London, and came to Birmingham, and called upon Getley, at his house at Moseley, where he received similar assurances as to the reduction of the debt due to the complainants: That in consequence of no reduction of the account of Fidgeon, Getley, and Lomas, with the complainants, having taken place, deponent, on or about the 27th of March, 1816, accompanied Mr. Richard Stanley, one of the complainants in this cause named, to Birmingham, to see Edward Getley, and to insist upon something being done to reduce the account, the balance of which was then, as this deponent was informed and believes, more than £25,000: that they saw Getley, and Richard Stanley peremptorily demanded from him that the account should be reduced, when the said Edward Getley gave bills upon Alexander Levi, or Alexander Levi and Co., (he does not recollect which,) drawn by Getley, in the firm of Henry Lomas and Co., for the amount of £10,000, [261] to go to the credit of the general account; but which bills have not been paid, the said Alexander Levi having refused to accept the same.

These depositions, and the depositions of Mary Fidgeon, taken before the hearing, were read before the Master, and were the only evidence produced before him under the last mentioned order.

In pursuance of the order of the 19th of July, 1822, the Master made his report, bearing date the 17th of January, 1825, as follows:

"In pursuance of an order made in this cause on the 19th day of July, 1822, whereby, etc. I have proceeded on the said enquiry, and for that purpose the depositions of Charles Brookfield and Mary Fidgeon, witnesses examined on the part of the Plaintiff previously to the hearing of this cause, and the depositions of William Dyson and Richard Wood, witnesses examined on the part of the Plaintiffs, under the order of the 19th of July, 1822, and cross-examined on the part of the Defendants, have been read before me: And upon consideration of the said evidence, I find, that the bond and the condition thereof are in the common and usual form of a joint and several bond for payment of money, with lawful interest for the same from the date thereof, except that the principal is expressed in the condition to be payable (with lawful interest) on demand, and not on any particular day; and I find, that William Fidgeon, one of the obligors in the bond, was a surety only for Thomas Fidgeon, Edward Getley, and Henry Lomas, the other obligors therein named, and that Thomas Fidgeon, Edward Getley, and Henry Lomas, were partners in trade, and kept an account with [262] the Plaintiffs, who carried on the business of bankers in partnership; and I find, that the bond was executed by William Fidgeon on or about the date thereof, and that such his execution was attested by Mary Fidgeon, (a witness examined on the part of the Plaintiffs,) and that the bond was, on the 13th day of January, 1816, re-executed by him, and that such re-execution was witnessed by Charles Brookfield, a witness also examined on the part of the Plaintiffs; and I find, that the said bond, executed by all the said obligors, was delivered by Henry Lomas to the Plaintiffs or one of them; and I find, that Thomas Fidgeon, Edward Getley, and Henry Lomas, meant and intended that the said bond should be held by the Plaintiffs as a security for the general balance, which should from time to time remain due from them; but it hath not been proved before me that William Fidgeon

ever made any agreement, declaration, or acknowledgment whether the said bond was to be held as a security for the particular balance due to the Plaintiffs on the banking account at the date of the bond, or for the general balance which should from time to time be due to them; and the only evidence produced before me of the intention with which the said William Fidgeon gave the said bond, is (as I conceive) the circumstance of his having, on the application of Charles Brookfield, as attorney for the Plaintiffs, re-executed the said bond on the 13th day of January, 1816, without having made any inquiry as to the amount of the balance then due from the said Thomas Fidgeon, Edward Getley, and Henry Lomas, to the Plaintiffs, from which circumstance I pre-[263]-sume that the same William Fidgeon considered the said bond as given by him for the general balance which might from time to time be due to the Plaintiffs."

The Respondents, John Hardman and Thomas Cooke, and the Defendant, Peter Kempson, took the two following exceptions to the Master's report of the 17th of January, 1825:

1st. "For that the Master hath in and by his said report certified, that he finds that Thomas Fidgeon, Edward Getley, and Henry Lomas in the said report named, meant and intended that the bond in the said report mentioned, should be held by the Plaintiffs as a security for the general balance which should from time to time remain due from them; whereas the Defendants submit that the said Master ought not so to have certified."

2nd. "For that the said Master hath in and by his said report certified, that the only evidence produced before him of the intent with which William Fidgeon, gave the said bond is, the circumstance of his having, on the application of Charles Brookfield, as attorney for the Plaintiffs, re-executed the said bond on the 13th of January, 1816, without having made any inquiry as to the amount of the balance then due from Thomas Fidgeon, Edward Getley, and Henry Lomas, to the Plaintiffs; from which circumstance, the Master, presumes that William Fidgeon considered the said bond as given by him for the general balance which might from time to time be due to the Plaintiffs; whereas the Defendants contend and submit, that the Master ought not so to have certified; but he ought to have certi-[264]-fied that the said bond was to be held as a security for the particular balance due to the Plaintiffs on the banking account at the date of the said bond: And the said Defendants contend and submit, that the said Master ought to have inquired and stated to the Court whether any and what sum remained due to the Plaintiffs on such bond, from the estate of the said William Fidgeon."

The Appellants, and the Plaintiff, Thomas Walker, also took the three following exceptions to the Master's Report of the 17th day of January, 1825:

1st. "For that the said Master hath not, in and by his said Report, certified as special circumstances, that the Plaintiffs understood the bond dated the 26th day of August, 1815, in the pleadings mentioned to have been given to them as a security for the general balance which should from time to time remain due to them, and that such was the agreement between them and Henry Lomas, Thomas Fidgeon, and Edward Getley, who then carried on business in partnership, under the firm of Henry Lomas and Co.; whereas the said Master ought to have certified such facts as special circumstances, having been requested so to do on behalf of the said Plaintiffs."

2nd. "For that the said Master hath not, in and by his said report, certified as special circumstances, that the bond was given in lieu of another bond in the penal sum of £10,000, which had been previously given by the same parties for securing the balance of the banking account of the said Henry Lomas and Co. with the said [265] Plaintiffs, to the extent of £5000; and that, previously to the execution of the said bond of the 26th of August, 1815, the said Henry Lomas and Co. had applied to the said Plaintiffs for further advances, and that the said Plaintiffs had refused to extend their advances to the said Henry Lomas and Co., without further security: And that the penalty in the said bond of the 26th of August, 1815, was made £20,000 instead of £10,000, and that the money thereby secured was made £10,000 instead of £5000, in order to induce the said Plaintiffs to make further advances to the said Henry Lomas and Co., and that on the occasion of the execution of the said bond, the said Henry Lomas delivered to the said complainants a list of the advances, amounting to £12,000, which the said Henry Lomas and Co. should have occasion for from the said Plaintiffs in the course of the ensuing month: And that the said com-

plainants actually made such advances on the security of the said last named bond; whereas the said Master ought to have certified such facts as special circumstances, having been requested so to do on behalf of the said Plaintiffs."

3d. "For that the said Master hath not, in and by his said Report, certified, as special circumstances, the several facts deposed to by William Dyson, in answer to the 12th and 13th interrogatories, exhibited before the Master for his examination, and by Richard Wood, in answer to the 11th and 12th interrogatories, settled by the Master for his examination as connected with the giving of the said bond, and forming part of the same transaction; whereas the said [266] Master ought to have certified such facts as special circumstances, having been requested so to do on behalf of the said Plaintiffs."

The Exceptions taken by the Respondents having been argued before the Vice-Chancellor, on the 12th of December, 1826,* his Honor made an order, whereby he

* The Vice-Chancellor, after hearing counsel in this case, delivered the following judgment:

The first question here is, what is the legal effect of this bond; does this bond at law import an obligation for the payment of a present debt, or the payment of any floating balance that may accrue between the parties? There are two expressions, which are quite decisive upon the subject. In the first place, the bond is payable upon demand, that imports a present debt, because the demand might be made the day after the execution of the bond; and therefore it is clear that this bond was for a present debt existing at the time of the execution of the bond: and there is no doubt that was the clear understanding of the Court at the time when the reference was made; unless the Court had been of that opinion, by no possibility could such a reference have been made to the Master. The reference is in these terms: The Master is required to state to the Court whether the bond, dated the 26th of August, 1815, was to be held as a security for the particular balance due to the Plaintiff on the banking account at the date of the said bond, or for the general balance which should from time to time remain due to him. Now, if upon the face of the bond, it imported to be a security for a general balance, the Court would not have sent such an inquiry; that inquiry must have been, from the clear legal opinion of the Court, that it was a bond, on the face of it importing the payment of a present debt. The Master, upon that inquiry, has reported with respect to the three principal debtors in partnership, that it was understood by them that the bond for £10,000 should stand as security for any floating balance that might be due from them to the obligee; but that with respect to Mr. Fidgeon, the surety whose estate is sought to be charged by this suit, the Master expressly finds there is no evidence to import an intention on his part to this effect, except that he had re-executed the bond (which the Master finds), after the original execution of it; and the Master, from that circumstance, presumes that Mr. Fidgeon had re-executed the bond without inquiring whether the debt was paid, considering that it should stand as a subsisting security for the general balance. When the evidence before the Master is considered, no such presumption arises out of the case; and the circumstance of the re-execution of the bond cannot have the effect of raising such a presumption, as the Master has concluded his report, by stating—"I am clearly of opinion that, by the legal effect of the bond, it is a security for a present debt." And it differs materially from those cases which have been referred to. The Judges there founded their opinion upon the circumstance on the face of the instrument—that it did not profess to be a security for a present debt; that was the ground stated by the Judges in the cases read at the bar. Being, therefore, of the opinion which I have stated, I must say I am rather surprised I should have sent it to a reference; if I accurately saw what the case was, I should not have been justified in sending it to a reference; and I must either not have known what the terms of the security were, or it could not have been properly discussed at the bar, and the real question brought before me. Having stated my opinion upon the legal effect of the bond, I think I should not be warranted in sending this question to a court of law; therefore I must allow the second exception, and overrule the first. At law, the effect of the bond for a present debt cannot be extended; but if there is some collateral agreement that the bond should be a security for any future floating balance, a court of equity will sustain the collateral agreement; which does not

held the 1st exception to be insufficient, and therefore ordered that the same [267] should be over-ruled. And his Honor held the 2d exception to be good and sufficient, and therefore ordered that the same should be allowed.

The three exceptions taken by the Appellants, were argued before the Vice-Chancellor at the same time; and thereupon an order was made [268] whereby he held that the said exceptions were insufficient, and it was ordered that the same should be overruled.

Against the order of the 19th day of July, 1822, and the two several orders of the 12th day of December, 1826, there was a petition of rehearing, and appeal to the Lord Chancellor.

Before the petition came on to be heard, the Defendant, Sam Cave Fidgeon, died, and after his death, letters of administration of William Fidgeon's estate and effects, left unadministered by Sam Cave Fidgeon, were granted to the Respondent, Ann, the wife of the Respondent Charles Baylis; and letters of administration of the goods and chattels of Sam Cave Fidgeon were granted to the Respondent Sophia, the wife of the Respondent William Baker; and thereupon the suit was in the usual way revived, by an order bearing date the 29th day of January, 1828.

The petition of rehearing and appeal came on to be heard before the then Lord High Chancellor, the Right Honourable Lord Lyndhurst, on the 8th and 10th days of July, 1830, and his Lordship took time to consider of his judgment; but his Lordship went out of office before he had delivered his judgment thereupon.

On the 14th day of January, 1831, the petition of rehearing and appeal, was heard before Lord Brougham, and dismissed, with costs.

After the last mentioned order, the late Plaintiff, Thomas Walker, died, but the whole of his interest in the suit survived to the Appellants; Peter Kempson also died, but the whole of his interest in the said suit survived to the Respondents, John Hardman and Thomas Cooke.

[269] The appeal was against the order of the 14th day of January, 1831, and the several orders or parts of orders thereby affirmed, and bearing date respectively the 19th day of July, 1822, the 12th day of December, 1826, and the 12th day of December, 1826.

For the Appellants Sir F. Pollock and Mr. Wigram.

The order of the 19th of July, 1822, is erroneous.

It ought to have overruled the exceptions taken by the Defendants to the Master's report of the 16th of July, 1821. The 1st exception should have been overruled, because there was no evidence of any sum of money having been received by the Plaintiffs, or any person for their use on account of the bond. The 2nd exception ought to have been overruled, because there was no evidence before the Master that the bond was given to secure such balance as was due at the time the bond was given, or so much thereof as did not exceed the sum of £10,000; and the only evidence laid before the Master, according to its fair construction, showed, that the bond was given to the Plaintiffs to secure the general or floating balance of the banking account of Henry Lomas and Co. with them. The 3d exception ought to have been overruled, because, in the absence of all evidence, the Master could do no otherwise than report, as he has reported, viz.: That nothing had been received by the Plaintiffs on account of the bond; and the only evidence before him was an examination of the Plaintiffs, which confirmed that conclusion. The 4th exception ought to have [270] been over-ruled for the same reasons as the former exceptions, and also as depending thereupon.

The inquiry directed by the order of the 19th of July, 1822, ought not to have been directed, because the only inquiry which, consistently with the principles and practice of the Court, ought to have been directed, was the inquiry which had been previously directed by the decree of the 31st of July, 1819, viz.: Whether any and what sum or sums of money had been received by the Plaintiffs, or by any other person or persons, for their or either of their use, on account of the bond?

The order of the 12th of December, 1826, made upon the argument of the De-

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contradict the bond, but gives to the agreement in the bond an extension which at law it does not import.

Against this judgment there was an appeal to the Lord Chancellor (Brougham). The appeal was heard in January, 1831, and dismissed, upon hearing he Appellants' counsel.

fendants' exceptions to the Master's report of the 17th of January, 1825, will, if the order of the 19th of July, 1822, is reversed or varied, be reversed or annulled as consequential thereupon; and if the order of the 19th of July, 1822, is affirmed, still so much of the order as allows the 2nd exception taken by the Defendants to the Master's report of the 17th of January, 1825, is erroneous, because the result of the evidence referred to by the Master in his report, as read before him, is, that the bond was to be held, not as a security for any particular balance due to the Plaintiffs on the banking account at the date of the bond, but for the general or floating balance which might, from time to time, be due to them on such account: and the Court did, in fact, by overruling the 1st exception, decide that such was the purpose for which Thomas Fidgeon, Edward Getley, and Henry Lomas, (the principal obligors) meant and intended that the bond should be held: so that the allowing of the 2nd exception is inconsistent with the overruling of the 1st ex-[271]-ception; and the order is inconsistent with itself, in deciding that the bond was to be held as a security for a different purpose from that for which three of the obligors intended it should be held.

This is, in its nature, purely a question at law. The death of William Fidgeon is the only reason why the proceedings found their way into a court of equity, otherwise the obvious course to adopt on the part of the bankers would have been to sue William Fidgeon at law on that bond; there was a reference to the Master in that suit, in equity, and then the meaning of the bond came in question, whether the bond was given for the specific balance owing at the time of the date of the bond, or whether it was given as a collateral security for any sum of money that might be due on the general account.

The objection was not taken by the answer or at the hearing. It arose first before the Master.

There are several cases which throw light on the subject, which we shall presently bring under your Lordships' notice; that really is the single question, whether, when there is a running account between bankers and a customer, and a simple bond is given without any recital, but merely with a condition to secure the payment of a sum of £10,000, with lawful interest, from the date of the bond, what is to be considered the construction of that bond?

In examining this, which is a legal and not an equitable question, the simplest mode of considering what the liabilities of the obligor would be, and what the rights of the obligee would be, is to see what would be the effect of putting in suit that bond in a court of common law. What is [272] the effect of the bond at law? It is an admission that a sum of £10,000 is payable, with lawful interest, from the obligor to the obligee, and it becomes incumbent on the obligors to show that they have paid that sum, or that there is some reason why they should not pay it. That such a security may be a security for a general balance will be clear from the authorities which we shall cite, and in order to show that the debt which, upon the face of the bond is due at law, is not due, it is incumbent, on those who seek to discharge themselves, to make out what was the debt for which that bond was given, and that such debt has been discharged.

The facts, which appear to be important, are these, what was the relative state of the parties when the bond was given? There was a banking account; on the credit side of that account the bankers entered all sums of money which they received, and all securities, that is, all bills or promissory notes, of every sort, they entered generally; all of them to the credit of the customer, leaving the interest to be calculated at the end of the year: on the other side the customer was debited with all sums drawn out, with all bills and securities with which they were furnished, and at the end of the year an interest-account was made up, and the account was to be balanced, and the balance carried to the commencement of the next year. Upon such a dealing what would be the natural conclusion as to the object for which that bond was given, supposing you are merely to look at the circumstances of the parties, the fact of the bond being given, and the advances made by the banker to the customers? At the time [273] when this bond was given the payments in and the payments out of the account, in respect of which, in some shape or other, the bond was given, amounted to no less than £10,000 a month. At the time the bond was given there was no specific ascertained balance actually due. You could get at what might be called the cash balance by throwing all the bills out of the account on each side, and ascertaining what was the actual money advanced by the bankers to the customer; in point of fact,

that was £2300, but there were bills running, to a very considerable amount, on both sides, and the real debt between the parties, if that expression be used without any particular reference to items, could only be ascertained by waiting till all the bills had run out, and then ascertaining to what extent they had become available or not.

There is no evidence whatever that the bond was given in reference to the particular state of the account: the only evidence on the subject is, that the customer required from the banker an advance, and an application having been made for indulgence and accommodation on the account, that was refused unless further security was given: there had been a bond, for a smaller sum, a very short time before, and on this expected further advance, this latter bond for £10,000, was given, and the question is, was that bond given for the particular specific balance that was due at the moment, or was it given upon the general account, and for the purpose of protecting the bankers, from time to time, on that running account? If the proceeding had taken a legal shape it would have been incumbent on the obligors to show to what that bond applied, so as to satisfy any Court, [274] before whom the question might have arisen, that the bond applied to a particular sum, and that such sum was discharged. *Prima facie* the sum secured by the bond was due, and it is incumbent on those who say it is discharged to prove that the fact is so.

In the case of Exparte Langston (17 Vesey, 227) an expression fell from Lord Chancellor Eldon, that, with respect to an equitable mortgage, if it has been given on a specific advance, and further advances are afterwards made, it is to be inferred those advances were made on the same security, for his Lordship says, "It is not probable that a person having made an advance on security, should make a further advance without security." But it is to be contended, on the other side, that this bond for £10,000 was paid and discharged by the first £10,000 that happened to come into the credit side of the account. Is it likely the bankers, who required security in respect of advances which they periodically make to a customer, would be satisfied with that security merely for the short period of one month, and then go on, from month to month, making advances, without requiring any further security? Nothing can be more absurd than to suppose that a banker would take such a security.

In the case of *Woolley* and *Jennings* (5 Barn. and Cress. 165), a warrant of attorney had been given for £4000, and the defeazance was in these words. "The within warrant of attorney is given to secure the payment of the sum of £4000, with lawful interest thereon." It appeared that the security was given on the 20th January, 1823, and on the 4th [275] October in the same year it was put in force, and certain property was taken under it. "Between the 20th January and the 4th October, 1823, the bankrupts in the course of their dealings with the Defendants had paid into their hands a larger sum than £4000, and it was thereupon contended that the warrant of attorney was discharged:" but the Chief Justice was of a different opinion, and the Jury found a verdict for the Defendants. The Attorney-General moved for a rule *nisi* for a new trial. The sum secured by the warrant of attorney (as he argued) was paid off before judgment was entered up. Sums amounting in the whole to much more than £4000 were paid by the bankrupts into the hands of the Defendants, between the 20th of January and the 4th of October. There was a running account between them: the monies paid in were therefore applied to the first items of the account, nothing to the contrary having been said when the money was paid. In such case, the party receiving the money had no right to appropriate it to the discharge of any particular items: Clayton's case, *Bodenham* v. *Purchas* [2 B. and Ald. 39]. If no warrant of attorney had been given, it is clear that the payments would have been considered applicable to the first items of the account; and it seems difficult to understand how that should be altered by giving a collateral security. But the Court observed, "In *Kirby* v. *The Duke of Marlborough* [2 M. and S. 18], Lord Ellenborough said, 'This is a bond given by the surety, as an indemnity for advances to a definite amount; it is the same as if the surety had expressed that the bankers might lend to the amount of £3000; and when the advance was made to that amount, the guarantee [276] became *functus officio*, and was not a continuing guarantee.' This case is very different: there is nothing on the face of the warrant of attorney or the defeasance to show that it was intended to secure the balance existing at the time when it was given. In the absence of any thing to show such an intention, it must be construed as a continuing security." If you substitute the warrant of attorney

for the bond, the two cases are in principle identical. There is nothing to show that this sum of £10,000 was the specific sum that was at that time due; if it is possible to discover what was the specific sum, and if Lord Eldon's judgment be law, the conclusion is, that if nothing appears to the contrary, then it was a continuing guarantee, and then certainly the Appellants are entitled to your Lordship's judgment.

The case of *Pease* v. *Hirst* (10 Barn. and Cress., 122), was an action on a promissory note bearing date the 6th of January, 1817, whereby the Defendants jointly and severally promised to pay on demand Messrs. Pease, Harrison, and Co., or order, £300, with lawful interest for the same, value received. Plea the general issue and statute of limitations. At the trial it appeared that the Plaintiffs and R. Harrison, in January, 1817, carried on business at Kingston-upon-Hull, under the firm of Pease, Harrison, and Company; the Defendant, Jonathan Hirst, had for some years before kept an account with them as his bankers, and at that time, in order to obtain credit with them, he prevailed with the other Defendants to join him in the promissory note in question. The note was deposited with the bankers, and they gave him credit for £300 on account of it in his pass-book, and charged him [277] interest for the same yearly. The circumstance of £300 actually finding its way into the account as an item of credit, would very naturally lead to the introduction of an argument founded on Clayton's case, *Bodenham* v. *Purchas* [2 B. and Ald. 39], *Simpson* v. *Ingham* [2 B. and C. 65], and other cases of that sort. But on a rule *nisi* having been obtained in order to enter a nonsuit, (the Judge who tried the case having directed a verdict for the Plaintiff) the Attorney-General showed cause, and the judgment was given by Mr. Justice Bayley and Mr. Justice Littledale, the Lord Chief Justice being absent from indisposition, and the other Judge having been counsel in the case. Mr. Justice Bayley says this: "It seems to me the Plaintiffs are entitled to retain their verdict. One objection is, that as to the liability being affected by the change of the firm," etc. (which is not material to the present point.) "Another objection is, that this note was discharged by a balance belonging to Jonathan Hirst, which afterwards came into the hands of the bankers. It was contended that the Plaintiffs are bound to consider the debt due on the note as paid and wiped off by that balance; it does not appear to me that that was a cash balance, but if it had been, the bankers would not have been bound to apply it in payment of the note. It would be directly contrary to the intention for which the note was given, that it should be paid off by the first money of Jonathan Hirst, which came to the hands of the bankers. If the persons who were in substance though not in form sureties had desired the bankers so to apply the balance, they perhaps would have been bound so to apply it." Mr. Justice Littledale says, "The next question is, has the note been [278] paid off by the bankers having struck a balance which was in favour of Jonathan Hirst? It was evidently not intended by the parties to consider it as satisfied as soon as there should be a balance of £300 in the hands of the bankers. It was intended to be a continuing security for advances to be made from time to time; it is made payable to order on demand: there clearly therefore was no legal obligation on the bankers to appropriate that balance to the discharge of the note, and there having been no appropriation by the debtor, I think the debt cannot be considered as discharged." Applying that case to the present, the bankers not only had no direction to apply any balance in satisfaction of this bond; but it would have been a breach of good faith, unless there was some special reason, since it might have caused the insolvency of the house. No person gives a bond and obtains advances from bankers on that sort of security, where there is a running account extending over many months, with a view that the moment funds come in, they should be applied to the satisfaction of the security.

The case of *Hargreave v. Smee* (6 Bingham, 244), was a question not of suretyship like this on an instrument for a certain sum, but was a question of guarantee: which was in these words. "I agree to guarantee the payment of goods to be delivered in umbrellas and parasols to John and Edward Augustus Smee, at No. 38, Milk Street, Cheapside, London, according to the custom of their trading with you, in the sum of £200." Goods to more than the amount of £200 had been delivered and paid for, and the question was whether this was a continuing guarantee. Lord Chief Justice Tindal [279] says, "The question is, what is the fair import to be collected from the language used in this guarantee? The words employed are the words of the Defendant in this cause, and there is no reason for putting on a guarantee a construction different from that which the Court puts on any other instrument. With regard to

other instruments the rule is, that if the party executing them leaves any thing ambiguous in his expressions, such ambiguity must be taken most strongly against himself. From the present agreement I collect that there were two parties already in a course of dealing. When the Defendant goes to guarantee the payment of goods to be delivered according to their custom of trading, I cannot but imply that, by some preceding dealing, (and I am confirmed in this by the finding of the jury,) the custom of the parties was to make up certain monthly accounts: I collect thence an intention that this course of dealing should continue, which would render the guarantee a continuing guarantee. If we were to put on it the limited construction which has been contended for, we should deprive the party of the benefit which appears to have been contemplated. If one supply of goods to the extent of £200 would satisfy the stipulation in dispute; there is no course of trading to which the words 'course of trading' could be applied. The cases on this subject run so nearly into each other, that it is difficult to reconcile them; but the distinction between this case and *Melville* v. *Hayden*, is, that here the Defendant meant to keep two persons engaged in trade, in their established custom of trade. The verdict must be entered for the Plaintiff." In this opinion the rest of [280] the Court concurred, Mr. Justice Gaselee expressing some difficulty on the subject; but on the whole concurring with the Court in the decision which was pronounced.

The rules to be collected from the authorities on this subject, are first, that you are not to presume if a person makes advances on security, that he will afterwards make advances on no security; secondly, that where a bond, or warrant of attorney, is given upon a running account, if there is nothing to confine it, the presumption is, that it is given as a continuing guarantee, and that although a bill of exchange should subsequently appear at the credit side of the account and apparently be mixed up with other funds, so that you might apply to it the rule of Clayton's case [See *Devaynes* v. *Noble*, (1 Mer. 592], it is an available security until it is actually discharged; and lastly, that an instrument of that sort is to be taken most strongly against the person who makes it. The result of this would be, that looking at the situation of the parties, the language of the instrument, and the legal liability created by it, there being no inquiry about the particular balance, there being no account at that moment rendered, the situation of the parties being such that the account did not easily admit of its being done if asked for; it is impossible to come to any other conclusion than this, that the bond was given in order that by that means the debt might be acknowledged, and the party, the obligee, might have the means of enforcing through that bond the payment of the sum of £10,000, with interest from the date, and it would be for the Defendants to show that it specifically applied to some particular sum actually paid off; failing that, the bond at law would have been [281] available and might have been put in force against those persons who are now represented by the Respondents.

What is it that is said on the other side, and what are the cases which will be cited as throwing a doubt on this case? The first is a case I have already mentioned as having been cited by Lord Ellenborough in his judgment in the case of *Woolley* v. *Jennings* [5 B. and C. 165]. On the other side *Kirby* v. *The Duke of Marlborough* (2 Maule and Selwyn, 18) will be cited; there the bond was construed by the Court to mean not a continuing guarantee, but a simple security for one sum and no more; but the recital in that bond proves what was the intention of the parties, and that it had reference to that single advance; the action is by *Kirby* and *others* against the *Duke of Marlborough* and *Coburn*, and the recital is that Coburn "having occasion for divers sums of money, not exceeding in the whole the sum of £3000, he applied to the Plaintiffs to advance that sum at such times and in such parts and proportions as he might require." Can any expression more particularly and distinctly refer to the advance of one single sum of £3000; but at such times and in such parts and proportions as the exigencies of the parties might require? "Which they had agreed to advance on the Duke's entering into the obligation jointly with Coburn, (to which the Duke at the request of Coburn had consented). It was therefore conditioned for the payment by Coburn and the Duke, or either of them, their or either of their heirs, executors, or administrators, unto the Plaintiffs, their executors, administrators, or assigns, of all such sum or sums of money not exceeding the sum of £3000 with lawful in-[282]-terest, which should or might at any time or times thereafter be advanced, and lent by the Plaintiffs to Coburn, or paid to

his use by his order and direction." The Court held, that under the terms of that bond, if the £3000 was advanced, and if a part of it was repaid, it could not be lent over again, and the recital which precedes the condition plainly proves that nothing was contemplated, but one single advance of a particular sum, which might be in different sums, and different proportions, and at different times, but not having the character of a continuing guarantee; nor does it appear, that the exigencies of the parties, or the nature of the business carried on, or of the dealings intended to be protected by the security were such as to require that continuing guarantee. Some stress has been laid on the words "on demand," that the bond is payable on demand. So it would be, although a continuing guarantee, if it was intended to give to the creditor whose debt was secured the means of immediately putting it in force. If he saw that the affairs of the customer whose account was to be protected by the bond, were getting into a state, that it made it necessary for him immediately to resort to the protection which the security would give him, nor does the fact that the bond is payable on demand show that it was to protect a particular rather than a general balance. But it is made payable with interest from the date; how does that tend to show that it was to protect one balance rather than another? If it had been given to protect a particular balance, it would rather have given the amount of the particular balance, and the interest due upon it from the time when the interest began to run. The circumstance of its being made [283] payable with interest from the date of the bond, merely shows that it was intended that the security should carry interest, and there being no other particular period from which the interest could be made to run, no other date that could be put in with any propriety, they took it at once from the date of the bond; why may not that be intended to cover a general balance upon the account which would be running in some shape or other? Being about to open an account with the Sheffield bankers, the members of the firm of Lomas and Company, together with William Fidgeon, as their surety, gave this bond conditioned for the payment of £10,000 immediately, with interest from the date of the bond; what would be the construction of that bond? Inasmuch as at that moment there could be no balance due, some other construction must be put upon it than the supposition of an existing balance, it must be some prospective, some future advance to be made limited to the extent of the security. The case supposed is precisely the case before your Lordships, because the cash balance at that moment did not certainly exceed £2300; but then it may be said, granted that in the case of a bond given before the account was opened at all, it must therefore mean some future advance to be made, but it shall mean only the first £10,000 that might be advanced, and it shall not apply to any other sum, and that £10,000 shall be wiped off by the first £10,000 to be paid in. Can any proposition as a matter of fact be more monstrous or absurd, than to suppose a man who intended to open an account with a banker, would be at the expence of a bond, or that a banker would accept such an instrument as a security, that it should [284] cover the one £10,000 advanced on one side, and to be wiped off by the next £10,000 that might be paid in and which according to the course of dealing between these parties would only take a month to do? What would have been the course of dealing, supposing the construction which is to be contended for on the other side as to this bond is the just one? Why the parties must have a new bond every month; a reasonable construction must be put on every such instrument as this, and according to the intent of the parties, and as funds were coming in, and being paid out to the extent of £20,000 every month, upon an average, is it not a strange conclusion to come to, that this bond so worded and so given, was merely intended to protect the existing balance between the parties at the time when the bond was given, and beyond that it has no operation; that as soon as ever funds came in, they were not to be applied to the exigencies of the account, they are not to be applied to pay checks to satisfy bills for the use of the party in the course of his business; but they are to be immediately applied in satisfaction of this bond? In other words, the bond is to be of no use whatever, for it would contribute nothing to the funds, or the advantages, or the interest of the party for whose benefit or in whose favour it was given, for if that is the right construction and meaning of the transaction, it is quite plain that the account must be stopped immediately.

As to the doctrine of Clayton's case [1 Mer. 592] *Bodenham* v. *Purchas* [2 B. and Ald. 39], *Simpson* v. *Ingham* [2 B. and C. 65], and other cases of that sort, which have been urged elsewhere, and which decided that wherever there is an account with items

of debit on one side, and credit on [285] the other, if there be no specific appropriation, the earlier credit must be applied to the earlier debits and the account must be satisfied, and the items discharged as it were, and wiped off in the order in which they stand, in point of time, in the account; that is perfectly true, wherever the doctrine is applicable, but the case is different where there is a collateral security; the doctrine of Clayton's case [see 1 Mer. 592] and *Bodenham* v. *Purchas* [2 B. and Ald. 39], and *Simpson* v. *Ingham* [2 B. and C. 65], has nothing to do with a question such as this, arising upon the intent and meaning of a collateral security: even in the case of *Pease* v. *Hirst* [10 B. and C. 122], although the £300 entered into the account, yet, as there was a promissory note taken as a collateral security, the Court held that the £300 was not discharged. Why? Because it did not stand singly as an item in the account to be wiped off, but was intended as a collateral security.

Here Clayton's case, and the other cases of that class, can have no application, the £10,000 never got into the account at all. The result of all those cases, the doctrine of wiping off the earlier debit by the earlier credit, does not apply to a case where the sum secured does not come into the account at all; it does not apply to such a case of a collateral security, it only applies to the case where a debit comes into the account; there is no collateral security to give a further demand on any other party.

Lord Lyndhurst: Clayton's case would apply to the collateral security in this case, if it were clear it was only intended as a cover for the first £10,000

For the Appellant: Certainly, the debit being paid, the collateral security would be satisfied.

[286] No doubt, if it were a single transaction; suppose a banker is applied to, to discount a particular bill, and he discounts the bill, and, according to the practice which has obtained here, immediately gives credit for the full amount of the bill, intending, at the end of the year, to charge interest for the whole of the time. If, doubting the validity of that bill, he requires that another promissory note, of another person, should be given as a collateral security for the payment of that bill, there can be no doubt the collateral security, so given, would be discharged if the account was allowed to run on, and that first bill was dishonoured when it became due, and carried to the debit side of the account, and then afterwards funds came in which satisfied that item in the account so carried to the debit side of the account; that item being paid off, and consequently satisfied, the collateral security for the payment of that bill might be considered as at an end; but that is not the way in which a banker would treat the case. Having a collateral security he would not pass that bill to the debit side of the account, or if he did it would be in such a form as to retain the security on the collateral note, and there are instances which have occurred in one or two cases which are reported, where that sort of practice obtained. If, then, there be nothing in the language of this bond that leads to any conclusion that it was intended to cover the specific balance due at that time, and if there be nothing in Clayton's case, and the other similar cases, which show that the first £10,000 must be wiped off, what is the immediate conclusion? That the debt remains unsatisfied; that that bond has never been [287] paid, and the parties, the obligees in the bond, are now entitled to stand on their claim against the estate of William Fidgeon, the security for the amount of the bond and the interest due upon it. Suppose it had not been necessary to resort to a court of equity, and suppose William Fidgeon was still alive and that he was sued upon this bond, upon whom would the *onus* rest to show that the whole of the bond was applicable, and whether the sum, to which it was applicable, was paid or not? Clearly not on the obligee of the bond. He has only to say, "there is your hand and seal to an acknowledgment that you owe me £10,000 and interest, payable from the date of that bond." The bond contains nothing more than a sort of covenant that the sum of £10,000, with interest, shall be paid to the obligee, and it may be admitted that the obligor has a right to give evidence of every matter that can tend to throw light on the question, whether the bond was given for the specific debt or the general balance, but the *onus* of explanation and proof is cast on the party who seeks to get rid of the effect of a legal instrument, which, on the face of it, creates a debt of £10,000, due, with interest, from a certain date; and what is the course that would have been taken at law? It would have been incumbent on William Fidgeon to have stated on the record, by way of plea, that that bond was given to secure a balance not exceeding £10,000 existing at that moment, and then he would have

pleaded the ground of the doctrine in Clayton's case, that that had been paid by subsequent items on the credit side of the account. The Plaintiff would have replied, that a bond was not given for a specific balance, and then it would [288] have been incumbent on the Defendant to prove the affirmative of that issue, that the bond was given for a specific balance, and that would have been a question of fact for a jury to try under all the circumstances of the case. There was a banking account, and sums paid in and drawn out every day, to the extent of £20,000 paid in and drawn out in the course of a month. There were no means of ascertaining what was the specific state of the account at any time; and, if it were ascertained, what evidence is there that the bond had any reference at all to it, or who can suppose the parties ever intended, when their debits and their credits for a continuance were based on the footing of this bond, that the first £10,000 which would come in, according to the course of dealing, within a fortnight, was intended to satisfy the bond?

The Master found that this bond was given by William Fidgeon for the general balance of the account, and certainly he assigned an inconclusive reason for that conclusion; a reason which, although it is not without any force at all, is hardly adequate to lead of itself to that conclusion: it is this, that the signature and execution of William Fidgeon was attested by some near relation of William Fidgeon's, and it being considered desirable that the obligees of the bond should not be, in any degree, in the hands of a witness who might be disposed to favour William Fidgeon, his near relative, with a very proper caution desired to have the bond re-executed in the presence of a witness perfectly impartial; or, at all events, certainly not the mere relative of and disposed to favour the obligor: application, on this account, having been [289] made to William Fidgeon to re-execute the bond, in the month of January, 1815, five months after the original execution of the bond by him, he re-executed it in the presence of another witness; and the Master thought and found that that was evidence, that it was intended to be a bond for a general balance, and the reasoning appears to be this: if William Fidgeon executed the bond again in January without asking whether the balance was altered, or what was then the state of the balance; if he knew any thing of the nature of the account, and the bond was intended to secure a particular balance, he must have known that it was for a particular balance, which must have been paid over and over again, between August, 1814, and January, 1815. The Master, therefore, said, that, in his judgment, this was evidence, and, I believe, it was the only evidence before him, in his view of the case, to prove that the bond was for the general balance, the only evidence against William Fidgeon, omitting the far more important and weighty evidence resulting from the state and dealings of the parties; if William Fidgeon knew any thing about the matter he must have known that unless it was a security for the general balance, something different from a specific balance due at the moment, it was of no use whatever, for, as the account was kept, if it had been incumbent on the bankers immediately to treat it as a security for the particular balance only, they must almost instantly, as soon as they received the bond, have stopped the account, in order to pay off the £10,000; in other words, that security, instead of enabling them to go on (the purpose for which it was given), would have had the effect of stopping the account [290] altogether. The Master came certainly to a conclusion on a fact by which it was hardly warranted. The Master might have come to a conclusion on erroneous grounds. But it does not follow that the conclusion itself was erroneous. The question was heard by the Lord Chancellor, but only on one side, and appears to have been decided on the ground, that it was incumbent on the Appellant to give evidence, which properly belonged to the other side, to prove that this legally sealed instrument, purporting to be a security for £10,000, has been paid off.

The defence of the personal representatives of William Fidgeon, against the claim upon the bond, was, that he was intoxicated at the time of its execution. No other ground of defence was taken, and that was not sustained. The bond in a court of law constitutes a debt; not the penalty but the sum specified in the condition, and it is agreed, that it is for some collateral purpose of security. The question is what is that purpose. The Appellant says, to secure a floating balance, the Respondent says, to secure the balance due at the date of the bond, this is purely a question of law. The accident of the death of the only solvent obligor brought the question into equity.

If the question had been tried at law in an action upon the bond, as soon as proof

had been given of the execution, the burden of reducing the debt would have rested upon the Defendant. The enquiry before the Master should have taken the same course.

William Dyson proves the mode of dealing between the parties, which is important in the absence of other evidence. It is material to see whether [291] at the date of the bond there is any particular balance to which it can be referred. Bills paid in by the customer were carried to his credit as cash. It was a mixed account of cash and bills; could the bankers have held their customers to bail on a balance excluding the bills? According to this mode of dealing there was only a balance of £2300 due to the bankers at the date of the bond. As against the principals in the bond it is admitted, that it must be considered as a continuing security.

What ground is there for a distinction as to the surety. There must have been a communication between the parties, and the surety ought to have enquired into the nature of the obligation which he voluntarily incurred. According to the evidence of Dyson, the customers expressly contemplated a security for future advances. William Fidgeon made no inquiry, which is what distinguishes his case from that of the others. It is in evidence, that application was made to the principals to give security for the general balance: this is proved by Richard Wood. If a joint action had been brought on the bond against the four, they must have discharged themselves by showing that it was given for a particular balance which was paid off. If there was any distinction of the surety from the principals it was for them to show it.

The case was decided by the Vice-Chancellor on the ground that interest was reserved.

Lord Lyndhurst: That would apply to the principals as well as the surety. If the principals state what the object of the bonds is, and the surety executes without inquiry, does he not adopt the statement and intention?

[292] For the Appellants.

It is at least evidence to go to a jury; if he executes without inquiry, he adopts the object and purpose of the security as settled by the principals. How can it be incumbent on the party secured to show communication of the purpose by the principal to the surety?

The decisions turn upon the mode of dealing between the parties, *Atwood* v. *Crowdie* (1 Starkie, 483), and their object in giving the security. When there is a running account and a security given for a general sum, that must be considered as a security for a general balance. As to the security including interest, that was so in *Woolley* v. *Jennings* [5 B. and C. 165] and *Pease* v. *Hirst* [10 B. and C. 122]. The balance due at the end of any given period might equal the sum secured by the bond and the interest. Suppose the bond to be given at the commencement of the dealing, it is not to be supposed, that they would go on dealing without security. From the nature of the transaction, this must have been intended to be a continuing security. This is clear as to the principals, the customers; and the surety, according to his engagement for the principals, is liable to the extent of the sum secured by the bond.

(25th March 1836.) For the Respondents, Mr. Pemberton and Mr. Jacob.

We propose first to consider what the effect of the legal rights of these parties will be under the instrument which they have executed, and according to the authorities applicable to the subject which have been cited for the Appellant, and then to make some observations on the objection as to [293] the form of proceeding. Looking at this instrument without reference to any extrinsic circumstances, the necessary effect of it is to secure a debt then actually due, and not any future or contingent debt. Supposing that any extrinsic circumstances could be received to alter the operation of that instrument as against the principal debtors, it is impossible, consistently with principle, to give any effect to those extrinsic circumstances as against the surety. Looking at the instrument without reference to the authorities, the question between us is whether this bond was given or purported to be given to secure a debt then actually due, or whether it is given to secure a debt not then actually due, but some debt which might in the course of transactions between the parties become due. The bond was in the common form of a money bond, by which the parties jointly and severally bound themselves in the sum of £20,000; the condition of the bond is this, "That if the above bound Thomas Fidgeon, Edward Getley, Henry Lomas, and William Fidgeon, or some or one of them, their, or some or one of their, heirs, execu-

tors, or administrators, or any of them, shall and do well and truly pay or cause to be paid unto the above-named Thomas Walker, Samuel Walker, Jonathan Walker, Vincent Eyre, and Richard Stanley, or any of them, their or any of their executors, administrators, or assigns, the full sum of £10,000 of lawful money of the United Kingdom of Great Britain and Ireland, current in England, upon demand, together with full lawful interest for the same from the date hereof, of like lawful money, without any deduction or abatement whatsoever (except for the property [294] tax as required by law), and without fraud or further delay, then this obligation shall be void and of none effect, or else shall remain in full force and virtue." If you look at the bond itself there cannot be a question whether it is a bond to secure a sum of money then actually due, a debt, or whether it is an indemnity bond against any balance which may hereafter become due in the course of transactions between the parties. How are you to look at an instrument for the purpose of ascertaining whether it is to secure a sum actually due? The sum secured is to bear interest from the date of the bond, and further, it is an interest actually payable from the date of the bond, because the property tax is to be deducted from it. The property tax is payable in respect of the income which, from time to time, is to be received by the persons to whom the bond is given, and to be deducted by the individual who is to make the payment. Is it possible for a party who stipulates to receive interest from the date of the bond, and at the same time agrees to allow that which the law would compel him to allow out of the income of the property, to say that on the face of the instrument no such sum of £10,000 was due, that no such interest was payable, and consequently no such property tax liable to be paid or deducted? If it stood on the bond itself, how is it possible to get rid of this express declaration? Is there any thing in the authorities which is inconsistent with this? By a collateral agreement between the parties it might have been converted into a collateral security for the ultimate balance; but that would not affect the question as between the obligor and obligee of the bond; for instance, suppose William Fidgeon had been indebted to these customers and had given them a [295] bond for £10,000; that bond for £10,000, as between the customer and the banker, might have been adopted to secure what would be ultimately due on the account between the customer and the banker; but that would not affect the question of liability as between the obligor and obligee of the bond; the obligor would remain liable only to the extent he had agreed to become liable, and if the debt in respect of that bond was paid to the obligee, of course those who claimed by equitable deposit, or any agreement between the obligee and themselves, could only claim that which, as between the obligor and obligee, would be due. Upon a plain money bond, such as this, to secure a sum of £10,000 with interest from the date of that security, and the property tax out of it, is it possible to argue from what appears on the face of the bond, that it is any thing but a bond to secure £10,000 then due? Supposing it had been to secure £10,000 actually due, in what other form could it be? Is it not usual in a common money bond to secure a sum of money then due, to introduce any recital; but you bind yourself in a penalty conditioned for the payment of the amount of principal and interest; but supposing an account had been settled and a balance struck, and a sum of £10,000 had been ascertained to be that balance, and William Fidgeon consented to become bound for that balance, could the bond be in any other form than it now is? If it had been intended as an indemnity or as a guarantee against any balance, which, in the course of the transactions between the bankers and their customers, might become due, is that the form in which it would appear? Why surely in that case it would have been an instrument very different from that [296] which we find it; it would then have been not a common money bond, but a guarantee and indemnity bond, it would not have been in all probability between the same parties, because if it was intended to secure the ultimate balance, that might become due in respect of a partnership account in the form in which the bond now is, the death of any one of the parties or admission of a new party, would destroy the effect of the bond. On considering the nature of the transaction in all cases where instruments of this description are prepared for the purpose of securing the balance of an account which may go on for years (and according to the argument on the other side there is nothing to limit it to any period), it might have gone on up to the present period if the customer had not become bankrupt: in such case would not the bond be to the parties to secure any balance which in the course of the dealings and transactions might become

due to them, or the persons who, from time to time, might constitute the banking firm? but if, on the contrary, you find the instrument itself is in the only form in which it could be to secure the existing balance at the date of the bond, and if you find it is useless as an instrument intended to secure the ultimate balance of the account subsisting between the parties, what more can you have in order to show that it is that which it purports to be, and not that which it is in argument contended to be?

The cases may have put a construction on instruments of this sort, which is so conclusive, that against all reason and sense you may be bound by precedent; but there is nothing which has the least application in the authorities cited to any [297] proposition of that description. In the cases cited, there is but one that bears upon the question. With respect to *ex parte* Langston, a case where there was a deposit of title deeds to secure a sum of money, it was decided that that deposit may be extended by parol to subsequent advances as well as to the debt due at the date of the deposit. The decision has been followed; but it is in effect a repeal of the statute of frauds, and does not bear on this question. Nor do any other of the authorities cited, except *Woolley* v. *Jennings* [5 B and C 165], which has a material bearing upon this case.

The question which arises on the present occasion, and which arose in Clayton's case [1 Mer. 592], and all the subsequent authorities, is this, where you keep an account current, you apply the credit side of the account to discharge the items on the debit side of the account, and consequently the principle in Clayton's case [1 Mer. 592], can by possibility apply only to those cases in which the debt to be discharged is on the debit side of the account. In the case of *Pease* v. *Hirst* [10 B. and C. 122], the principle is entirely different; Clayton's case [1 Mer. 592] could have no application to it, for in *Pease* v. *Hirst* [10 B. and C. 122], the debit was never found on the debit side of the account at all. *Pease* v. *Hirst* is simply this. A customer keeps a running account with his banker in the ordinary way, a customer may have two accounts, which are generally designated a loan account and a current account, for as soon as you borrow money from the bankers and make a deposit of securities for the loan, what is the consequence? The banker gives you credit in the running account for the amount of those advances, he retains those securities which he has in his hands, he does not introduce the securities [298] on the debit side of the account, or charge you with the amount he advances; but he gives you credit for it on the credit side of the account, and it being a loan account and not a current account, it is never introduced on the debit side of the account, otherwise in truth the transaction would be unintelligible, one side would balance the other. That was exactly what was done in *Pease* v. *Hirst*. A man keeping a current account with his banker borrowed £300, and to secure that £300 he gave a promissory note by himself and three sureties. The bankers advanced £300 on the credit of that note, and they gave him credit for it in the current account; but the note never was found on the debit side of that account, and it never was contended on the authority of Clayton's case, that that debt could be discharged; from the nature of the thing it was never in that state in which the application of the credit could apply to the discharge of the debit; but why was it contended in *Pease* v. *Hirst*, that the note was discharged? On a totally different principle, that there was a period at which the bankers had in their hands more than £300 belonging to their customer, and therefore they were bound to apply that £300 which they once had in their hands, in discharge of that promissory note which they held from him and others. The case was decided on a principle entirely different from that of Clayton's case, and it appears to have depended upon there being an actual balance in the banker's hands, which they might have applied to the purpose of discharging the note, and which they were bound to apply; in point of fact they did not so apply it, and the Court said there was no appropriation by the party who made the pay-[299]-ment. That being so, the person who received it had a right to appropriate it; he said, he was not bound to appropriate it to the loan account; but he had a right to carry it to the credit of his debtor on the running account; but it is obvious that that has nothing to do with Clayton's case, because in Clayton's case, and here, it is not contended that the customer ever had a balance due to him from the bankers; but the ground on which in Clayton's case it was held that the debt was discharged, and the ground on which it was discharged, was this: that the balance being on the debit side of the account, the payments which were made from time to time, though

with corresponding advances by the bankers from time to time, had the effect of making an appropriation by the creditor of money balances from time to time received, and of appropriating the earliest payment to the earliest advance; but the principle does never apply to a case where the debit is never found in the debit account at all, the very foundation of that principle does not apply, and, accordingly, *Pease* v. *Hirst* distinctly establishes this proposition, and no more, that where there is a loan account and a running account, and where the bankers had in their hands at a particular period money due to their customer, sufficient to discharge the security in their hands, they were not bound to apply the surplus monies in the running account in discharge of the security on the loan account. The case of *Hargraves* v. *Smee* [6 Bing. 244] has no more application than *Pease* v. *Hirst*. In *Hargraves* v. *Smee* the question arose on the construction of a guarantee in these words, "I do hereby agree to guarantee **[300]** the payment of goods to be delivered in umbrellas and parasols, to John and Edward Augustus Smee, at No. 38, Milk Street, Cheapside, London, according to the custom of their trading with you in the sum of £200." And the question on that guarantee was this, whether, after goods to the amount of £200 had once been advanced, and other goods had been paid for, the guarantee was discharged, or whether that guarantee extended to secure goods to the amount of £200 during the continuance of the dealings between the parties in whose favour the guarantee was given, and the parties to whom it was given. The decision in that case depends and it is put in the judgment on the words "According to the custom of their trading with you." It was extremely difficult to distinguish that case from two others cited of *Wright* v. *Russell* [3 Wils. 530; 2 Black. W. 934] and *Pearsell* v. *Summerset* [4 Taun. 593] but the Chief Justice Tindal in the decision he came to founds himself expressly on the course of trading; he says, "The question is, what is the fair import to be collected from the language used in this guarantee? The words employed are the words of the Defendant in this cause; and there is no reason for putting on a guarantee a construction different from that which the Court puts on any other instrument. With regard to other instruments the rule is, that if the party executing them leaves any thing ambiguous in his expressions, such ambiguity must be taken most strongly against himself. From the present agreement, I collect that there were two parties already in a course of dealing; when the Defendant goes to guarantee the payment of goods to be delivered according **[301]** to their custom of trading, I cannot but imply there had been some preceding dealing, and I am confirmed in this by the finding of the jury, that the custom of the parties was to make up certain monthly accounts. I collect thence, an intention that this course of dealing should continue, which would render the guarantee a continuing guarantee. If we were to put on it the limited construction which has been contended for, we should deprive the party of the benefit which appears to have been contemplated. If one supply of goods to the extent of £200 would satisfy the stipulation in dispute, there is no course of trading to which the words 'in their course of trading' could be applied. The cases on this subject run so nearly into each other, that it is difficult to reconcile them; but the distinction between this case and *Melville* and *Haydon* [3 B. and Ald. 593] is, that here the Defendant meant to keep two persons engaged in trade, 'in their established custom of trading.'" Mr. Justice Park puts it on this ground, "The true sense has been put by my Lord Chief Justice on the words 'delivering according to their custom of trading,' and when we consider that the persons to whom the goods were to be delivered were the sons of the Defendant, we should defeat the intention of the parties if we were to hold that his liability was determined upon a single delivery of goods to the amount of £200. There is enough here to show that the guarantee was to continue till notice should be given to determine it." Even in this case Mr. Justice Gazelee differs from his brethren on this point; he says, "I have great difficulty in deciding this case, and I am rather inclined to come to a different conclusion. **[302]** It is hard to distinguish it from *Melville* v. *Hayden* [3 B. and Ald. 593]. There the parties were to account quarterly, and yet the Court held the guarantee to be restricted to a single dealing. There are, however, other facts in this case which are in favour of the decision which the Court has pronounced." In that case the guarantee expressed that it was a security for the advances to be made according to the course of dealing, and upon the introduction of those words

and on that ground alone that guarantee, which otherwise must certainly, according to all the authorities, have been held to be confined to a single advance of £200, was held to be a fluctuating guarantee for any advance of £200 from time to time to be made. The case of *Woolley* v. *Jennings* [5 B. and C. 165], has a nearer application to this case than any of the others.

This case is entirely distinguishable from *Woolley* and *Jennings* on principle, and what is more important, it is clearly distinguishable on this ground, that the present case is one between the surety, and not between the principal debtor and the bankers, a ground which is conclusive. The case of *Woolley* and *Jennings* has been quoted from Barnewall and Cresswell's Reports; but it is of so much importance that your Lordships should see accurately what the ground of the decision in *Woolley* and *Jennings* was, that it is material to cite it from two other books. It is reported first at *nisi prius*, in Carrington and Payne's Reports (Vol. 2, page 144); and when it came before the Court of King's Bench, it is reported more fully in Dowling and Ryland [Vol. 7, p. 824] than in Barnewall and Cresswell. In the former it is thus stated.—"Trover for goods and **[303]** bills of exchange; plea, general issue. It appears that the bankrupts and the defendants having had considerable dealings, and a balance of about £4000 being due to the defendants, the bankrupts, on the 20th of January, 1823, gave a warrant of attorney to confess judgment to the defendants. This warrant of attorney was endorsed: 'The within warrant of attorney was given to secure the sum of £4000, with lawful interest thereon.' By a statement of the accounts between the bankrupts and the defendants (which statement was partly in the handwriting of one of the defendants, and contained the whole of their dealings up to September 22d, 1823) it appears, that payments had been made by the bankrupts between the date of the warrant of attorney and the time of the making-up of the account, to an amount of near £20,000, but that there were dealings on the other side of the account to near the same amount; and no mention was made of the warrant of attorney. On the face of this statement a balance of £2409 4s. 9d. appeared to be due to the defendants, exclusive of any sum that might be due on the warrant of attorney. On the 4th of October, 1823, a writ of *scire facias* was sued out by the defendants against the bankrupts, on the warrant of attorney; and on the 29th of October the commission of bankrupt issued. The question therefore was, whether the warrant of attorney had been satisfied by the payments that had been made.—Abbott, Chief Justice: It appears by this account that sums very much exceeding £4000 were paid after the warrant of attorney was given, **[304]** but that there is nearly as much on the other side of the account. On this the assignees contended, that as soon as a sum of £4000 was paid, there was an end of the warrant of attorney, it being satisfied. Now, can you, Mr. Attorney-General, adduce any evidence that any payment was made specifically to reduce this warrant of attorney.—The Attorney-General: I cannot, my lord.—Abbott, Chief Justice: Then I think that this falls within the general rule of law. The payments were made generally, and the receiver put them to the current account: there is no appropriation of the money by the debtor; he leaves it to the creditor to put it in reduction of either debt, and the creditor appropriates it to the running account.—Sir F. Pollock: The question intended to be raised is, whether there can be a running security given by a trader for his creditor to have immediate execution for debts that became due afterwards.—Abbott, Chief Justice: I am not called upon to decide that abstract proposition." This occurred at *Nisi Prius*: and the question never was raised, that is quite clear, although the principle might have been adverted to. In the confusion which happened at *Nisi Prius*, and which happens there very frequently, the principle of Clayton's case [1 Mer. 592] was not adverted to, neither was it made a question whether it was a running guarantee or not, or whether it was to secure a debt due at the date; but the question raised was this, Has that been paid by the subsequent advances? To which the judge says, Can you show subsequent payments made on that account? The Attorney-General answers, No; and he says, The debtor **[305]** had a right to appropriate, and he did not appropriate. It is quite clear the principle on which it is now stated at your Lordships' bar, viz. That this was not to secure the debt then due, but was to secure the balance that might ultimately become due, never was the point raised at the trial; nor was it the point on which the decision was there pronounced: nor was it the ground on

which the Chief Justice decided it: not only was it not so, but it is quite clear, from the report in Dowling and Ryland, that the principle on which it was argued at *Nisi Prius*, and at the trial, is consistent with the fact of its being a running guarantee. If it was to secure, not a debt then due, but a debt which might ultimately become due when the transaction closed, or when judgment was entered up on the warrant of attorney, the mere appropriation by payment could have nothing to do with it. The question put by the Chief Justice was wholly beside the point, as the answer given was also: but Sir Frederick Pollock there says, "The question intended to be raised is, whether there can be a running security given by a trader for his creditor to have immediate execution for debts that became due afterwards. Abbott, Chief Justice: I am not called upon to decide that abstract proposition." On what ground was it that the Judge then charged the jury in favour of the Plaintiff? Surely upon this, that there was no appropriation made by the debtor of the sum which he paid to discharge this particular security on that warrant of attorney, and consequently that they never had been so appropriated.

Lord Lyndhurst: Clayton's case [1 Mer. 592] would not apply, because it formed no part of the account.

[306] For the Respondents. That at once gets rid of the authority of the case, as applicable to the question now before the House.

Lord Lyndhurst: Considering the subject in that view.

For the Respondents. As the case is reported in Barnewall and Cresswell, a warrant of attorney given to secure the payment of £4000, with lawful interest thereon, (not from the date which it is here, not deducting property-tax as here,) but a warrant of attorney to secure £4000, would seem to show that the £4000 was due when the warrant of attorney was given. It would not appear to import futurity, and the sum then due is that for which it is to be the security. But a bond or a warrant of attorney to secure £4000, with interest thereon, can only mean to secure £4000 then due, with interest from that time. It is said, *per curiam*, according to the report, not professing to give the observations of the Judges themselves, but what the reporters collect to be the substance and import of the judgment *per curiam*. See *Kirby* v. *The Duke of Marlborough* [2 M. and S. 18]. Lord Ellenborough said, "This is a bond given by the surety as an indemnity for advances to a definite amount; it is the same as if the surety had expressed that the bankers might lend to the amount of £3000, and when the advance was made to that amount the guarantee became *functus officio*, and was not a continuing guarantee." This case is very different; there is nothing on the face of the warrant of attorney or the defeasance to show that it was intended to secure the balance existing at the time when it was given. In the absence of any thing to show such an intention, it must be con-**[307]**-strued as a continuing security. It is not probable that the Court of King's Bench ever said any such thing. In *Dowling* v. *Ryland* (Vol. vii. p. 824) your Lordships will find this reported, not *per curiam*, but with the judgment of each of the Judges; and they put it on a totally different point, and one quite inconsistent with the previous authorities, and with the law: they put it on this, that, where the words are ambiguous, you must look at the course of dealing between the parties, and then the course of dealing will show this must be a continuing guarantee, and not a particular guarantee.

Lord Lyndhurst: It is quite a different view of the subject from what took place at *Nisi Prius*.

For the Respondents. When you find, out of three reports of this case, two to a certain degree corresponding with each other, and in the other report you have nothing which professes to give the judgment of the Court, or the opinions or language used by each judge, but only gives what the reporter considers to be the effect of the judgment, and you have, on the other hand, a detailed account of the opinion of each judge, and the grounds on which it is put, the more detailed account is that which you would be more disposed to rely on. The case reported in Dowling and Ryland (Ibid.) is the same case, but undoubtedly the judgment is not the same; it is more detailed: and grounds are stated which will make it consistent with prior authorities, which, I will undertake to say, no ingenuity can make consistent with the decision in *Woolley* v. *Jennings*, as reported in Barnewall and Cresswell [5 B. and C. 165], putting it in the form of a guarantee, without reference to the **[308]**

transaction. The argument, as it is reported in Dowling and Ryland, does not differ from the report in Barnewall and Cresswell. With respect to the judgment of the Chief Justice, he adhered to his opinion expressed at *Nisi Prius*. I take it for granted, therefore, he did not assign any reason. Mr. Justice Bayley says, "This is a question of construction on the terms of the defeasance. It is probable that at the time when the warrant of attorney was given there was more money due to the defendants than the defeasance specifies. There is nothing to show that the warrant of attorney was to be discharged as soon as payments were made to the amount of £4000. The plain inference from the terms of the defeasance is, that the warrant of attorney was to remain as a security at all events to the extent of £4000, at whatever period the accounts between the parties were taken. If we are to look at the nature of the security, and the course of dealing between the parties, we must give effect to the import of the defeasance, especially where the language is ambiguous, and may be applicable either to a balance due at the time the warrant of attorney was given, or to a running security for the balance which should be ultimately due. It is obvious that this is meant as a security at all events to the extent of £4000, and with a view to the continuance of the dealings between the parties. Unless it was meant as a continuing security, it might very soon have become of no use at all."

Lord Lyndhurst: That is what they say here.

For the Respondents. That will be considered presently:—"Because, if the bankrupts had made **[309]** payments to the defendants, to the amount of £4000, shortly after the date of the security, and then became indebted again on a running account, the defendants would have had no remedy. In the absence, therefore, of some expression on the face of the warrant of attorney, or of the defeasance, showing that it was intended to secure only the balance due at the time when it was given, I am of opinion it must be construed as a continuing security for any balance which might be afterwards due to the defendants. This is not like the case of *Kirby* v. *The Duke of Marlborough* [2 M. and S. 18], where there was an express stipulation on the part of the defendants not to be answerable for moneys advanced exceeding a certain sum; but here, assuming the language of the defeasance to be equivocal, I am of opinion that, looking at the terms of the warrant of attorney, it is to be considered as applicable to any balance which might appear to be due at any time from the bankrupts to the defendants."

Lord Lyndhurst: That does not appear to me to be different from the other report.

For the Respondents. It appears to differ from it materially; it says, considering the language of the instrument to be ambiguous, you are to look at the nature of the transactions, and the course of dealing between the parties.

Lord Lyndhurst: That is added.

For the Respondents. It is an addition of great importance; because, if you are to reconcile *Woolley* v. *Jennings* [5 B. and C. 165] with *Kirby* v. *The Duke of Marlborough* [2 M. and S. 18]——

Lord Lyndhurst: Read the closing expression of the Court, in Barnewall and Cresswell.

[310] For the Respondents. "This case is very different. There is nothing on the face of the warrant of attorney or the defeasance to show that it was intended to secure the balance existing at the time when it was given. In the absence of any thing to show such an intention, it must be construed as a continuing security."

Lord Lyndhurst: It says, where it is equivocal we will so construe it.

For the Respondents. It says, *primâ facie*, it is a continuing security on the face of it: in the other report they say it is ambiguous, and we will look at the course of dealing to explain it: and then they show it could not be intended to be a warrant of attorney to secure a present balance.

Lord Lyndhurst. You say there is no evidence as to the course of dealing in that case of *Woolley* v. *Jennings?* [5 B. and C. 165.]

For the Respondents: We say a great deal more, which, with your Lordship's permission, we will come to presently. If we make out, on the face of the instrument itself, that it purports to secure a present debt it is then for those who say it

is not to secure a present debt to show from the course of dealing, or other circumstances, that it was not intended to be that which it appears on the face of it to be. Can you hold that *Woolley* v. *Jennings* is a decision independent of the course of dealing, that a warrant of attorney so given is to be held as a security in payment of a future balance; how is it possible to arrive at that conclusion unless you admit the course of dealing, for which there is no foundation; for obviously it does not import any course of dealing? A warrant of attorney to secure a sum of money to A. B., **[311]** with interest, does not import any dealing or any security, except the acknowledgment of a debt on which execution might be issued for the amount of it, but except with reference to the course of dealing it is impossible to lay a foundation for the argument; but, admitting the course of dealing, and looking at the purpose for which the security was given in this case, as to which there can be no doubt, the intention of those who gave and those who received the instrument was that the acknowledgment of both parties was equal; and, therefore, whatever was the intention of one must be considered to be the intention of the other, as far as it appears on the security. The instrument in this case was very distinguishable from the instrument in the former case. In the first place, it was there a warrant of attorney to enter up judgment at a future time; it was obviously, therefore, not in its nature a security for a present debt: it might or might not be: but, as judgment, if entered up on the warrant of attorney, was to be so entered up at a future time, it follows that, until the judgment was entered up, there was no security. Suppose the party had become bankrupt before the warrant of attorney was executed, it was in itself no security, but it enabled the party to obtain a security. It imported futurity. It was that which was a security to be constituted at a future time for a debt, not a security given by the warrant of attorney itself.

Lord Lyndhurst: I believe the practice is to enter up judgment immediately: that is the course.

For the Respondents: It may or may not: it would be very injurious to trade; and it is not the habit, in the course of mercantile transactions, **[312]** where a security of this kind is given, to enter up judgment immediately; for the consequence of that would be, that the entering up the judgment would, in all probability, be the ruin of the credit of the party. In this case the warrant of attorney is given in January, and judgment was not entered up till October. The very purpose of giving a warrant of attorney principally is to keep the transaction quite secret, and to prevent the debtor having his credit injured, and yet, at the same time, to give his creditor a security.

The Lord Chancellor: This bond is, in one sense, future: it is not payable on any particular day, but it is payable on demand.

For the Respondents: The bringing the action is sufficient to constitute the demand; but the distinction is this, that the warrant of attorney is itself no security. You cannot bring an action on the warrant of attorney: it binds nobody. You may enter up judgment upon it, which enables you to get a security for it.

Lord Lyndhurst: You can enter up judgment *instanter*, to enable you to take out execution when you like. If a party does not enter up judgment, it is perhaps because he is requested not to do it; but he has a right to do it at any moment, unless the party bargains to the contrary.

For the Respondents: And at that moment he obtains his security; but it is not so with a bond, which is a security from the date of it. Suppose a man, wishing to bind his real estate, gives a warrant of attorney, and dies before judgment is entered up: it would be no specialty debt at all. The bond is an instrument which, at the moment, creates a debt at law, and the warrant of attorney **[313]** does no such thing; but even in the case of the warrant of attorney, where a warrant of attorney is given to secure £4000, with interest, apparently it would mean £4000 and interest from the date of the warrant of attorney; but it is not so held: it would, however, be impossible to say that it was not for a debt now due. If it had been to secure £4000 or £10,000, with interest, from the demand, it would have been a totally different thing; but here it is expressly from the date hereof, and it is not confined to the direction to pay from the date hereof, but allowing the property-tax out of the income, therefore clearly contemplating the regular payment, with interest, till the debt is satisfied. Well, then, independently of dealing, suppose this had been a simple

bond, by William Fidgeon to these parties, to secure £10,000, with interest, and allowing the property-tax, surely it would be impossible, on any ground of reason or law, to doubt that it was an acknowledgment that a sum of £10,000 was then due; and that it was given to secure the sum of £10,000 then due? Then that sum would appear to be payable without further inquiry, unless the Defendant introduces some explanation by way of defence.

Let us see how the case is varied by the extrinsic circumstances here. The evidence of a fact, introduced on behalf of the Appellant, is quite conclusive on the point in this case, with respect to the intention, because they say, there is no such sum as £10,000 then due; there was only £2300 then due, and therefore, as between the bankers and customers, it could not be intended to secure a balance of £10,000 then due, or a larger balance of which £10,000 was a part. This is a very sin-**[314]**-gular argument, considering that the statement in their bill, and the evidence upon which they obtained their decree in this cause, expressly sought to establish, not only that a larger balance than £10,000 was due, but that this bond was given to secure that larger balance; that a larger balance than £10,000 was due at the date of the bond, and this bond was given for the purpose of securing the sum of £10,000, part of that balance, then due. In the Appendix to the Appellants' case you will find the evidence of Mr. Brookfield, the solicitor, who was acquainted with the transaction, and who, by his evidence, established this bond. At page 17 of the Appellants' Appendix your Lordships will find this: "This deponent saith, that he has seen the paper writing, marked A., now produced to him, this deponent, and it is a bond from Thomas Fidgeon, Edward Getley, Henry Lomas, and William Fidgeon to the complainants in this cause named, for securing to them the sum of £10,000, and lawful interest from the date thereof; which said sum was part of a much larger balance due to the said complainants, at the time of the execution of the said bond, from the said Thomas Fidgeon, Edward Getley, and Henry Lomas." Is this a mistake? It is perfectly true, true to the letter; and not only so, but it is confirmed by the examination which this witness afterwards put in: at page 20 of the Appendix, your Lordships will find how he states it: "These examinants severally say, that the bond therein, and in the former answer and examination of these examinants mentioned, was given as a security (to the extent of £10,000) for the balance of the banking account in such former examination **[315]** mentioned, and which balance did, at the date and execution of such bond, exceed, and hath ever since exceeded, and now exceeds the sum of £10,000, and the same bond was not given for any other specific sum of money; and these examinants say, that, besides the said bond, they hold sundry bills of exchange, as securities for the balance of their said banking account, and which were given to these examinants by Thomas Fidgeon, Edward Getley, and Henry Lomas." This at once displaces the whole of the argument on the other side as to the dealing: viz., that these bills were brought into the account as cash; that they were not discounted but treated as cash; and until those bills of exchange were dishonoured, that the advances which had been made by the bankers never could be considered as a balance. They tell us here directly the contrary, according to their own statement, and the evidence of Mr. Brookfield, their witness, as to what the dealings were. They entered the amount of these bills, it is true, in the account, not discounting them, not treating them as cash, but reserving them as securities for the amount of the advances: whatever they paid in respect of the advances was so much paid for while they held these bills as a security: they are quite accurate, therefore, when they say there was £10,000 due at that time.

Lord Lyndhurst: Striking out all the running bills on both sides, how would the balance be then? We ought to have the account.

Sir Frederick Pollock: If you strike off all the bills on both sides, there would be a very large cash balance due to the bankers from the customer, amounting to between £20,000 and £30,000.

[316] Lord Lyndhurst: At the date of the execution of the bond?

Sir Frederick Pollock: Yes, they were in the habit of paying in bills received in the course of trade, and immediately drew on the credit of those bills.

Lord Lyndhurst: Those bills were in the nature of security for a cash balance; we need not look at the accounts after that admission; they used to draw against the bills in a certain proportion to the amount of the bills.

Sir Frederick Pollock: No, my Lord, the bills were paid in as cash, and were

given credit for, and entered into the account as if so much was paid into the bank, and then the interest account was settled at the end of the year.

The Lord Chancellor: Those are the bills on the credit side of the account, with which the bankers have nothing to do.

Sir Frederick Pollock: They were not entered short, according to the usual practice in London, which is that they shall be entered into the account as soon as assets are made available.

The Lord Chancellor: How were the bills on the debit side of the account?

Sir Frederick Pollock: If they applied for and obtained a bill, their account was debited with that bill.

The Lord Chancellor: Those were bills to which the bankers were parties: and if they were parties it became their debt. Those bills to which the bankers were parties could not be struck out of the account again, but the bills of other parties might.

[317] Lord Lyndhurst: And suppose there was a cash balance besides the bills?

For the Respondents: Strike out the bills, and £10,000 was due.

Sir Frederick Pollock: The bills were taken as cash on both sides.

Lord Lyndhurst: Suppose you include all the bills that were ultimately paid, how was it?

For the Respondents: There was a balance to the amount of £20,000.

Sir Frederick Pollock: If you take the account, treating the bills, as they were treated, as cash, and striking the balance one way or other, the account was £2300.

For the Respondents: That is if you include and give them credit for all the bills which were never paid, and which they say were held as security, in that case there was only £2000 due; but treating this as they swear they held it, that is, as a security for the amount of the bills, there was £28,400 due. They have sworn it, and it is proved by the examination of Mr. Brookfield, their attorney, who was the party to the re-execution of the bond, that there was a larger balance than £10,000 due; and this bond was expressly taken to secure that balance.

Lord Lyndhurst: A country banker receives bills as security from his customer, and the customer takes bills from the banker instead of cash. It is for the customer's accommodation that he takes them as cash.

For the Respondents: There is only one account. When this transaction originally took place, the law in Clayton's case was not established, and therefore they took this for the amount of the balance, not considering that by the law, which was **[318]** not then so well understood, the effect of that would be to destroy that balance: at that time traders were not aware of the doctrine of that case, and they took it as a security; they were not aware that by the course of dealing, the effect of that would be to destroy the security; but that cannot alter the rights of the parties as they were at the time of the transaction, and as they swore they were. Clayton's case was decided on the 3d of July, 1816; but it was not reported till some time afterwards.

At that time the importance of this doctrine was not known: a large balance was owing; and they take a bond to secure £10,000, part of that balance, not being aware that, by the effect of the mode in which the account was subsequently dealt with, that the bond would be discharged. Is it possible to say that, because by a subsequent development of the law, not within their knowledge at the time when the transaction took place, they can change the nature of the transaction, which they themselves have sworn to, and established by evidence in their own cause?

Lord Lyndhurst: It was found by the Master in this case, that, as against them, the principals, the bond was against the running balance.

For the Respondents: The principals having become bankrupt, it has never become material to enter into the consideration of that question; and they being unable to pay the demand, the question arose only with the surety. Supposing you are to look at the course of these dealings for the purpose of giving a different interpretation to the bond from that which the bond itself would bear on the face **[319]** of it, how is it possible to fix the surety with notice of that agreement? What is the evidence against the surety? There is no evidence whatever against the surety, except the simple fact, that his name and seal are found attached to the bond, which a witness says, she believes to be his: but that any account was kept between the bankers and the customer, that that account was intended to be continued; that it was the intention of the customer in consequence of this security to obtain further advances, there is neither proof

nor allegation. If the surety is to be made liable, it must be upon the security which he has executed; how is it possible to fix the surety beyond the amount of his legal obligation, beyond the amount of that which appears on the face of the instrument which he has executed, unless by some collateral circumstance of which you must prove him to have had notice? Your Lordships need not be referred to the general principle, which is so clearly expressed by Sir William Grant, in *Sumner* v. *Powell* (2 Merivale, 36); the case is not different where you are construing an instrument by which a party enters into an obligation and subjects himself to a liability, and a case where a party subject to a previous liability gives an engagement for a certain portion of the previous liability. The case of *Sumner* v. *Powell* (*ibid.* 30) was this: a banking firm having a power of attorney from their customer to sell out stock, one of the firm had sold out stock and misapplied it; the banking firm afterwards took in a new partner, who of course was subject to no liability in respect of the transaction, and the partners, together with the new partner, covenanted to give a guarantee against [320] the loss which might arise from the fraudulent misappropriation of the property by one of the partners. That was made in the form of a joint security; the party who was the surety died, and it was sought to enforce it against his estate, on the ground that being a partnership debt, a court of equity would consider a security of that description a joint and several security, a security to be enforced against his estate, and so it would be against the partners in such a case. Sir William Grant held, in *Devaynes* v. *Noble* [1 Mer. 592], that the assets of a deceased partner were liable in equity, though not liable in law; and what is the ground on which he held it? That you could not adopt the same construction with regard to the surety; that you cannot bind the surety beyond the letter of the obligation into which he has entered: there is no fresh liability out of which the engagement arises, and where it arises simply on the engagement, it must depend on the extent of the engagement. The expressions of Sir William Grant in that case of *Sumner* and *Powell* [2 Mer. 30] are these:

"The question is, whether any other effect can be given to this covenant in equity than it has at law. It has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors. In the late case of *Devaynes* v. *Noble* I had occasion to examine the authorities on that subject, and found no such general proposition any where laid down. When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived. A partnership debt has been treated in equity as the several debt of each partner, though at law [321] it is only the joint debt of all. But then all have had a benefit from the money advanced or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured. So, where a joint bond has in equity been considered as several, there had been a credit previously given to the different persons who have entered into the obligation. It was not the bond that first created the liability to pay. But in this case the covenant is purely matter of arbitrary convention, growing out of no antecedent liability, in all or any of the covenantors to do what they have thereby undertaken." The principle is obviously this: you cannot carry an obligation of the surety beyond the letter of his obligation; you may no doubt affect the surety with notice, and affect him by a collateral agreement; but you must do it by proving that notice and by proving that agreement: and it would be a doctrine the most dangerous that ever was suggested, to hold that a surety who enters into an obligation and who gives a security to a limited extent, may, by a collateral agreement between the principal debtor and creditor, have his liability extended beyond the amount of that for which he stipulated.

It has been argued for the Appellant,—that whatever the obligation was between the principal debtor and creditor must, of course, be the measure of the obligation between the surety and the principal debtor. We utterly deny the proposition. Suppose this bond had recited that £10,000 was then due, and it was given to secure that existing balance: it is quite clear that, by an agreement between the parties, between the banker and [322] the customer, they might have stipulated, that although such was the form of the bond, it should be held as a security for any balance ultimately due: but in that case would the surety have been held liable for that balance, because he was a surety for the obligation into which the principal debtor had entered? He only can be held liable for the principal debtor to the extent of the obligation into which he has entered, only to the extent of the notice which he had of the obligation.

The surety is to perform that obligation according to the express agreement between the principal debtor and creditor; his obligation is not to be constituted by agreement to be inferred from the nature of the dealings and transactions between the creditor and principal debtor. It is obvious that, neither in the case of express agreement or implied agreement, can you bind a surety beyond the extent to which he has thought fit to bind himself by the instrument into which he has entered. Even in that case it was held that, as regarded the principal debtor, the party was surety for nothing but the balance then due; not for that which must be so construed by some collateral agreement to be inferred from the nature of the dealings to which the surety was no party, and by which he cannot be bound.

Lord Lyndhurst: As far as relates to the principal debtor, Dyson's evidence is, that he admitted to him that it was a security for £10,000 for the advances made and to be made.

For the Respondents: It is said, that you are to infer from the nature of the dealings that that must be so, although you have no notice of the nature of the dealings. It would be monstrous to bind the surety by that, if on the instrument the surety professes to bind himself to pay the debt **[323]** then due, and that debt has been discharged; there is nothing either in moral or technical equity which will justify the Court in saying his obligation is to be extended to any thing further. The truth is, the effect was not known to them; they were not aware that the liability would be increased or diminished by considering it as a security for the ultimate balance; but they did take the security as a security as they have sworn, for part of the debt then due; the subsequent transactions have reduced the debt, and the consequence is, the security is gone.

With respect to the form of proceeding in this case, the first complaint that has been made by the Appellants is of the order of the Vice-Chancellor of 1822, directing a reference to the Master to make an enquiry on this subject, with respect to the purpose for which the bond was given, and it is said no such direction ought to have been made. Now, supposing it to be admitted that that judgment was wrong, what would be the consequence? You must strike out all that has since occurred, all the subsequent evidence, all the subsequent enquiries; and how would it then stand on the exceptions; what would be the evidence on which this must be decided? The Master had found this was a bond to secure the balance due at the time of the execution of the bond; to that there was an exception, alleging it was given to secure a debt due when the bond was given, and alleging that subsequent payments had diminished or discharged that debt. Supposing you were to decide this now, on what would you decide it? On that warrant of attorney and the evidence of Brookfield, the only evidence by which it is expressly sworn that the **[324]** bond was given to secure a larger balance due at the date of the bond. There never was so unreasonable a complaint made in a Court of Justice as the complaint which is made of this order. For whose benefit was it made? Who obtained the order which is complained of? The very parties who now complain of it, who have taken the benefit of it, and endeavoured to support by evidence a collateral agreement extending the purposes of the bond beyond its legal effect, and who having failed in that attempt, now complain of their own success in obtaining the order, because the order was not succeeded by such consequences as they expected. When this matter came on upon exceptions, the evidence could admit of no doubt; there was the evidence of Dyson, no evidence of admission of the principal debtor, no allegation that it was given to secure the ultimate balance; there was no allegation that £10,000 was due upon this bond, with interest from the date of the bond, and there was proof that it was given to secure the balance then due, and no allegation substantiated by proof that that balance had not been paid. The necessary consequence of reversing the order of 1822, will be to make a new decision allowing the exceptions, and referring it back to the Master to see whether any subsequent payments were made or not, because there is no competition of evidence as it stands.

The Lord Chancellor: The Master had found no payment could be made before this report of 1821.

For the Respondents: To which the exceptions were taken, and upon these exceptions they complain that the Master ought to have found that the bond was given to secure the payment of the **[325]** existing debt; and, secondly, that the payments

subsequently made have diminished or destroyed that debt; the necessary consequence of the Master's finding that no payments could have been made; because if it was held that it was to secure the balance due at the time of the bankruptcy, it was a necessary consequence no payments would have been made since. Upon these exceptions, assuming for a moment that the order of 1822 is wrong, what is the consequence, the bond itself professing to be, for a present debt, and the evidence in the cause proving that it was given for an existing debt? Your Lordships must of necessity reverse so much of the decision of the Master which held that it was given for a future debt, and, of course, that no payments could be made. The Vice-Chancellor's opinion with reference to the legal effect of the bond is clear. He was of opinion, that it was at law a bond to secure an existing debt due at the date of it, and it could be nothing else, for the reasons pointed out; but then he referred it to the Master to make the enquiry, and I allude to it, because there might have been a collateral agreement affecting this bond, or affecting any other bond given by persons not parties to it, but adopted as a security by a third person; there might have been a collateral agreement in his opinion; whether legally it could be so may be doubted; but certainly, the decision in *Woolley* v. *Jennings* [5 B. and C. 165] might make that possible, for if you could do it as against the principal debtor, you might also do it against the surety. The Master has found that such evidence only has been laid before him, and on that evidence he has reported; our exception is that the Master having so stated, **[326]** has come to a wrong conclusion on the evidence, and that he has found that which it is admitted he ought not to have found on that evidence; the exception therefore is necessarily right. If so, how does it stand upon the substance of the case? If you are now deciding the exception, you must decide it with reference to what was before the Court, and then you have the form of the bond conclusive, or, at all events, made conclusive by the positive oaths of the witnesses produced on the part of the Plaintiffs to prove for what purpose the bond was given. On the other hand, if you say the Vice-Chancellor was right in giving the parties liberty to prove (if they could) by evidence that the liability of the surety was to an extent beyond the legal effect of the instrument which he had executed, have the Appellants shown, or have they attempted to show, that there is any thing by which that collateral agreement is to be established? Is it shown that the surety was party to the acknowledgment the principal debtor made? Is it in proof that he was acquainted with the nature of the dealings between the parties? Is it in proof (I do not say what the probability might be) that he knew it was intended to be a continuing account between the parties? Is there any thing to show that William Fidgeon, when he executed the bond, did not believe that it was for an estimated balance then ascertained, which was to clear all transactions between them? It is insisted that there is not any thing to fix this party with notice. It is argued for the Appellant generally, that he became surety for the principal debtors, and therefore is to be liable for all the obligations of the principal debtors, whether they intended it by the obligation or not. With respect to the last order which was made on **[327]** the set of exceptions taken on each side, they do not surely complain of that part of the order which overrules the first exceptions. By the Vice-Chancellor's order of 1822, it was referred to the Master to enquire "Whether this bond was to be held as a security for the particular balance due to the Plaintiffs on the banking account to the date of the said bond, or to the general balance which should from time to time remain due to them." The Master did not find directly either in the affirmative or negative upon that point; but he found that it was the intention of the principal debtor that it should be so held. To that there was an exception which the Vice-Chancellor overruled. It is admitted on all hands to be wrong, upon the evidence of that which passed upon the re-execution of the bond, to find that William Fidgeon was liable; the Vice-Chancellor could not do otherwise than disallow the exceptions. That the Master had not stated various facts as special circumstances which they considered to be material. That is a mere matter of form, and the exceptions are taken for the mere purpose of bringing those circumstances before the Court, and therefore whether they are allowed or disallowed is matter of but little moment; but it is clear in this case they were properly disallowed, for this reason, that he went on the circumstances as between the principal debtor and the creditor, in respect of which the Vice-Chancellor was of opinion, that the Master had come to a right

conclusion, having found against us, though the special circumstances were indispensable to be stated, the question being with respect to the security as to which the surety of the principal debtor had a right in relation to it.

[328] There is no statement in the bill as to the mode of dealing between the bankers and their customers generally, or this customer in particular. According to law, bills paid into a banker's may be a security for any balance which may be due from the customer, and the bankers may have a lien upon it for that purpose; but it remains the property of the customer, unless it is bought by, or by indorsement and agreement made the property of the bankers. *Giles* v. *Perkins* (9 East, 12). *Thompson* v. *Giles* (2 B. and C. 422. Exparte Armistead 2 G. and J. 371). In this case there is no proof that the bills were indorsed, and it is material that they were not entered in the books *minus* the discount, from which it is to be inferred that they were not received as cash. By the case, as originally made on behalf of the Plaintiffs, it was sworn by their witnesses, that the balance due to them, at the date of the bond, was above £40,000. Now, having found the difficulties of that statement from the application of the law of Clayton's case, they shift their ground and contend that the balance was £2,300 at that time, and this is effected by considering unpaid bills as cash, without regard to discount.

The case of *Copis* v. *Middleton* (Turner and R. 224) shows that a bond paid off by a surety cannot be extended to operate in equity beyond its legal operation. The principle of all the cases on the construction and effect of bonds, as against sureties, is the same: that they cannot be extended. *Lord Arlington* v. *Merrick* (2 Saunders, Williams's edit. 411), *Dance* v. *Girdler* (1 B. and P. New Rep. 34).

[329] Another objection is, that the obligation, as it regards the surety, is for the debt of another, which must be in writing; and the intent, as it regards him, cannot be proved by implication, or by parol declarations, or by any thing which passes between the obligee and the principal debtor. In the cases cited on this point for the Appellant, the Court has always decided on something appearing on the face of the instrument. On this ground and principle *Kay* v. *Groves* (6 Bing. 276) was decided, where it was held not to be a continuing guarantee. So in *Nicholson* v. *Paget* (1 Cro. and Mee. 48) where Bayley J. says, "it is the duty of the party taking such guarantee to see that it is couched in such words as that the party giving it may distinctly understand to what extent he is binding himself."

Lord Lyndhurst: This instrument does not, on the face of it, import that it is a guarantee; you must therefore call evidence to show that it is, and may not that evidence also show for what it is a guarantee! In all those cases it is a guarantee on the face of the instrument itself; here it is meant to be a security, a simple bond meant to be a security for something that must be proved by evidence; therefore you may have evidence to show for what it is a security.

For the Respondents: The Appellant's counsel, in arguing this case, took it for granted, that the case upon this bill was precisely the same as if tried in an action at law, precisely the same as if an action was brought on this bond against the obligor; and, for many purposes, proceedings in equity on a bond are very similar to those at law; in some respects, however, there are differences; **[330]** for example, a bond may be sued on in equity not as a bond, but showing the agreement sought to be specifically performed. There is this distinction also; in proceeding at law on a bond, there is no occasion to allege or to prove any consideration, or any purpose for which the bond was given; it is sufficient to produce the bond; it is sufficient to prove that the condition of that bond has been broken, to call on the other party to prove it has not been broken: on the production of the bond, judgment is given for the amount there expressed, unless it appears that the condition has been performed: but in equity it is differently dealt with. At law the judgment would be given for the total amount appearing to be due on the face of the bond, without any inquiry as to the amount: for instance, on this bond, if it were sued on at law, unless we prove payment of £10,000 and interest, according to the tenor of the bond, there would be judgment for that amount, and the question at law would be simply whether we could show that £10,000 and interest has, since the date of the bond, been paid in such a manner as to be applicable to the payment of the bond.

But there has not yet been any account taken of the dealings between the bankrupts and the bankers: there has not been any reference to the Master until the last re-

ference appealed from, under which he could take an account of the dealings between the banker and the bankrupts subsequent to the date of the bond; there has been no inquiry taken hitherto, as to whether payments made by the bankrupt, since the date of the bond, were or were not appropriated in any particular manner, or to what purposes they are to be applied, [331] in point of law. What the Appellants now claim is not a sum of £10,000 due at the date of the bond, but a sum which came into existence long afterwards.

The Lord Chancellor: How do the Defendants meet that? There is only a very short passage of the answer upon the subject printed; that puts the issue in a very singular way; "they believe it to be true that the sum of £10,000, and some interest for the same, hath not been paid to the said Complainants; but whether the whole of the said principal sum and interest, from the date of the said bond is now due, or the amount of what is now due thereon, for principal and interest, on the security of the said bond, or whether the said Complainants have or have not made such demand as in the said bill mentioned, these Defendants cannot set forth."

Do the Defendants say that the £10,000 was due, and that, by the subsequent transactions, it has been paid? because that is quite inconsistent with the extract in page 5; they say there, they believe it has not been paid; but whether the whole of the said principal and interest has been paid or not they do not know.

For the Respondents: They say in effect that they believe it to be true that the whole £10,000 has not been paid, but whether the whole is due they do not know.

The Lord Chancellor: That is not the necessary meaning of the words; they say, "believe it to be true that £10,000, and some interest for the same, has not been paid, but whether the whole of the said principal sum and interest is due they cannot say."

[332] For the Respondents: They speak to their belief; it is not admission, and they are not persons acting in their own right.

The Lord Chancellor: They are bound to put in issue the grounds and purposes of the defence.

For the Respondents: The Master's office is the proper place to put in a defence as to the debt in a creditor's cause; a new issue is raised there, and it is open to them to take what steps they may; we do not know what other steps have been taken by the other Defendants; they may defend themselves as they please; what an assignee, who has not a principal's knowledge, states with respect to his belief is not taken as binding on him; if it was, it would be very hard on the creditors that they should be bound because the assignee has in his own mind a private view of the case. We put it in this way; with the Plaintiff's bill it is a different thing; he has to state that he has represented it truly, and we put it as showing how they conceived it was at the time, because what he swears, his attorney swears too. Afterwards, when Clayton's case was cited against them, they shifted their ground, and alleged that all they said before was wrong; they said they treated it as a real, not as a fictitious sum of £10,000, carrying interest from the date of the bond. If the case had any thing to do with the intentions of William Fidgeon, Mr. Brookfield had some means of knowing his intentions, because he had interviews with him. He says, in positive terms, that this bond was given "for securing to the bankers the sum of £10,000, and lawful interest from the date thereof, which said sum was part of a much larger balance due to the said complainants, at the time of the exe-[333]-cution of the said bond, from the said Thomas Fidgeon, Edward Getley, and Henry Lomas." (Page 17. of the Appellant's appendix).

The principle of the report was this, that because they had never received any thing which reduced the balance below £10,000, therefore the Master was of opinion that they were not to be considered as having received any thing on account of the bond; that is the mode in which he arrives at his conclusion: they had received money on account of the balance, but they had never brought it below £10,000. The Master is to inquire whether they had received any thing on account of the bond: he says no; why? because they had never received any thing that brought it below £10,000. That was the erroneous notion on which the Master proceeded. The report has some symptoms of there being a glimmering of the real state of the law as then decided. The Master's report had been founded on the assumption that money paid on account of a balance not below £10,000 was not paid on account of the bond.

although the Master had it established that the bond was given for the last £10,000; it is plain that all were proceeding on the erroneous notion, that that £10,000, due at the date of the bond, continued to be due at the end of the dealing, unless, at some intermediate period, the balance had been reduced below £10,000; that was the point contended for in *Devaynes* v. *Noble* [1 Mer. 592], the contrary of which was there settled. Towards the latter part of the proceedings before the Master, the real view of it began to be seen, and then we objected, and the exceptions were founded on our objections; these were all founded on the principle of Clayton's **[334]** case [1 Mer. 592]; it was observed that there was no exception to that part of the report in which the Master finds that there was £13,000 due to the Plaintiff; it is true there is no exception which states that part of the report which mentions the £13,000, but there is an exception which states the same thing in effect, that the Master has not taken the account as he was directed to do by the decree; it is our fourth exception. He was directed, by the decree, to take an account of what was due to the Plaintiffs and all the creditors; he reported that he had found £13,000 due to the Plaintiffs; we except to that, for we say he has not taken "an account of what is due to the Plaintiffs," as directed by the decree, but has only inquired what balance was due to the Plaintiffs from the said Thomas Fidgeon, Edward Getley, and Henry Lomas, at the time of the bankruptcy, and has certified, by his report, that the bond is a security for the floating balance. If *Woolley* v. *Jennings* [5 B. and C. 165] be distinguished from the present case on any solid and legal grounds, it may be assumed, with confidence, that whatever an agreement means between a principal and the contracting party, it must mean the same thing as between the surety and the contracting party.

In that case the attention of Lord Tenterden was called to this question; can a trader give a running security by a warrant of attorney, which shall protect future dealing and debts not then due? The answer of his Lordship was, that the question did not arise in that case. That was at *Nisi Prius*. When the case was argued before the Court, the Chief Justice stated, that he adhered to his opinion expressed at *Nisi Prius*. Mr. Justice Bayley says, "This is a question of construction on the terms **[335]** of the defeasance. It is probable that at the time the warrant of attorney was given, there was more money due to the defendants than the defeasance specifies. There is nothing to show that the warrant of attorney was to be discharged as soon as payments were made to the amount of £4000. The plain inference is that the warrant of attorney was to remain as a security at all events to the amount of £4000, at whatever period the accounts were taken. If we are to look at the nature of the security, and the course of dealing we must give effect to the terms of the defeasance, especially where the defeasance is ambiguous, and may be applicable to a balance due at the time the warrant was given, or as a running security for what might be ultimately due." On the other side they say, we care nothing about this being a bankers' account, or of its running on for months and being then overdrawn; we pay no attention to the relative situation of the parties; we say that William Fidgeon knew nothing of all this, and was no party to it, and that the legal construction is, that the bond is for a debt which is a debt due at the moment. But suppose a bond given before the account began be wholly ineffectual, would it be sufficient to say, that the bond, on the face of it, is for a sum of money then presently due, and therefore, that Clayton's case applies to it, and there is an end of the question? This case is by no means new to me; the doctrine of Clayton's [1 Mer. 592] case is not at all new. In *Daw* v. *Holdsworth* (Peake's Rep. p. 60, 61), Lord Kenyon laid down the rule broadly, that in a debtor and creditor account the credits must be taken to extinguish **[336]** the earlier debits. That case was this: a man had been made a bankrupt; during the pendency of an account with the petitioning creditor, he ceased to be a trader. At the time the account began he was indebted to the petitioning creditor in upwards of £100, and so he was at the time when the account was closed, but he ceased to be a trader during the middle period of that account; and the question was, whether that sum was owing from him as a trader? Lord Kenyon said, "This account has been running on; in Clayton's case, the earlier debits were extinguished by the earlier credits, and in consequence all the debits which existed while the man was a trader were satisfied; what was owing were the later debits not paid off, and which were due from him not being a trader;" and therefore Lord Kenyon held that it was not a

good commission. If the bond was given for part of the balance due, it does not follow as a consequence that it was not given for the floating balance, or a future balance which might be due upon the winding up of the account. If no particular balance was contemplated, and none has been alleged or proved by the Respondents, that makes it the more probable that the intention of the parties was that it should secure a floating balance. An advance in bills treated as cash cannot be called in at any time. It is therefore not wholly unimportant in order to come to a proper decision of this case, to enquire what was the relative situation of the parties. Could the bankers have arrested their customer for all the amount of the monies they had advanced to him, and could they have treated the bills then owing merely as securities which they would keep in their drawer for the purpose of [337] ascertaining whether they would turn out to be good or not? They would, if they attempted to make that arrest, have been liable to an action for a malicious arrest, and if an enquiry had taken place, the parties would have been discharged on giving bail merely for the reduced sum. If that is in strictness the case, the real balance which existed at the time this bond was given, was not £20,000, or £30,000, or £40,000, but merely £2300, which the witness Wood makes it, as I have read to your Lordships, and which it was agreed to be, and admitted and argued on that admission before Lord Chancellor Lyndhurst. This was the effect of the examination of Dyson, the very object of the giving the bond being to obtain further advances, of which a list was given in, and for which the bond was given. What then was the meaning of this bond *quoad* Thomas Fidgeon, Edward Getley and Henry Lomas? Can there be a doubt that as far as they were concerned, it was a bond given for a floating balance, and have they not always acted on that supposition? Does not the Master find it? Is there not an exception to that finding, and is not that exception over-ruled? The bond was given clearly in that view by the three; the bankers are dealing with their customers; the account is unsatisfactory; and they require security; the customers bring this bond as a security. The surety then is acting by the customer as his agent.

If this bond was a bond for a continuing guarantee with reference to three of the obligors, it must be so with reference to the fourth; and the Master having the evidence before him, came to that conclusion; he had no evidence except the fact of the bond being re-executed; his conclusion was [338] right, but the premises were not sufficiently large; he had not taken into consideration those points which not only ought, but which must have led him to that conclusion.

Lord Lyndhurst: Supposing there was nothing on the face of the bond to lead the surety to suppose it was for any thing more than an existing debt, and no communication whatever was made to the surety, would he have been bound by the arrangement with his principal?

In reply: I apprehend that he would at all events.

Lord Lyndhurst: It would be a species of fraud on him, would it not?

In reply: It might or might not be a species of fraud upon him; but the question is, who is to suffer in respect of that? This is a question of fact for a jury, not so much a question of law as to the construction of the bond, as a question of fact. But I will take it, that he knew nothing more of the transaction than that he was applied to to execute the bond, and that he gave that joint and several bond as a security for something. Now the bond was given so as to bind the three, and would bind the fourth, provided there was nothing inconsistent in the terms of the bond that it should be so made use of. What are the facts? The bankers complain that the account is overdrawn; they represent to the customer that they require a security, and that they desire he will prepare that security; it is to be observed that the security is not prepared by the bankers or the bankers' attorney; it is prepared by the customer; the customer gets it executed by all the parties; the customer brings it, and immediately has the accommodation which it [339] was the object of the bond to procure. What then is the presumption? William Fidgeon, the surety, executes the bond; he delivers it to the person for whom he means to be surety, and authorises him to deliver it to the obligee; the principal on delivering it to the obligee does so with reference to the previous treaty and transactions, the creditor having asked for security, and refused to continue his advances unless the debtor gives security for the general balance; the question is, Who is bound by that? Here, upon the face of the bond, they are all equally principals, and for this purpose wherever a man enters into a

joint obligation, and enters into that joint obligation in terms not inconsistent with the particular use which is made of it, he is the person who is responsible for the use that one of the obligors may make, and he is bound by the delivery of the bond for that purpose. If we are to receive evidence that one of the apparent principals is a surety, on what principle is evidence to be excluded of the circumstances under which he became surety? and if you come to presumption, you are never to presume fraud; you are to presume that the obligor applied to his friend, his relation, his brother, and said, I want a security to put into the hands of my banker: will you execute it? And he said, I will: there it is; and he executes it. If he does not ask what is the use to be made of it, that is his fault. Is the banker who receives the security bound to go and say to the obligors, I ask you whether you mean so and so, or has he not a right to take it when he applies to the customer for a bond with the additional security of some other person joining in that bond, and the name is added, and the bond executed and [340] brought to him in that form, is it not the presumption at law that the one obligor constitutes the other his agent? For the purpose of accommodating the obligee, the bond is given, and for that purpose no Court would ever direct a jury to presume a fraud; to presume that the obligor had been imposed upon; and that the bond being given by the obligor to be used for one purpose, it had been used behind his back for another purpose.

It is not immaterial to observe upon what fell from my learned friend about the situation of William Fidgeon; I never could make out, and I cannot now make out what my learned friend meant by the argument or by the evidence. The evidence of that scene of doubtful or rather suggested intoxication is published, and before your Lordships. Is it intended to be said, that the bond was not a valid and perfectly good bond? That cannot be said. We have a decree that it is so against the parties, and there is no doubt about it. Then why is this to be thrown in? What have we to do with the alleged intoxication, and the conversation which William Fidgeon had with Mr. Brookfield, in which he said he thought he was liable only for a quarter of the sum secured? In judging of a man's acts, you cannot take the particular case of the individual; you cannot enquire whether he was a little intoxicated or a little unwell in consequence of indulgence, and therefore not in a condition to draw a conclusion which another person would have drawn. The first enquiry is whether the bond is binding; it is; then he must be taken to have executed it, not in an utter state of ignorance, as if you had brought a man from Timbuctoo and set him down on the Royal Exchange, and asked him to put his [341] name to a bond or any other instrument; you are to take it that the man who executed the bond made the necessary enquiry as to what was the use to be made of it. We lay no stress upon the fact that William Fidgeon was the elder brother of Thomas Fidgeon. Suppose that they are strangers, and that Thomas applied to William to execute the bond? are we to suppose that William desired to remain in a state of ignorance as to the purpose of the bond? What is it that would be fairly presumed? Why, that when William Fidgeon was asked to execute the bond, he would ask for what purpose, and to whom it was to be executed? Any man who signs a bond must be taken to be clothed with the common information of mankind; he cannot afterwards shelter himself from the obvious and necessary consequences of his position by saying, I really knew nothing about it; I was so ignorant, that when I had the conversation with the attorney, I said I thought I should only be called upon for one fourth of it and not the whole; I had not the least idea of the use that was to be made of it. It would be utterly impossible that the affairs of life could be carried on, if arguments of this sort could prevail. A man has no right to put his name and seal to any instrument, and then make a profession of ignorance as to the purpose for which it is used, or that he was in such a state of intoxication that he knew not what he was about. If that were true and available as to the first time the bond was executed, it was not true as to the second. If the three parties to the bond, the customers, were bound by this as a security for a running balance, as a floating security and not for a specific sum, William Fidgeon must be bound in the same man-[342]-ner; and the Master ought to have found it on all the facts of the case, and not on that insulated fact which does not warrant the conclusion which he professes to have drawn from it. William Fidgeon must be taken to have entered into the same agreement with the other parties; if he did not, it is for him to show it; the obligation is a joint obliga-

tion, and whatever binds one binds the rest. There may be a difference as to the evidence by which you get to the effect of it, and the admission of the one after the act may not be good evidence against the other. Where four persons enter into a joint bond, and all the four agree that one of them shall take the bond and make use of it, whatever that one does with reference to the use of the joint obligation is evidence against all the four. The form of sealing and delivering at the very moment is that which gives the bond its legal validity; but for the purpose of giving effect to this bond as a security for the particular or general balance, the period when importance attaches to it, is not when it is sealed or delivered, but when it is put forth to the world. It must be presumed first as matter of law, that all these parties entered into a joint obligation, and whatever be the obligation that attached to it *à priori* is evidence against all, and shows that whatever is the effect of the bond as to one, is its effect as to all. Whether William Fidgeon gave a distinct authority or not, it must be presumed; when the parties enter into a joint contract, and one of them is allowed to make use of it, he is thereby constituted the agent of all, and the use he makes of it binds them all; it is so as a matter of fact quite beside any presumption of law: it must **[343]** be presumed as a fact that William Fidgeon, when he executed the bond, made all the enquiries that a sane and rational man would make before he put his name to it; and if he had made any enquiry, he must have known that it was asked for by the bankers as a floating security, and not as a security for a specific sum. If it were considered to be a security for a specific sum, for the balance due at that moment, the man stood at once indebted and discharged; the bond could not have any operation for a single moment; it could not remain as an available security, so as to allow the account to go on for five minutes; this fact does not make the argument better, but it must make it more striking. It appears by the account that on the very day when the bond was executed, there came in and were paid out sums to the amount of £1500 or £2000; it might have been much larger; between the period of the man putting his name and laying down the paper and delivering it up, that supposed account might have been altered by thousands of pounds.

It appears, by their own statement, that in September they would have £6750 worth of bills to provide for, which may be taken as a fair average (in October it is £9000, and in November £5000); but, in the meantime, there might be other bills coming due in October and November; so that the effect of this would be, that on the very day, if the bond was executed during the hours of business, the very account, which it was supposed to secure, might be altered to the extent of several thousand pounds. According to this hypothesis, what would be the duty of the bankers from that **[344]** moment to make the security available? According to the statement of my learned friend, they were to go direct to the counter, and say, stop all payments on account of Lomas and Company, for I have just taken a security which will be of no avail to me unless I immediately carry to the credit of the security all the payments that come in; although the object of giving the bond was to guard against that; its object being not that the account should be stopped, but that the account should go on.

It is argued that we had no equitable relief, and that we could not extend the bond equitably against the surety. We do not want any equitable relief; we come here disclaiming any asistance from a court of equity except to get the assets. But it is further argued, if you come to get the assets, you must do equity. Why, if this was a voluntary bond, as against the obligor, it would be good if there were assets, though not good against a creditor; and when the party goes into equity, merely for the purpose of getting the assets, he has the same rights as if he were at law. That brings us round again to the question, what is the legal construction of the bond? and that brings us again to the question, if it does not appear upon the face of it, what evidence is to be applied, and what is the conclusion to be drawn from the evidence?

This bond constituted a legal debt, which the parties, at any time, had a right to put in suit; and it would be incumbent on those who said there was no debt due at law, to make that out, either by filing a bill for equitable relief, or by putting on the record a plea adapted to the nature of the de-**[345]**-fence; and in either of those cases it would be incumbent on the other side to show that the bond was discharged; *primâ facie* it is a good, available, legal debt. In going into a court of equity to get distri-

bution of the assets, we carry with us all the legal rights which would have belonged to us in a court of law. The question then is, independently of the evidence, what is the conclusion which, in this case, ought to be drawn as to the meaning of this bond? Why, if the meaning is to be varied from its being legal evidence of the debt, it is incumbent on those who seek to advance that proposition to prove it: the authorities, as far as they go, are decidedly in favour of the bond being a continuing guarantee: the case of *Woolley* v. *Jennings* is direct, positive, and clear; the opinion of the Court there is not pronounced on the particular circumstances of the case, but generally; and it might be inferred from that case, and from all the authorities, that, in order to come to a direct and correct conclusion on a question of this sort, you must not shut your eyes to what are the habits of business and life; you must have your attention directed to what is the object and the intention of the parties; and, in order to get at that, you must look at the situation and the circumstances under which the security was given; and it cannot be denied, if you look at the evidence, that it was the intention, clear and undoubted, on the part of the customer, to give the bond as a continuing guarantee. It is said that the Master has not so found, and that although the exception is over-ruled, it avails us nothing, because the Master has only found the intention and the meaning, as if there [346] were any distinction, either in law or in common sense, between a contract and the meaning of a contract, and as if that which is the meaning of a contract is not according to all good sense and law the contract itself. Having ascertained the meaning of the contract, with respect to the three, that must be the meaning with regard to the fourth, to whom the other three are agents, for whom they were acting, and who must be presumed to be cognizant of the obligation he was entering into, the intent and nature of that obligation, and the necessity that that should be a running guarantee, and not a guarantee for a specific sum only. William Fidgeon executed the bond at the same time as Thomas Fidgeon, and must be presumed, according to the general rule, to have entered into it with the same view.

With respect to the form, the main question is this: Is the order which was last made, confirming the prior order, that which will obtain the justice of the case? And that brings me to the question, what is the justice of the case? That I apprehend is, that the bankers should have the benefit of this security, according to the legal effect of the document at the time when it was executed. Your Lordships can be at no loss to know from the evidence before you, independently of the legal construction of this instrument, what that legal effect is. It is a question which affects the extended commerce of this country, and the securities given from time to time to an immense amount of property; it affects the security of that property, and it is essential to justice that it should be sent to a jury to be considered.

[347] Lord Lyndhurst: This case of *Walker* v. *Hardman*, is an appeal from the decree of the Lord Chancellor, affirming a judgment of the late Master of the Rolls, pronounced when he was Vice-Chancellor. A bond, in the amount of £10,000, was entered into by the house of Henry Lomas and Co., and a person of the name of William Fidgeon, as surety for the house to Messrs. Walker and Co., who were bankers: and the sole question is, whether that bond which was so given was, as far as relates to William Fidgeon, a bond for the purpose of securing a debt then actually due, or whether it was meant as a security for any future balance that might exist in the accounts between Henry Lomas and Co. and Messrs. Walker, the bankers.

Now, on the face of the bond there is nothing to show that it was a security for any future balance. On the contrary, the circumstance of the interest being reserved from the date of the bond, would rather lead to the conclusion that it was intended as a security not for any future uncertain balance, but for some debt then existing; because a debt, then existing and carrying interest, would advance as the security itself advanced, viz. with the addition of interest; whereas, if it was a security for a future balance, that balance might be more or less; and it seems inconsistent that the security should, under such circumstances, be a variable security, increasing from time to time. As far as relates therefore to the inference to be drawn from the bond itself, it would appear, that it was rather intended as a security for an existing debt than for a future balance.

But then it is said, that Henry Lomas and Company deposited this bond, and intended it as a [348] security for a future balance; and in fact the Master by his

report has so found; and that report has been confirmed; and from the nature of the transaction it must have been so, because it would have been of no advantage whatever to Messrs. Walker and Co. to have had a security for a mere existing debt, since large advances were made from time to time, and large liabilities incurred on both sides. The amount of the existing debt would therefore be soon wiped off; and, as between Henry Lomas and Co. and the bankers, I have no doubt that it was intended as a security for any balance that might be found due between them. That is the ordinary nature of transactions between bankers and their customers.

But then the question is, whether that will affect William Fidgeon: William Fidgeon was a mere surety; Henry Lomas and Co. might have deposited this bond as a security for a future balance: but by depositing this bond as a security for a future balance, they could not vary the liability of William Fidgeon, unless William Fidgeon gave authority for that purpose. Now, there is nothing to show that William Fidgeon did give authority for that purpose: he was a mere surety. There is no evidence from which you can draw the conclusion, that William Fidgeon ever considered this as a security for a future balance. The observation which I have just made, that it would have been of no use to deposit a bond of this description as security for an existing balance, may weigh against Henry Lomas and Co., who are men of business; but William Fidgeon, the surety, was totally unacquainted with business. So ignorant was he, that he considered, that because he was one of four **[349]** obligors he was liable for only a fourth part of the debt. In fact, all the circumstances show that he, the surety, was totally unacquainted with business; and therefore no inference of that kind can be drawn against him.

The Master, indeed, has said in his report, that at the time when this bond was re-executed by William Fidgeon, he did not ask what the amount of the debt was: from which the Master says, he presumes that he considered it a security not for the debt, as it existed at the time when the bond was given, but for a future balance. But, in the first place, I think that is answered by the observation which I have already made, that William Fidgeon was a man totally unacquainted with business: And in the next place it appears to me as natural, supposing the bond to have been given as a security for a future balance, for him to have asked what the amount of the balance was at that time, as for him to have asked the question, supposing the bond to have been given as a security for the debt as it existed at the time when the bond was executed.

I think, therefore, that no fair inference can be drawn from these circumstances against William Fidgeon. It appears to me, that there is no evidence whatever to show that William Fidgeon intended that this bond should be deposited as a security for a future balance; and as upon the face of the bond it appears only to be a security for an existing debt, I am of opinion that this judgment must be affirmed. I think William Fidgeon cannot be rendered liable for anything more than the debt which existed at the time when the bond was executed. That would of course leave the inquiry, **[350]** whether that debt had been wiped off. The result therefore of the opinion which I have formed is this: That the judgment of the Lord Chancellor, affirming the judgment of the Vice-Chancellor, be affirmed, with costs.

Lord Brougham: My Lords, after giving judgment in this case in the Court of Chancery, I had occasion to reconsider the question; and certainly that reconsideration confirmed the opinion I had originally formed.

Judgment affirmed, with costs.

[351] ENGLAND.

(COURT OF CHANCERY.)

WILLIAM GORDON, JOHN HANCOCK, and GEORGE ARUNDALE.—*Appellants;*
GEORGE SELBY, THOMAS HART, and SAMUEL LEMAGE,—*Respondents.*

[Mews' Dig. vii. 409; ix. 1393.]

By indenture, dated the 4th of August, 1814, E. T. (then a widow) assigned to

T. S. L. a leasehold house at C.; and, by another indenture, on the 6th of August, 1814, she assigned to T. S. L. other leasehold premises. Upon the face of the instruments they appeared to be absolute assignments, upon a nominal consideration; and had no *ad valorem* stamp.

By the draft of a bond, dated on the 11th of October, 1814, it was recited, that D. was indebted to T. S. L. in a sum of £2100; that she E. T. had assigned the premises as a collateral security for the repayment; and that T. S. L. thereby bound himself, in a penal sum of £2000, not to sell or charge the property, provided the interest upon the debt was regularly paid; and that he would re-assign the premises upon repayment of the principal and interest by D. or E. T.

In 1816, D. became bankrupt, and T. S. L. laid a case before counsel, in which the debt and securities were stated with a view to be advised whether a proof of the debt could be made without affecting the securities.

The opinion being favourable, proof of the debt was made, and a dividend received, to the amount of £700. In 1824, E. T. joined with T. S. L. in granting a lease of part of premises assigned, at a rent of £100 a year. In this lease it was stated, that the premises were in mortgage to T. S. L., for £1500, with interest at 5 per cent., and the rent was made payable to T. S. L. until the mortgage should be satisfied. During all this time, E. T. remained in possession of the premises, and paid to **[352]** T. S. L., until his death in 1826, £75 a year, being interest at 5 per cent. upon £1500, to which the debt had been reduced upon account between the parties; and this payment was continued to his widow and executrix until 1831.

In 1832, E. T. having married, together with G. her husband, filed a bill, stating a case of imposition and undue influence exercised over her by T. S. L., and fraud in obtaining the assignment without consideration, and claiming the premises as upon a resulting trust. The bill also made an alternative case, representing that T. S. L., having obtained the assignment, insisted upon retaining the property as a security for the debt owing to him by D. for a larger sum than he was intitled to, or than was intended to be secured.

Upon these grounds the bill prayed a re-assignment and account of the rents received; or if a case of mortgage for collateral security should be made out, then the bill prayed an account and redemption.

The answer insisted upon a case founded on the facts as above stated, and as appearing by the documents proved in the cause, showing the real nature of the transaction.

The bill was twice amended after the coming-in of the answer, and after inspection of the documents; but the amended bill raised no case to impeach or to meet the effect of the documents. An objection was taken to the admission of the draft bond as evidence; but it was received. It was also proved, that E. T. was an active and intelligent woman of business; that she had in conversation frequently stated, that she had assigned the premises as a security for the debt of D., and paid the interest, £75 per annum, upon £1500. To the applicability of this evidence, it was objected, that no consideration could be shown different from that which appeared upon the face of the instrument; and that parol evidence was inadmissible to show a qualified estate in land.

By the decree in the Court below, it was declared, that the assignment was valid as a security for £1500; and the bill was dismissed, except so far as it prayed redemption; and an account, etc., was directed.

On appeal, this decree was affirmed.

On the 28th day of July, 1832, the Appellants and Mrs. E. Gordon, then the wife of the Appellant William Gordon, (formerly Elizabeth Taylor, **[353]** who has since died,) filed their original bill in the Court of Chancery, against Mrs. Maria Lemage, who is also since deceased, and the Respondent George Selby, for the purpose of setting aside certain assignments and securities upon the ground of fraud. That original bill was twice amended; first, after the Defendants had answered under an order of the 14th day of February, 1833, and once again under

an order of the 6th day of June, 1834, after the bill as first amended had been answered, and after production and inspection of the deeds of assignment and other documents in the possession of the Defendants, who were ordered to produce the same. The bill, as thus amended, stated, that in August, 1814, the said Elizabeth Taylor was possessed of and entitled to several leasehold premises: That for some time previously thereto, the said T. S. Lemage had become intimately acquainted with the said Elizabeth Taylor, and her family; and that great intimacy subsisted between her and the said T. S. Lemage, and that he had very great influence over her, and also over Lydia Mason, widow, her daughter by the said Joseph Taylor: And that the said T. S. Lemage was acquainted with the amount and situation of her property: and that he acted in the management thereof: And that he had also at the same time divers dealings with John Davies, who was married to a daughter of the said Elizabeth Taylor.

That in or about the month of August, 1814, the said T. S. Lemage persuaded the said Elizabeth Taylor to asign to him, in trust for herself, absolutely, three leasehold messuages or tenements in Great and Little Wilde Street, Lincoln's Inn Fields, and a certain messuage or tenement in **[354]** Pleasant Row, Camden Town; and that the said Elizabeth Taylor did not consult any professional or other adviser relative to such assignment: And that the said Thomas Samuel Lemage caused certain assignments of the said premises to be prepared by one Mr. Shorter, since deceased, an attorney in the Temple, with whom the said Thomas Samuel Lemage was well acquainted, but who was a stranger to the said Elizabeth Taylor: And that the said T. S. Lemage caused the said assignments to be prepared by the said Mr. Shorter, from instructions given by him, the said T. S. Lemage, and not from any instructions given by the said E. Taylor: That the said E. Taylor executed the same, according to the directions of the said T. S. Lemage, and without reading the same, or having the same read over to her: That no draft or copy of either of the said indentures was ever submitted for perusal to the said Elizabeth Taylor, or any person on her behalf: and that no consideration of any kind was ever at any time before, or at, or after the execution of the said indentures or deeds, or either of them, paid or given by or on account of the said Thomas Samuel Lemage, to or on account of the said Elizabeth Taylor, and that she had no other information as to the nature, purport, and effect of the said deeds or indentures than such as was given to her by the said Thomas Samuel Lemage; and that she had never seen the said indentures, or either of them, since she executed the same as aforesaid. That soon after the said Elizabeth Taylor had executed the said indentures, the said Thomas Samuel Lemage alleged that the said John Davies was indebted to him in the sum of £500, and that **[355]** he had been induced to give credit to the said John Davies because he was the son-in-law of the said Elizabeth Gordon, and that therefore he was entitled to consider the said several leasehold premises so assigned to him, as vested in him by way of security for the debt of £500, due to him by the said John Davies, although in fact the said Elizabeth Taylor never did by any deed, instrument, or writing, make herself liable to the said Thomas Samuel Lemage, or undertake to pay the said alleged debt. That the said Elizabeth Taylor never was in any manner bound at law or in equity to make good the said debt alleged to be due by the said John Davies. That the said Thomas Samuel Lemage not only alleged that he was entitled to hold the said several leasehold premises as a security for the said debt, or alleged debt of £500 due to him by the said John Davies, but also alleged that he was fully entitled to sell all the said leaseholds without the concurrence of the said Elizabeth Taylor.

That in November, 1816, a commission of bankrupt was issued against the said John Davies, and that the said Thomas Samuel Lemage proved a debt under the said commission, to the amount of £2150, and received a dividend in respect thereof; and that the said debt so proved by him included the said £500, for which he alleged that the said Elizabeth Taylor had become surety. That the said Thomas Samuel Lemage received the sum of £700 and upwards as the amount of such dividends: That in November, 1818, he alleged to the said Elizabeth Taylor, that the said John Davies remained indebted to him in the sum of £1300 and upwards, and also represented to the said Elizabeth **[356]** Taylor, that as the said leaseholds were vested in him as aforesaid, he the said Thomas Samuel Lemage was entitled to hold the same as a security for the said sum of £1300, and interest for the same; and also

represented to her that he would sell the said leaseholds for his own benefit, and was entitled so to do, and to retain the money to be produced by sale in payment of the said sum of £1300, which he alleged to remain due to him from the said John Davies: That the said Thomas Samuel Lemage at the same time stated to the said Elizabeth Taylor that he would refrain from selling the said leaseholds if the said Plaintiff would pay to him interest on the sum of £1500, which he said was the amount then due for principal and interest in respect of the said sum of £1300: That the said Thomas Samuel Lemage then had, and exercised, unbounded influence over the said Elizabeth Taylor, and represented to her that it was only by agreeing to pay such interest that she could prevent the necessity for the sale of the said leaseholds; and that he also declared and promised that if she would pay such interest, he would bind himself not to sell the said leasehold messuages or tenements and premises: That the said Elizabeth Taylor, in order to prevent the sale by the said Thomas Samuel Lemage of the said leaseholds, paid him the sum of £75 in respect of interest on the said alleged debt of £1500 due from the said John Davies to the said Thomas Samuel Lemage, and continued from time to time to pay the said sum of £75 per annum to the said Thomas Samuel Lemage, in respect of interest, to prevent him from proceeding to sell the said leaseholds.

[357] That the said Thomas Samuel Lemage, from the date of the said indenture of assignment, entered into the possession and into the receipt of the rents and profits of all the said leaseholds, and that the rents and profits thereof received by him amounted to a very large sum of money, and to much more than the sum of £75 per annum; but that he represented to the said Elizabeth Taylor that the rents and profits so received by him from the month of November, 1818, amounted to no more than the sum of £75 per annum, and were just enough to keep down the interest on the said sum of £1500 due to him by the said John Davies, which the said Elizabeth Taylor was, as he alleged, bound to keep down in order to prevent him from selling the said leaseholds: That the said Thomas Samuel Lemage, from time to time up to the time of his death, wrote out or stated accounts or memorandums, which he delivered to the said Elizabeth Taylor, wherein he gave her credit for £75 per annum, as the rent received by him in respect of the said leaseholds, and debited her with the said sum of £75 per annum, in respect of such interest as aforesaid. That the influence and power which the said Thomas Samuel Lemage had over the said Elizabeth Taylor, and her family, by reason of his connection with her said daughter Lydia Mason, prevented the said Elizabeth Taylor from consulting any professional adviser as to the matters aforesaid, and from taking any advice as to how she should act. That the said Thomas Samuel Lemage continued in possession and in the receipt of the rents and profits of all the said leaseholds up to the time of his death: and that he made his will, and appointed his wife, Maria Lemage, and the Respondent George Selby, **[358]** executrix and executor of his said will: and that in the year 1826 he died, and that the said Respondent, George Selby, and the said testator's widow, Maria Lemage, duly proved the same: That they had possessed themselves of the personal estate and effects of the said testator Thomas Samuel Lemage, more than sufficient for payment of his just debts and funeral and testamentary expenses. That after the death of the said Thomas Samuel Lemage, the said respondent, George Selby, and the said Maria Lemage, his widow, as such his executor and executrix, entered into the possession and into the receipt of the rents and profits of all the said leaseholds; and that they claimed to be entitled to the said sum of £75 for such interest as aforesaid, and claimed also to be entitled to set off the rents, so received by them for interest on the said alleged debt, due by the said John Davies to the said Thomas Samuel Lemage. That the said testator, Thomas Samuel Lemage, brought, or caused, great shame and sorrow to the said Elizabeth Taylor, and her family, by his connection with her said daughter, Lydia Mason, and by his conduct towards her; and that divulging the said connection and conduct of the said Thomas Samuel Lemage would have ruined and disgraced the said Elizabeth Taylor and her children, under the circumstances in which they then were; and that she could not have obtained advice relative to the matters aforesaid without divulging or disclosing the said connection of the said Thomas Samuel Lemage with her said daughter.

That the said Plaintiff, Elizabeth Taylor, continued a widow until the month of May, 1829, when she intermarried with the Appellant, William **[359]** Gordon: and

that previously to the said marriage, a memorandum of agreement, bearing date on or about the 5th day of May, 1829, and made between the Appellant, William Gordon, of the first part, the said Elizabeth Taylor, of the second part, and the Appellants, John Hancock and George Arundale, of the third part, was signed by the said parties, whereby it was agreed, that all the estate and property of the said Elizabeth Taylor should be vested in the Appellants, John Hancock and George Arundale, upon trust, to permit the said Elizabeth Taylor to receive the rents and annual proceeds thereof for her separate use, during her life; with power for her to dispose of such estate and property, notwithstanding her intended marriage: and, in default of any disposition thereof being made by her then, in trust, to divide the same amongst her next of kin: That for some time after the said marriage, the said Elizabeth Taylor, then Elizabeth Gordon, continued unwilling to disclose the matters aforesaid; but that, in or about the year 1831, the Appellants having made inquiries as to the said leaseholds, and as to the manner and purpose for which the same had been assigned to the said Thomas Samuel Lemage, the various matters therein-before mentioned were disclosed to them. That the execution of the said indentures of assignment, of the 4th and 6th days of August, 1814, by the said Elizabeth Gordon, was unduly and improperly obtained, by the said Thomas Samuel Lemage, from her; and that a fraudulent and improper use was made by the said Thomas Samuel Lemage of the said assignments, and of the possession of the said leaseholds thereby obtained by him: and that the said **[360]** Plaintiffs were entitled to have from the said Maria Lemage, and the Respondent, George Selby, an absolute reconveyance of all the said leaseholds or to have the said indentures of assignment delivered up to be cancelled; and were also entitled to have all sums received by the said Thomas Samuel Lemage, during his life, and by the said Respondent, George Selby, and Maria Lemage since his death, in respect of the rents and profits of the said leaseholds refunded and repaid to them.

The bill, as so amended, amongst other things charged, that if the said Elizabeth Gordon ever made herself liable to the said Thomas Samuel Lemage, or became surety for any debt due from the said John Davies to the said Thomas Samuel Lemage, her liability as such surety was discharged by subsequent dealings and transactions between the said John Davies and Thomas Samuel Lemage, to which she the said Elizabeth Gordon was no party; and in particular, that in or about November, 1814, the said Thomas Samuel Lemage, without the knowledge or concurrence of the said Elizabeth Gordon, caused the said John Davies to give to the said Thomas Samuel Lemage a warrant of attorney for £2100, including the amount for which the said Elizabeth Gordon was alleged to be surety as aforesaid: and that the said Thomas Samuel Lemage then cancelled a previous warrant of attorney, executed by the said John Davies to him for a smaller sum of money, in respect of part of which the said Elizabeth Gordon is alleged to have been surety to the said Thomas Samuel Lemage.

The bill further charged that no sum was then due from Elizabeth Gordon to Maria Lemage and **[361]** George Selby, or either of them, in respect of any debt due from John Davies to Thomas Samuel Lemage, or in respect of any other matter; but that, on the contrary, a large sum of money, to the amount of £400 or thereabouts, was due from Maria Lemage to Elizabeth Gordon, on the security of her promissory notes, or to the Appellants, John Hancock and George Arundale as such trustees as aforesaid, in respect of monies paid by the said Elizabeth Gordon, to or for the use of the said Maria Lemage since the death of the said Thomas Samuel Lemage: and that, in fact, no debt was then due from the said John Davies to the said Thomas Samuel Lemage, or to the said Maria Lemage and George Selby, his executors: and that, although the said John Davies was at the time of the said commission of bankruptcy being issued against him indebted to the said Thomas Samuel Lemage, in a sum of £1500 or thereabouts, yet that such debt was not justly due and payable to the said Thomas Samuel Lemage, for that, by the terms on which such debt was contracted, a rate of interest exceeding £5 per cent. per annum was contracted to be paid for the same; and that, in fact, the said John Davies did pay to the said Thomas Samuel Lemage interest on such debt, at the rate of from £8 to £15 per cent. per annum; and that no debt was contracted by the said John Davies to the said Thomas Samuel Lemage at any time subsequently to the said commission of bankrupt; and that the said Maria Lemage, since the death of her said husband, had borrowed from the said Elizabeth Gordon the sums of £200 and £150; which were still due to the

said Elizabeth Gordon, or her said trustees, with a large arrear of interest [362] thereon; and that the said Maria Lemage, well knowing that no sum was due to her in any manner from the said Elizabeth Gordon in respect of the said pretended guarantee for the debt of the said John Davies, or otherwise, gave to the said Plaintiff her promissory notes, or other securities, for the said sums of £200 and £150; and that the Respondent, George Selby, was an attorney or solicitor, and was the confidential legal adviser of the said Thomas Samuel Lemage; and that he the said Thomas Samuel Lemage employed another professional person (that is to say), the said Mr. Shorter, and did not employ him the said George Selby to prepare the said indentures of the 4th and 6th days of August, 1814, or to do any other act in respect of the said leaseholds although he the said George Selby was consulted and employed by the said testator, Thomas Samuel Lemage, relative to his the said testator's own affairs.

The bill prayed, that it might be declared that the said indentures of the 4th day of August, 1814, and the 6th day of August, 1814, were unduly and improperly obtained from the said Mrs. Elizabeth Gordon, and that the same might be decreed to be delivered up to the said Appellants and Mrs. Elizabeth Gordon, to be cancelled; or that the said Mrs. Maria Lemage and George Selby, and all other necessary and proper parties, might be decreed to join in re-assigning the said premises to the Appellants, John Hancock and George Arundale, as such trustees under the said memorandum of agreement of the 5th day of May, 1829, as therein before mentioned, free from all incumbrances created by the said Mr. Thomas Samuel Lemage, or any other person or persons claiming [363] under him: and that it might be declared, that if the said Mrs. Elizabeth Gordon ever became or made herself liable as surety for any debt due from the said John Davies to the said Mr. Thomas Samuel Lemage, that such liability was discharged by the subsequent dealings and transactions between the said Mr. John Davies and the said Mr. Thomas Samuel Lemage, to which the said Mrs. Elizabeth Gordon was no party, and particularly by the said warrant of attorney of the 19th day of November, 1814: and that the said Mrs. Maria Lemage and George Selby might be decreed to deliver up to the Appellants, and the said Mrs. Elizabeth Gordon, all the leases and other title-deeds, instruments, muniments, and writings in their possession, custody or power, relating to the said leaseholds or any part thereof; and that an account might be taken by the Court of all the rents and profits of the said leasehold property received by the said Mr. Thomas Samuel Lemage in his life-time, and by the said Mrs. Maria Lemage and Mr. George Selby, since his death, or which, without the wilful neglect or default of the said Mr. Thomas Samuel Lemage, Mrs. Maria Lemage, and Mr. George Selby, might have been received: and that the said Mrs. Maria Lemage and Mr. George Selby might be decreed to pay to the Appellants, Mr. John Hancock and Mr. George Arundale, as such trustees, the amount of the rents so received: and that the said Mrs. Maria Lemage and Mr. George Selby might admit assets of the said Mr. Thomas Samuel Lemage, sufficient to pay the amount of such rents, or that an account might be taken in the usual manner of the personal estate and effects of the said testator, Mr. Thomas [364] Samuel Lemage, possessed or received by the said Mrs. Maria Lemage and Mr. George Selby, or which, without their wilful neglect, might have been received, and that the same might be applied in a due course of administration, and in payment of what should be found due to the said Appellants: and if Mrs. Elizabeth Gordon was justly bound to make good any sum of money to the said Mrs. Maria Lemage and Mr. George Selby, in respect of any debt due from the said Mr. John Davies to the said Mr. Thomas Samuel Lemage, then that an account might be taken of what was due from the said Mrs. Elizabeth Gordon, giving credit for all sums received by the said Mr. Thomas Samuel Lemage, or by the said Mrs. Maria Lemage and Mr. George Selby, since his death, in respect of the said rents; and also giving credit for all sums due to the said Mrs. Elizabeth Gordon from the said Mrs. Maria Lemage: and that, upon payment of what, if any thing, should be found due, after giving such credits, the said Mrs. Maria Lemage and Mr. George Selby might be decreed to reconvey the said leasehold property to the Appellants, Mr. John Hancock and Mr. George Arundale, as such trustees: and that the said Mrs. Maria Lemage and Mr. George Selby might be restrained, by the injunction of the Court from receiving the rents of the said leasehold property; and that some proper person might be appointed to receive them, and for general relief.

The Defendant, Mrs. Maria Lemage, appeared, and answered the original bill, and the first amendment thereof; but died before it was amended the second time.

The Respondent, George Selby, also appeared [365] to, and answered the original bill, and the first amendment thereof.

The answers of the several Defendants stated a case in substance, as follows: That in the month of July, 1814, Mrs. Elizabeth Taylor, then a widow, living in or near Saint Martin's Lane, and who, having afterwards become Mrs. Gordon, was one of the Plaintiffs in the original bill filed in the said suit, was possessed of certain leasehold premises, consisting of a flatting-mill, some houses, stables, and other premises, situate in Great and Little Wild Street, Lincoln's Inn Fields, and of a house and premises, situate in Pleasant Row, Camden Town, under separate leases, for terms which were still unexpired: that one of Mrs. Taylor's daughters was married to Mr. John Davies, a carpenter, living in Saint Martin's Lane, to whom Mr. Thomas Samuel Lemage, at the time above mentioned, lent £1600 upon his (Davies's) warrant of attorney: that in the same month of July, 1814, Mr. Davies was indebted to Mr. Jones, a timber-merchant, to the amount of about £3000, the immediate payment of which debt was required by the said Mr. Jones; and Davies, being unable to meet this demand, requested time for payment, which Mr. Jones consented to allow him as to £2000, part of his debt, on condition that Davies paid him £1000 down, and accepted bills of exchange, payable at distant dates, for the balance: that Davies, being unable to raise such sum of £1000 from his own resources, applied to his mother-in-law, then Mrs. Taylor, to assist him: that Mrs. Taylor, who was desirous of assisting Davies, but who was also unable to advance the requisite sum, applied to Mr. Thomas Samuel Lemage, with whom she had for [366] several years been on intimate terms, and requested him to advance the sum which Davies required: that Mr. Lemage declined to do this; and his own debt from Davies being considerable, and having no other security for it than the warrant of attorney which he then held, (and which, from the representation Davies made of his circumstances, was a very insufficient one,) stated his determination to be, that he would not advance any sum whatever unless a satisfactory security should be given to him, as well for the £1600 then due to him as for any other sum which he should lend to Davies at Mrs. Taylor's request: that Mrs. Taylor, being very anxious to extricate Davies from the difficulties which then beset him, and Davies's want of money extremely urgent, they, after having deliberated upon Mr. Lemage's statement, made a proposal to him, that if he would lend Davies the further sum of £1000, which would make his whole debt £2600, Davies would sell and assign to him, for the sum of £500, the equity of redemption, to which Davies was then entitled, in certain leasehold premises in Castle Street, and Hunt's Court, Leicester Square, and which were then charged with a mortgage to a Mr. Tripp, for £800 and interest; and that Mrs. Taylor would assign to Mr. Lemage her leasehold property in Great and Little Wild Street, Lincoln's Inn Fields, and in Pleasant Row, Camden Town, for securing to him the repayment of £2100, which would be the full amount then due to him, after deducting the price of the equity of redemption, with interest on such sum of £2100, at the rate of £5 per cent. per annum: that Mr. Thomas Samuel Lemage was induced, from his desire to oblige Mrs. Taylor, to consent to this [367] proposition; and accordingly, in the month of July, 1814, he advanced such sum of £1000 to Mr. Davies, at Mrs. Taylor's request; and Davies, in consideration of £500, part thereof, thereupon assigned to Mr. Lemage the equity of redemption in the said premises in Castle Street, and Hunt's Court, Leicester Square; and Mrs. Taylor, by an indenture of assignment, dated the 4th of August, 1814, assigned to Mr. Lemage her leasehold house and premises in Pleasant Row, Camden Town; and by another indenture, dated the 6th of August, 1814, she assigned to Mr. Lemage her flatting-mill, houses, and other premises in Great and Little Wild Street, Lincoln's Inn Fields, for the residue of the several terms therein, and subject to the rent and covenants under which the said leasehold premises were held by her: that for some reason, which it was not possible, from the distance of time, and by reason of all the parties to the transaction being dead, to explain, both the last-mentioned assignments were upon the face of them absolute assignments, and did not purport to be securities for money, and redeemable on payment of the £2100 and interest, as the same were intended to be, and as they were always known

and considered by the parties to be: that in order, however, to prevent the absolute effect of the assignments, and to evidence the true intent of them, Mr. Lemage executed a bond to Mrs. Taylor, dated the 11th of October, 1814, a draft of which bond (the original not being forthcoming) was produced, on the hearing of the said suit before the Master of the Rolls; whereby, after noticing that the said Mr. Davies owed Mr. Lemage £2100, and that the said Mrs. Taylor had assigned to him all her said **[368]** leasehold property in Great and Little Wild Street, and in Pleasant Row, Camden Town, as a collateral security for payment thereof, the said Mr. Lemage bound himself in the penal sum of £2000 not to sell or in any manner charge the said leasehold property during Mrs. Taylor's life, provided he was regularly paid the interest agreed on the said sum of £2100; and also, that he would re-assign to her all her said leasehold property, free from all incumbrances, in case she or the said John Davies should repay to Mr. Lemage the £2100, with interest, as therein metioned: that at the same time, and as an additional or collateral security for the said sum of £2100, and interest, the said John Davies executed his warrant of attorney to the said Mr. Lemage, dated the 19th of October, 1814, defeasible, on payment by the said John Davies to the said Thomas Samuel Lemage, of the said sum of £2100, with interest thereon from the 29th day of September then last past; and thereupon the former warrant of attorney, dated the 4th of July, 1814, was cancelled or destroyed: that in the month of November, 1816, a commission of bankruptcy was issued against John Davies; and Mrs. Taylor as well as Mr. Lemage were desirous that the amount of the debt due from Davies should be proved under the commission, for the purpose of reducing the amount of the debt secured by the assignments before stated, and which would be obviously for the benefit of Mrs. Taylor: that some doubts were entertained by Mr. Lemage as to whether he could do so without prejudicing or giving up his security on the said leasehold property assigned to him by Mrs. Taylor; and under these circumstances, he caused a case, in which the several circumstances above stated, **[369]** respecting the said debt and the securities were detailed, to be laid before the late Mr. Cooke, an eminent bankruptcy lawyer, for his opinion thereon; and Mr. Cooke's opinion being, that Mr. Lemage was entitled to prove his debt, without prejudice to the securities executed by Mrs. Taylor, Mr. Lemage, on the 25th of January, 1817, proved, under the said commission of bankruptcy, a debt of £2140 19s. for principal and interest, due upon his aforesaid debt of £2100, up to the date of the said commission; and in such proof stated that he had no security for the same, except the last-mentioned warrant of attorney, and except the aforesaid assignments of the 4th and 6th of August, 1814: that the said Mr. Lemage afterwards received dividends, on such proof, to the amount of £700, or thereabouts, which he applied in relief and diminution of the debt which had been secured to him by Mrs. Taylor, and for her benefit; for after he had received such dividends, he came to an account with Mrs. Taylor of what remained due to him on the security of her said leasehold property, so assigned to him by the said indentures of the 4th and 6th of August, 1814, respectively; and the balance so due to him was thereupon computed, and finally settled between them, to amount to the sum of £1500: that the accounts being so settled, Mr. T. S. Lemage thereupon executed another bond to the said Mrs. Taylor, in substitution of the former bond, and for the purpose of enabling her to redeem her said leasehold property on payment of the sum of £1500; to which sum the amount of her security was reduced, with interest thereon at the rate of £5 per cent. per annum: that in pursuance of the arrangement which had been entered into, and in **[370]** accordance with the real intent and meaning of the said securities, notwithstanding the absolute form of the said assignment, Mrs. Taylor was permitted by Mr. Lemage to remain in the possession or in the receipt of the rents of the said leasehold property which had been so assigned to him; and she collected and received such rents herself, or by some person as her agent; and from the time of such last mentioned settlement of accounts, she paid to Mr. Lemage £75 a year, for interest on the said debt of £1500, at the rate of £5 per cent. per annum, down to the time of his death; and after his death she continued the payment of such annual interest to Mrs. Maria Lemage, his widow and executrix, to the 29th of September, 1831: that in the month of June, 1824, the said Mrs. Taylor, and the said Mr. Lemage, joined in granting a lease of the mill, houses, and premises, comprised in the said indenture of assignment of the 6th of August, 1814, to one Thomas Cholerton, for a term of twenty-one years,

at a rent of £100 a year; in which lease it is stated, that the said premises were then in mortgage to the said T. Samuel Lemage, to secure the said sum of £1500 and interest, at the rate of £5 per cent. per annum; and such rent is made payable to the said Mr. T. S. Lemage, his executors, administrators, and assigns, so long as such mortgage should remain unsatisfied; and, after the payment and satisfaction thereof, then to the said E. Taylor, her executors, administrators, and assigns: that in the month of September, 1828, and after the death of the said Mr. T. S. Lemage, the said Mrs. Maria Lemage, as his widow and legatee, and the said Elizabeth Taylor, joined in demising the messuage and premises in Great Wild Street, comprised in **[371]** the said assignment of the 4th of August, 1814, to one James Forsyth, for a term of twenty-one years, from the 23d of May, 1827, at the rent of £35 a year, to the said Maria Lemage, her executors, administrators, and assigns; and the said Mrs. Taylor not only never complained of or objected to the several arrangements and dealings with the said leasehold property before mentioned, but she continued on the most friendly footing with the said Mr. Lemage until his death, and visited and attended him in his last illness, and continued on the same friendly and intimate terms with his widow, the late Mrs. M. Lemage, until the said Mrs. Taylor married the Appellant, William Gordon: that on the 23d of February, 1825, Mr. T. S. Lemage made his will, whereof he appointed Mrs. Maria Lemage, then his wife, and the Respondent George Selby, his executrix and executor, and died in December, 1826, without having revoked or altered his will, which was proved by Mrs. M. Lemage, and the Respondent George Selby; who, having thereby become his legal personal representatives, became also entitled to the said leasehold property mentioned in the said deeds of assignment; and, under the bequests contained in such will, the said Maria Lemage became entitled to the said debt of £1500, and the interest thereon, and to the benefit of the assignments by which the same were in manner aforesaid secured: and that in the month of May, 1829, the said Mrs. E. Taylor, being then eighty-one years of age, married the Appellant William Gordon.

To this answer a replication having been filed, and the suit being at issue, on the 17th of February, 1833, the Plaintiff, Elizabeth Gordon, died, where-**[372]**-upon in the month of April, 1833, the Appellants filed their bill of revivor in the Court of Chancery against Mrs. Maria Lemage and the Respondent George Selby, stating the death of Mrs. Elizabeth Gordon, and her will, whereby she devised and bequeathed her said leasehold property to the Appellant, Mr. William Gordon, and appointed him her sole executor; and that he had duly proved her will, and had thereby become her legal personal representative; and praying that the said suit and proceedings might stand revived against the said Mrs. Maria Lemage, and the Respondent George Selby, and that the Appellant might have the same relief against them that they might have had in case the said Mrs. Elizabeth Gordon had not died.

Mrs. Maria Lemage, and the Respondent Mr. George Selby, accordingly appeared to the bill of revivor, and the said suit and proceedings were accordingly revived; but in the month of January, 1834, Mrs. Lemage died, having made her will, dated in February, 1831, whereby she appointed the Respondents, Mr. Thomas Hart and Mr. Samuel Lemage, executors; and the suit having thereby again become abated, the Appellants, in the month of April, 1834, filed their bill of revivor and supplement against the Respondents, Mr. Thomas Hart and Mr. Samuel Lemage, stating the death of Mrs. Maria Lemage, her will, and the probate thereof by the last-named Respondents, and praying that the suit and proceedings might stand revived against the Respondents, Mr. Thomas Hart and Mr. Samuel Lemage, and that the Appellants might have the same relief against the Respondents last-named as they might have had if the said Mrs. Maria Lemage had not died; and **[373]** that the Respondents, Mr. Thomas Hart and Mr. Samuel Lemage, might admit assets of Mrs. Maria Lemage, sufficient to answer the Appellants' demand in that suit, or that in default thereof, the usual accounts might be taken, under the direction of the Court, of the personal estate and effects of the said Mrs. Maria Lemage, possessed or received by the Respondents, Mr. Thomas Hart and Mr. Samuel Lemage.

To this bill of revivor and supplement the Respondents, Mr. Thomas Hart and Mr. Samuel Lemage, appeared, and in February, 1834, put in their answers thereto, thereby admitting the death of Maria Lemage, and her will; and that they had proved the same in the proper Ecclesiastical Court, and had thereby become, and were, her legal personal representatives.

The bill having afterwards, by an order dated the 6th of June, 1834, been further amended by the Appellants, the Respondent, George Selby, put in his answer thereto; and the cause being at issue, witnesses were examined on each side, and the cause came on for hearing on the 3d, 7th, and 8th days of July, 1835, before the Master of the Rolls.

Upon the hearing of the cause the Appellants put in as evidence, amongst other things, a draft of the case before mentioned to have been submitted to Mr. Cooke, with a copy of his opinion thereon, and the proceedings under the commission against John Davies, with the proof of debt made by Thomas Samuel Lemage, and read, among others, the deposition of John Davies, who stated that Mrs. Gordon, at his request, agreed to become surety to Mr. Lemage for £500, but no more.

[374] The Respondents put in and relied on the documents referred to in their respective answers, including the settled account by which the debt was reduced to £1500; and read the depositions of the witnesses examined by them, except the deposition of Lydia Hart,—whose evidence being objected to, upon the ground that she had an interest in the subject of the suit, was not received.

Among other matters given in evidence on the part of the Appellants, the copy or draft of the case and opinion, and of the bond of the 11th of October, 1814, were proved to be in the handwriting of Mr. Shorter, who, at the times to which those documents relate, was the solicitor of Mrs. Gordon and of Mr. Lemage; and Earle, the witness by whom this fact was proved, stated that he had heard, in a conversation which took place between Mr. Thomas Samuel Lemage and Elizabeth Gordon, that the said draft bond was drawn for the purpose of a bond being given by Thomas Samuel Lemage to Elizabeth Gordon, in order that she might have the property in Wild Street, and which she had assigned to Thomas Samuel Lemage as a security for the money advanced by him to John Davies, re-assigned to her when the money advanced by him should be repaid: upon the Respondents putting in such draft bond, which was referred to in the deposition of the last-mentioned witness, the same was objected to on the part of the Appellants: it was argued on the part of the Appellants, that the bond could not be looked at or received in evidence at all, it not being an original document, and no ground having been properly laid for its reception as secondary evidence; but it was not tendered by the Respon-[375]-dents as evidence of the contents of the bond, but as the paper respecting which Elizabeth Gordon, then Elizabeth Taylor, had made and heard the statements deposed to by the last-mentioned witness, and as one circumstance among others, proving and corroborating the fact that she had admitted the purport and effect of the said assignments to be such as they were stated to have been, and on that ground only the draft bond was permitted to be received in evidence.

Upon the production of the assignments, it appeared that the indenture of the 4th of August, 1814, was made between the Plaintiff, Elizabeth Gordon (then Elizabeth Taylor, widow), of the one part, and Thomas Samuel Lemage (therein described as of Upper Smith Street, Northampton Square, in the parish of Saint James, Clerkenwell, in the county of Middlesex), of the other part; and that the messuage or tenement and premises at Camden Town were thereby in consideration of the sum of 10s. therein expressed to have been paid by Thomas Samuel Lemage to Elizabeth Gordon, absolutely assigned by Elizabeth Gordon to Thomas Samuel Lemage. The indenture was stamped with a stamp denoting the payment of the proper amount of duty which an assignment of that nature would require, but not properly stamped as an assignment by way of mortgage or security. It was executed in the presence of and attested by Stephen Shorter alone. No receipt or acknowledgment for any money or other consideration appeared thereon. Immediately after the signatures of Mrs. Taylor and Mr. Shorter, a strong line was drawn in ink, and a deed written thereunder, dated the 2d day of December, 1816, made [376] between the said Thomas Samuel Lemage of the one part, and Lydia Mason (therein also described as of Upper Smith Street, Northampton Square aforesaid), of the other part: whereby it appeared that Thomas Samuel Lemage, in consideration of £15, therein expressed to have been paid to him by Lydia Mason, absolutely conveyed the premises assigned by the indenture of the 4th day of August, 1814, to Lydia Mason, her executors, administrators, and assigns. This instrument also was stamped with a 10s. stamp, and appeared also to have been executed by Thomas Samuel

Lemage in the presence of, and attested by, Stephen Shorter only. A receipt for the £15 consideration-money was also written, signed, and attested, and the whole of this deed of 2d December, 1816, was then cancelled by lines drawn through each word; and the following words, viz. "cancelled with consent of both parties, December 17. 1817," were written thereunder in the handwriting of Thomas Samuel Lemage; but these words are not signed or witnessed by any person.

Upon the production of the other indenture of the 6th day of August, 1814, it appeared that the messuages or tenements and premises in Great and Little Wild Streets, Lincoln's Inn Fields, were in like manner absolutely conveyed by Elizabeth Gordon to Thomas Samuel Lemage, for an expressed nominal consideration of 10s. only. The stamp upon it was merely the proper stamp where there was a nominal consideration. It had no *ad valorem* stamp, or such as is proper for a conveyance, in consideration of the payment of any large sum of money, or for the purpose of a mortgage or security. It appeared to be executed by both [377] parties in the presence of, and attested by, Stephen Shorter; and no receipt for any valuable or other consideration was written or indorsed thereon.

Upon this indenture also was indorsed another deed of assignment, dated the 2d day of December, 1816, whereby Thomas Samuel Lemage absolutely conveyed and assured the last-mentioned premises to Lydia Mason for a nominal consideration only. This instrument also appeared to have been stamped, and executed by Thomas Samuel Lemage in the presence of Stephen Shorter; but the stamp and the seal had been torn off, the deed had been cancelled, by drawing lines through each word, and an endeavour had been made to erase the attestation and the signatures of Thomas Samuel Lemage and Stephen Shorter; but these signatures, and the words "cancelled by consent of both parties, December 17. 1817," written by Thomas Samuel Lemage, but unsigned and unattested, were partially visible.

The depositions read upon the hearing were as follows:

John Davies, one of the Appellants' witnesses, proved that the draft case which had been produced and deposited in Court, by the Respondent George Selby, was in the handwriting of Stephen Shorter: that Stephen Shorter was the attorney of Thomas Samuel Lemage at the time when the same was prepared: that to his (witness's) knowledge or belief, Elizabeth Gordon had not at any time become a surety or made herself liable to Thomas Samuel Lemage, in respect of any debt due from himself to Thomas Samuel Lemage, to any extent beyond the sum of £500: that that was the sum which he wanted to borrow of Thomas Samuel [378] Lemage, and which he agreed to lend him, if his mother-in-law, the Plaintiff, Elizabeth Gordon, would join in the security; and it was only to the amount of that intended loan of £500 that he requested the Plaintiff, Elizabeth Gordon, to become surety for him to Thomas Samuel Lemage.

Upon his cross-examination on behalf of the Respondents, John Davies stated that he first knew the Plaintiff, Elizabeth Gordon, deceased, in the month of March, 1805, and continued to be acquainted with her from that time until the time of her death, in February, 1833: that he was a son-in-law, having married her daughter in 1807: that Elizabeth Gordon was a shrewd worldly woman, and understood business well: that during the whole time he had known her, he was in the constant habit of being with her; and that he had seen her collect her rents and pay her tradespeople, and manage her affairs from the time he had first known her until about five years before her death; and during the whole of that time she was well competent to conduct her own affairs: that she was quite conversant with business, and had managed her own affairs during the year 1814, to his knowledge: that he was acquainted with Thomas Samuel Lemage: that he had known him from the year 1805 until the time of his death, which he believed was in the year 1826: that a warrant of attorney (then produced) for £1600 and interest, from him to Thomas Samuel Lemage, had been signed, sealed, and delivered by him for the purpose of securing to Thomas Samuel Lemage, the sum of £1600 and interest thereon; he believed the same was cancelled when he had given him another warrant of attorney, for £2100 which he had given [379] him upon his threatening to arrest him under the first warrant of attorney: that he gave him the first warrant of attorney in the month of July, 1814: that he called upon him to give the second warrant of attorney, for £2100, about three or four months afterwards; and that he gave it

for fear of being arrested on the first: that he was, in the month of August, 1814, indebted to Thomas Samuel Lemage in the sum of £1600, secured by the said warrant of attorney for that sum: that he was, in the month of August, 1814, indebted to Mr. Jones in the sum of £2700: that it reached that amount about that time, and had been gradually accruing from the year 1805; from which time he had been dealing with him as a timber-merchant: that the said Mr. Jones called upon him on the 1st of July, 1814, to require payment of such debt; that he was not able to pay the same, and told him that he could not meet his demand: that he then told him to make up his books, to satisfy him that he was solvent, and he promised to do so; and rendered him an account some time afterwards: that he was not satisfied with the accounts; but after much negotiation on the matter, he did on or about the 9th of August, 1814, say that he would take £1000 down, and would give him six years to pay the remainder; and he then paid him £1000 down, and gave him bills for six years for the remainder: that he was, in the early part of the month of August, 1814, in want of money to pay the said Mr. Jones the sum of £1000, part of his debt of £2700, due to him as the witness had stated: that he did at that time apply to the said Elizabeth Gordon for pecuniary assistance; he applied to her to be a security for him for a sum of £500: that **[380]** she declined at first to do so, but ultimately she consented: that he could not say whether Elizabeth Gordon had actually applied to Thomas Samuel Lemage, to lend her the said sum of money for his use; but he knew that she did offer to give some security for the repayment of the said sum of £500 which he had applied to her to procure for him from the said Thomas Samuel Lemage: that he could not say what the nature of that security was; but that the said Thomas Samuel Lemage was satisfied with it at the time; and he advanced the money to the witness, in the presence of the said Elizabeth Gordon: that he executed the warrant of attorney for £2100 in or about the month of November, 1814, in consequence of the said Thomas Samuel Lemage threatening to arrest him if he did not execute the same.

No evidence was given on the part of the Respondents, of any express agreement or promise in writing on the part of the Plaintiff, Elizabeth Gordon, to pay any debt due from John Davies to Thomas Samuel Lemage, nor of any other legal consideration given by Thomas Samuel Lemage to Elizabeth Gordon for the assignments, nor of any intention on her part to grant or give the same to him, either voluntarily or in respect of any debt due from her to him; nor did the Respondents adduce any evidence to show that the assignments were ever read or explained to, or perused by Elizabeth Gordon.

Of the undue influence charged by the bill to have been exercised by Lemage over Mrs. Gordon, there was no material evidence.

On the part of the Respondents, Mrs. Elizabeth Westron stated, that during the whole time she had **[381]** been acquainted with Elizabeth Gordon, which was from and prior to the year 1814, until the time of her death, she was fully competent to manage her affairs, and she was well conversant with business; and up to the time of her marriage with the Compainant, William Gordon, which was, as she remembered, about six years ago, she had managed her own affairs; and that she had never seen a woman who was more competent to manage her affairs, or who was more capable of transacting business: that she had frequently, when in conversation with the Complainant, Elizabeth Gordon, heard her say that money to the amount of £2000 had, in the year 1814, or about that time, been advanced by Thomas Samuel Lemage to John Davies: that she had upon those occasions frequently heard the Complainant, Elizabeth Gordon, say that she had given Thomas Samuel Lemage a security of property in Wild Street, Drury Lane, for repayment of the money: that she had heard the Complainant, Elizabeth Gordon, on many occasions in conversations with her, say that John Davies was always troubling her for money, which she stated he ought not to do, as she was paying Thomas Samuel Lemage £75 a year interest on money which had been advanced to John Davies, and for which she had become security: that she had several times seen the Complainant, Elizabeth Gordon, pay the Defendant, Maria Lemage, the £75 for the annual interest of the balance of money advanced to John Davies, which she believed was generally paid quarterly: she had also heard the Plaintiff, Elizabeth Gordon, say that the balance of money due to Samuel Lemage was £1500, and for which she was paying £75 a year interest; and that when **[382]** the

sum of £1500 principal money had been paid off by her, she was to have the property in Wild Street returned to her; and that she had heard the Complainant, Elizabeth Gordon, say that she had in her possession a bond from Thomas Samuel Lemage, covenanting that the property assigned by her should be re-assigned when the principal and interest were paid up; and that she had also seen Elizabeth Gordon and Thomas Samuel Lemage upon the most friendly terms together.

John Bridges, another of the Respondents' witnesses, upon his examination proved the execution by Thomas Samuel Lemage of an indenture of lease, then produced to him, dated the 29th day of June, 1824, made between Thomas Samuel Lemage of the first part, Elizabeth Gordon (therein described as Elizabeth Taylor) of the second part, and Thomas Cholerton of the third part. This lease recited, that by indenture of assignment, bearing date on or about the 6th day of August, 1814, and made, or expressed to be made, between Elizabeth Taylor of the one part, and Thomas Samuel Lemage of the other part, the mill, house, and premises therein-after demised or expressed, or intended so to be, were assigned to Thomas Samuel Lemage, his executors, administrators, and assigns, for the term of ninety years, and part of a year, from the of June, 1790, for securing to Thomas Samuel Lemage, his executors, administrators, and assigns, the sum of £1500, and interest, after the rate of 5 per cent. per annum; and recited that Thomas Cholerton had agreed with Elizabeth Taylor, with the approbation of Thomas Samuel Lemage, for a lease of the mill, house, and premises therein-after described and demised, for the [383] term of twenty-one years, from the 24th of June then instant, under and subject to the rent, covenants, and agreements therein-after contained; and that Thomas Samuel Lemage had agreed to grant and concur in the same in manner therein-after expressed: And it was thereby witnessed, that Thomas Samuel Lemage, at the request of Elizabeth Taylor, demised the premises to Thomas Cholerton as therein mentioned, subject to the yearly rent of £100 thereby reserved, payable to Thomas Samuel Lemage, during such part of the term thereby demised, as the premises should remain in mortgage as aforesaid; and after payment and satisfaction of the mortgage, and all sums due thereon, then payable to Elizabeth Taylor.

Upon his cross-examination, Mr. Bridges stated that he took a very trifling part in the actual preparation of the lease: that he was, however, at that time managing clerk to Mr. Whittard, then of Gray's Inn, solicitor, who was the solicitor employed to prepare the lease, and he knew of the lease being prepared, and saw the parties upon the subject of it at Mr. Whittard's office: that he also carried instructions for drawing a draft of the lease to Mr. Preston, the conveyancer, and, to the best of his recollection, he made a copy of such draft after it had been drawn: that he knew it was originally intended that the lease should be granted to a Mr. Lindley, for his name stood in the said draft as lessee: that John Lindley was a friend or acquaintance of Thomas Samuel Lemage; that he had, to a certain extent, an opportunity of observing the conduct of Mr. Lindley during the negotiation for the lease, from seeing him at Mr. Whittard's office; but that he had no opportunity [384] of seeing Mr. Lemage's or Mr. Cholerton's conduct at that time, for he did not recollect that they either of them, came at all to Mr. Whittard's office pending such negotiation: that he could not go so far as to say that he inferred collusion between Mr. Lemage and Mr. Lindley respecting the lease; but Mr. Lindley appeared to him to assume an authority and control over Mrs. Taylor, which he never could account for, but which he supposed that he must in some measure have derived from Mr. Lemage: that no person was employed by Mr. Cholerton in preparing or perusing the draft lease on his behalf: that Mr. Lemage perused and approved it on his own behalf; that no person was employed as the solicitor or professional adviser of Mrs. Taylor with regard to the lease: that the draft lease had not been read over to Mrs. Taylor by himself; and, as far as he knew or had any reason to believe, it had not been perused by her, or read to her by any other person.

John Milbourne Bannister proved the execution of the lease by the Plaintiff, Elizabeth Gordon.

William James Boulton, another of the Respondents' witnesses, proved the execution, by the Defendant, Maria Lemage, of another indenture of lease, dated the 25th day of September, 1828. This lease purported to be made between the Defendant, Maria Lemage, of the first part; the Plaintiff, Elizabeth Gordon, (therein described

as Elizabeth Taylor,) of the second part; and James Forsyth, of the third part: and by it Maria Lemage (with the consent and by the direction of Elizabeth Taylor) demised to James Forsyth, as therein mentioned, the messuage or tenement situate in Great [385] Wild Street, therein particularly described, at the yearly rent of £35, thereby reserved payable to Maria Lemage, her executors, administrators, and assigns.

William James Boulton, upon his cross-examination, admitted that he was, when the lease was executed by Maria Lemage, a partner with the Respondent, George Selby, in the business of a solicitor: that he had perused and approved of the draft of the lease on the behalf of Maria Lemage: that he could not state, as to his knowledge or belief, whether the lease, or the draft thereof, had been prepared in pursuance of any agreement between Mrs. Taylor and Mr. Forsyth, or any other persons: but to the best of his recollection, a previous lease had been prepared by Mr. Forsyth's solicitor, in which Mrs. Taylor had been made the only lessor: but either before or about the time of the execution of that lease, it was discovered that the demised premises were vested in the executors of Thomas Samuel Lemage, deceased; and in consequence of that discovery, George Selby and Maria Lemage were applied to, as executors, to grant, or join in granting, a lease of the premises to Mr. Forsyth: that he could not state, as to his knowledge or belief, whether any person had been employed as the solicitor or professional adviser of Mrs. Taylor, as to the lease which preceded the one in which Maria Lemage had been made a party: nor could he state, as to his recollection or belief, whether he had perused the last-mentioned lease on the behalf of Maria Lemage and Mrs. Taylor, or on the behalf of Maria Lemage only, the draft having been returned to Mr. Duncan, who had prepared it, and not having been seen by [386] him since: and that if he had not perused it on the behalf of Mrs. Taylor, he believed that no other person had done so.

John Duncan, another of the Respondents' witnesses, deposed, that he was, in the month of November, in the year 1828, instructed to draw or prepare the last-mentioned lease, and did accordingly draw or prepare the same: that he knew Edward Whitaker, whose name appeared to be set or subscribed to the same as a witness attesting the execution thereof: Edward Whitaker was, at the time the lease bears date and purports to have been executed, his clerk; and (after proving his handwriting) he stated, that Edward Whitaker was not then in his service; that he left the same about the year 1829: that he did not know whether Edward Whitaker was then living or dead; and if living, where he then was, or could be heard of.

Upon his cross-examination, this witness stated, that in the month of November, 1828, he was employed by Mr. Forsyth, as his solicitor, to prepare a lease to him, from Elizabeth Taylor, of a house and premises in Wild Street, Lincoln's Inn Fields, pursuant to an agreement which was brought to him by Mr. Forsyth, and which purported to be an agreement between Mrs. Taylor and Mr. Forsyth only: that he was not aware of any person having been employed to act as the attorney or solicitor of Mrs. Taylor, in respect of the lease: that one Maria Lemage was made a granting party to a lease of the premises which was substituted for the lease alluded to in the first part of his answer, in consequence of its having been discovered that Mrs. Taylor had not the power to grant a lease of the premises; and that Maria Lemage had some [387] legal estate or interest in those premises: that he did not recollect he ever knew in what character or manner she, Maria Lemage, became entitled to such estate or interest: that George Selby, one of the Defendants, and his then partner, William James Boulton, acted as the solicitors of Maria Lemage in respect of the last-mentioned lease; and that he never saw Mrs. Taylor upon the subject of either of the said leases; and could not state, as to his knowledge or belief, whether, previous to the discovery of Maria Lemage's interest, she was, or seemed to be aware, or to consider, that any other person besides herself had any right or property in the premises, except as far as might be inferred, from the aforesaid circumstance, that in the agreement she was the only granting party.

Taylor Mason, another of the Respondents' witnesses, a relative of Mrs. Gordon, but very young at the date of the transactions, gave evidence as to conversations respecting the loan and security, and payment of the interest (£75) by Mrs. Gordon to M. Lemage. An objection was suggested to his evidence, on the ground of interest as the legatee under the will of Maria Lemage; but on cross-examination he said that he had released his legacy.

Joseph Earle proved the capacity of Mrs. Gordon in business; he proved also the draft of the bond of indemnity given by Lemage to Mrs. Gordon, which draft he said that he had heard, in a conversation between Mrs. Gordon and Lemage, was drawn for the purpose of a bond being given by Lemage to Mrs. Gordon, that she might have the property in Wild Street, assigned by her as a security for money advanced to John Davies, [388] re-assigned to her, when the money had been paid back.

The draft was full of erasures, but purported to be a draft of a bond from T. S. Lemage to Eliz. Taylor in a penal sum of £2000, reciting that J. Davies was indebted to T. S. Lemage in a sum of £2000, and that E. Gordon had assigned the premises in question to secure the repayment of that sum, with interest in the mean time; and the condition was, not to sell or dispose of the premises during the life of Mrs. Gordon, while the interest of the debt was regularly paid.

The draft itself was produced in evidence, as also was the case laid by Mr. Lemage before Mr. Cooke, and his opinion. In the case, the transaction was stated to the same effect, in substance, as in the draft bond; except that, after stating that Davies was indebted in £2000, the case states that the security was to be given for the said £2000 and interest. The case also states the bond, to the effect before set forth.

The cause having been heard on the 11th of January, 1836, his Honour the then Master of the Rolls delivered his judgment; and after having stated and commented upon the pleadings and the evidence which had been adduced on either side, declared his opinion to be, that the security of the said assignments was good for the sum of £1500 and interest; that the objections raised by the bill to the security, and the charges which had been made of alleged fraud, had failed of proof; and that therefore the bill, except so far as it sought to redeem the property comprised in the assignments on payment of the £1500 and interest, ought to be dismissed with costs.

His Honour therefore decreed and declared, [389] that the indentures of assignment bearing date respectively the 4th and 6th days of August, 1814, were a good security for the sum of £1500 and interest thereon. And his Honour ordered, that the Appellants' bill, except so far as the same sought a redemption of the leasehold premises comprised in the same indentures, upon payment of what should be found due from the Appellants in respect of any debt due from Mr. John Davies to the said Mr. Thomas Samuel Lemage, deceased, be dismissed with costs, to be taxed by the Master of the Court, to whom these causes stood referred: And it was ordered, that the said Master should include in such taxation the costs of Mrs. Maria Lemage, deceased: And it was ordered, that the costs of the Defendant, Mrs. Maria Lemage, should be paid to the Respondents, Thomas Hart and Samuel Lemage, her personal representatives: And his Honour ordered and decreed, that it should be referred to the Master to take an account of what was due to the Defendant, Mr. George Selby, as the surviving executor of Mr. Thomas Samuel Lemage, for principal and interest, in respect of the sum of £1500, and to tax the Respondents so much of the costs of this suit as related to the redemptions aforesaid, including therein the costs of the said late Defendant, Mrs. Maria Lemage; and upon the Appellants, or either of them, paying to the said Mr. George Selby what the said Master should so find to be due to him for such principal and interest, together with the Respondents' costs of so much of this suit as related to the redemption aforesaid, and also paying unto the Respondents, Mr. Thomas Hart and Mr. Samuel Lemage, their [390] and the said late Defendant, Mrs. Maria Lemage's, last-mentioned costs, within six months after the said Master should have made his report, at such time and place as the Master should appoint; it was ordered, that the said George Selby should re-assign the leasehold premises comprised in the said indentures respectively, free and clear of all incumbrances done by him or by the said Mr. Thomas Samuel Lemage, or any claiming by, from, or under them respectively, and should deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the said Appellants, or to such of them as should so redeem the same, or as they should appoint; but in default of the Appellants, or any or either of them, paying unto the Respondents what the said Master should so find due for such principal, interest, and costs as aforesaid, by the time aforesaid, it was ordered, that the remainder of the Appellants' bill should also stand dismissed out of the said Court, with costs, to be taxed by the said Master: And it was ordered, that the Appellants should also pay to the Respondents, Mr. Thomas Hart and Mr. Samuel Lemage, the remainder of the said costs of the said late Defendant, Mrs. Maria

Lemage; and, for the better taking the said accounts, the parties were to produce before the said Master, upon oath, all books, papers, and writings in their power, relating thereto, and were to be examined upon interrogatories, as the said Master should direct, who, in taking the said accounts, was to make unto the parties all just allowances; and any of the parties were to be at liberty to apply to the Court, as there should be occasion.

The appeal was against this decree.

[391] For the Appellants, Mr. Pemberton and Mr. Knight.

It was not proved, or even alleged, that Elizabeth Taylor had ever incurred any debt to Thomas Samuel Lemage on her own account, or had ever signed or made any writing by which she was bound for any debt or sum of money due to Thomas Samuel Lemage from John Davies.

The contents of the indentures of assignment of the 4th and 6th of August, 1814, and the stamps affixed to them, are wholly inconsistent with the allegation that they were assignments by way of security to Thomas Samuel Lemage for any debt due to him from John Davies; and no evidence is admissible to contradict the consideration stated on the face of the instruments themselves. The nature of those instruments, and the stamps upon them, establish the case of a resulting trust which is insisted upon for the Appellants; and the execution of those assignments by Elizabeth Taylor, without any professional advice, and under the influence which Thomas Samuel Lemage is proved to have had over her, are circumstances of great weight against the claim of the Respondents to hold the property as a security, not for any debt due by Mrs. Taylor, but for Davies' debt to Lemage.

The depositions as to acknowledgments or declarations by Mrs. Taylor, that the assignments were by way of security for the debt due to Thomas Samuel Lemage by John Davies, ought not to have been admitted, and are not sufficient evidence that Mrs. Taylor ever made herself legally liable to Lemage for that debt, or of the amount of the debt for which she is alleged to have made herself liable.

[392] The decree declares the leasehold property to be a security for the debt due from Davies to Lemage to an amount greater than that for which Lemage himself, in the draft case stated by him for the opinion of counsel, alleged to be the amount for which Mrs. Taylor made herself liable, and greater also than the amount mentioned in the evidence of Davies as that for which it was proposed or intended that Mrs. Taylor should make herself liable.

The draft of writing, purporting to be the draft of a bond, is not evidence against the Appellants, and ought not to have been admitted as evidence to prove the amount of the debt due by Davies to Lemage, for which Mrs. Taylor is alleged to have made herself liable, or as an acknowledgment that she had made herself security for any such debt.

At all events an issue should have been directed, whether the deeds were executed by Mrs. Taylor to secure any and what sum of money to Lemage. This the Appellant is ready to accept, with a direction for liberty to the Judge to indorse any special matter on the *postea*.

For the Respondents, Mr. Jacob and Mr. Wigram.

It is admitted upon the pleadings that some security was intended to be given, and the question is, whether it was obtained by fraud. The £1500 mentioned in the lease of 1824, is consistent with the rest of the case, for the original debt had been reduced, and the recitals of this lease constitute a sufficient acknowledgment for the support of the Respondents' claim. No case is brought forward by the Plaintiff to impeach the lease. The answers insist upon this and the lease of 1828. The **[393]** schedule to Selby's answer contains the leases, the draft bond, and the case for Cooke's opinion. On the 30th of November, 1833, there was an order of Court for the production of these specific documents. In June, 1834, there was an order to amend the bill upon affidavit of inspection of these documents. The bill was amended accordingly; and yet is silent upon the subject of the documents, and makes no case against the leases; they were made to the tenants of Mrs. Taylor, and the witnesses are not cross-examined. No evidence is given on the part of the Plaintiff respecting the cancelled instruments endorsed upon the leases, which seems to form a prominent part of the Appellants' case; and during all the time Mrs. Taylor was paying £75 annually, by way of interest. There is no proof of fraud, and yet an issue is asked; but this is

matter of indulgence, and in the discretion of the Court. Of the case of alleged influence arising from the cohabitation of the daughter with Lemage, there is neither proof nor probability; the conveyance is stated by the bill, that it was to be a security for some loan, of some amount, is in proof, and the alleged influence is equally applicable to both cases. If it ever existed, it would have ceased upon the death of Lemage, which occurred in 1826; yet the payment of interest equivalent, at the rate of 5 per cent., to the principal secured, continues; and the party supposed to have been influenced and defrauded was, according to the evidence, a woman of great acuteness and experience in business. Under these circumstances there ought to be no inquiry; the facts in proof being sufficient to enable a Court of Equity to decide for itself, without the aid of a Court of law. **[394]** There was acquiescence during eighteen years; no disability in the party; and her acts were in accordance with and explanatory of the case, as made by the Respondent.

Admissions made by a Defendant are not allowed to be given in evidence unless alleged by bill. *Hall* v. *Maltby* (6 Price); *Small* v. *Attwood* (2 Y. and J. 512); *Powys* v. *Mansfield* (6 Sim. 565).

As to a resulting trust, there is none, if a consideration is shown.

The Lord Chancellor (15th July): The case made on behalf of the Appellants is, that certain property belonging to Mrs. Gordon, whose interests they represent, was assigned by her to one Lemage, who is represented by the Respondents; that this assignment was obtained by an improper influence exercised by Lemage over Mrs. Gordon, and without consideration. That having so obtained the assignment, Lemage claimed a right to hold the property as a collateral security for a debt owing to him by one Davies, the son-in-law of Mrs. Gordon. Mrs. Gordon, nevertheless, was left in possession of the property, receiving the rents, and from that time paying to Lemage the sum of £75 annually, until the year 1826, when Lemage died. It appears that Davies having become bankrupt, Lemage proved his debt, amounting to £2100, under the commission, and received a dividend, by which the debt was reduced to £1500, and upon this sum the interest was paid by Mrs. Gordon up to the time of Lemage's death, and afterwards to his representatives, nearly until the time of filing the bill. In support of the case **[395]** on the part of the Appellants, the evidence of John Davies, and other witnesses, was read, and certain documents were produced, among which was a case laid before Mr. Cooke, as to the expediency of proving the debt under the commission; whether such proof would affect the right to hold the security in question, which was stated in the case. The draft of a bond given by Lemage to Mrs. Gordon was also produced, in which the assignment of the leasehold property was recited, and the agreement that it should be a security for the debt; and by which it was conditioned that the property should not be sold during the life of Mrs. Gordon, provided the interest upon the debt was regularly paid, and that the property itself should be re-assigned when the principal was paid. The depositions of Davies, and the other witnesses, with the documents produced in evidence, displaces entirely the whole of the principal case made by the bill; and it is evident that the assignment of the leasehold property was intended as a security for the debt of Davies, and was not confined to the £500, as the Appellants seek to establish by his deposition. There are some parts of the evidence which may be passed over; but the question arising upon the proofs is, whether the security is to be confined to the sum of £500 or comprises the whole debt claimed.

In support of the claim, on the part of the Respondents, several witnesses depose to admissions by Mrs. Gordon, that the assignment was for the security of a debt from Davies; that it amounted to £1500, appears from the conclusive fact, that she paid upon that debt £75 a year, by way of interest. It is argued, that as the original assignment appears **[396]** to be without consideration, there is a presumption of a resulting trust, which cannot be repelled by parol testimony. This is a misapprehension of the law of the case. It is alleged also, that Mrs. Gordon executed the deed without advice, under improper influence and in ignorance of the contents; but to support these allegations there is an absence of all evidence, and such things are not to be presumed, especially under circumstances of long acquiescence and lapse of time; nor ought an issue in such a case, to be directed to try whether the assignment was made for the purposes alleged. It would be dangerous and unjust to commit such a case to a trial at law, all the witnesses being dead.

Lord Brougham agreed in this opinion, thinking the evidence quite sufficient of itself to enable a Court of Equity to decide.

Judgment affirmed without costs.

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[397] IRELAND.

(COURT OF CHANCERY.)

WILLIAM PARROTT CARTER, Esq.,—*Appellant*; Sir WILLIAM HENRY PALMER, Bart.,—*Respondent.*

[Mews' Dig. i. 369; ii. 1428; vii. 224, 235; xiv. 828. S.C. 8 Cl. and F. 657. Commented on (as reported in 8 Cl. and F. 657) in *Luddys Trustee* v. *Peard*, 1886, 33 Ch. D. 517. See notes to 8 Cl. and F. 657.]

By a bond, dated in 1816, P. (who was entitled under a devise to the remainder for life of lands in Ireland, subject to a life estate in E.,) became bound in a penal sum of £8000, reciting that he lately carried on business with O. and Co., as merchants, in copartnership, and that they were indebted to S., and M. his partner, in the principal sum of £2663, and that S. was solely entitled to the debt; for which P. had agreed to give his separate bond, payable two years after the death of E., or so much thereof as should not be paid in the meantime by O. and Co., and also to give judgments in the Courts of King's Bench in England and Ireland, and to execute an indenture for the purpose of charging the principal sum and interest upon his reversionary estate in the lands, in Ireland. The condition of the bond was, to pay the principal sum with interest, etc., within two years next after the death of E., and such further sums as S. should pay for keeping on foot the then present and all future insurances on the life of P., not exceeding altogether the sum of £4000.

By indenture of even date with the bond, P. covenanted with S., that immediately after the death of E. he would charge the lands by way of mortgage with the principal sum of £2663 and interest; and such further sums as S. might expend upon insuring the life of P., with interest.

In 1817, S. was declared a bankrupt. By indenture, dated the 10th of March, 1820, the assignees of S. assigned to M. (formerly the partner of S.) the bond of the Respondent, and warrants of attorney, and judgments for securing the same and the monies and interest thereby secured, and then due or to become due, and all other the goods, etc. of which the bankrupt and M. were jointly possessed, etc., as copartners [398] and which were then vested in the assignees, and all indentures, bonds, etc. concerning the same, to hold, etc. In Hilary term 1820, judgment was entered up on the warrant of attorney in the Court of King's Bench in Dublin, against P., at the suit of S. In July, 1832, E. died, and thereupon P. entered on the lands in Ireland, and became seised thereof for the term of his life. On the 3d of August, 1833, M., in consideration of £2000 paid to him, and £400 to be paid to him by C. (the Appellant) in May following, in case P. should be then living, assigned to C. the bond and deed of covenant of 1816, and all monies due thereon, etc. In July, 1834, two years after the death of E., the Appellant filed a bill in the Court of Chancery in Ireland, stating that there was then due, for principal and interest, upon the securities before mentioned, upwards of £6000, and praying a declaration that he was entitled to the benefit of the covenant contained in the indenture of 1816, and for a specific performance thereof by P.; also for an account of principal and interest due, and to settle the necessary mortgage deed, with a receiver, injunction, etc.

P. by his answer stated, that he had been imposed upon, and induced by misrepresentation to execute the bond; and that, supposing he was liable, for the sum due upon the securities was less than represented by the bill, that the

securities should stand only for such sum as was really due. He also represented, that in 1832 he had entered into a treaty with M. to compromise the debt for a sum of £2000, at which time C. was employed as the counsel, and acted for and advised P. upon the matter of that treaty, whereby he gained a knowledge of all the circumstances relating to the debt; and being the professional adviser of P., and having obtained this knowledge as such, privately made an agreement with and purchased the debt of M., for a sum of £2400; and P. then, by his answer, stated an offer made by him in writing, in December, 1834, to pay to C. the sum of £2400 for his purchase, with interest and costs, which offer he then and thereby repeated. Evidence was given of the allegations of the bill and answer respectively.

By the decree it was declared, that C. was entitled to £2400, with interest and his costs up to the time of service of the notice, according to the terms of the offer made by P., provided C. should declare his election to accept such offer within two months from the date of the decree, etc., with an account of the sum, due, etc., and that he should only hold the judgment and deed of covenant as securities for such sum [399] as should be found due; and in case C. should decline or omit to make such election, that his bill should be dismissed with costs.

Upon appeal to the House of Lords, this decree was reversed, upon the ground that no such relief could be given upon the pleadings, according to the rules of equity; but that a cross bill, on the part of P., should have been filed. It was directed by the order, that a reference should be made to the Master, to ascertain what was due upon the security, etc.

Roger Palmer, Esquire, being, at the time of the making his will and of his decease, seised or well entitled to considerable freehold estates, situate in England and in Ireland, by his last will and testament in writing, dated the 20th of April, 1801, and duly made and published as by law required to pass real estates by devise, gave and devised unto trustees, therein named, and their heirs, all his real estates whatsoever and wheresoever, in the United Kingdom of Great Britain and Ireland, to the use of his sister Elizabeth, the wife of Joseph Budworth, Esquire, and her assigns, for the term of her natural life, with remainder, in the lifetime of his sister, to trustees, to preserve contingent remainders. And after her decease, as to all his real estates in Ireland, the testator gave and devised the same to the use of the Respondent, then William Henry Palmer, Esquire, and his assigns, for his natural life, with remainder, during the lifetime of the Respondent, to trustees, to preserve contingent remainders; and after the decease of the Respondent, to the use of the first and every other son of the body of the Respondent, in tail male, with divers remainders over.

[400] The testator died in or shortly after the end of the year 1811, and thereupon Elizabeth Budworth, who assumed the surname of Palmer, became seised for her life of all the estates in England and Ireland, with remainder, as to the Irish estates, to the Respondent for his life.

The Respondent, by bond, dated the 31st of July, 1816, became bound in the penal sum of £8000 to Richard Wilsonn Sheppard, with a condition thereunder written, reciting that the Respondent lately carried on business with Alexander Oswald and George Howell, as merchants, in copartnership together, in Dean Street, Soho, London; and on Ormond Quay, Dublin, under the firm of Alexander Oswald and Company, who, in the course of such their business, became, and then were justly and truly indebted unto the said Richard Wilsonn Sheppard, and to Edward Longdon Mackmurdo, theretofore his partner, in various sums of money, amounting in the whole to the principal sum of £2663 19s. 6d., besides interest as thereinafter mentioned, viz.: on the sum of £200, part thereof from the 19th of October, 1811; on the further sum of £375 9s., other part thereof, from the 3d of November, 1811; on the further sum of £624 9s. 10d., other part thereof, from the 13th of December, 1811; on the further sum of £737 12s. 11d., other part thereof, from the 24th of January, 1812; and on the further sum of £613 1s. 11d., other part thereof, from the 30th of January, 1812; which said several sums were due upon bills of exchange which were all unpaid; on the further sum of £37 0s. 10d., other part thereof, from

the 28th of September, 1812; on the further **[401]** sum of £25 8s. 4d., other part thereof, from the 12th of October, 1813; on the further sum of £25 8s. 4d., other part thereof, from the 19th of September, 1814; and on the further sum of £25 8s. 4d., residue thereof, from the 19th of September, 1815; which said four last-mentioned sums were monies paid by the said Richard Wilsonn Sheppard and Edward Longdon Mackmurdo, or one of them, as premiums of an insurance on the life of the Respondent for the sum of £1000, and which he had agreed to repay with interest; and reciting that Richard Wilsonn Sheppard was solely entitled to the debt and interest as a collateral security, for which, as well as for such further sums of money as Richard Wilsonn Sheppard might pay for insuring the life of the Respondent, and interest thereon, he, the Respondent, had agreed to give his separate bond, to be payable at the expiration of two years next after the decease of Elizabeth Budworth Palmer, or so much thereof as should not be paid in the mean time by Alexander Oswald and George Howell, or either of them; and also to give judgments in the Courts of King's Bench in England and Ireland, and to execute an indenture, or deed of covenant of three parts, bearing even date with the bond, and made between the Respondent of the first part, the said Edward Longdon Mackmurdo of the second part, and the said Richard Wilsonn Sheppard of the third part, for the purpose of charging the said principal sums of money and interest, and such further sums of money and interest as aforesaid, upon the Respondent's then reversionary interest in the testator's Irish estates, and subject to the life in-**[402]**-terest therein of Elizabeth Budworth Palmer. The condition of the obligation was declared to be, that if the Respondent, his heirs, executors, or administrators, within two years next after the decease of Elizabeth Budworth Palmer, should pay unto Richard Wilsonn Sheppard, his executors, administrators, or assigns, as well the said £2663 19s. 6d., with interest from the respective times thereinbefore mentioned, as all such further sums of money as Richard Wilsonn Sheppard, his executors, administrators, or assigns, should pay for effecting, continuing, and keeping on foot the then present and all future insurances on the life of the Respondent, for better securing the principal monies and interest aforesaid, and which principal monies were not to exceed in the whole the sum of £4000, then the said obligation was to be void, or else to be and remain in full force and virtue.

By indenture of even date with the above-stated bond, and made between the Respondent of the first part, Edward Longdon Mackmurdo of the second part, and Richard Wilsonn Sheppard of the third part, the Respondent covenanted with Richard Wilsonn Sheppard, that he, the Respondent would, immediately on the decease of Elizabeth Budworth Palmer, make and execute all such further and reasonable acts, deeds, and assurances, for the better and more perfectly charging the said estates, late of the testator, by way of mortgage, with payment of the said principal sum of £2663 9s. 6d., and interest, and such further sums of money as the said Richard Wilsonn Sheppard, his executors, administrators, and assigns, might **[403]** expend in insuring the Respondent's life, as aforesaid, with interest, as by Richard Wilsonn Sheppard, his executors, administrators, or assigns, or his or their counsel, should be advised and required. The indenture then provides for payment of three several annual premiums of the then existing policy of insurance on the Respondent's life, and for the assignment by him to Richard Wilsonn Sheppard of a certain policy of insurance on the Respondent's life for £4000, upon the happening of the event therein mentioned, or for effecting a new insurance in a sufficient sum to secure the debts to Richard Wilsonn Sheppard, his executors, administrators, and assigns, and provides for the repayment by the Respondent of all the premiums to be paid in respect thereof, with interest. By the same indenture the Respondent covenanted and agreed that the said indenture, and the said bond and judgments, were executed, accepted, and given, upon condition that the Respondent should forthwith pay unto Richard Wilsonn Sheppard, his executors or administrators, or his or their solicitor, his solicitor's bill, as between attorney and client, as well for preparing the said indenture and the bond and judgments, as for his journey to Dublin in that matter, and the proceedings had thereupon, and for all other matters and things in negotiating that agreement, or in relation thereto, as therein particularly mentioned; and in the mean time, that such costs, charges, and expenses, then incurred, and to be incurred, should remain as part of the monies secured by the said indenture, bond,

and judgments: And it was thereby provided, that in case it should thereafter appear that any [404] mistake had been made in the amount of the said debt, and that the balance due should be found to be less than was stated in the accounts rendered, the said deed, and bond, and judgments were to be securities for so much less as the real balance should be found to be, together with interest thereon, and such other sum and sums of money for insurance, and interest, and costs, as aforesaid.

A commission of bankrupt, dated the 12th of February, 1817, was issued against Richard Wilsonn Sheppard, under which he was found and declared a bankrupt, and Joseph Echalez, Henry Hughes, and Antonio De La Torré, were chosen his assignees, and the usual assignment was thereupon made to them.

By indenture, dated the 10th of March, 1820, made between the assignees of the one part, and Edward Longdon Mackmurdo, of the other part, the assignees (in pursuance of the resolution of creditors of the bankrupt therein recited) bargained, sold, and assigned unto Edward Longdon Mackmurdo the bond of the Respondent, of the 31st of July, 1816, and also the warrants of attorney and judgments for securing the same bond, and the monies and interest thereby secured, and then due or to become due, and all and singular other the goods, wares, merchandises, securities for monies, debts, and effects whatsoever, which the bankrupt and Edward Longdon Mackmurdo were jointly possessed of, interested in, or entitled unto, as co-partners, and which were then vested in the assignees, as assignees, and all indentures, bonds, deeds, papers, and writings relative to or concerning the same, to hold, receive, and enjoy the indenture of covenant, bond, warrants of attorney, [405] judgments, and premises thereby assigned unto Edward Longdon Mackmurdo, his executors, administrators, and assigns, as and for his and their own proper deeds, monies, and effects absolutely.

In or as of Hilary Term, 1820, judgment was entered up, under the Irish warrant of attorney, in his Majesty's Court of King's Bench in Dublin, against the Respondent, at the suit of Richard Wilsonn Sheppard, for the sum of £8000 sterling, with £4 13s. 11d. costs.

Upon the death of Mrs. Elizabeth Budworth Palmer, on the 31st of May, 1832, the Respondent entered upon the estates in Ireland, and became seized thereof for the term of his natural life.

By indenture, dated the 3d of August, 1833, and made between Edward Longdon Mackmurdo, of the one part, and the Appellant of the other part, Edward Longdon Mackmurdo, in consideration of £2000 to him paid by the Appellant, on the sealing and delivery thereof, and of the further sum of £400 to be paid him by the Appellant on the 31st of May then next, in case the Respondent should be then living, and for which £400 the Appellant had given his bond, bargained, sold, assigned, and transferred unto the Appellant the bond and indenture or deed of covenant dated the 31st of July, 1816, and all monies due thereupon, or to be received by virtue thereof; and the judgment in the Court of King's Bench in Ireland, of Hilary Term, 1820, to hold, receive, and enjoy the same unto the Appellant, his executors, administrators, and assigns, for his and their own absolute use and benefit.

On the 31st of May, 1834, being two years after [406] the decease of Mrs. Elizabeth Budworth Palmer, the bond and securities became due and payable.

On the 5th of July, 1834, the Appellant filed his bill in the Court of Chancery in Ireland, against the Respondent, setting forth that there was then due, for principal and interest and other monies, on the securities aforesaid, upwards of £6000, and praying a declaration that the Appellant was entitled to the benefit of the covenant contained in the indenture of the 31st of July, 1816, and for a specific performance thereof by the Respondent, and for a reference to the Master to take an account of principal and interest due on the said securities, and to settle the necessary mortgage deed, and for a receiver of the rents and profits of the estates in Ireland, and for an injunction to stay the Respondent's receipt thereof.

The Respondent having appeared, by his answer admitted the execution of the bond of 31st July, 1816, and the deed of covenant of the same date, under the circumstances thereinafter mentioned, that viz., at the time of the execution of the bond he was residing at Bruges, in the Netherlands, and was waited upon by an individual on behalf of Richard Wilsonn Sheppard, who produced the bond and deed, requiring them to be executed immediately, and representing that by the acts done by him, the

Respondent, he had become a partner in the firm of Oswald and Howell, and answerable for their debts, and that unless he executed the bond, he would be exposed to much costs, and his estate in remainder would be sold ; and the Respondent, after denying that he ever was in partnership with the firm of Oswald and Company, said that being little [407] acquainted with business, and influenced by such representations, he executed the bond ; that since execution thereof, he had heard that the firm of Oswald and Company was not indebted to Sheppard and Mackmurdo, and that consequently the bond and securities ought not to be enforced, or at least that they should stand only for such sum as was really due ; and submitted that the Appellant should not claim any benefit from his assignment of the said securities.

The Respondent by his answer then said, that for several years before, and until the latter end of 1831, the Appellant was employed by the Respondent as his consulting counsel and confidential professional adviser, and that Edward Longdon Mackmurdo, having applied for payment of the bond, the Respondent caused a statement of the circumstances to be laid before the Appellant, who then became acquainted with the existence of his claims ; that a treaty for compromise of the demand was set on foot with Mackmurdo, and the terms thereof were submitted to the Appellant as his confidential adviser, and which were nearly concluded in the beginning of the year 1832 ; that Mrs. Budworth Palmer died on the 31st of May, in that year ; and the Appellant, having been in treaty with Mackmurdo before her death, entered into some treaty with him for the assignment of the bond, which Mackmurdo afterwards refused to recognise ; that he, Mackmurdo, again entered upon a treaty with the Respondent, through his English solicitors, for a compromise ; and they were on the point of terminating all differences for a sum of £2000, or thereabouts, when the Appellant applied to Mack-[408]-murdo, and agreed to give for the bond and judgment, and all money due at foot thereof, £2400 ; that at the time of such negotiation, the Appellant was the counsel and professional adviser of the Respondent, and had been such for about eleven years before ; and the Respondent was not aware until some time afterwards of the contract entered into between Mackmurdo and the Appellant, which was made without his knowledge or sanction, contrary to his interest ; and the Respondent submitted that the Appellant acted unjustly in interfering with Mackmurdo for the purchase of the bond, and procuring the assignment thereof, and in doing so, that the Appellant violated the trust and confidence reposed in him. The answer then stated an offer made on behalf of the Respondent, by notice in writing, dated the 24th of December, 1834, to pay the Appellant the sum of £2400, the purchase money given by him for the bond, with interest and costs : and the Respondent then, as he said for peace sake, and to avoid litigation, repeated the same offer.

The Respondent having by his answer raised a question, whether he had executed the bond and securities under threats and fraudulent misrepresentations, as above set forth, the Appellant amended his bill, charging that the bond and deed were prepared by or under the direction of Mr. Matthew O'Reilly, barrister at law, then acting for the Respondent, and who was then his land-agent, (and which Mr. O'Reilly was the attesting witness to the execution of the said securities by the Respondent) ; and that the same securities remained in Mr. O'Reilly's hands, from such execution thereof, on the 16th of July, 1816, till the 20th of May, 1817, when they were transmitted by him to Mr. [409] Henry Carpenter, the then solicitor of Sheppard and Mackmurdo.

The Respondent, by his answer to the amended bill, denied the agency of O'Reilly, save as a friend in receiving his income from the castle of Dublin, and in receiving rents out of certain lands, payable to the Respondent as an *elegit* creditor, on foot of an *elegit* therein particularly mentioned ; and denied that the indenture or bond were prepared or approved of by O'Reilly, or that he acted on his behalf in the transaction, but admitted that the bond and deed might have remained in O'Reilly's hands until the 20th of May, 1817, and might then by him have been transmitted to Carpenter, as in the amended bill stated.

Before the Respondent had answered the Appellant's bill, the Appellant had applied for, and obtained a conditional order for a receiver of the Irish estates, which the Respondent discharged by investing in government 3½ per cent. stock, under an order of the Court, the sum of £6147 19s. 3d. cash, and transferring the stock, so invested, to the credit of the cause, to abide the further decree or order of the Court in the cause.

The Appellant having filed replication to the Respondent's two answers, and the Respondent having rejoined, the cause was at issue, and both parties entered into evidence, and examined witnesses in chief, and the Appellant cross-examined several of the Respondent's witnesses.

The following is an abstract of the evidence:

Mr. Samuel Cotton, of Basinghall Street, solicitor, proved that he was from the year 1824, for six years, or thereabouts, the solicitor of E. L. Mackmurdo, and during that period was employed **[410]** by him to obtain from the Respondent payment of, or further security for, the sums mentioned, to be secured by the bond and deed of covenant. And in the course of such employment, he understood it to be admitted by the Respondent, whom he, witness, saw at Bruges, expressly upon the business of obtaining such payment or security, and also by Messrs. Lucas and Parkinson, as his solicitors, that the said sums were wholly and *bonâ fide* due and owing by the Respondent.

Sir Peter Laurie, knight, proved having obtained, on the 26th of December, 1814, from the Respondent and George Howell, as partners in the firm of Alexander Oswald and Company, a joint bond, to secure a debt which was due to witness as a creditor of the firm, and that he gave bills also for the debt as a collateral security; and he proved payment to him by the Respondent of £600, in discharge of such debt.

Richard Wilsonn Sheppard Wilsonne, theretofore Richard Wilsonn Sheppard, the bankrupt (who disclaimed all interest in the bond and securities, and the monies thereby secured), proved the connection of the Respondent as a partner in the firm of Alexander Oswald and Company, and meeting him in that character; and he proved the matters out of which the debt arose, for securing which the securities were given, and his employing his solicitor, Mr. Carpenter, in 1815, to go to Ireland, to effect a settlement with the Respondent, as a partner in the firm of Alexander Oswald and Company, who had previously stopped payment; and that Matthew O'Reilly acted, in relation to the said demand, as the legal adviser and agent of the Re-**[411]**-spondent. And he then proved the taking and adjusting of the accounts, and the striking the balance, which witness proved he understood and believed to be fairly and duly settled by the partners of both firms, or by their respective legal advisers and agents. And he denied authorising any one to make the representations as an inducement to the execution of the bond, as pretended and set forth by the Respondent in his original answer.

Mr. Henry Carpenter, the solicitor employed by Richard Wilsonn Sheppard, proved meeting O'Reilly on the business as the legal adviser of the Respondent, and corresponding with him in that character; and his evidence confirmed the evidence of Mr. Sheppard Wilsonne, as to the taking and adjusting the accounts, and striking the balance; and that the drafts of the said securities were submitted to Mr. O'Reilly for his approval, on behalf of the Respondent. And that he, O'Reilly, undertook to get them executed by the Respondent, which he accordingly did; and that such securities, so executed, remained with O'Reilly until May following, when he transmitted them to witness.

Mr. William Day, another witness on behalf of the Appellant, in a long examination, confirmed the evidence of the above witnesses in all material respects.

The Respondent, on his part, examined several witnesses, some of whom the Appellant examined also on cross interrogatories.

George Howell, one of the partners in the late firm of Alexander Oswald and Company, whose evidence in chief was directed principally to calling in question the correctness of the balance struck on **[412]** adjusting the accounts, and that the securities given by the Respondent were to stand only for the amount to be found really due, on a new investigation of accounts; on cross-examination, proved that the Respondent was a partner in the firm of Alexander Oswald and Company, though there was no deed of partnership.

E. L. Mackmurdo proved that the Appellant, about the middle of the year 1832, for the first time proposed to become the purchaser of his claims and demands in the pleadings mentioned, when, after some discussion, the witness agreed to take £1000, and subscribed a memorandum to that effect, which contract the witness afterwards refused to conclude; and that about the middle of the year 1833 the witness accidentally met the Appellant, and a new treaty was opened, and a new contract made and

signed, to sell the debt to the Appellant for the sum of £2400. And the witness said that there was not, to his knowledge and belief, any treaty for the compromise of the said claims and demands entered into or carried on by and between himself and the Respondent, or any person on his behalf, further than that he had heard and believed that Messrs. Lucas and Parkinson, the Respondent's solicitors, at different times, in the course of conversation with witness's solicitor, expressed some intention of making an offer for compromise, but they never actually made an offer; and that for such reason, the Appellant was not aware of the pendency of any treaty or negotiation with the Respondent for a compromise; and the Appellant did not at any time interfere with witness, to prevent a compromise with the Respondent. He confirmed the **[413]** evidence of Mr. Sheppard Wilsonne, and of Mr. Samuel Cotton.

Mr. John Lucas, and Mr. John Parkinson, the Respondent's English solicitors being severally examined, said, that the Appellant was engaged, employed, or retained, as the counsel, or legal adviser of the Respondent, for the first time in the year 1820, and so continued such counsel or legal adviser till August, 1831, and was not so employed after that period, or until any period in the year 1832; and that as such counsel, the Appellant became acquainted with the said claims and demands of the said E. L. Mackmurdo, against the Respondent, and had copies thereof laid before him, and particularly that the draft of a *post obit* bond for £3570, payable six months after the decease of Mrs. E. B. Palmer, from the Respondent, and his son William Henry Roger Palmer, to the said E. L. Mackmurdo, in satisfaction of his said claims, was laid before the Appellant for perusal, in or about 1827, which treaty was afterwards interrupted, and never carried into effect, and all further treaty for the same ceased in July 1831.

The cause was heard on the 8th day of November, 1836, before the Lord Chancellor of Ireland, when his Lordship was pleased to declare the Appellant entitled to the sum of £2400, with interest, according to the terms of the offer made by the Respondent to the Appellant, by notice of the 24th of December, 1834, and his taxed costs as between party and party, up to the service of the notice of the 24th of December, 1834, provided the Appellant should elect, to accept the same, and declare such his election by written notice, to **[414]** be served on the Respondent's solicitor in the cause, within two months from that day; and in such case, the Respondent to be entitled to his costs in the said cause to be taxed as between party and party, from the time of the service of the said notice, of the 24th of December, 1834; and that an account should be taken of the sum due to the Appellant on foot of the said principal sum of £2400, with interest and costs, and also of the sum due to the Respondent, on foot of the said costs; the latter sum to be deducted from the former, and the Appellant to be entitled to be paid the balance to be found due to him on foot of such account, by a transfer of so much of the sum of £6158 8s. 4d., 3½ per cent. stock, remaining in bank to the credit of the said cause; and it was further decreed, that the Appellant should only hold the said judgment and deed of covenant assigned to him, as securities for such sum as should be found due to him as aforesaid, and should execute an assignment or release of the said securities to the Respondent at the costs of the Respondent; and that thereupon the Accountant-general should transfer to the Respondent the balance of such money as should be in the funds, or in the bank, to the credit of the said cause: and in case the Appellant should decline or omit to declare his willingness to accept such terms, then that the Appellant's bill should stand dismissed, with costs. And in such case the Accountant-general should transfer to the Respondent the entire of the sum of £6158 8s. 4d., and also such cash as might be in the bank, to the credit of the cause.

The Appeal was against this decree.

[415] For the Appellant, Mr. Pemberton and Mr. Knight.

The Respondent has not established by any evidence the issue raised by his answer: viz., that his treaty for a compromise with E. L. Mackmurdo, was nearly concluded in the beginning of the year 1832; and that the Appellant had been in treaty with E. L. Mackmurdo, before the death of E. Budworth Palmer; which issue is contradicted by all the witnesses of the Respondent who have been examined by him to that supposed fact.

The Appellant did not make any proposal, or commence any treaty, with E. L. Mackmurdo, until after the death of E. Budworth Palmer, in May, 1832, nor until

some time after the Appellant had been discharged by the Respondent from being his counsel or legal adviser.

The Appellant, at the time of his negotiation with E. L. Mackmurdo, was not the counsel and professional adviser of the Respondent; and did not violate any trust or confidence reposed in him.

At the time when the Appellant first opened such treaty, and from that time until the completion thereof by execution of the assignment to him, on the 3d of August, 1833, there was no treaty pending between the Respondent and E. L. Mackmurdo for a compromise of the claims of E. L. Mackmurdo; and therefore the Appellant did not act unjustly in interfering with E. L. Mackmurdo, for the purchase of the bond, and procuring the assignment thereof.

For the Respondent, Mr. Tinney and Sir W. Follett.

[416] In this suit there may be no need to question the original securities. It is a defence which impeaches the right of the Appellant to inforce them. He was confidentially employed, as counsel, to advise the Respondent with regard to these securities, and cannot be permitted to use the knowledge which he acquired in that character to obtain a benefit for himself by a purchase which is injurious to his employer. Exp. *James* (8 Ves. 337), *Coles* v. *Trecothick* (9 Ves. 234), *Beer* v. *Ward* (Jacob, 77), *Cholmondeley* v. *Clinton* (19 Ves. 261. 4 Bli. O.S.). The bill is for a specific performance, by the Respondent, of a covenant to assure; but that relief is in the breast of the Court, and if it appears that the Appellant has acted contrary to equity the relief may be refused. It is argued, that the confidential relation of the Appellant had ceased when he made the purchase; but having acquired the knowledge in that character he can never afterwards make use of it to the prejudice of his employer. *Fox* v. *Mackreth* (2 B. C. C. 400). Suppose a trader, under embarrassment, is desirous of compromising for his debts, and he employs an attorney to manage the affair, could the attorney buy up the debts for himself? *Lees* v. *Nuttal* (1 Russ. and M. 53). It is doubtful whether there is any debt at all; and if so, what is the amount of it? (See Exparte, Bennet, 10 Ves. 381. *Lord Kingsland* v. *Barnewall*, 4 B. P. C. 154. *Norris* v. *Le Neve*, 3 Atk. 98).

The Lord Chancellor (July 15): In this case it appears, that William Henry Palmer, in the year 1816, executed a bond to a person of the name of Shep-**[417]**-pard, and he at the same time executed a deed of covenant, by which he charged real estates belonging to him with certain sums due from him. Mr. Carter, the present Appellant, was professionally employed for Mr. Palmer, and afterwards he purchased the charge upon the Respondent's estate; and the question which was discussed at your Lordship's bar, was, whether Mr. Carter from his connection as professional agent, and being employed by Mr. Palmer, was incapacitated from purchasing that charge on the estate of the person for whom he was so concerned. The case came before the Court of Chancery in Ireland; and it appeared from the answer of Mr. Palmer, that he was willing to pay a certain sum, not the amount of what was alleged to be due on the charge; but he said he was willing to pay a certain sum to Mr. Carter, being the sum which Mr. Carter had paid for the purchase from the person in whom the incumbrance was then vested. The decree which was pronounced by the Lord Chancellor of Ireland, was in these terms: the Court declared "The Appellant entitled to the sum of £2400 with interest, according to the terms of the offer made by the Respondent to the Appellant, by the notice of the 24th of December, 1834, and his taxed costs, as between party and party, up to the service of the said notice of the 24th of December, 1834, provided the Appellant should elect to accept the same, and declare such his election by written notice, to be served on the Respondent's solicitors in the cause, within two months from that day; and in such case the Respondent to be entitled to his costs in the said cause to be taxed, as between party and party, from the time of the **[418]** service of the said notice of the 24th of December, 1834." Now it is quite obvious what the intention of the Court was in making that provision: one party, the Defendant, had said he was willing to pay a certain sum which was less than the amount of what the Plaintiff claimed, and the object undoubtedly was to give the Plaintiff the option of having that sum, merely to give him the opportunity of accepting the sum tendered: but I apprehend, however meritorious the object, that it was not consistent with the forms of the proceedings in a court of equity to make that part of the order: the parties might settle that between themselves: but it

was not proper or regular to make that a part of the decretal order. Then the decree goes on: "in case the Appellant should decline or omit to declare his willingness to accept such terms as aforesaid, then that the Appellant's bill should stand dismissed, with costs against the Appellant." Whether Mr. Carter was or not in a situation to buy up this incumbrance on Mr. Palmer's estate is a question which in the view I take of this case it is not necessary for your Lordships to give a decision upon, inasmuch as it appears to me that the form of the decree is not such, as under the circumstances of the case it ought to have been. It appears that Mr. Carter had bought up the incumbrance, he had bought up the incumbrance for a less sum than was due upon it. Now that he was entitled to something out of the estate is beyond all question; because the party, the owner of the estate, owed the debt; and the only way in which the owner of the estate could compel Mr. Carter to take less than the amount of the incumbrance on the estate was on this ground, [419] that inasmuch as he was employed as agent for him, equity would not permit an agent dealing with a debt charged on his client's or employer's estate to take a benefit to himself; and the client or employer is in such cases entitled to say, "If you buy up that debt on my estate, I must pay you what you have paid; but I have a right to consider the purchase as made on behalf of the owner of the estate." But that is an equity which the party, the owner of the estate, must enforce against the agent, it is not an equity which will entitle the owner of the estate to refuse to pay anything in respect of that demand. The decree as pronounced by the Court of Chancery in Ireland, dismissed the bill; it therefore does not say whether he is to receive the whole, or so much as he has paid; but the effect of it is to deny all relief and payment to the person in whom this charge is legally vested. I apprehend the course which a court of equity ought to have taken would have been, not to have dismissed the bill, but to have given effect to the charge to the extent of making such a decree as the party was entitled to; but to make it so as to give the Defendant, the owner of the estate, an opportunity of asserting his equity; that equity being, to consider the purchase of the charge as a purchase for the benefit of him the owner of the property. That ought to have been done by a cross bill; they seem very much to have mistaken their way in the proceedings of the Court of Chancery in Ireland. The object of your Lordships would be to give them an opportunity of setting themselves right; and the way in which your Lordships may effect that object would be to reverse the decree dismissing the bill, and in lieu of that decree of dismissal to direct that [420] there shall be a reference to the Master to enquire what was due in respect of the charge on the property, created by the deed of the 30th of July, 1816, at the date at which Mr. Carter purchased the charge, without prejudice to any bill which the owner, Mr. Palmer, may file against Mr. Carter, the agent. If it is the duty of a court of equity to make a decree, it is impossible to make a decree which shall be less injurious to the future rights of Mr. Palmer than that which I have suggested, inasmuch as there will only be an inquiry to ascertain what was due on the charge; and if Mr. Palmer thinks proper to raise this question against Mr. Carter, he will have the opportunity, before the cause comes to that state in which payment will be awarded to Mr. Carter, of contending that he is only entitled to the purchase-money which he paid for the charge on the estate.

Decree reversed.

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[421] ENGLAND.

(EXCHEQUER CHAMBER.)

GEORGE GARLAND, Esq.,—*Plaintiff in Error:* THOMAS CARLISLE, Assignee of the Estate and Effects of GEORGE VALENTINE LEONARD, a Bankrupt,—*Defendant in Error.*

[Mews' Dig. i. 363, 461; ii. 940; vi. 646. S.C. 4 Cl. and F. 693; 5 Cl. and F. 354; 4 Scott 587; 4 Bing. N.C. 7; 3 M. and W. 152. Cited with approval in *Hollins* v. *Fowler*, 1875, L.R. 7 H.L. 764.]

In an action of trover, brought by the assignees of a bankrupt against a sheriff to recover the value of goods seized under an execution, the following facts (among others) were found by special verdict:

On the 16th of December, 1824, a writ of *fieri facias* against L., and at the suit of P., was delivered to the under sheriff. On the 17th of December, the goods on the premises of the debtor were seized. On the 24th of December, in consequence of an arrangement between the debtor and creditor, the execution was withdrawn; and, under the agreement, the goods were removed by the direction of W., an agent for the attornies of the execution creditor. How they were disposed of does not appear: but the fees, poundage, etc. of the sheriff's officer were paid. On the 8th of January, 1825, a commission of bankruptcy issued against L., founded on an act of bankruptcy committed on the 15th of October, 1824: It did not appear that the sheriff at the date of the seizure had notice that an act of bankruptcy had been committed. On the 29th of January, the usual assignment of the bankrupt's estate and effects was made to the Plaintiff. The action was brought in June, 1825, and a verdict found for the Plaintiff: upon a new trial, a special verdict was found, comprising the facts before-mentioned.

Upon argument of the special verdict, the Court was of opinion,

1. That there was a sufficient conversion by the sheriff whereon to maintain the action of trover.

[422] 2. That the sheriff was liable for such conversion, notwithstanding his total ignorance at the time that an act of bankruptcy had been committed; and judgment was given accordingly.

Upon writ of error to the Exchequer Chamber, the judges being equally divided in the opinions, the judgment stood; and upon further writ of error to the House of Lords, the judgment was affirmed.

This writ of error was brought by the Plaintiff in error, to reverse a judgment of the Court of Exchequer Chamber, of Michaelmas term, 1833.

The action was in trover, brought in his Majesty's Court of Common Pleas, by Thomas Carlisle, the Defendant in error, as assignee of the estate and effects of George Valentine Leonard, a bankrupt, against George Garland, Esquire, the Plaintiff in error, late sheriff of the county of Dorset.

The cause was tried before Mr. Justice Littledale, at the Summer assizes at Dorchester, in the year 1825, when a verdict was found for the Plaintiff. Damages £450.

This verdict was set aside; and upon a new trial, before the same learned Judge, the jury found the following facts by a special verdict:

"That the within named George Valentine Leonard, at the time of the committing the act of bankruptcy, and the issuing of the commission hereinafter mentioned, was a trader within the intent and meaning of and subject to the statutes made and then in force concerning bankrupts; and that there was then a good petitioning creditor's debt: That the said George Valentine Leonard, on the 15th of October, 1824, committed an act of bankruptcy: That on the 15th of December, in the same year, a writ of *fieri facias* issued out of his Ma-[423]-jesty's Court of King's Bench, tested the last day of Michaelmas term preceding, returnable on Monday next, after eight days of St. Hilary then next, and directed to the sheriff of Dorset, commanding him, that of the goods and chattels of the said George Valentine Leonard, he should cause to be levied as well a certain debt of £604, which Joshua Payne had recovered against him in the Court of King's Bench, as also 65s. for his damages, as well by reason of the detaining of that debt, as for his costs and charges; which said writ was endorsed to levy £306 1s. 6d, besides sheriff's fees, poundage, officers' fees, and all incidental expenses: That on the 16th day of the same month of December the said writ was delivered to Mr. William Parr (at that time under-sheriff to the Defendant, who was then sheriff of Dorset,) by John Williams, an agent of the said Joshua Payne, together with a letter from Green and Ashhurst, his attorneys; a copy whereof is as follows:

"Sambrook Court, Basinghall Street,
"15th December, 1824.

"Sir: The bearer, Mr. Williams, will deliver a writ of *fieri facias* to you, which

we have issued against the goods of Mr. George Valentine Leonard, and upon which you will be pleased to grant a warrant to an officer living near to Lyme. We authorise you and the officer to take Mr. Williams's directions on the subject of this execution, and to withdraw from possession if he shall think fit to request you so to do. (We are) Green and Ashurst.

" Mr. Parr."

[424] And on the 17th of that month the Defendant issued his warrant, directed to William Restarick, his bailiff, reciting the said writ, and commanding him to levy of the goods and chattels of the said George Valentine Leonard, as required by the said writ, that the said sheriff might have the money as by the same he was commanded: That the warrant was, by the said John Williams, the agent of the said Joshua Payne, delivered to the said William Restarick, together with a letter from the said William Parr, as under-sheriff as aforesaid, to the said William Restarick; a copy of which is as follows:

" *Payne* v. *Leonard.*

" Poole, 16th December, 1824.

" Sir: Inclosed is a warrant to levy on the Defendant's property, which I send you by Mr. Williams, whose directions you will take in the execution of the warrant: and if he requests you to withdraw the execution, you will do so on his giving you a written authority. Wm. Parr."

Who afterwards, on the 17th of December, in the year last aforesaid, entered the said George Valentine Leonard's house and premises at Lyme, in the county of Dorset, and there seized and took divers goods in the declaration mentioned, which were the goods of the said George Valentine Leonard, but which, by the subsequent commission of bankrupt and assignment, became the property of the Plaintiff, by relation from the act of bankruptcy, of the value of £450, under and by virtue of the same writ, putting Robert Gascoigne, his assistant, [425] in possession, and leaving with him the warrant, and kept possession of the same till the 24th of the same month: That whilst said Robert Gascoigne was so in possession, as the assistant to the said William Restarick, divers goods, parcel of the said goods in the said declaration mentioned, of the value of £445, which were the goods of the said George Valentine Leonard, but which, by the subsequent commission of bankrupt and assignment, became the property of the Plaintiff, by relation, from the act of bankruptcy, were made up into thirteen packages, which the said William Restarick understood were packed for the purpose of satisfying the levy, in pursuance of an arrangement made between the said John Williams and the said George Valentine Leonard, eight of them to pay the debt due from the said George Valentine Leonard to the said Joshua Payne, and the remaining five of them to be sold by the said Joshua Payne, for the sheriff's poundage, officers' fees, and other expenses, which the said John Williams, as such agent, should have incurred, or might incur, in and about the said levy, the surplus balance to be remitted to the said George Valentine Leonard; the greatest part of these goods had been originally purchased, by the said George Valentine Leonard, of the said Joshua Payne, but some few of the goods, so purchased, having been sold, the value of them was made up out of the said George Valentine Leonard's stock, but the said Joshua Payne had not, by this arrangement, any more than his just debt: That after such arrangement had been so made between them, on the 24th of the same month of December, the said John Williams, agent for the said Joshua Payne, delivered to the said [426] William Restarick two letters, one dated the 23d of December, signed by the said George Valentine Leonard, and directed to the said William Restarick, as follows:

" ' I request and empower you to take goods instead of cash, to the amount of the levy in the above cause.'

" And the other, dated Lyme, 24th of December, 1824, signed by John Williams, as follows:

" ' I hereby authorise and request you to quit possession, the Plaintiff having been satisfied the whole debt and costs in this action.'

" The execution was afterwards, on the last-mentioned day, wholly abandoned;

and the said Robert Gascoigne, and the said William Restarick, quitted the premises of the said George Valentine Leonard, leaving all the said goods thereon; the said Robert Gascoigne going to Bridport, and taking the said warrant with him, and the said William Restarick to the Cups Inn at Lyme: That, two hours after, the said John Williams, the agent of the said Joshua Payne, came to the said William Restarick, at the Cups Inn, to settle with him for the sheriff's poundage, and his, the said William Restarick's, expenses for inventory, holding possession, levying, and other expenses, which was done, and was the first time they had been adjusted; and the said John Williams paid to the said William Restarick the whole thereof except five pounds, which he did not pay. He, the said John Williams, and the said William Restarick, agreed that the said John Williams should cause goods, to the amount of five pounds, to be packed up, and send them to Bridport to the said Restarick, to be deposited with, [427] and kept by him, till the said five pounds should be remitted to him.

"That a quantity of goods of the value of five pounds, being the residue of the goods mentioned in the declaration, was accordingly fetched from the shop of the said bankrupt by Dudley, and by Farrant, a shopman of the said bankrupt, and sent to the Cups Inn, and was afterwards, on the following Monday, the 26th of December, in the same year, received by the said William Restarick, at Bridport, by the Lyme carrier: That the said five pounds were, about two months after, paid to the said William Restarick, who forwarded the said package of goods, about the same time that the money was paid, by the van, to London, to the said Joshua Payne: That the said William Restarick, at the time he received the same quantity of goods, knew that they were part of the goods which had been so seized as aforesaid. That the said thirteen packages of goods were, after the said execution was so abandoned as aforesaid, on the same day, sent by the said John Williams, as such agent as aforesaid, from the said house and premises of the said George Valentine Leonard, to the Cob at Lyme, each of them being marked with the letters I. P., being the initials of the said Joshua Payne's name, and thence shipped for London, addressed I. P., Carpenter Smith's Wharf; and were directed, by the said John Williams, to be sent to 34, Old Change, for Joshua Payne. They were sent, together with four other packages of goods (which had been sent to the Cups some days before the execution, and are not the subject of the present action) making seventeen packages in the whole: That they [428] were landed, on their arrival in London, at Carpenter Smith's Wharf, whereof Richard Wilson was the wharfinger: That, on the 8th day of January, 1825, a commission of bankrupt issued against the said George Valentine Leonard, under which he was, on the 14th of the same month, declared a bankrupt: That, on the 29th of the same month, an assignment of the estate and effects of the said bankrupt was made by the commissioners under the said commission to the said Plaintiff That in the beginning of February, 1825, Mr. Henry Ball asked the said Richard Wilson, if he would deliver the said seventeen packages of goods to him? who said, certainly not, until it was ascertained in a court of law to whom they belonged; and they still remain at the said wharf, in his possession: That on the 15th of June, 1825, at Poole, in Dorsetshire, the said Plaintiff demanded the goods mentioned in the declaration of the said Defendant, who referred him to Mr. Parr, his under-sheriff: That the said Plaintiff soon after, seeing the said Defendant and the said Mr. Parr together at Poole, in the said county of Dorset, asked the said Mr. Parr, in the presence of the said Defendant, whether it was his, the said Mr. Parr's intention, to comply with the terms of the same demand or not? to which the said Mr. Parr answered, 'No, certainly not.' But, whether or not upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, the said Defendant is guilty of the premises within mentioned, within laid to his charge, or any part thereof, in manner and form as the said Plaintiff hath within thereof complained against him, the jurors aforesaid are altogether ignorant; and [429] thereupon they pray the advice of the Court of our said Lord, the King of the Bench: and if upon the whole matter aforesaid it shall seem to the said Court that the said Defendant is guilty of all the said premises, then the jurors aforesaid, upon their oaths aforesaid, say, that the said Defendant is guilty thereof in manner and form as the said Plaintiff hath within thereof complained against him; and, in that case, they assess the damages of the said

Plaintiff, by him sustained by reason of the same premises, besides his costs and charges by him about his suit in this behalf expended, to £450, and for those costs and charges to 40s. And if, upon the whole matter aforesaid, it shall seem to the Court that the Defendant is guilty of the said premises, as to the said goods so packed up and sent to the said William Restarick, at Bridport, then the jurors aforesaid, upon their oath aforesaid, say, that the said Defendant is guilty thereof in manner and form as the said Plaintiff hath within thereof complained against him; and, in that case, they assess the damages of the said Plaintiff, by him sustained by reason of the said last-mentioned premises, besides his costs and charges by him about his suit in this behalf expended, to £5, and for those costs and charges to 40s. But if upon the whole matter aforesaid it shall seem to the Court that the said Defendant is not guilty of the same premises, then the jurors aforesaid, upon their oath aforesaid, say, that the said Defendant is not guilty thereof in manner and form as he hath within in pleading alleged."

This special verdict was argued before the Court of Common Pleas, in Hilary term, 1831, and the [430] Court delivered their judgment in favour of Thomas Carlisle, the Defendant in error.*

On the 16th of May, 1832, the judgment was signed, and entered on the Roll.

On the 10th of August, 1832, a writ of error to reverse this judgment was brought into the Exchequer Chamber by George Garland, esquire, the Plaintiff in error; and he assigned for error, as follows:

"That in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the declaration aforesaid, and the matters therein contained, are not sufficient in law, for the said Thomas Carlisle to have or maintain his aforesaid action thereof against the said George Garland: there is also error, in this to wit, that, by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid, was given for the said Thomas Carlisle against the said George Garland, whereas by the law of the land the judgment ought to have been given for the said George Garland, against the said Thomas Carlisle; and the said George Garland prays, etc."

To which assignment the Defendant in error joined.

The special verdict was argued before the Court of Exchequer Chamber, on the 17th of June, 1833; and, on the 26th of November, 1833, that Court affirmed the judgment of the Court of Common [431] Pleas in favour of Thomas Carlisle, the Defendant in error.†

Upon this judgment the Plaintiff in error brought a writ of error returnable before Lords in Parliament; and assigned for error, as follows:

"That in the record and proceedings aforesaid, and also in giving and affirming the judgment aforesaid, there is manifest error in this, to wit, that, by the record aforesaid, it appears that the judgment aforesaid, given by the said Court of our Lord the King of the Bench, at Westminster, before the Right Honourable Sir Nicolas Conyngham Tindal, Knight, and his companions, then his Majesty's Justices of the Bench, at Westminster, in the county of Middlesex, was given for the said Thomas Carlisle, assignee, as aforesaid, against the said George Garland, whereas, by the law of the land, the said judgment ought to have been given for the said George Garland against the said Thomas Carlisle, assignee, as aforesaid; therefore in that there is manifest error: there is also error in affirming the said judgment, because he says that the judgment aforesaid was affirmed in the Court of our Lord the King of the Exchequer Chamber, at Westminster, before the Justices of our Lord the King, assigned to hold pleas in the Court of our said Lord the King, before the King himself, and the Barons of the Exchequer of our said Lord the King of the degree of the coif, whereas no such affirmance of the said judgment ought [432] to have been given there-

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* The arguments of counsel and the judgment of the Court of Common Pleas on this special verdict are reported in the seventh volume of Bingham's reports, page 298.

† The judgment of the Court of the Exchequer Chamber, delivered by the several learned judges, will be found in the third volume of Tyrwhitt's reports, page 705, and in the second volume of Crompton and Meeson's reports, page 31.

upon: but, by the law of the land, the said judgment ought to have been reversed, therefore in that there is manifest error; and the said George Garland prays, etc."

To which assignment the Defendant in error joined.

The printed reasons* in support of the Plaintiff in error's case, were as follows:

The facts stated in the special verdict do not show a sufficient conversion to entitle the Plaintiff to sustain the action, inasmuch as the sheriff did no more than seize the goods. His interference never went beyond the mere seizure. It terminated when the execution was withdrawn, and before there had been any conversion of the goods. From the moment when the execution was withdrawn, he ceased altogether to have any thing to do with the matter. By the act of withdrawing the execution, the possession of the goods was restored to the bankrupt; and the subsequent dealings with the goods were the acts of the bankrupt and of Payne, by his agent, Williams: and to those acts the sheriff was no party. If even there was a conversion of the goods by the sheriff, he acted in total ignorance that any act of bankruptcy had then been committed by Leonard. And, although the Plaintiff in the execution is bound by relation back to the act of bankruptcy, the sheriff is in a wholly different situation, inasmuch as he acts, not of his own accord, or for his own benefit, but as a public officer of the crown, and in strict obedience to the king's writ; and he ought, therefore, to be protected by his official character, if he acts igno-[433]-rantly and innocently, and not to be made answerable as a wrong-doer, by subsequent events, for that which, at the time he did it, it was not only lawful, but his bounden duty to do, and which he would have had no excuse for refusing, and could not have refused to do.

For the Defendant in error, the following reasons were assigned:

Supposing that in this case there had been a regular execution of the writ by the sheriff (the Plaintiff in error), it is contended that the property of the bankrupt, the said George Valentine Leonard, became the property of the assignee (the Defendant in error) by relation from the time of the act of bankruptcy, and consequently the property seized was not that of George Valentine Leonard, which the sheriff was directed, by the writ, to take, but the property of the assignee.

There is nothing in the statute 21 James I., c. 19. s. 9., or any other of the statutes relating to bankruptcy, which prevents this relation operating against a sheriff, as well as against the execution creditor, on whose behalf the seizure is made; on the contrary, it remains as the decision of all the superior courts at Westminster, that the relation takes effect against the sheriff, and he is liable to an action of trover at the suit of the assignees, if he seize and sell the goods of the bankrupt before the commission with notice of the bankruptcy; and it is contended, that the goods cannot be more or less the property of the assignees because the sheriff has, or has not, notice of the bankruptcy.

The action of trover is founded in property, and the amount to be recovered is limited by the [434] value of goods converted. The term wrongful conversion, which is sometimes said to be necessary to the support of an action of trover, implies only a civil wrong, and in no way infers the slightest moral or criminal wrong, but only that the property of another has been converted without the right to do so; nor is it easy to conceive that an execution creditor, who delivers a writ to the sheriff, directing him to seize the property of A. B., and in no other way interferes, can be guilty of any more wrongful conversion than the sheriff who, upon his own judgment, seizes, in supposed execution of that writ, the property which had been the property of A. B., but has become, by his bankruptcy, the property of his assignees. The term wrong doer, when applied in such a case to the sheriff, or the execution creditor, is subject to the same observation; it means no more than that he has, without any wrong intention, taken the property of another person.

But in whatever sense the action of trover considers the Defendant to be a wrong doer, and guilty of a wrongful conversion, it remains decided by all the courts that the sheriff may be such a wrong doer and guilty of such a wrongful conversion by relation: for if a sheriff have notice of the bankruptcy, but acting *bonâ fide* on the belief that no commission will be taken out, he seizes and sells the goods of the bankrupt, he must do it at the peril of answering it to the assignees: if no commission is taken out, he has done right; but if a commission should afterwards be taken out, an

* The arguments of counsel and authorities cited did not differ materially from those in the Courts below.

action of trover may be supported, and the sheriff will be made a wrong doer, and guilty of a wrongful conversion by relation.

[435] As therefore the goods, the value of which is sought to be recovered, were, at the time of the seizure by the sheriff (the Plaintiff in error), the property of the assignee (the Defendant in error), and that such a relation may, and does, operate against a sheriff, and as there is nothing in the conversion necessary to support the action of trover but what may by law be attributed to a sheriff acting honestly and innocently, it is contended, on the part of the assignee (the Defendant in error), that the sheriff (the Plaintiff in error) has seized his goods, and wrongfully converted the goods in question in this action, and, consequently, is liable to this action of trover for the whole sum of £450.

But it is contended, that whatever may be the general rule of law as to the liability of the sheriff, in this case the sheriff (the Plaintiff in error) acted irregularly, and has identified himself with the execution creditor, and is, consequently, not entitled to any protection.

For the sheriff (the Plaintiff in error), by the letter of his under-sheriff, directed the officer to take the directions of Williams (the agent of the execution creditor) in the execution of the warrant, and thereby it is contended Williams was made also the agent of the sheriff. In pursuance of that letter, instead of the officer proceeding in the usual course to a sale, while he (the officer) was in possession, the goods mentioned in the declaration were, under the directions of Williams, packed up in order to satisfy the levy, and the sheriff's poundage and officer's fees. The poundage and fees were afterwards advanced to the sheriff (the Plaintiff in error), so far as Williams had the means; and for the residue, that is the sum of £5, the sheriff **[436]** (the Plaintiff in error), by his officer, kept a sufficient part of the goods, thus making himself a party to the arrangement, and he is afterwards made the means of transferring the goods to the execution creditor, by the letter of the 22d of December, signed by the bankrupt, and delivered by Williams, the agent of the execution creditor and of the sheriff, to the officer, requesting him to take goods instead of cash; and then, by the letter of the 24th of December, from the said Williams, the sheriff is requested to quit possession, the execution creditor being satisfied; and the goods are afterwards removed by the execution creditor to London for sale. It is, therefore, contended, that what the sheriff did was not, at the time he did it, in strict obedience to the commands of the writ; it was not what the Court itself, if it could have acted, would have done; it was not at that time justifiable by the writ under which he acted: and, consequently, it is contended that he is answerable to the Defendant in error.

That the sheriff (the Plaintiff in error) having first lent himself to the execution creditor, in the manner before-mentioned, the execution was, as the jury have found, wholly abandoned; and consequently the said sheriff cannot now justify himself under a writ abandoned.

As to the goods of the value of £5 which the officer held, on account of his fee, still after the commission, and then delivered to the execution creditor, it is contended that those goods do not come within the question raised as to the sheriff's liability, but the Defendant in error is clearly entitled to the £5, being the value of those goods.

But it is contended further, that the transaction **[437]** as to the £5 explains the other part of the arrangement; and as the execution creditor advanced to the sheriff (the Plaintiff in error) the residue of the poundage and fees upon the security of the goods of the assignee (the Defendant in error), packed up for that purpose, with the knowledge of the said sheriff, and while they were in his possession, in pursuance of the directions of Williams, the agent of the execution creditor and of the said sheriff, he is equally responsible for the remaining goods.

For the Plaintiff in error, Sir F. Pollock and Sir W. Follett.

For the Defendant in error, and Serjeant Bompas.

The case was argued before the House of Lords, the judges being present, in May, 1837. At the conclusion of the argument, the following questions were put by the House to the Judges:

First: "Whether a sheriff seizing and selling goods under a *fieri facias* was, in December, 1824, liable in an action of trover, brought by the assignees of the Defendant in the action in which *fieri facias* was issued; such Defendant having committed an act of bankruptcy before the seizing or selling of the goods, but no commission having issued until after the sale?"

If this question be answered in the affirmative, then,

Secondly: "Whether such sheriff was liable, if after seizing the goods he had permitted them to be disposed of according to an arrangement between the Plaintiff and Defendant in the action [438] without proceeding to a sale, but under which the sheriff received his poundage?"

If the first question be answered in the negative, then,

Thirdly: "Whether such sheriff was liable if, instead of selling the goods, he had concurred in an arrangement between and the Defendant, in the action under which the goods were delivered to the Plaintiff in the action, in satisfaction of his demand, the sheriff receiving his poundage?"

The Judges desiring time to consider these questions, the further consideration of the cause was adjourned *sine die*.

On the 27th of June—the Lord Chancellor having informed the House that the Judges differed in their opinions upon the questions of law propounded to them—

It was ordered, that they do deliver their opinions upon the said questions *seriatim*, with their reasons

On the 29th of June, the Judges delivered their opinions *seriatim*, as follows:

Coltman J.: The first question proposed by your Lordship is one which, after the conflict of opinion it has given rise to, cannot but be considered as of no ordinary difficulty.

The question refers to the state of the law in December, 1824, at which time the act 5 Geo. 4. c. 98. had passed, but had not come into operation, except for the special purposes referred to in the 133d section.

The decision of the matter in debate must therefore turn upon the previous statutes, especially that of 13 Eliz. c. 7; and on the course of decisions [439] which have taken place in reference to those statutes.

The first statute, that of the 34th and 35th year of Henry 8. c. 4., authorises the disposition of the bankrupt's property for satisfaction of his creditors, and gives the same effect to the transfer as if it were a conveyance by the bankrupt himself.

There is nothing in this act showing an intention that its enactments should have a retrospective effect.

The statute 13 Eliz. c. 7., after authorising the appointment of commissioners for managing and disposing of the bankrupt's estate, directs that every direction, order, bargain, sale, and other thing done by the persons so authorised, shall be good and effectual in the law against the said offender or offenders, debtor or debtors, etc., and against all other person or persons claiming by, from, or under such offender or offenders, debtor or debtors, by any act or acts, had, made, or done, after any such person shall become bankrupt.

The object of this statute was undoubtedly to give the commissioners when appointed a retrospective power, so as to enable them to avoid incumbrances and transfers of the bankrupt's property happening subsequent to the act of bankruptcy.

To what extent and against what persons, this power was intended to operate is the main subject of the present enquiry.

The 9th section of the statute, Jac. 1. c. 19. has, not as it seems to me any very direct bearing on the present question. The lands of the bankrupt were at that time bound by a judgment from the day to which the judgment related; and when a writ of *fieri facias* issued, the goods were bound [440] from the *teste* of the writ of *fi. fa.*: the judgment in many cases was not for a just debt but for a penalty: the object of the clause was, to provide a remedy for these special inconveniences; but it applies only in terms to creditors, and appears to leave the liability of the sheriff where the former statutes had left it.

The material words of the statute of Elizabeth are, that every direction, order, etc. by the commissioners, shall be good against the offender or debtors, etc., and against all other persons claiming by, from, or under him by any act had, made, or done, after he shall become bankrupt.

It was stated by counsel at your Lordships' bar, if I rightly apprehend his argument, that the provision in question did not apply to judgment creditors, and that their case was not provided for till the statute of James: but I am not aware of any authority which bears out the position intended to be implied; viz., that the act of Elizabeth applied only to persons claiming under the bankrupt by some voluntary act or conveyance by him had, made, or done.

On the contrary, I conceive that an execution creditor has always been considered as falling within the fair scope and meaning of the words "claiming by, from, or under, etc."

He has no claim or title to the goods whatsoever, except what he derives from his debtor. It is because they belong to the debtor that he lays claim to them; and for that only reason he does not claim by an independent or paramount title, but by one subsequent—subordinate and dependent entirely upon the goodness of the debtor's title.

If any doubt could be entertained on this point, [441] it is to be recollected, that by the statute 21 Jac. 1. c. 19. s. 1. the provisions of the statute of Elizabeth are to be expounded in all things largely and beneficially for the aid, help, and relief of the creditors.

If such is the case with the execution creditor, what is to be said as to the sheriff?

The ground on which his case was sought to be distinguished in argument from that of the execution creditor was this, that he claimed nothing but to execute the King's writ, and could not strictly be said to claim any thing.

This mode of treating the subject seems to savour a little of verbal refinement, and strikes the mind with an impression as if it were more specious than solid; for it occurs at once to ask, if the sheriff claim nothing in the goods, why does he intermeddle with them at all? It seems to me that he does claim a right in the goods; namely, a right to seize, and sell them; and that right is derived out of the debtor's right to them. He may then, without any impropriety of language, be considered as falling within the description of a person claiming by, through, or under, the debtor, if such appear to be the intention of the act of parliament.

But if the general object and scope of the act would be satisfied by putting a different construction upon the clause, I do not think it would be doing any great violence to the language of it, if we were to say, that the act was intended only to apply to persons who claimed an interest in the goods for their own benefit.

The object of the act of parliament is, to promote an equal distribution of the assets amongst all the creditors. To effectuate this object, it is essential [442] that an execution creditor, who has laid hold, for his own use, of a portion of the fund, should be made to refund it.

But the case of the sheriff is different; he does not keep the money in his hands, he is a mere instrument of transfer; and it is by no means necessary, in order to carry out the object of the Bankrupt Laws, that he should be liable to pay back money which is no longer in his hands; the policy of the Bankrupt Laws is satisfied by holding, that the party to whom he has paid the money over is liable to refund it.

It seems to me, therefore, that although the words of the clause in question are large enough to include the sheriff, and do in their natural sense include him, yet that it may be construed in the more restricted sense without doing much violence to the terms in which it is expressed.

An argument in favour of the more restricted construction has been urged at your Lordships' bar, which appears to me of considerable weight.

It was said, that if after an act of bankruptcy committed, a debtor of the bankrupt having notice of the act of bankruptcy pays his debt, he will be liable to pay it over again to the assignees if a commission should afterwards issue; yet if he is sued before the commission issues, he cannot defend himself on the ground that an act of bankruptcy has been committed, and that a commission may issue. *Prichett* v. *Downe* (3 Camp. 131), was cited in support of these positions; and *Foster* v. *Alanson* (2 T. R. 479), is to the same effect. It was said, further, that if the bankrupt should sue for the debt and recover judgment, [443] and the debt should be thereupon paid by the debtor in satisfaction of the judgment, the assignees, under a commission subsequently issued, could not claim to be paid over again. The law was certainly so laid down by the judges in the above-mentioned case of *Foster* v. *Alanson* (2 T. R. 479); and has not, as far as I am aware, ever been called in question.

Here then is a striking exception to the universality of that rule of the Bankrupt Law by which all the property and rights of the bankrupt are by relation transferred to the assignees in all their entirety as they existed at the time of the act of bankruptcy.

On what principle does this exception rest? I am not able to find any satisfactory

one other than that which was contended for in argument at the bar, that what the law compels a man to do, that it will, if possible, justify him in doing.

This principle is so entirely consistent with reason, and the plainest dictates of justice, that it ought not lightly to be departed from.

It cannot indeed be contended, that it is of force sufficient to controul the distinct and positive enactment of a statute; but where a statute admits of two constructions, it may furnish an argument of considerable weight for the adoption of the one in preference to the other.

It is obvious that this argument, be its weight more or less, is directly applicable to the case of the sheriff. He is bound to obey the writ—he is liable to attachment if he does not.

In the construing of an act of parliament, some degree even of astuteness might be pardoned in endeavouring to avoid such a scandal to the law as must result; where a man having been compelled to do a certain act, he is afterwards punished for [444] doing it, where he is compelled to pay either in purse or in person for having done an act which he had been compelled by a similar legal necessity to perform.

If these considerations had induced the courts of law to adopt what I have called the more restricted construction of the clause in question, I should have thought them well warranted in doing so; and it seems to me, that in the early cases the courts leaned to that construction: but I am constrained to say, that, in my judgment, the great body and weight of authority is on the other side. I do not propose to go in detail through the cases; they have already, on former occasions, been sifted with a degree of learning and care, which leaves nothing further to be said on either side the question: whatever conclusion may be come to with respect to the earlier decisions, which are for the most part but indifferently reported, it is indisputable that for many years back the decisions have been uniform that the sheriff is liable. The case of *Potter* v. *Starkie* [4 Cl. and F. 714 *n.*], decided in the Exchequer in 1807, is of itself an authority of great weight; it was, as I have learnt from one of my learned brothers now present, having been himself a counsel for the Plaintiff, elaborately argued on behalf of the sheriff, by a most able, acute, and learned person (Sir John Richardson), and before judges perfectly conversant in the law applicable to the question in debate. It is stated in 4 M. and S. 260, that the decision in *Potter* v. *Starkie* was considered as following from the case of *Cooper* v. *Chitty* [1 Barr. 20]. But it is not to be understood from this statement, that the difference between the two cases escaped the attention of the bar and the bench. On the contrary, in the case [445] of *Lazarus* v. *Waithman* (5 B. Moore, 19), Mr. Justice Richardson, when speaking of the case of *Potter* v. *Starkie* by the name of *Lyon* v. *Lamb*, informs us, that the difference between these cases and the case of *Cooper* v. *Chitty* was pointed out and insisted on; but that the Court held, that the property was changed, and vested in the assignees by relation from the time that the act was committed. This decision must therefore be looked upon as the deliberate judgment of the Court of Exchequer, expressly upon the point now in debate. That decision appears to have been acted upon by Lord Ellenborough, in 1813, in the case of *Wyatt* v. *Blaydes* (3 Camp. 396). It was followed, in 1821, by the Court of Common Pleas, in the case of *Lazarus* v. *Waithman*, and again, by the same court, in *Price* v. *Helyar;* and, in 1831, by the Court of King's Bench, in *Dillon* v. *Langley*. [2 B. and Ad. 131].

Now, if it were admitted (which is open to some dispute) that the early decisions are at variance with the modern ones, the latter are so precise, and have now been considered for so many years as established law, that even if less capable of being upheld upon the express words of the statute than I think they are, they ought not now to be overturned.

The law is pre-eminently a tentative and a practical science; where there is a real grievance it never fails to shew itself, and usually either works out a remedy for itself, or is remedied by the legislature.

However great the anomaly may be (theoretically considered) in holding the sheriff liable in the case under consideration, the practical inconvenience has never been found to be very serious.

[446] If the sheriff is called upon to pay over to the assignees money which he has already paid to the execution creditor, he may recoup himself at the expense of the creditor, or if before he has paid over the money he has good reason to apprehend

a bankruptcy, he may apply to the party suing out the writ for an indemnity, or to the Court for time to return the writ.

How little of real practical grievance there is may be inferred from the well known fact, that the office of under-sheriff is in general request, and is looked upon as an office of emolument sufficient to countervail any risk it may bring with it.

The practical evil on the other hand is of no small amount, when the courts of law depart on any but the most solid grounds from an established course of legal precedents. The importance of certainty with respect to the rules of law ought never to be lost sight of. That important object can hardly be attained if the authority of decided cases is to be shaken by a perpetual recurrence to first principles, and upon doubts not bottomed in any great practical mischief.

These considerations have led my mind to the conclusion, that the answer to the first question proposed by your Lordships ought to be in the affirmative.

To the second question proposed by your Lordships, I answer also in the affirmative. The goods, by the supposition, having been seized by the sheriff, and being in his custody and power, they cannot be disposed of by the agreement of the parties without the permission of the sheriff; the disposing of the goods in this way without the consent of the sheriff, is, as against the assignees, a conversion of [447] the property, as much as if he had sold them by auction.

To the third question no answer is required, the first question having been answered in the affirmative.

In obedience to your Lordships' commands, I have considered the questions proposed to the Judges in this case; and I have now to state the opinion which I have formed. It can hardly be necessary for me in so doing to state, that I have formed it, and express it with real diffidence of my own judgment, when your Lordships' are aware of the difference of opinion which exists upon the subject among the highest legal authorities. I may add, however, that I have not only formed it with diffidence, but retain it not without some hesitation, on account of the difficulty I have at times found in reconciling all the legal principles which appear to me to be applicable to it.

Upon the best judgment which I have been able to form, I think your Lordships' first question should be answered in the affirmative. I believe that I shall be able to state my reasons for so thinking, at no great length: for I do not propose to review the authorities upon the subject. That has been already so fully and ably done at the bar, and in elaborate judgments, which are in your Lordships' hands, that I feel I should be taxing your Lordships' attention without the reasonable expectation of throwing any additional light upon that branch of the argument. Speaking in this house it seems to me enough to say, that the result of my examination of the cases is this—I do not find a balance of authority so preponderating, as to be absolutely conclusive on my judgment either way. Putting [448] however, the authorities which are in accordance with my own opinion at the very lowest possible estimate, and speaking of them in a way in which even those who differ from them cannot but concur, they are numerous, of great weight, entitled to high respect, and have been (which is most important) acquiesced in generally by the legal profession, and acted on for many years. If therefore I determine my own opinion independently of them, and upon principle alone, still they warrant me in the satisfactory feeling that I am not setting up that fallible opinion so formed against all the authority bearing on the case; and I profess to pray in aid these decisions, no farther as authority, though I shall use without scruple many of the arguments I find stated in them.

Considering this question as one that is to be answered upon principle, I ask myself, What are the principles to which I am to apply for an answer—and that raises the further point, What is the nature of the question itself? If it be a question of common law, in the absence of direct authority I must look to legal analogy; and considerations of moral right and wrong, of general expedience, or inconvenience, may be properly allowed to enter largely into the argument: although the process be in form for the discovery of the law, yet in the case supposed it is perhaps the province of the judge substantially rather to make it. If it be however a question of statute law, the inquiry becomes one of a much more restricted range: it is then in truth simply a question of construction; and none of those general considerations to which I have alluded have any place, except so far as they serve to illustrate the meaning of the language which the [449] Legislature has chosen to

employ. And it is obvious, upon this principle, that where the legal, ordinary, and grammatical sense of the language is unambiguous, these considerations are wholly irrelevant—they cannot alter that sense, which must prevail: we must take the law as we find it; and if it be unjust, or inconvenient, we must leave it to the constitutional authority to amend it.

Now, this I think, is purely a question of statute law: it depends on the construction of a single section of a simple statute—of the 2d sect. of the 13 Eliz. c. 7; for the 21 Jac. 1., in my opinion, does not apply: and there seem to me but two points for consideration: First, Is the sheriff within the words of the statute, according to their legal ordinary and grammatical sense? Second, If so, is there any rule of law, resulting from his character as an officer of the Court, or from any other circumstance which exempts him from its operation?

By the 2d section of the statute above-mentioned, the commissioners are empowered to take, by their discretions, order with the bankrupt's goods and chattels, to make sale of them, and otherwise order them for true satisfaction and payment of the creditors: and every such order, sale, and other things done by them, shall be good and effectual in the law, to all intents, constructions, and purposes, against the bankrupt, his wife, heir, children, "and against all other person or persons claiming by, from, or under the bankrupt, by any act or acts, had, made, or done, after he has become bankrupt." It is said, that the sheriff is not within these general words; for two reasons: First, That he does not claim by, from, or under the bank-**[450]**-rupt. Secondly, That even if he does, it is not in consequence of any act done by the bankrupt.

With regard to the first, the argument at the bar relied on both parts of the proposition as being inapplicable to the sheriff; it was said, he was no claimant at all—he claimed nothing; and if he did, he claimed nothing under the bankrupt, but all under the writ. This argument I confess seems to me rather fanciful than sound; when the sheriff is either insisting upon his right to take or to hold the goods or the proceeds, or justifying the act he has done in the seizure of them, I do not know any general term more appropriate to describe his situation than that which the statute uses; and if the right to take or to hold depends, as no doubt it does, on the title of the bankrupt, surely he claims under him, although not by descent, conveyance, or any mode of voluntary transmission. If the execution creditor, who sets the sheriff in motion, claims under the bankrupt if the sheriff's vendee of the goods, claims under the bankrupt (and it is not disputed that both do), can their case as to this be put upon any principle, which will not include that of the sheriff? Is it not, that you destroy their respective titles, if you shew that the goods were not the bankrupt's when seized?

But, secondly, it is said, that at all events the claim does not arise by virtue of any act done by the bankrupt. It is obvious to answer, that the statute says nothing of the act being done by the bankrupt: the words are "any act, or acts had, made, or done, after any such person shall become bankrupt." Nor can I think that those words ought to be imported into the statute; if they were, the objection now relied on would apply not merely **[451]** to the sheriff but to the execution creditor, who yet is admitted to be within the clause; he does not claim necessarily under any act done by the bankrupt any more than the sheriff. If these words, "by the bankrupt," are not to be imported into the statute, the difficulty does not arise; for the issuing of the writ, the delivery to the sheriff, the seizure by him, are all acts done subsequently to the bankruptcy.

This section of the act of parliament has created the doctrine of relation as applicable to this subject matter; and it in effect vests the property in the bankrupt's goods in the assignees (who now, by subsequent statutes, stand in the place of the commissioners), from the date of the act of the bankruptcy. The words are quite general; in order to effectuate their purpose, they have been always held to over-ride every transaction with regard to the property from that date: into whose hands soever the goods may come, and through whosesoever they may pass, the property at every instant is in the assignees, so soon as their general title as such is complete. If at the moment of that event happening, the goods should be in the sheriff's hands, there is no doubt but that they might recover them from him; and if after notice of the assignment he were to sell, no one disputes his liability to answer to the assignees for such sale. It follows, therefore, that the sheriff is within the

general words of the statute, although not mentioned expressly;—a circumstance this last, which somewhat diminishes the weight of an observation made at the bar, that he is not expressly named in any of the statutes, which have subsequently restrained [452] the period of relation to the act of bankruptcy within certain limits of time.

If then the sheriff falls within the general words of the statute, upon what ground are we to exempt him from their operation? I admit, that a case of great hardship is made out for him; and if we were at liberty to enter into that consideration, I confess, in the various arguments and judgments which I have heard and read on this point, no satisfactory answer has in my opinion been given. I cannot admit it to be such, that upon the whole the sheriff's poundage makes his office profitable and desirable; or that he is liable in trover only, or in assumpsit, in which the value of the goods is sought to be recovered, and not in trespass. But no lawyer maintains in terms, that the argument of hardship can be relied on where the meaning of the statute is unambiguous. Those therefore who contend, that the sheriff is not responsible, shape the argument differently: they rely on the ministerial character of the sheriff: that he acts only in strict obedience to the orders of the Court—whose officer he is, and whose judgment he executes, and is bound to execute. Reason and justice, and well recognised legal principles, they say, require that in so doing he should be borne harmless; that the relation to the act of bankruptcy is but a fiction of law, and must not be allowed to work wrong; and therefore, that however general the words of the statute are, they must be read with an implied exception as to him.

I state the argument very shortly, not from any wish to diminish its real strength, but because your Lordships are fully aware of all the particulars which are involved in the simple proposition, [453] that all that the sheriff does he does in the strict performance of his duty, and under orders; still, as it seems to me, the substance of the case is merely hardship and unreasonableness; and that the only grounds of law advanced cannot be safely relied on.

First, Is this doctrine of relation a mere fiction of law? The statute-law in substance enacts that a trader, owing a debt or debts of a certain amount, and committing an act of bankruptcy, holds thenceforward his goods by a defeasible title; and that, if a certain other event happens, his title shall be defeated from the date of such act of bankruptcy; and this as regards not merely himself but every one claiming intermediately under him. In what sense is there any fiction here? no fact is supposed to exist contrary to the truth: the assignees have no possession supposed to be in them at a time when it was actually in the bankrupt; but the law making his title defeasible from a certain moment, avoids, in favour of the assignees, the title of all those who claim under him by any intermediate acts. The case of the disseisor and disseisee, put by the Ch. J. in *Liford's* case, 11 Co. 51 *b.*, *is* an illustration in point; by the disseisin the disseisor acquires the freehold against all the world —and among them the disseisee, so long as the disseisin continues; but if the disseisee re-enter, or against the wrong-doer or his servants, the law supposes the freehold always to have remained in him, and he may maintain trespass for the fruits taken while he was disseised. Now this supposes a possession contrary to the fact; and the law will not allow that to prevail against any one coming in by title *bona fide* under the disseisor; but gives the whole remedy against him. Here is a fiction of law; and therefore moulded by [454] law to meet the ends of justice: but if the act of the Legislature (upon which this part of the common law must in legal contemplation be supposed to vest) were now in the Statute-book, in order to effect its purpose its language must be very different from that of the statute now in discussion instead of simply saying, that the disseisee's title shall prevail, it must have enacted what would on the face of it have appeared to be a fiction; namely, that as against the disseisor the disseisee after re-entry shall be deemed to have been seised and in possession at a time when he was notoriously not so.

I conceive, therefore, that this is not in fact any fiction of law; but, if it be, it is one enacted by the express words of the act of parliament, and therefore we cannot mould it, as we might a fiction of the common law. I may here revert to the case I have just put, and suppose the Legislature to have enacted, that as against all persons the disseisee after re-entry should be deemed to have been in possession, in that case,

could any sense of hardship or injustice warrant the expounding of the law by holding that he might not maintain trespass for the mesne profits against the disseisor's vendee?

But, lastly, Can we read the statute with an implied exception in it in favour of the sheriff? I am aware of the lengths to which our predecessors in former times have thought themselves justified in going, when dealing with the concise language and general terms of ancient acts of parliament. I will not stop to inquire, whether in all the instances that might be cited their course was to be justified, or in precisely similar circumstances their example to be followed; but for one, I think the principle **[455]** which limits my duty in regard to the opposition of statutes of so late a date as those of Elizabeth so clear and paramount, that I shall never think myself justified in taking a case out of the operation of a statute, which falls within its plain and unambiguous language.

For these reasons—I fear imperfectly expressed, and less strong in themselves perhaps than may suggest themselves to other minds, but which I humbly submit to your Lordships—I beg to answer your Lordships' first question affirmatively.

I beg to draw attention to the precise words in which I lay down the rule for my own guidance: it is one thing to imply as written in a statute all that is absolutely necessary to give the written words and sensible operation; it is another to exclude any case, which the words in their ordinary legal and grammatical sense embrace; and this I may say in addition, that upon those who call on us to so do lies the *onus* of shewing that to include the case will defeat the intention of the Legislature, or at all events is not necessary to effect it. The former it is not pretended has been done here, and, in my opinion, the latter has not been made out; on the contrary, I see many reasons for thinking, that to prevent the various frauds which the doctrine of relation was intended to meet, it is wise to conclude the sheriff within its operation.

Second, The circumstances which differ this question from the former, appears to me not to distinguish it in principle, so far as regards the operation of the statute; and as regards the requisites for maintaining the action of trover, the seizing of the goods, with the permission to the Plaintiff and Defendant to dispose of them, whereby the **[456]** real owners are deprived of them, seem to me equivalent to the seizure and sale mentioned in the first question;—the sheriff makes himself party to, and therefore liable for a conversion. I therefore answer this question in the affirmative.

Williams J. In considering the answer to be given to the first, and by far the most material question proposed by your Lordships for our consideration, I, at first, doubted whether, after the many discussions which have taken place and the opinions already given, it might not have been sufficient to assume the authorities on each side to be equal, and to proceed at once to examine the subject, as if it had been *res integra*. I have been induced, however, upon further reflection, not to adopt that course,—not from a vain expectation of making any important addition to what has been already delivered, but, partly, because I, hitherto, have had no opportunity of giving any opinion upon the subject at all; chiefly, however, because the supposition above made would, as I think, place the question in a most unfavourable position for the Defendant in error. I am quite aware that the decisions of the Courts below are not binding upon the authority of your Lordships; but I do also presume that opinions here delivered are valuable in proportion as they embody in them and are founded upon those decisions. And, in this view of the case, notwithstanding the doubts which have been suggested—for which, considering the quarter from which they originated, I entertain a long-continued and most sincere respect—I must think that this question has been, theoretically and practically for upwards of **[457]** twenty years, without pretending to go further back, (I speak of the period from 1807 till 1829) as fixed and settled as almost any ever was or can be without receiving the final sanction of this House. I must refer to the cases more particularly, and (for the reason first mentioned) as shortly as possible hereafter; but, in confirmation of my assertion, I have to state that this question has been solemnly decided in the Court of Exchequer once, in the Common Pleas twice, and in the King's Bench once,—with this, that in the latter Court, upon the occasion alluded to, the point was declared to be so fully ascertained and finally settled, that argument was become superfluous,—and argument was *not heard*. To this, is to be added what Sir John Richardson (with, I believe, many others) observed in the case of *Lazarus* v. *Waithman* (5 B.

Moore), "that the law on this question has long been settled, and has frequently occurred of late years at Nisi Prius;" which observation would, if it needed it, receive confirmation from the experience of every one who has at all engaged in the practice to which the learned judge was alluding.

Having adverted, generally, to the decisions, it may not, perhaps, be out of order to proceed, at once, to an examination of them. The first in order is the case of *Potter and another, Assignees, etc.* v. *Starkie*, of which there was no printed report at the time, but of which some notice is to be found in 4 M. and Selw. 260, and also in Mr. Selw.'s treatise on the Law of Nisi Prius. It has, however, frequently been alluded to, and generally, for the purpose of receiving a ready and easy [458] refutation,—viz. that it purported to proceed on the authority of *Cooper and another* v. *Chitty* (1 Burr., 20), whereas that authority, properly understood, is directly opposed to it. If the case of *Cooper* v. *Chitty* be founded on two principles;—1st., that the property, upon assignment, vests in the assignees from the date of the act of bankruptcy, and 2dly, (as Lord Mansfield expressly puts it in one part of his judgment,) that the taking was not lawful, because they were *then* the goods of a third person, and so there was a conversion; then is the case of *Potter* v. *Starkie* in strict accordance with *Cooper* v. *Chitty*. If, however, the latter case (never denied to be law) can only be sustained by the sheriff having had notice of the bankruptcy when he sold, then the Court of Exchequer, though they agreed in the *decision* of *Cooper* v. *Chitty*, were opposed to that part of *the reason* for the judgment, and in my humble opinion rightly. Seeing, however, that the decision in *Potter* v. *Starkie*, is of some importance, having been upon a state of facts, which completely coincides with the present, I am desirous to furnish your Lordships with the best information that can be obtained in the absence of a contemporary printed report. I happened to be counsel in the cause, and have a note taken at the time, and, what is much more material, I have a note of my friend Sir John Richardson, who was opposed to me on that occasion. From the statement in that note it appears that all the acts of the sheriff were completed before he had any notice of the bankruptcy, and before the commission was sued out. It further appears that the exemption of [459] the sheriff *before notice*, was distinctly brought before the Court, upon the plea that he acted only in pursuance of his duty; and, on the other side, the immateriality of notice was pressed, and it was even urged that the observations of Lord Mansfield were entitled to less weight on this particular point, because there was no statement in the case of any notice to the sheriff *in fact*, but that the decision may well be sustained upon the other reasoning to be found in that judgment. It has been observed, that those cases, which are supposed to be the foundation of the argument for the Plaintiff in error, were not brought under the notice of the Court of Exchequer by Sir J. Richardson, who was not in the habit of doing things imperfectly. But the protection of the sheriff under the writ was expressly urged by him, and all the cases alluded to are cited and commented upon by Lord Mansfield in *Cooper* v. *Chitty*, which was itself made the subject of most minute and laborious inquiry and comment in the Court of Exchequer; so that it seems to me impossible that they could have utterly neglected the alleged authorities upon which one principal position contended for before them was made to rest;—and the more so, if (as *I believe*) time was taken to consider the decision. The cases to which I have been alluding are, of course, *Bayly* v. *Bunning* [1 Lev. 173], *Lechmere* v. *Thorogood* [3 Mod. 236], and *Cole* v. *Davis* [1 Ld. Raym. 724], upon which the judgment of the Court of Exchequer in the case of *Balme* v. *Hutton* is made so much to rest. But if the decision of *Potter* v. *Starkie* depends and mainly upon the distinction therein taken between trespass and trover, according to the report of Sir J. Richardson, which, from his general [460] accuracy, as well as the course which the discussion took, I have no doubt whatever is correct, how can it be supposed that the second of the three cases alluded to, which turned expressly upon the form of action (trespass) had been utterly overlooked by the judges? Upon the whole, if the decision had been one at Nisi Prius only, by Mr. Baron Wood, I should have thought it entitled to much consideration, when I bear in mind that few judges, of any time, can be named better stored with legal information generally, and absolutely none, who understood better the forms of actions, and their respective limits and boundaries: but when to this is added, that the very point, recently (and recently only) so much in agitation was brought immediately and directly under the consideration of the Court, I confess

I must consider it not merely as a decision expressly in point, but, moreover, entitled to very great weight and authority.

The next case in order of time was that of *Wyat* v. *Blades* [3 Camp. 396], in 1813, Lord Ellenborough C. J., in which the same point was ruled, and trover was held to be maintainable against the sheriff. It has been remarked upon this case, that the character of the sheriff, and his liability in that form of action was unnoticed, and it is for that reason that (although there was no decision) I mention it. It appears, from the Report in 3 Campbell, 396, that this observation is well-founded; and I believe it to have been unnoticed, simply because matters of constant occurrence and continued acquiescence pass without notice or observation, or, in the words of Mr. J. Richardson already referred to, "because the **[461]** law had long been settled, and the case had frequently occurred at Nisi Prius of late years." A report, at this time of day, would have somewhat of a whimsical appearance, if the object of it was to show, that "money had and received" is the appropriate remedy where a person holds the money of another which he is bound, by law, to pay over.

The next was the case of *Lazarus* v. *Waithman*, 5 B. Moore, Easter T. 1821. The point was decided by the Common Pleas, as it had been in the Exchequer. *Price* v. *Helyar* followed in 1828 [4 Bing. 597, 1 M. and P. 541], with the same result: it is another decision upon the point in question. Lastly, came the case of *Dillon* v. *Langley*, Easter, 1831, 2 Barn. and Adolph. 131. The Report by no means gives an adequate account of the fixedness and settlement at which, in the opinion of King's Bench, the point now under consideration had arrived. I happened to be counsel in the cause, and am not likely very soon to forget what happened, particularly when I learnt, so soon after, what had occurred in the Court of Exchequer in the very Michaelmas Term following, as to the case of *Balm* v. *Hutton* [3 M. and S. 1, 9 Bing. 471]. I am far from saying that I was prepared with an argument as ingenious as that contained in the elaborate judgment pronounced by Lord Lyndhurst in the Court of Exchequer, but this I must say, that I was prepared with all the authorities, upon which reliance is therein placed: Lord Lyndhurst, however, having first stopped the counsel on the other side, plainly intimated to me that the season for discussion was past, and, accordingly, having barely noticed two of the authorities alluded to, and particularly the main story of the Plaintiff in error, **[462]** (*Bayly* v. *Bunning*,) which then produced no effect in that quarter of Westminster Hall, though it produced so much in another, within half a year, against me. I sat down unheard.

"Those decisions," as Mr. Justice Taunton observed (and I quote his words in consequence of the comment upon it), "will be found to embrace a very considerable period of time, and to have been established in succession by all the Common Law Courts in Westminster Hall; and the common practice, I believe, has been in uniform accordance therewith." And, speaking of the case now before your Lordships and of the same decisions, he added, "I dread the consequences of a decision of this Court in favour of the Plaintiff in error. Certainty is of the first importance in judicial proceedings, and the decisions during a period of sixty years ought not to be disturbed by fanciful innovations on the one hand, or the authority of some doubtful, if not obsolete, decisions on the other." I am aware that this statement has been represented as an exaggeration; if, however, the case of *Cooper* v. *Chitty* may be maintained, independent of what is said by Lord Mansfield about notice, that period, or even a larger one, will be found more appropriate and accurate than the more limited one mentioned by me at the outset.

I purposely forbear adding to the list of decisions either the case now before your Lordships, or that of *Balm* v. *Hutton* [3 M. and S. 1, 9 Bing. 471], although the judgment of the Exchequer was raised by a majority of seven judges against one. I do so, because the doubt, which has given rise to them both, was first started, I believe, in the case of *Hartly and another* v. **[463]** *Hornby*, tried at Lancaster in the Spring Assizes, 1829. That was an action for money had and received, against the sheriff, who had levied after an act of bankruptcy, but had sold the goods and paid over the proceeds before the commission issued. The question came on before the Court of King's Bench, upon a motion to enter a nonsuit; and upon the discussion then ensuing, the doubt arose, to which I have alluded, and a difference of opinion; from which cause, as I presume, the case is not reported. I have, however, procured my brief from the agent of the attorney who instructed me, and there find a very full note of

the argument. I shall not trouble your Lordships with any part of it, further than to mention that the learned counsel for the Defendant cited and expressly admitted the authority of the before-mentioned cases, establishing the liability of the sheriff in trover; and founded their argument entirely upon the fact, that the money had been paid over before notice of the bankruptcy, and that therefore that form of action could not be maintained. So settled, up to this time, was the question now proposed by your Lordships for our consideration.

I come now to the authorities which are opposed, or supposed so to be, to the long train of modern cases expressly and deliberately decided upon the point; the authorities I mean already referred to, on which the judgment of the Court of Exchequer mainly rested in the case of *Balme* v. *Hutton*, and to which, with some emphasis and appearance of assumed superiority, the title of the *older* authorities has been studiously applied. I am not aware that a case is, of necessity, better for being old; nor, I admit, is it worse,—but I make the admis-[464]-sion with a material proviso: viz. that it has not been impugned by subsequent decisions; for, if so, it is. Else, what is meant by expressions (in courts of law not unknown) of decisions over-ruled, and cases no longer law, which compose a list which it would be most inconvenient to enumerate?

The first of these old authorities is the case of *Bayly* v. *Bunning* (1 Levinz. 173), reported also in *Siderfin and Keble*), and, I may add, the only case, which purports to be in point, which has been decided by any court. To what authority this case is entitled from the state of the reports of it, how far it is impaired by the quaere in *Siderfin*, or its own intrinsic defects, I will not waste your Lordships' time by inquiring. I can make no addition to the comments which have been made by my learned brothers, with whose opinion, upon the main question, I agree. I will therefore only say, that if (and upon this point I shall endeavour to explain myself more fully hereafter) the fact of notice to the sheriff be not material, and, moreover, (as I think,) the case of *Cooper* v. *Chitty* [1 Burr. 20] may still be maintained as law, then, in my humble judgment, was this old case over-ruled very nearly three-quarters of a century ago, and remained dormant, until revived (your Lordships are to determine for what duration) by a decision of the Court of Exchequer in 1831.

The second case, *Letchmore* v. *Thorowgood* (3 Mod. 236), is not in point. It only decides that trespass will not lie in such case;—which leaves, untouched, the question, whether trover will lie or not: the distinction between them being not quite so nominal and unreal, as might be at first supposed: the [465] damages in the latter being limited by the value of the goods seized, in the former they may be, what Mr. Justice Ashurst (in a case to which I must refer) calls "vindictive." The expression must be rejected; because "vindictive" damages, in the ordinary sense of the term, cannot be heard of in courts of law; but, if it be understood to mean general damages upon the whole case, without any certain limit, the meaning may be adopted;—and that is sufficient for my purpose.

The third case is *Cole* v. *Davies* (1 Lord Raymond, 724). Your Lordships are aware of the comments which have been made by Lord Mansfield upon the authority of this report; into that discussion I decline to enter. Whether Lord Raymond was, at that time, as knowing as age ought to be, or as uninformed as youth sometimes is, I am wholly ignorant; but this I know, that it is *Nisi Prius* decision only; and (in imitation of the criticisms upon the modern decisions, as they have been called) I must add, without the slightest information of how the question was submitted to the learned judge,—whether with argument, or how much, or how little, or without any at all,—of this we have nothing. I now ask, with all respect, are these cases to be opposed to the dense body of authority arranged on the other side?

I pass on, however, to an important part of the present discussion,—I mean, the true import and bearing of the case of *Cooper* v. *Chitty*.

That Lord Mansfield did not conduct his argument throughout that judgment, without some variableness and shades of turning, I think must be admitted. From which cause it follows, that [466] the case is seized as an authority both for the Plaintiff and the Defendant in error. I am extremely anxious to bring to a test before your Lordships the question, to which side the weight of its authority ought to incline.

Upon this point, I shall first inquire, Whether there be any ground, *in fact*, for those observations which Lord Mansfield has made respecting notice to the sheriff.—

as the foundation *of the conversion?* and next, Whether, if there be no ground for those observations, the case may still be sustained?

That Lord Mansfield does say, at the conclusion of his judgment, "That the sheriff knew of the bankruptcy before the sale," and derives an inference therefrom, is most certain: but, that there is no *fact* in the case to justify that assertion, is certain also; unless, indeed, the commission sued out and assignment thereon be notice in point of law. But, *how* is such commission notice: and from what time? the day it issues—or within a week; or at what time? I am aware of no authority which establishes that a commission is evidence of itself and for itself, of the time at which it issues. This, at least, I know, that in the case of *Lee* v. *Lopez* (15 East, 230), where notice to the sheriff was considered material, the point to be ascertained, according to the language of the Court, was, not when the commission *issued*—as if imputing notice of itself—but when the sheriff *had notice* of the commission. If, then, the fact of the commission having issued was to be brought home to the sheriff, like any other fact; upon the statement of the case, *it was not.* If, then, there be no facts in the case to sustain the observations, [467] what is the result? Why, that, in my opinion, the judgment may be sustained for *other* reasons, which Lord Mansfield has given. In the report of the case in Blackstone, Lord Mansfield is made to say, "That if the sheriff had sold *immediately* after the seizure, he would have been liable." If he did say so, I think he would have said truly; but I find that it is generally considered to be an error in that report. But how stands the case in Burrows? The concluding words of Lord Mansfield, in his judgment in the case of *Cooper* v. *Chitty* [1 Burr. 20], have been quoted, and with great reliance. "The seizure here is after the act of bankruptcy, and, therefore, after the property was vested in the assignees; but that was excusable, and the sheriff shall not be made liable by relation, as a wrongdoer; the gist of this action is, the false return and sale long after the commission and assignment." Passing by the diminished weight of these remarks from the doubt suggested, whether there be any fact to sustain them, let us see what else has been said in an earlier part of his judgment in the same report. I find these words: "But the argument from these principles (cases are stated to have been commented upon, but the comments are not given,) is this, here the taking was *lawful*, and, therefore, the sheriff was bound to complete the execution by the sale. Answer: the premises are not true; and, if they were, the consequence would not follow." And then come these words, which I must think are hardly less material in a contrary direction: "The taking was not lawful, because then they were the goods of a third person." So then, the taking was unlawful; and why? because it was the taking of [468] the goods of a third person,—that is, of a person not named in the writ. And why is that unlawful? Because it is, when followed up by a sale, an unauthorized disposal of the goods of another,—which is another name for a conversion. But, beyond all this, for what purpose is notice necessary, and in what respect material? Is the property more or less in the assignees, according as there has or has not been, notice to the sheriff of attorney of the stages of the bankruptcy? Is it more or less the taking of their goods? And, accordingly, the learned and experienced counsel who argued this case at your Lordships' bar, expressly rejected the fact of notice, as wholly immaterial; and discussed the case, as if the Plaintiff in error had been fully affected by it.

If then the observations, at the conclusion of Lord Mansfield's judgment, upon which so much reliance has been placed, may be rejected, and the case is sustained without them, then must the case of *Cooper* v. *Chitty* [1 Burr. 20] be added to the authorities in favour of the Defendant in error. But if the fact of notice may be considered as existing in that case, from a commission having been sued out—and, moreover, that in order to constitute conversion in the sheriff, notice to him is necessary, though its materiality is now abandoned; still I agree with those of my learned brothers, who are of opinion that the case I am observing upon must be considered to be in favour of the Defendant in error. The late Mr. Justice Taunton (and with him several of the learned judges have coincided) thus expressed himself in the case of *Balme* v. *Hutton* [3 M. and S. 1; 9 Bing. 471]: "I am pretty clear that an opinion grew up, that the sheriff was equally answerable in both cases (*i.e.* [469] with or without notice), that from the act of bankruptcy the property vests in the assignees; and that any sale or disposition of it afterwards, without their privity, must be a wrongful conversion, by whomsoever made." I will only add, that this is

precisely the view presented to the Court of Exchequer on behalf of the Plaintiff, in the case of *Potter* v. *Starkie*. On the case of *Timbrell* v. *Mills*, already referred to, I shall trouble your Lordships with no further remarks.

The case of *Smith* v. *Milles* (1 T. R. 475), proceeds entirely upon the distinction between trespass and trover; and reference is made, in the considered judgments then pronounced, to the said cases or *Thorowgood* v. *Letchmore* [2 Mod. 236], and *Bayly* v. *Bunning* [1 Lev. 173]; and particularly, to that part of Lord Mansfield's judgment in *Cooper* v. *Chitty*, wherein he speaks of men being excused from being punishable by indictment or action as trespassers. Mr. Justice Ashurst then adds, "The Plaintiffs are not injured, as it is competent to them to recover the value of the goods by bringing the proper action of trover; but the officer shall not be harassed by this species of action, in which the jury might give vindictive damages." It must be admitted, however, that if notice be material, this case is not any authority for the present; inasmuch as the fact of notice did exist in it.

Suppose, however, that all authorities are rejected, as if they were equal, or as if there had been no decision at all, the question then must have turned upon the construction of the statutes, and chiefly of the 13 Eliz. c. 7. s. 2:—whereby the Lord Chancellor is empowered to grant a commission; and the Commissioners are to take, by their discre-**[470]**-tion, such order and directions as well with the body of the offender, as also with his lands, etc., and with his money, goods, chattels, etc., and by deed, indented and inrolled in one of the Queen's Courts of record, to make sale of the lands of the bankrupt; and also of all furniture, etc., goods and chattels, or otherwise to order the same for the true satisfaction and payment of the creditors, rate and rate alike, according to the quantity of their debts: and it is further enacted, "That every direction, order, bargain, sale, etc., shall be good and effectual in, the law to all intents and purposes, against the said offender or debtor, etc., and against all other persons claiming by, from, or under such offender, by any act or acts had, made, or done, after any such person shall become bankrupt as is aforesaid." And, (by 21 Jac. 1. c. 19. s. 1.) it is enacted, "That all and singular the aforesaid statutes and laws theretofore made against bankrupts, and for relief of creditors, shall be largely and beneficially construed and expounded for the aid and relief of the creditors of such person or persons as already be or hereafter shall become bankrupts."

These provisions are, certainly, of a sweeping nature, and were obviously intended so to be. They avoid all acts done after the bankruptcy, and they vest all the property in the assignees (since the statute 6 Anne, c. 22) by relation. "This relation (says Lord Mansfield) the statutes concerning bankrupts introduce to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed (for the old statutes consider him as a criminal) and make the sale by the **[471]** commissioners good against all persons who claim by, from, or under the bankrupt, after the act of bankruptcy, and against all executions, not seized and executed before the act of bankruptcy. Dispositions by process of law are put on the same foot with dispositions by the party." The prevailing object was, to prevent and avoid those partial, and therefore unjust, dispositions of the remnant of their fortunes; which men in desperate circumstances (as we learn from the statutes) had been in the habit of making, and which we know men, in such a situation, are likely to make;—hence the relation to which I am alluding. The case of *Carey* v. *Crisp* (1 Salk. 108), cited at the bar, for the purpose of showing that, till assignment, the property remains in the bankrupt, may well be admitted: for it is in no respect inconsistent. The question is, where the property is after the assignment—and from what date? and, upon that question, as no doubt exists, so none was attempted to be raised: the point was admitted. Consequently, as to the first requisite for maintaining the action of trover—I mean property in the goods—the case of the Defendant in error is abundantly established.

Next, as to the second requisite for supporting this action: a conversion.

Suppose it had been the case of a stranger: an indifferent person. The point, I apprehend, would have been clear;—and why? Because it would have been an unauthorised intermeddling with, or (in the language of the Court in the case of *Perkins* v. *Smith* (1 Wils, 328), when defining a conversion) "the taking upon him to dispose of the property of another:" **[472]** which is there declared to be "the tortuous act, the gist of this action."

The question, therefore, comes to this, Whether the case of the sheriff be excepted

from, or rather not included in the operation of the statutes? or, if not, whether he be protected by the peculiarity of his situation and character?

That he is not expressly excepted is clear, and has, no where, been pretended. To hold that he is so, virtually, or constructively, is more than I am prepared to do. And, herein, I beg leave to say that I do most perfectly agree with the observations of more than one of my learned brothers, as to our duty in construing and interpreting acts of parliament. I take it to be this; where the words of the act are general and comprehensive, and the object clear, nothing short of gross and manifest inconsistency with that object, or plain and palpable injustice, which must inevitably ensue from such a construction, can authorize courts of law in giving a more confined and limited meaning to such general expressions than they ordinarily and naturally import and bear. What else is restraining by inference, or varying by interpretation, but, to a certain extent, recasting and remodelling the statute, or, in other words, invading the province of the Legislature itself? What right have we to assume, that, if the object in this case was (as it was undoubtedly) for the sake of preventing those frauds which have been before alluded to, to cut matters short at and from the act of bankruptcy, some inconveniences and hardships, consequent upon the general object and prevalent design, were not foreseen and known, but neglected for the sake of what was considered to be the greater good,—the **[473]** protection of the body of creditors? Supposing the sheriff to be, not excepted from, but included in the operation of the statute of Elizabeth, and that there may be some degree of hardship (if, in truth, that can be used as any argument at all) in such interpretation; all that can be said is, that he shared the same fate with others, equally entitled to consideration, or, if the phrase be allowable, compassion. *Bona fide* payments were to be refunded; harmless and honest dealings were avoided: against which inconveniences the Legislature, as your Lordships are aware, have, very properly and consistently, granted relief; but an attempt to do the same by the courts of law would have been equally inconsistent and improper. In that relief, however, the sheriff is not included. Is he then, within the words of the statute of Elizabeth, "a person claiming by, from, or under the offender?" It has been contended, that he is not; and if, by that, it be meant to assert that he claims nothing for his own individual use and benefit, the observation is certainly not without truth; but it falls short of the purpose for which it is made. The creditor who sets the sheriff in motion, clearly claims "from" the bankrupt; the vendee, to whom the sheriff transfers the goods, claims "from or under" the bankrupt, or he gets nothing. Can I then say, that the sheriff who is so mixed up with the concerns of the bankrupt, in effectuating the claims of a party against him, and transferring the title to another from him, is to be considered, with reference to the statute, as if he stood wholly aloof from the transaction,—and, that too, when for the purposes of this action, and in order to constitute conversion in point of law, it is not necessary that any claim **[474]** should be made for the party's own emolument? This was the very point decided in the case, referred to already, of *Perkins* v. *Smith* [1 Wils. 328]; the special verdict there finding, that what was there done was by a servant, and, expressly, for the use of his master.

I come now to consider the situation of the sheriff, and how far that can, in any degree, affect the question. And surely this is not the first occasion, on which the responsibility of that officer has been heard of. That responsibility is the price which persons of figure and fortune are content to pay for distinction—one of those admirable arrangements in this country, by which men of possessions are made to contribute, in proportion to them, to the public good. I will not waste time, by enlarging upon instances: but what can be more responsible than his position with respect to bail? What more so with regard to the malversations of his subalterns, in cases even so much beyond, or out of the line of duty? This, undoubtedly, is not without compensation; and, practically, no difficulty is found in providing officers to act under him. But however that may be, the sheriff having acted with some peril of liability around him, in this instance, is no exception to or deviation from, but an illustration of, and in perfect conformity to, his usual course of duty. And how is it in cases more immediately in connection with the present, the execution of writs? If he be directed to take the goods of A., and he take those of B., he is answerable for

the mistake. The like, of course, if he takes a wrong person. In this instance he has been directed to take the goods of the bankrupt, and he has taken those of the assignee:—why should not liability follow?

[475] But maxims of the common law, "That no relation shall make that tortuous, which was lawful:" and "That relations are fictions at law, which shall do no wrong," have been quoted with some reliance. How far general maxims or sayings are found to be of much value, when they come to be applied to any particular state of facts, I will not undertake to determine. If, however, they are to be considered in the nature of rules, which have grown up under the sanction and control of courts of law, it may be reasonable that the same authority, which created them, may also apply and bend them, as to right and justice may seem meet. But how they are to be applied to the construction of an act of parliament, I am quite at a loss to perceive. The question there only is, What has been enacted? I know of no rules of law or logic either, which can have any bearing upon the subject, except such as may be supposed to aid and assist in the true interpretation of the statute, and the ascertainment of its meaning. Its provisions may be, in policy, unwise—in theory, unjust; but when a court of law fully perceives and understands what is written, it is ready to give judgment,—its duty is complete. If it be (as any proposition can be) clear that the object of the Legislature was to pursue one main end and object,—the vesting property in a certain person or persons, from a by-gone period, by relation, overlooking, or disregarding as comparatively immaterial, certain incidental inconveniences consequent upon that relation, of which, for the purposes of the present observations, the liability of the sheriff may be admitted to be one, an attempt to show that such liability ought not to exist, either by the aid of maxims of law, or any [476] other process of reasoning, is quite beside the legitimate purpose of ascertaining the intention of the Legislature. It is argument not to explain what has been done, but to prove what *ought* to have been done,—what *would* have been reasonable and what just; or, in other words, argument out of time, and out of place.

Upon the whole, upon the weight of authority, and the reason of the thing, if the question had been entirely new, I consider myself bound to give my answer in the affirmative.

Gurney B: The first question upon which your Lordships have required the opinion of the Judges, is, Whether a sheriff seizing and selling goods under a *fieri facias*, was, in December 1824, liable in an action of trover, brought by the assignees of the Defendant, in an action in which the *fieri facias* was issued, such Defendant having committed an act of bankruptcy before the seizing or selling of the goods, but no commission having issued until after such sale?

The opinion which I have formed is in favour of the affirmative.

This question depends upon the construction of the statute of 13th Eliz. cap. 7., which empowers the Lord Chancellor, by commission under the Great Seal, "to appoint persons who shall have full power and authority to take such order and direction with the body of the bankrupt, as also with his land, and also with his money, goods, chattels, wares, and merchandises, and debts wheresoever they may be found or known, and cause them to be appraised to the best value they may, and to make sale of the same, or otherwise to order the same for true satisfaction and payment of the creditors."

[477] This is a plain, clear, distinct enactment.

The first question is, What is the property of the bankrupt respecting which the Commissioners are to take order? The answer, it appears to me, must be, the property which the bankrupt had at the time he became so. The fact of his being bankrupt is not publicly known at the time when it takes place—it is ascertained at a subsequent period: a commission issues, adjudication is made, assignees are appointed; to them the bankrupt's property is assigned, and their title to the bankrupt's property relates back to the time of the act of bankruptcy.

It is, indeed, stated in the special verdict, that these were the goods of Leonard: but, by the subsequent commission of bankrupt and assignment, became the property of the Plaintiff by relation, from the act of bankruptcy.

This relation back is absolutely necessary for the prevention of fraud.

Unquestionably this often produces great hardship to individuals—if that were not known when the statute passed, it has become known in a thousand instances

since; and in particular cases the application of the rule has been restrained, not by the courts of law, but by the Legislature. Where exceptions have not been introduced, the rule has been considered as inflexible.

If the assignees have therefore a title to the property of the bankrupt, it appears to me to be a necessary consequence, that they must be entitled to follow that property whithersoever it goes, and must have a right of action against any person who converts it; otherwise it is impossible that they can make due distribution among the creditors.

In this case, at a period when the fact of the bank-[478]-ruptcy was not known (although it had taken place), the Defendant, the sheriff, who was commanded to take the goods of Leonard the bankrupt, took goods which *had* belonged to Leonard, but which had then ceased to belong to him, and were (as it was afterwards ascertained) the goods of his assignee; and he converted them.

The Defendant contends, that he is not liable to this action of trover, because he is a public officer; that he was called upon to execute the process of the law; and that at the time when he executed it, he had no reason to doubt that the goods which he found in the possession of Leonard were his property. I admit the hardship, and regret that it exists; but the Legislature has not made any exception in favour of a public officer, under these circumstances; and I think that a court of law cannot supply that omission.

This is the best opinion I can form upon the act of parliament itself; and this would be my judgment were the case *res integra*.

The next question is, Whether this act of parliament has in all times received a contrary exposition? If an act of parliament more than two centuries old, has received one uniform construction, it would, perhaps, be more safe to yield to that construction (even though it should not be quite satisfactory) than, by making a change, to unsettle the opinions and the practice of the profession and of the public.

But I do not find the stream of authority so uniform as to compel me to adopt a construction of this statute at variance with my own conviction. On the contrary, I find the cases and the practice for a period of nearly eighty years, in favour of [479] the construction which I have given: and the older cases, upon which reliance is placed for the opposite construction, appear to me to have been of doubtful authority.

The first case which is relied upon in favor of the Plaintiff in error is *Bayly* v. *Bunning* (this is reported; 1 Levinz, 173; 1 Siderfin 271; 2 Keble, 32, 33).

This case is very imperfectly and confusedly reported.

It was an action of trover; yet, if we can trust the reports, the discussion that took place would rather have induced the supposition that it had been considered to be an action of trespass. The finding of the jury, indeed, appears to have proceeded upon that supposition, for they submit the question to the Court upon the taking by the Defendant; which would have been the question if the action had been trespass, but certainly was not the question when the action was trover.

It appears, too, upon an examination of the Postea, that although the jury found the demand and refusal (which are evidence of conversion) they did not find the conversion, and the goods remained in the hands of the sheriff.

Considering the actual finding of the jury, the discussion that took place, and the imperfect reports with which we are furnished, I cannot but think that much more importance has been ascribed to this case than it deserves.

The next case is, *Letchmore* v. *Thorowgood* (3 Mod. 236), and which came on again as reported in 1 Shower, 12.

This was an action of trespass, and all that the [480] Court was called on to decide was, whether trespass would lie,—and they held that it would not.

I agree entirely with the decision in that case, that trespass would not lie. The bankrupt could not bring the action, for his property in the goods had ceased. The assignee could not bring the action, because possession, real or constructive, is necessary to sustain an action of trespass; and he had neither.

His property related back, because the statute had given it to him; but the statute had not given a relation of possession.

An action of trover was afterwards brought, and the Plaintiff again failed; and Shower, in his report, says it was decided, that having brought trespass and been defeated, trover could not now be sustained.

The Court did not decide that trover could not have been maintained if that had been brought first. Whether the Court decided rightly, that the judgment for the Defendant in the trespass was a bar to the action of trover, it is not necessary to inquire.

The next case is *Cole* v. *Davies* (Lord Raymond, 724), which at best is but a Nisi Prius case.

Lord Mansfield, in the case of *Cooper* v. *Chitty*, suggests a doubt of the correctness of the note; and if Lord Raymond, in taking his note, omitted but two words, the law laid down will be unquestionable.

If Lord Holt said, not that no action will lie, but no action of trespass will lie against the sheriff because he obeyed the writ, then this case will not [481] be inconsistent with what I conceive to be the law.

These cases appear to me to be but slender authority for deciding that the sheriff shall not be answerable for converting the property of the assignees of the bankrupt, under a warrant to levy on the goods of the bankrupt.

The last of these cases occurred in the year 1698; and there does not appear to be any thing to fill up the chasm between that case and the case of *Cooper* v. *Chitty*, which was decided in the year 1756.

The case of *Cooper* v. *Chitty* was twice argued, and Lord Mansfield, assisted by Mr. Justice Dennison, Mr. Justice Foster, and Mr. Justice Wilmot, delivered an elaborate judgment upon it.

It is reported by Burrow, Blackstone, and Lord Kenyon; and I think the report by Lord Kenyon is the most distinct and satisfactory.

There is no doubt that the facts of this case of *Cooper* v. *Chitty*, differ from the facts in the case before your Lordship, inasmuch as the conversion was after the bankruptcy; but the value and the importance of the case consists in this, that the whole doctrine upon the subject of bankruptcy being amply discussed, Lord Mansfield illustrated with great perspicuity the distinction between trover and trespass,—a misapprehension respecting which had before existed; and the Court decided that the sheriff would not be liable to an action of trespass, but that he was liable to an action of trover, where the act of bankruptcy over-reached the execution.

The case is further valuable for this reason, that the preceding cases of *Bayly* v. *Bunning*, *Letchmore* v. *Thorowgood*, and *Cole* v. *Davies*, were brought under the consideration of the Court; and [482] so far as either of them can be considered as militating against the doctrine then laid down by the Court, they were over-ruled.

I think that the reasoning of Lord Mansfield is sound and convincing—that he has made the true distinction between trover and trespass; and it is certain that that solemn decision received the universal assent of Westminster Hall. It appears from the declaration of Mr. Justice Burrough, in the case of *Lazarus* v. *Waithman* [5 B. Moore. 19], that when he entered into the profession he found it settled and established law.

That is confirmed by the case which occurred next after the case of *Cooper* v. *Chitty*, in 1772; the case of *Hitchin* v. *Campbell*, reported in 2 Blackstone, 779 and 827, and 3 Wilson, 304.

It appears that in that case the assignees had first brought an action of trover against the sheriff for a conversion of the bankrupt's goods, in which they had failed; and they afterwards brought an action against the sheriff for money had and received, that money being the produce of the goods sold under the execution; and the Court decided that, inasmuch as the Plaintiff had had judgment against him in the action of trover, he could not after that maintain an action for money had and received.

In the report in Wilson, it is stated, that at the trial of the present action, it was proved that Anderson committed an act of bankruptcy before the 9th of March, to wit, in February. This was necessary to over-reach the execution. From this, I think, that the inference is, that in the action of trover that proof was not given; from what followed, it could not have been on account of the [483] Judge being of opinion that the action could not be maintained; for occasion is taken by Lord Chief Justice De Grey—an able, learned, and accurate lawyer—to declare the law to be that which had been laid down by the Court of King's Bench, in the case of *Cooper* v. *Chitty*.

The report in Blackstone is this:

"The legal effect of an act of bankruptcy committed by a trader, is to put it in the power of the commissioners by relation to divest the property of the bankrupt from that time, in case a commission be afterwards issued: this relation takes place in every instance, but three excepted, by statutes 1 Jac. 1., 21 Jac. 1., and 13 Geo. 2. Executions are not among these excepted cases, but are expressly declared void by the statute 21 Jac. 1., the commission being in the nature of an execution for the whole body of the credtors."

By the old acts of Henry 8th and Elizabeth, commissioners had a power of acting themselves in recovering the bankrupt's effects: afterwards it became the practice to assign, which is allowed by 1 Jac. 1. c. 15.; it was not till the 5th of Anne that assignees were directed to be chosen, which was revived by 5 Geo. 1. Yet, notwithstanding this transfer of the property by relation, the sheriff is certainly no trespasser by taking the goods in execution after the act of bankruptcy, and before the commission issued: so ruled in *Letchmore* v. *Thorowgood*, in Comb. and Shower, and in *Cooper* v. *Chitty* (1 Burr 20): but by selling, the sheriff converts the goods, and then trover is maintainable against the [484] sheriff or his vendee, or the Plaintiff in the original action.

This case occurred sixteen years after the decision in *Cooper* v. *Chitty*; and Chief Justice De Grey and the Court of Common Pleas adopt the principle laid down by the Court of King's Bench in *Cooper* v. *Chitty*, distinguishing the case of trespass from that of trover.

The next cases in order of time is, the case of *Smith* v. *Milles* (1 Term Rep., 475., in 1786). At the time that case was argued and decided there were but two judges sitting in the Court, but they were judges of great authority,—Mr. Justice Ashurst, and Mr. Justice Buller.

That was an action of trespass against the sheriff; the act of bankruptcy was on the 1st of February, and the commission on the 27th, the adjudication of bankruptcy on the 28th.

The seizure by the sheriff was upon the 23d.

The goods were sold in the middle of the month of March.

The Court was of opinion, that the action of trespass did not lie; but it declared its entire concurrence in the opinion of the judges in *Cooper* v. *Chitty*, that trover might have been maintained.

Mr. Justice Ashurst makes a long citation from the judgment of Lord Mansfield to establish both positions, and then concludes:

"The Plaintiffs (the Assignees), therefore, are not injured, as it is competent to them to recover the value of the goods by bringing a proper action, namely, an action of trover: but the officer should not be harassed by this species of action, [485] in which the jury might give vindictive damages."

The next case is *Potter* v. *Starkie*, 1807 (cited in 4 Maule and Selw. 260). The Court of Exchequer held the sheriff liable in trover, though he had seized, sold, and paid over the money before commission issued, and before any notice, saying this necessarily followed from *Cooper* v. *Chitty* [1 Burr. 20], for it was an unlawful interference with another's goods.

There is a case which has not been cited in the course of the argument; it is true it is only a Nisi Prius case, but I mention it as one of the very many that have occurred, where the law has been treated as settled. *Wilson* v. *Milner* (2 Campb. 452).

An action for money paid, and money had and received.

"On the 20th of February, 1809, the Defendant sued out a *fi. fa.* into Middlesex, upon a judgment against one J. George; and the warrant to levy £155 besides poundage, was directed to he Plaintiff, a bound bailiff of the sheriff of Middlesex: the Plaintiff made his levy, and on the 22d of February paid over the £155 to the Defendant.

"On the 1st of March, a commission of bankrupt was sued out against George, and it was found that he had committed an act of bankruptcy on the 19th of February. His assignees immediately brought an action of trover against the sheriff, and both the parties to the present suit, and recovered £152 18s. 6d. damages, together with costs, making up the sum of £216: the whole of which was paid by the bailiff to the assignees.

"It was contended on the one hand, that the [486] Plaintiff was entitled to be completely indemnified by the Defendant: and on the other, that an action could not be maintained by the bailiff to recover back even the £155, which as it could not be retained by the Defendant was money had and received to the use of the sheriff.

Lord Ellenborough: "I think the Plaintiff cannot recover on the count for money paid. Among joint tort-feazors there is neither contribution, nor implied promise of indemnity. But the £155 being paid to the Defendant, under a mistake respecting George's bankruptcy, I think it may be recovered as money had and received to the use of the Plaintiff, who was answerable for it to the assignee."

The next case in order is *Lazarus* v. *Waithman* (5 B. Moore, 312).

In this case the goods were seized and sold by the sheriff after an act of bankruptcy, but before the commission; and it was decided that trover was maintainable against the sheriff.

The case of *Bayly* v. *Bunning*, and the subsequent cases, were fully gone into: and the Court adopted the judgment of the Court of King's Bench, in *Cooper* v. *Chitty*, and *Smith* v. *Milles*, distinguishing actions of trover from actions of trespass.

The next case is *Price* v. *Helyar* (4 Bing. 597).

In this case the subject was very thoroughly discussed; and the Lord Chief Justice (now a member of your Lordships' house) pronounced the judgment of the Court, affirming the doctrine of *Cooper* v. *Chitty*, and the subsequent cases—adhering firmly to the distinction between actions of trover and actions of trespass. The only remaining case [487] is *Dillon* v. *Langley* (2 Barnw. and Adol. 131), K. B. It was decided three days after judgment in this case had been given by the Court of Common Pleas, and in conformity with it.

The cases which I have cited have the authority of nearly twenty judges, who have sat in Westminster Hall, who are not now living, and several who are now present. These cases appear to me to prove to demonstration what has been considered to be the law from the time of the case of *Cooper* v. *Chitty* until the case of *Balme* v. *Hutton;* and the judgment of the Court of Exchequer in that case was reversed in the Exchequer Chamber.

Besides the cases which have been reported, numerous cases have occurred at Nisi Prius, in which this doctrine has been held and acted upon, and no motions made for new trials on the ground of misdirection, because this has been the general opinion of the profession.

Against all this we have nothing but the plea of hardship.

It is undoubtedly true, that it is a hardship upon the sheriff, that he should be liable to an action of any kind when he has acted in ignorance and *bona fide*.

But it is part of the infirmity of human legislation, that the general rule which it prescribes will work hardship in particular cases; and it is for the Legislature to afford such relaxation of the rule as can be done with safety. This has been done from time to time with regard to this rule of relaxation, but the Legislature has not relaxed it so far as to give relief to the sheriff in this case.

The sheriff is exposed to other risks where he [488] acts equally *bona fide*. The office is an office of risk and liability; but the sheriff receives ample remuneration for his risk as well as his trouble, and he cannot take the remuneration and shake off the liability.

If he thinks that the risk is disproportioned to the remuneration, let him apply to the Legislature for relief; his risks have been materially lessened by the Legislature, his profits have not been abridged.

There is not any case of hardship upon the sheriff under the Bankrupt Law which can be compared with the case of *Glasspoole* v. *Young* (9 Barnw. and Cress. 696), which was an action of trover against the sheriff.

The Plaintiff, then a widow, had intermarried with one Mearing. The goods in question at the time of her marriage were her property. In the course of the next year a judgment, on a Warrant of Attorney, was entered up against Mearing, and a writ of *fi. fa.* issued, under which the sheriff seized the goods in the house where Mearing and the Plaintiff lived together as man and wife.

The Plaintiff believed herself to be his wife; an application was made to set aside the execution, for some supposed irregularity in which she made an affidavit as his wife. Two years afterwards she discovered that he had a former wife living. She

brought an action of trover against the sheriff, and recovered the value of the goods which he had taken.

There was in that case every ingredient that could constitute a case of *bona fides* in the sheriff, and of hardship in his being thus called upon long afterwards to pay the value of the goods which he [489] had seized and sold; but the law was inflexible. Under a warrant to take the goods of Mearing, the sheriff had taken the goods of Glasspoole; and the Court of King's Bench held that he was liable.

This case was cited in the Court below, merely for the purpose of showing the inflexibility of the rule of law, and that it was a case of even greater hardship upon the sheriff than the case at bar.

The learned counsel has pointed out that it does not entirely resemble this case, for that the fact of want of ownership in the Defendant existed at the time, although it was not known to the sheriff; but a sheriff is not much benefitted by the existence of a fact which he is unable to discover; and if he had refused to levy on these goods the judgment creditor might have attached him, because the Defendant had possession of the goods as owner, and no one but himself knew that he was not.

I do not know that the hardship upon an officer, who is well paid for his risk, is greater than that of many other persons upon whom the operation of the Bankrupt Laws is found to press, and upon whom they formerly pressed still more heavily.

The preambles to the early statutes show the unceasing jealousy of the Legislature as to the frauds of bankrupts: and one after the other recites the difficulty of keeping pace with the secret frauds and contrivances which were resorted to to defeat their creditors.

Possibly it was owing to that, that the relation back of the title of the Assignees was long allowed to prevail to an extent which worked great injustice: nevertheless, the courts of law contented themselves with expounding the law as they found [490] it; and the repeated amendments which the law has received, it has received from the Legislature.

The statutes of the 1 Jac. 1. c. 15., 21 Jac. 1. c. 19., 19 Geo. 2. c. 32., 46 Geo. 3. c. 65. have all been passed to relieve persons from the hardship occasioned by the application of this principle, the relation back of the property of the assignee, and during the pendency of this cause the Interpleader Act has extended the protection which before was given to the sheriff.

Having answered that question in the affirmative, the second question which your Lordships have proposed is, Whether such sheriff was liable, if, after seizing the goods, he had permitted them to be disposed of according to an arrangement between the Plaintiff and the Defendant in the action, without proceeding to a sale, but under which the sheriff received his poundage?

This question I answer also in the affirmative. The sheriff having seized the goods, he is to proceed to a sale, unless he becomes satisfied that the goods are not the property of the Defendant in the cause; and then it is his duty to abandon: if he abandons, he does not receive any poundage.

Permitting the goods to be disposed of according to an arrangement between the Plaintiff and the Defendant, without proceeding to a sale, I consider a conversion.

The goods were in his possession: permitting them to be disposed of appears to me to be the same thing as disposing of them himself. He cannot be permitted to say that he has not made an effectual levy, for he has received the legal remuneration for an effectual levy—for an effectual levy to the whole amount of the debt.

[491] The case of *Thomson* v. *Clerk* (Cro. Eliz. 504), decided that the sheriff, upon the writ of *fieri facias*, cannot deliver the Defendant's goods to the Plaintiff in satisfaction of his debt.

It is no part of the duty of the sheriff to step in upon the requisition of the Plaintiff with a writ as the instrument to hand over the goods to him.

His duty is clear; he is to sell, or to withdraw; if he withdraws, not having disposed of the goods or concurred in any arrangement for their disposal, he will not be liable to an action of trover, because he will not have been guilty of conversion; but if he does either the one or the other, I humbly conceive that he is liable.

Mr. J. Patterson: The first question proposed by your Lordships being limited in point of time to the month of December, 1824, which was long before the statute 6 Geo. 4. c. 16. came into operation, the answer must depend upon the construction which ought to be put upon the previous statutes as to bankrupts, particularly 13

Eliz. c. 7. The second section of that statute authorises the Commissioners to make sale of the bankrupt's goods wheresoever they may be found or known; and enacts, that what they shall do shall be good and effectual in the law to all intents and purposes gainst the said offenders or debtors, "and against all other person or persons claiming by, from, or under such offender or offenders, debtor or debtors, by any act or acts had made or done after any such person shall become bankrupt as is aforesaid."

The previous statute, 34 and 35 H. 8. c. 4., did [492] not contain any words so strong as these; and the subsequent statutes passed in the reign of James the First, in general refer to the statute of Elizabeth.

But the ninth section of 21 Jac. c. 19. provides "That all and every creditor and creditors having security for his or their several debts by judgment, statute, recognisance, specialty, with or without penalty, or having attached goods of the bankrupt, whereof there is no execution or extent served and executed upon any the lands, tenements, hereditaments, goods, and chattels, and other estate of such bankrupt, before such time as he or she shall or do become bankrupt, shall not be relieved upon any such judgment, etc. for any more than a rateable part of their just and due debts with the other creditors of the said bankrupt, without respect to any such penalty, or greater sum contained in any such judgment." This section appears to me not to affect the present question, but to have been framed with a view to do away with any distinction between debts of different denominations or degrees, and to put all creditors on an equal footing, whether they have security or not. It, however, provides that judgment creditors shall have no preference; and it follows that any execution levied after an act of bankruptcy cannot be sustained, and that any goods seised under such an execution must be dealt with by the commissioners under the 13 Eliz. c. 7. s. c.; and so it may be considered to be a legislative exposition of that statute, as applying to executions, as well as all other dispositions of a bankrupt's property.

The object of both statutes appears to have been to avoid every act affecting the bankrupt's [493] property after he has committed an act of bankruptcy, in order to ensure an equal division among his creditors; and such has always been the effect given to them by courts of law. In 1 Ves. 328, *Billon* v. *Hyde*, Lord Hardwicke says, "By the Act of Bankruptcy all the real and personal estate vested in the assignees, and the property vested in them from the time of the act committed; and that may go back to a great length of time, and it overcharges all those acts without regard to the fairness or fraud in them: so that a sale of goods by the bankrupt after the act committed is a sale of their property; and for which they may maintain trover. So it is, as to the payment of money; and this was the intent of the act of parliament, the statute of James the First, c. 19. s. 14. being, that this shall not extend to the prejudice of any debtor of the bankrupt who paid his debt after the act committed without knowing it. The relation the assignment has, does not only overcharge acts done in pais, and contracts entered into by such persons having committed an act of bankruptcy, but also acts on record and legal acts done by him, such as judgments: so that if execution is taken out after the act committed upon a judgment before, that execution is undone and set aside. It is said that the rule, founded on this act of parliament, is contrary to the general reason of the law, which says, that fictions of law and legal relations shall not enure to the injury of any one; which is a general rule invented to support the right and equity of the case. But the reason for taking this case out of that rule is plain, and the law did intend it, on this general rule, that it is [494] better to suffer a particular mischief than an inconvenience; and the Legislature foresaw there would be a particular mischief, which they cured by that proviso, but did not extend it further, because the inconvenience on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments, would put it in their power to defeat their just creditors of their debts: so, as it would be difficult commonly to find out, whether there was a mixture of fraud, the Legislature thought it better to lay down that general rule."

Lord Hardwicke here treats the relation to the Act of Bankruptcy as a positive enactment by statute, not as a mere fiction of law; perhaps his language in so treating it is not quite consistent with that which is attributed to him in *Brassey* v. *Dawson* (2 Str. 978), but I apprehend that it is the true view of the subject; and as such has been generally adopted by the Courts, and indeed by the Legislature. The subsequent

statutes, which exempt from this relation certain specified cases, recognise and confirm its general operation—as for instance, 19 Geo. 2. c. 32., as to payments in the ordinary course of trade—46 Geo. 3. c. 65., as to conveyances, contracts, and other dealings and transactions *bona fide* made and entered into more than two calendar months before the date and issuing of the commission; and more particularly 49 Geo. 3. c. 121. s. 2., as to executions *bona fide* made and levied more than two calendar months before the date and issuing of the commission. This last statute is the most important to the present question, because it seems to me to be an exposition of [495] the meaning of the second section of the statute of Elizabeth, and the 9th section of the statute of James, and to furnish a satisfactory answer to the argument raised at the bar, viz. that the sheriff does not claim "by, from, or under, such offender or debtor." It is plain that, by the 49 Geo. 3., if an execution be *bona fide* executed less than two calendar months before the commission, although in ignorance of the bankruptcy, it is not good. Why is it not? Because it is avoided by the statutes of Elizabeth and James, and the property is in the assignees by relation, under the statute of Elizabeth; which it would not be unless the persons putting it in force were considered to claim "by, from, or under," the bankrupt. The truth is, that those who enforce an execution—and the sheriff amongst them—do claim "by, from, and under," the debtor within the meaning of that statute; they claim to take the goods because they are the property of the debtor: it is only on that ground that they can claim them at all. They do not pretend to have any property in them themselves, but only to take them, as being the goods of the debtor, in order to convert them into money for the satisfaction of his debt. They claim indeed against the will, and without the consent of the debtor; but not the less "by, from, and under," him; and the clause in the statute of Elizabeth was so framed in order to exclude from its operation persons claiming the goods as their own, asserting property in them, and denying them to be the goods of the debtor.

Accordingly, it has hitherto been uniformly held, that the execution creditor is liable to the assignees in trover, if he takes part in the sale, or receives the proceeds, wherever there has been a prior act [496] of bankruptcy, unless the case be within the exemption in 49 Geo. 3. Not even a *dictum* is to be found to the contrary, and it is admitted in the fullest terms in the judgment of the Court of Exchequer, in *Balme* v. *Hutton* (2 Cr. and Jerv. 19). It is also held that a vendee of the goods at a public sale by the sheriff is liable to the assignees in trover, under the same circumstances, and for the same reason, viz. that the goods were at the time of sale the property of the assignees, although no commission had then issued; *Farrant* v. *Thompson* (5 B. and A. 826; S. C. 2 Dowl. and Ry. 1). Yet if the goods are the property of the debtor, the vendee under the sheriff is not liable to an action, although the judgment or execution under which they are seized be set aside for irregularity, *Doe* v. *Thorn* (1 M. and S. 425); or reversed on error, *Buckhurst* v. *Mayo* (Vin. Abr. Error, I b. pl. 3 and 4).

If then the creditor who puts the sheriff in motion, and the vendee who takes by sale from him, being wholly ignorant of any act of bankruptcy, are nevertheless liable in trover, in consequence of the relation enacted by the statute of Elizabeth, in order to give full effect to the bankrupt laws, what ground is there for exempting the sheriff from a similar liability? No provision to that effect is to be found in any of the statutes. If there be any such exemption, it must arise impliedly from the nature of his office and the circumstances under which he is called upon to act. Now his office is one of some profit, and of considerable risk in the taking of bail, in the execution of writs, independent of questions under the bankrupt laws, and in many other respects, to which he is exposed for the sake of the community by the common law and [497] by legislative provisions; instances of such risks are noticed in several of the judgments in the case of *Balme* v. *Hutton* (1 Cr. and Mees. 272), and in the present case of *Carlisle* v. *Garland* (2 Ibid. 31), to which I would beg to refer your Lordships, rather than repeat them tediously.

The circumstances under which he is called upon to act are often difficult in cases such as are referred to in the first question proposed by your Lordships. He is commanded by the writ to seize the goods of A., and he seizes goods in the possession of A., supposing them to be his property, and having no reason to doubt it. It turns out that A. had only a defeasible property in the goods: that, by reason of subsequent

events, they were by relation the goods of other persons from a time antecedent to the seizure; so that the sheriff, without any fault on his part, has not obeyed the writ; yet if he had refused to seize the goods, and no commission had subsequently issued, he would have been answerable in another way to the execution creditor for such refusal. This appears to be very hard; but I cannot admit that hardship is in any case in itself a sound ground for a legal decision: the utmost effect that it can properly have, as it seems to me, is to induce a doubt, and to make the mind pause before it acquiesces in a rule from which such a consequence will follow. If the argument of hardship could prevail, it surely ought to extend to the vendee, who has paid once for the goods, and has no remedy except by proof under the bankrupt's commission; whereas the sheriff has his action against the execution creditor for money had and received. *Wilson* v. *Milner* (2 Campb. 452), *Austin* v. *Ward* (1 Car. and P. 370. and 507). [498] The apparent hardship has therefore made me doubt and examine the statutes of bankrupt to see whether I could find any thing in them pointing at any distinction between the sheriff and any other person concerned in putting an execution in force against the goods of a bankrupt. I have been unable to discover any thing of the sort: and when I recollect that the Legislature has from time to time given relief in other cases of apparent hardship under the bankrupt laws, and more particularly in the year 1809, when the doctrine of the sheriff's liability in such cases was uniformly acted upon, has given relief with respect to executions more than two months before the commission, but has not then made any distinction as to the sheriff; I cannot but think that no such distinction was intended; and that, construing the statutes in their plain meaning, I am bound to say, that the property is in the assignees by relation, from the time of the act of bankruptcy, against all persons but the Crown: and that it follows of necessity that all persons who intermeddle with that property, not being within the exceptions of any of the statutes, are answerable for so doing.

Thus far I have stated my opinion upon the construction of the statutes, independent of the authorities upon this particular question. Those authorities have been cited, and commented upon so fully, in the cases of *Balme* v. *Hutton* and *Garland* v. *Carlisle*, that I do not feel myself justified in occupying your Lordships' time by again going through them. I admit that the case of *Cooper* v. *Chitty* (1 Burr. 20) is not a direct authority upon the point. But since that case there are many [499] authorities, which I need not cite, directly in point, that the sheriff is liable in trover, though not in trespass: a distinction for which, I think, I see good reason: but it is not necessary to discuss that point, since your Lordships' question is confined to the action of trover. Opposed to these are some older cases; *Cole* v. *Davies* (1 Lord Raym. 724), which is, at best but a *nisi prius* case, loosely reported; *Bayly* v. *Bunning* (1 Lev. 173; 1 Sid. 271.; 2 Keb. 32), of which case, speaking with all deference, I must say, as I have said before, that the reports of it are so confused and contradictory, that I am really unable to discover what the Court ultimately did decide, or upon what ground they decided. *Letchmore* v. *Thorougood* (3 Mod. 236.; 1 Show. 12.; Comb. 123) and *Letchmore* v. *Toplady* (1 Show. 146.; 2 Vent. 169) decided only, first, that *trespass* would not lie, and secondly, that the judgment in an action of trespass was a bar to an action of trover; neither of which decisions are in point to the present question. I by no means agree that the modern decisions have proceeded, as has been supposed, on a mistaken notion with regard to the case of *Cooper* v. *Chitty*, for I find that, in many of them, the older cases, and that of *Bayly* v. *Bunning* in particular, were cited. The preponderance therefore of authority, as to decided cases, is greatly in favour of the liability of the sheriff, and the established practice was such that the law was considered as fully settled. Still, if I was satisfied that it had been so settled upon any erroneous principle, I should be bound to say so, and to point out what I considered to be the error, in answering the question put by your Lordships; although, in [500] the Courts below I might not feel myself at liberty so to do. But for the reasons already given I think that the modern decisions are correct. The cases of *Rickett* v. *Downe* (3 Campb. 130) and *Foster* v. *Allanson* (2 Term. Rep. 479) were pressed at the bar; in which it was held, that the fact of an act of bankruptcy having been committed by Plaintiff, was no answer to an action brought by him; and the reason given was, that if the Plaintiff should recover, and the Defendant pay, under process of law, the assignees under a subsequent commission could not sue him for the same debt. How far those decisions are consistent with the provisions of the

statutes of Elizabeth and James may, perhaps, be doubted; they can, at all events, apply only to cases arising on similar facts, and do not, as it seems to me, authorise the introduction of another exception to the retrospective operation of the bankrupt laws. In answer, therefore, to your Lordships' first question, I am of opinion that the sheriff, under the circumstances therein stated, is liable to an action of trover brought by the assignees.

In answer to your Lordships' second question, I am of opinion that the sheriff having seized goods under the circumstances mentioned in the first question, and having permitted them to be disposed of, according to an arrangement between the Plaintiff and the Defendant, the action without proceeding to a sale, but under which the sheriff received his poundage, is liable in the same manner as if he had himself sold them.

I consider the sheriff to have seized under a writ of *fieri facias* against the bankrupt's goods, which **[501]** turn out to be the property of the assignees: he has permitted two persons to dispose of these goods, neither of whom had the absolute property in them. The Plaintiff in the action had no property whatever in them; the Defendant had but a defeasible property; and the sheriff, by his acts of permission and receipt of poundage, has made himself a party to the disposition of the goods of the assignees, without their authority or consent, which I have no doubt makes him liable to an action of trover.

With respect to the third question proposed by your Lordships, I presume that I ought not to offer any opinion, as I have answered the first question in the affirmative.

Alderson B.: I do not apprehend, after the very full and elaborate discussion which this case has undergone, that I should usefully occupy your Lordships' time by commenting at length on the various cases and statutes referred to in the course of this argument.

I propose, therefore, to state shortly to your Lordships the points which I consider to have been established, and the grounds on which my opinion must depend.

In the first place, I consider it as made out that upon the assignment by the commissioners, all the bankrupt's property vests in the assignees by relation from the act of bankruptcy; and that this being a relation created by the Legislature, is equivalent to a statutable enactment; that at the time of, and by the commission of, an act of bankruptcy, that property which before was the property of the bankrupt, becomes the property of others his assignees.

I am content, for this purpose, to refer your Lordships to the reasons contained in the judgment **[502]** of Mr. Baron Parke, in this case, which is to be found in 3 Tyrw. p. 746.

I entirely concur, also, with that learned judge in thinking that the sheriff, who undoubtedly claims to take the goods under the execution, only because they are the goods of the bankrupt, is a person who claims by or under the bankrupt. And where the proceedings are subsequent to the act of bankruptcy, that he claims "by or under the bankrupt, by an act done after the bankruptcy."

For if we were to confine those words to voluntary acts done by the bankrupt himself, we should, in the first place, violate their most simple and plain meaning; and secondly, the more limited construction thus adopted would equally enable the execution creditor to hold the goods, which would be contrary to the policy of the law; and thirdly, it would equally exonerate the sheriff if he acted after he had notice of the act of bankruptcy, and even of the commission itself. In addition to these reasons, I may also rely on the authority of Lord Mansfield, in *Cooper* v. *Chitty*, where he says dispositions by process of law are put on the same principle with dispositions by the party; to be valid, they must be completed before the act of bankruptcy: and of Lord Hardwicke, in *Billon* v. *Hyde* (1 Ves. sen. 328.), where he says,

"By the act of bankruptcy all the real and personal estate vested in the assignees, and the property vested in them from the time of the act committed—and that may go back to a great length of time, and it overcharges all those acts without regard to the fairness or fraud in them; so that a sale of goods by the bankrupt after the act committed is a sale of their property; for **[503]** which they may maintain trover. So it is as to the payment of money; and this was the intent of the act of parliament, the statute of Jac. I. c. 19. s. 14. being, that this shall not extend to the prejudice of any debtor of the bankrupt who paid his debt after the act committed, without

knowing of it. This relation the assignment has: it does not only overcharge acts done in *pais* and contracts entered into by such persons having committed an act of bankruptcy, but also acts on record, and legal acts done by him, such as judgments; so that if execution is taken out after the act committed upon a judgment before, that execution is undone and set aside. It is said, that this rule, founded on this act of parliament, is contrary to the general reason of the law, which says, that fictions of law and legal relations shall not enure to the wrong of any one; which is a general rule invented to support the right and equity of the case. But the reason of taking this case out of that rule is plainly this—and the law did intend it on this general rule—that it is better to suffer a particular mischief than an inconvenience: and the legislature foresaw there would be a particular mischief which they cured by that proviso; but did not extend it farther, because the inconvenience, on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments, would put it in their power to defeat their just creditors of their debts, so as it would be difficult commonly to find out whether there was a mixture of fraud:- the Legislature thought it better to lay down that general rule." And again, Lord Mansfield, in *Cooper and Another* v. *Chitty*, ex-[504]-presses himself in these words: "This relation the statutes concerning bankrupts introduced to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed (for the old statutes consider him as a criminal); they make the sale by the commissioners good against all persons who claim by, from, or under, the bankrupt after the act of bankruptcy, and against all executions not served and executed before the act of bankruptcy."

Now if this be the result of a due construction of the various statutes applicable to bankrupts, and there be no express exception in those acts of parliament in favour of the sheriff (which I take to be a conceded point), what reason is there why the Court should make an implied exception in order to avoid what is supposed to be a great hardship on this public officer. I conceive this is a question for legislative interference, and not for judicial interpretation.

If the legislature have enacted, for certain wise and convenient purposes, that this relation shall exist, and have made no express exception, the best course, as it seems to me, is to carry into effect their enactments simply and without subtle and nice exceptions to be engrafted thereon, according to our private notions of expediency and justice. Where is a limit to be drawn?

One Judge may limit his view of the hardship being such as to introduce an exception in the act of the case of the sheriff alone; another may include the execution creditor; a third, extend it to the case of an intermediate pledge; and in the end, that great object, clearness and certainty in [505] the law, will be wholly lost sight of and forgotten.

If I were at liberty to discuss the question as a legislator, I think many good and valid reasons might be given, why, for the prevention of frauds to be committed through the medium of the sheriff by creditors secretly indemnifying the officer by whom the levy is made, the law, as I take it to be at present, ought to remain; but I disclaim to discuss the question at all on that ground.

I shall, therefore, next proceed to refer to the cases which are reported in our books on this subject; because, undoubtedly, if I had found this question already settled by a course of decisions, it would have been my duty to acquiesce, even if those decisions did not agree with the view I might take of the legislative provisions on this subject.

Now, on examining these authorities, I think they will be found very strongly to support the view I have before taken.

In *Cooper* v. *Chitty*, which took place in the year 1756, the Court decided that where there was an act of bankruptcy before the seizure by the sheriff, and after that a commission and assignment, and then subsequently a sale by the sheriff, under the writ, the action of trover was maintainable, although an action of trespass would not lie. Now, there has been much argument on the point whether this decision really turns on a distinction between the actions of trespass and trover, or on the circumstances that the act of seizure was before, and the sale after, the assignment. The Judges, who have decided the cases in our books, seem to me to have adopted the former as the real ground [506] of that decision. In the earliest case on the

subject, that of *Campbell* v. *Hitchin*, which was decided by Lord Chief Justice De Grey, assisted by Mr. Justice Blackstone, who reported both that case and *Cooper* v. *Chitty*, I find it thus laid down: "Yet, notwithstanding this transfer of the property by relation, the sheriff is certainly no trespasser by taking the goods in execution after the act of bankruptcy and before the commission issued. So ruled in *Lechmere* v. *Thorowgood* and in *Cooper* v. *Chitty*. But, by selling, the sheriff converts the goods, and then trover is maintainable against the sheriff and his vendee, or the plaintiff in the execution." It may be said that this is only an *obiter dictum*. Even so, it is entitled to much weight, as showing what was considered to be the law in 1772; and this too, when we find that Mr. Justice Blackstone, who concurred in this decision, represents Lord Mansfield as having expressed himself to the like effect in *Cooper* v. *Chitty*. But that judgment contains another passage to the same effect, to which that observation does not properly apply. The facts of that case, which was an action for money had and received, were these:—On the 9th of March, 1769, the goods were levied and sold; on the 9th of April following, the commission and assignment took place. The act of bankruptcy was in February preceding. There had been previously an action of trover, in which the prior act of bankruptcy had not been proved. The Court say, "In the present case, *as there was clearly a conversion before the action of trover*, the only question could be on the property"; and this observation was unnecessary to the judgment. **[507]** The Court, therefore, clearly decide that the sale by the sheriff before the commission and assignment is a conversion sufficient to maintain trover. From that time till the case of *Potter* v. *Starkie*, decided first by Mr. Baron Wood, and afterwards confirmed by the Court of Exchequer, there are no decisions to be found in our books. *Potter* v. *Starkie* was followed by *Lazarus* v. *Waithman*, in which the so much relied on case of *Bayly* v. *Bunning* was cited without effect. There Mr. Justice Burrough says, "This point was settled before I knew Westminster Hall." Mr. Justice Richardson says, "The law has been long since settled"; and he adds, afterwards, "In the case of *Lyon* v. *Lamb* the sheriff sold under an execution before he had any intimation that an act of bankruptcy had been committed, and it was insisted that that circumstance distinguished it from *Cooper* v. *Chitty;* but the Court of Exchequer held that the property was changed and vested in the assignees by relation, from the time when that act was committed." I cite these observations to show that it can scarcely be proper to say that all these decisions proceed on a mistake as to *Cooper* v. *Chitty*. It is clear to me that they proceed on what the Judges think to be the only true ground on which *Cooper* v. *Chitty* can properly stand. *Price* v. *Hellyar* was the next case, and there also the Court adopted the same distinction. *Dillon* v. *Langley* is the last decision to which it is necessary to refer. There the point was expressly raised. *Bayly* v. *Bunning* and *Cole* v. *Davies* were both cited, and the decision was again, that, under the circumstances, trover was maintainable, though trespass would not lie.

[508] It cannot be disputed, that upon this subject the course of decisions was, for a very long period, uniform in all the courts. *Potter* v. *Starkie* was a decision of the Court of Exchequer; *Lazarus* v. *Waithman* and *Price* v. *Hellyar*, of the Common Pleas; *Dillon* v. *Langley*, of the King's Bench. These were all decisions in bank. And the same rule has, at all events, been incidentally laid down by Lord Chief Justice De Grey in *Hitchin* v. *Campbell*. A similar decision was made by Lord Ellenborough in one reported case at *nisi prius;* and, probably, by various other learned Judges, in cases in which it was treated as law too clear to be reported. For we find it so laid down in our text books; and the personal testimony of those who have led, during the last half century, the principal mercantile cases at Guildhall, is to the same effect. If even all these were erroneous, it is one of the strongest instances of the ancient maxim *communis error facit jus*.

This was the state of the authorities when the case of *Balme* v. *Hutton* was brought before the Court of Exchequer; and surely if any point could be considered as established by an uniform course of decisions, subsequent to *Cooper* v. *Chitty*, this was that point.

That case, however, was decided otherwise; and, as it is said, on the authority of cases prior to *Cooper* v. *Chitty*, I will shortly advert to these earlier decisions. The only case of trover against the sheriff is that of *Bayly* v. *Bunning*. Now, after

examining that case with attention, it appears to me not entitled to much weight. The reports of it are clearly, in many respects, incorrect. The observation on which the main reliance is placed, if made **[509]** at all by the Court, is not very applicable to the facts as they now are clearly ascertained from the special verdict. It is possible that the real point decided there was, that the mere seizure by the sheriff did not amount to a conversion, and that the Court thought that, although if an ordinary person seized property, and took possession of it, it would be a conversion; yet that in the case of the sheriff, who, in obedience to the writ, took possession of property in which the bankrupt had, at the time, a defeasible interest, such taking would not amount to a conversion. The facts of that case bear no resemblance to that now before your Lordships; for there the goods remained in the sheriff's hands at the time when the action was brought. If we are to pay no attention to the *obiter dicta* in *Hitchin* v. *Campbell*, why should we give so much weight to an *obiter dictum* in a case remarkably ill reported?

The other cases are all actions of trespass. One of them, *Letchmore* v. *Thorowgood*, is another instance of bad reporting, and was so treated by almost all the Judges in *Giles* v. *Grover*; some of them suggesting that to get a clear view of it, you must take a piece from one report and a piece from another, and so make up a sort of patchwork report of the whole. Such authorities are not surely entitled to great weight.

Cole v. *Davies* is a *nisi prius* decision of Lord Holt; and Lord Mansfield's opinion in *Cooper* v. *Chitty* is not favourable to the accuracy of that report. As to the case of *Turner* v. *Felgate*, it really does not appear to me materially to bear on the present question.

[510] Upon the whole, then, I think that if this were *res integra*, I ought to come to the conclusion on the true construction of the various provisions of the bankrupt laws, that as the property vests by relation, from the time of the act of bankruptcy, in the assignees, and not by a fiction of law, but by a positive enactment of the Legislature, for wise reasons; this relation ought to be followed out into all its natural consequences. One of these is, that the sale of this property by the sheriff is, in truth, the sale, not of the bankrupt's property, but of J. S., a stranger; and so a conversion of the property of J. S., for which he can maintain trover.

This view of the case seems to me to be supported by a long and (with the exception only of *Balme* v. *Hutton*, which has been reversed upon error brought) by an uniform course of decisions. I think, if the opinion I entertain as to the construction of the statutes was doubtful, I should be bound by this current of authority; and, therefore, I have no hesitation, when I find both authority and the true construction of the statutes concur, in answering the first question put by your Lordships in the affirmative.

As to the second question, I apprehend there is no doubt or diversity of opinion. I shall, therefore, content myself with saying, that I am of opinion it should be answered in the affirmative also.

The third question, in the view I take of the first, it is not necessary for me to answer at all. But my opinion, as to that, is, that the sheriff is liable; because he has not obeyed the writ by selling the goods in the ordinary and usual way.

[511] Bosanquet J.: Upon the subject of the first question proposed by your Lordships to the Judges, I expressed my opinion judicially in the case of *Balme* v. *Hutton*, which has been repeatedly cited in the course of this discussion; and notwithstanding the arguments which I have heard at your Lordships' bar, I am still of opinion that a sheriff is liable to be sued by the assignees in an action of trover under the circumstances supposed by the question. It is agreed on both sides that the general effect of the statutes of the 13 Eliz. c. 7. s. 2. and 21 Jac. 1. c. 19. s. 9. is to vest in the assignees the property of the bankrupt by relation from the act of bankruptcy, and that persons in general who intermeddle with the property between the act of bankruptcy and the assignment are liable to be sued by the assignees in an action of trover. Even a judgment creditor who claims under a writ of execution issued before the act of bankruptcy is liable to be sued by the assignees in that form of action, if the writ has not been executed by a seizure till after the act of bankruptcy, whether the goods were sold under the execution before or after the assignment. The relation thus established by statutory authority, which vests the property in the assignees *ex post facto*, unquestionably produces occasional

hardships of considerable magnitude; but it was adopted by the Legislature for the necessary prevention of fraud. Certain inconveniences, which might without much danger be provided for, have from time to time been obviated by particular statutes; but many still do and must remain, unless the great principle of the bankrupt laws, an equal distribution among the creditors, is to be abandoned.

Even at this time the vendee of a sheriff who [512] purchases *bona fide* under an execution executed by seizure after an act of bankruptcy, and completed by sale before the assignment, is nevertheless liable to be sued in trover by the assignees. While adverting to this point, I beg leave to correct a mistake in the opinion which I delivered in *Balme* v. *Hutton*, where I inadvertently used the word "sale" instead of "seizure;" saying that the vendee would be liable if an act of bankruptcy appeared to have been committed before the *sale*, when I ought to have said before the *seizure*.

But an exception in favour of the sheriff himself is contended for, not on account of any exemption to be found in the statutes, which are altogether silent with respect to him; but on account of the nature of his office, by which he is compellable to execute the writs intrusted to him. There is no doubt that a sheriff may, without any fault of his own, at times incur considerable hazard in the discharge of his duty: but it is the peculiar nature of his office which subjects him to this risk. Though he may sometimes suffer from it, much practical advantage accrues to the public from his responsibility. The execution of writs according to the ordinary course of practice is not undertaken by the high sheriff in person, nor by his undersheriff. It is conducted by subordinate officers in inferior situations of life, from whose conduct, unless guarded by strict responsibility, collusion may reasonably be apprehended. Accordingly, the high sheriff takes security from the undersheriff, who takes security from the bailiffs. From the discharge of their duty considerable profits arise, and there is no difficulty in finding persons willing to undertake the risk for the sake of the emolument. There can be [513] little doubt that if the seizure of goods under a writ of execution by a sheriff's officer after an act of bankruptcy, were sufficient to excuse a sale by the sheriff before assignment, the property which ought to be equally divided among the creditors, would in numberless cases be collusively disposed of to fictitious or favoured creditors, who, when sought for by the assignees would either have absconded or be found insolvent. The relation out of which this responsibility arises is created by statute: and it must be recollected that it is not the only case in which the sheriff is subjected to heavy responsibility in consequence of a statutable duty which he is compellable to execute, and in the execution of which he may be wholly without blame. The sheriff upon making an arrest is bound to discharge the Defendant upon a bail bond, if good bail are tendered; yet if the bail, who were perfectly solvent when the bail bond was taken, became insolvent in the interval between that time and the time for the appearance in Court of the Defendant, and the Defendant cannot be found, the sheriff must pay the debt. This liability operated with peculiar hardship upon the sheriff before the passing of the Uniformity of Process Act; when the arrest might have taken place at the end of Trinity term, and the time for appearance not arrive till the beginning of Winter term.

It has been suggested that the sheriff, though not expressly exempted by the terms of any statute, yet is not included within the description of persons in the statute of Elizabeth, against whom the bargain and sale of the commissioners shall be good and effectual to all intents and purposes, because he is not a person "claiming by, from, [514] or under, the bankrupt, by any act had, made, or done," after the bankruptcy. By what right then, it may be asked, does the sheriff claim any right to meddle with the property at all, unless it be by the act of the execution creditor in delivering a writ into his hands; which act of delivery takes place after the bankruptcy? The words of the statute are not confined to acts of the bankrupt himself. It is clear that the execution creditor is barred of any right to require the sheriff to levy for his debt at the time when he delivers the writ to him for that purpose. The sheriff, therefore, can derive no authority from him whose personal interference in the execution would be tortuous, and the undoubted subject of an action of trover. If the effect of the bankrupt statutes is to be confined to persons strictly claiming under the bankrupt, all tort-feasors between the act of bankruptcy and the assignment, who, without any pretence of right under the bankrupt, have interfered with and disposed of the property, will be exempt from liability to answer the assignees

in an action of trover, as well as the sheriff. But such a construction would be utterly inconsistent with the received interpretation of the bankrupt laws, and the express provision of the statute of 21 Jac. 1. c. 19. s. 9., that all those laws shall be largely and beneficially construed and expounded for the help and relief of the creditors. Here reasons, independently of authority, appear to me to afford strong ground for holding that the sheriff, as well as all other persons who do any thing between the act of bankruptcy and the assignment, which amounts to a conversion of the bankrupt's goods, is liable to an action of trover at the suit of the assignees.

[515] But decisions upon the subject, express and numerous, have taken place in all the Courts of Westminster Hall. The Courts of Exchequer, Common Pleas, King's Bench, and Exchequer Chamber, have successively declared that a sheriff under the circumstances stated in your Lordships' first question is liable in an action of trover: and if I thought the question, in the absence of all authority, more doubtful than I consider it to be, I should not feel myself authorised, in opposition to such concurrent authorities, to advise your Lordships that an interpretation adopted in so many judicial determinations, and which is not inconsistent with the language of any statute, ought to be adjudged erroneous.

I forbear to cite the cases which have been so often mentioned.

In addition to the decisions which appear in the printed reports, we learn from Mr. Justice Burrough, who was called to the bar in 1773, that the point was settled before he knew Westminster Hall: and from Mr. Justice Richardson, whose extensive practice both as a pleader and at the bar are well known, that it had been (in cases) long since settled, and had frequently occurred of late years at *Nisi Prius*.

All the decided cases above alluded to were professedly founded upon the doctrine laid down by Lord Mansfield, in *Cooper* v. *Chitty*, in 1756, and the practice which had prevailed in consequence of that doctrine. The facts in *Cooper* v. *Chitty* certainly were not identical with those stated in your Lordships' question; but the practice which obtained, and the decisions which followed that **[516]** case, have been considered as necessary consequences of the principles therein promulgated.

Lord Mansfield in that case, after stating that in an action of trover two things are necessary to be proved—property in the Plaintiff, and a wrongful conversion by the Defendant—proceeds distinctly, perhaps more distinctly than had before been done, to declare that the property of a bankrupt vests in the assignees at and from the act of bankruptcy by relation; that the sale by the commissioners is good against all persons who claim by, from, or under, the bankrupt after the act of bankruptcy, and against all executions not served or executed before the act of bankruptcy; that dispositions by process of law are put upon the same footing with dispositions by the party; to be valid they must be completed before the act of bankruptcy; that the sheriff acts at his peril, and is answerable for any mistake; that, although he may not be liable to answer as a trespasser for laying his hands upon the goods by seizure, yet that the taking is not lawful, because the goods are the property of a third person; but is nevertheless so far excusable that the sheriff shall not be made a trespasser by relation; and that if the sheriff convert the goods by a wrongful sale, he is liable to be sued in trover as well as any other person. He certainly notices, and in some degree relies upon, the conversion by sale having taken place after the commission and assignment; but if, according to Lord Mansfield, "dispositions by law are put upon the same foot as dispositions by the party;" if the vendor of the goods between the act of bankruptcy and assignment is liable to be sued by the assignees in trover for wrongful conversion; if the sheriff act at his peril **[517]** and is answerable for a mistake; and if trover be the proper remedy where the sheriff is guilty of a conversion; it seems to follow, that the sheriff who sells during the interval between the act of bankruptcy and assignment must be deemed guilty of a conversion, and be liable to an action of trover, unless an exemption founded on statute or judicial authority can be established in his favour. The sale in *Cooper* v. *Chitty* having in fact taken place after the assignment, it was natural that Lord Mansfield, after having stated the general principles to show that the excusable character of the seizure did not, as had been contended, justify a sale, should advert to the actual period of sale, which in the case before him put the question of conversion beyond all doubt. This he might think the more proper, as the special verdict in *Bayly* v. *Bunning* was not before him, and that case had been cited to show that the sheriff who had seized and

detained goods between the act of bankruptcy and the assignment was not liable in an action of trover; and also to show that the *dictum* of Lord Holt, in *Cole* v. *Davies*, which had been cited, whatever he might think of it, was not applicable to the case in judgment. If the inferences which have been drawn from the case of *Cooper* v. *Chitty* depend upon the particular circumstances, and not upon the principles which are found in it, that case is not an authority for the practice or the decisions which have followed it; and it has been argued, that the cases which preceded it are adverse to the practice and decisions which have been founded upon it.

The cases preceding it, which have been cited, are six in number: of the cases of *Turner* v. *Fel*-[518]-*gate*, and *Letchmore* v. *Thorowgood*, it is sufficient to say that they were actions of trespass, and can decide nothing with respect to the sheriff's liability in trover. *Letchmore* v. *Toplady* was indeed an action of trover, but the only question there was, whether the acquittal in a preceding action (*Letchmore* v. *Thorowgood*), which had been brought in trespass for seizing and carrying away the same goods, the causes of action being averred to be the same, was a bar to a second action in trover (see the pleadings, 2 Vent. 156) for the same cause; and, it having been determined that it was a bar, the liability of the Defendant in trover, under the circumstances of the case, did not come in question.

Thompson v. *Phillips* was an action of assumpsit, brought by assignees against an execution creditor, for money received of the sheriff under an execution, levied between the act of bankruptcy and assignment; in which the Court held that the assignees ought not to have sued in assumpsit for the money, but in trover for the goods. Whether the action of trover should have been brought against the sheriff who levied, or against the creditor who received the money, but who does not appear to have interfered with the goods, the Court does not say. If trover for the goods could be maintained against the execution creditor, it would hardly be contended, at the present day, that he might not be sued, for the proceeds, in an action of money had and received.

Bayly v. *Bunning* [I Burr. 20] was an action of trover against the sheriff, who seized the goods after an act of bankruptcy and before the assignment, un-[519]-der a writ which was antedated, and refused to deliver them after demand made. The only question in that case was, whether the taking, that is the seizure under the writ, was lawful. The sheriff detained the goods but did not sell them. After the assignment, the special verdict finds a demand and refusal; which, it is well known, do not amount to a conversion: consequently, unless the seizure itself was a conversion, the sheriff could not be liable in trover. The special verdict stated, that if the taking was lawful, the Jury found for the Defendant, if not, for the Plaintiff; and the Court held that the issue was found for the Defendant; for the taking, by virtue of the writ, was in their opinion lawful. This is exactly the doctrine of Lord Mansfield. The mere taking possession by the sheriff is excusable, if he do no more; but if he proceed to sell or otherwise to dispose of the goods, it is a conversion, for which he is answerable in trover: and this is consistent with the observation often made, that the sheriff may apply to the Court for time to return the writ, which implies that, having taken possession of the goods under the writ, his merely keeping them in *custodiâ legis* till the return of the writ, for the purpose of ascertaining to whom the goods belong, would not be deemed a conversion. It also agrees with the opinion delivered by Lord Ellenborough, in *Wyatt* v. *Blades* (3 Campb. 396), which was an action of trover against a sheriff for seizing in execution, and carrying to a broker, goods of a bankrupt, after a secret act of bankruptcy, but before the commission, which goods continued at the broker's unsold, [520] in consequence of a notice to the sheriff not to sell. His Lordship says, "Had the goods not been removed, it would have been difficult to say there was any conversion; but I think the removal of them, after an act of bankruptcy, is a sufficient conversion to maintain the action, notwithstanding the subsequent notice." There are many other authorities,—*e. g. Solomon* v. *Dawes*, 1 Esp. N.P.C. 83.; *Green* v. *Dunn*, 3 Camp. 215., note; Bulstrode, 312.; Dict. per Coke C. J., 2 B. and P. 464.; Dict. per Chambre J., 2 B. and B. 449.,—to show that reasonable hesitation, in a doubtful case, to deliver goods upon demand, does not amount to a conversion.

If the case of *Bayly* v. *Bunning* be urged as an authority for holding any imputed conversion by the sheriff, except the seizure, excusable, it may be answered,

that nothing but the seizure occurred in that case before the assignment; and it is not contended that an act of the sheriff amounting to a clear conversion, such as a sale after the commission and assignment, would not subject him to an action of trover.

The only remaining authority, prior to that of *Cooper* v. *Chitty*, is *Cole* v. *Davies* (1 Ld. Raym. 724), which was an action, not against the sheriff, but against assignees of bankrupt, in which Lord Holt is reported to have said, at *Nisi Prius*, that if the sheriff seizes and sells goods of a bankrupt, after the bankruptcy and before commission, the assignees may maintain trover against the vendee, but no action lies against the sheriff. This gratuitous observation, ascribed to Lord Holt at *Nisi Prius*, was entirely [521] beside the cause in hand, which was an action against assignees, apparently brought to recover from them goods sold to the Plaintiff, under an execution before the bankruptcy, and collusively left in the bankrupt's possession. Whether the observation be or not correctly reported, it is not supported by any preceding known authority, and it was treated by Lord Mansfield as a loose note of what was said *obiter*, having a manifest reference to *Bayly* v. *Bunning*, which, it has been seen, does not support it: that case having turned altogether upon the seizure under the writ, no sale, or other disposal of the goods, having taken place before the commission.

The *dicta* of many Judges, commencing as early as 1772, and several passages from practical writers, have been referred to, for the purpose of showing the prevailing impression in Westminster Hall, soon after *Cooper* v. *Chitty*, in 1756, and long prior to the case of *Potter* v. *Starkie*, in 1807; but unless it can be clearly established, from an examination of the authorities before *Cooper* v. *Chitty*, that they are at variance with those which have since taken place, I humbly apprehend that the latter decisions, considering their number and the weight of authority which they carry with them, ought to prevail. Upon your Lordships' first question, therefore, I am humbly of opinion that a sheriff seizing and selling goods under a *fieri facias* was, in December 1824, liable in an action of trover, brought by the assignees of the Defendant, in the action in which the *fieri facias* was issued, such Defendant having committed an act of bankruptcy before the seizing and selling of the goods, but no commission having issued until after such sale.

[522] Your Lordships have been pleased to inquire, secondly, if the first question be answered in the affirmative, then, whether such sheriff was liable, if, after seizing the goods, he had permitted them to be disposed of according to an arrangement between the Plaintiff and the Defendant in the action, without proceeding to a sale, but under which the sheriff received his poundage. In answer to which second question, I am humbly of opinion that he was liable.

If, by proceeding to a sale in the ordinary course of executing the writ, he would be guilty of a conversion, he would not be less guilty in allowing a proceeding to take place between other persons, by which the goods seized, under the writ, were tortuously disposed of, and taking a profit in the shape of poundage upon such proceeding.

Your Lordships inquire, thirdly, if the first question be answered in the negative, then, whether such sheriff was liable, if, instead of selling the goods, he had concurred in an arrangement between the Plaintiff and the Defendant in the action, under which the goods were delivered to the Plaintiff in the action, in satisfaction of his demand, the sheriff receiving his poundage. Upon this third question, I am humbly of opinion that however excusable the sheriff may have been in seizing and selling the goods between the act of bankruptcy and the assignment, in the ordinary course of his supposed duty, yet, that by concurring in an arrangement for the delivery to the Plaintiff of the goods in his custody under the writ, in a manner not authorised by the writ, he loses every right to avail himself of the character of sheriff, and subjects himself to answer for any conversion, in the [523] same manner as those to whose wrongful act he has made himself a party.

A removal of goods for the purpose of sale under the writ, though no sale actually take place, is a conversion, according to the doctrine of Lord Ellenborough in *Wyatt* v. *Blades* [3 Camp. 396], before referred to. Consequently, an actual delivery of the goods to the execution creditor in satisfaction of his debt without sale, if wrongful, must, *à fortiori*, amount to a conversion.

A writ of *fieri facias* in December, 1824, would, according to the law and practice then in force, have been tested of the preceding Michaelmas term, and returnable in Hilary term following; by which the sheriff would be commanded to cause to be made of the Defendant's goods a certain sum of money for debt and costs, and to have that money before the Court at the return day, to render to the Plaintiff, and to have then there that writ. If, instead of pursuing the directions of the writ, and levying the money, the sheriff, after taking the goods of the Defendant, delivered them, or voluntarily allowed them to be delivered, without sale, to the Plaintiff in the execution, he took upon himself to dispose of the goods in a manner not authorised by law. The receipt of the poundage, which he might have lawfully taken upon a levy of the money, shows the connection of the sheriff with the transaction, but it cannot have the effect of converting an irregular and extra official disposal of the goods into a regular levy of debt and costs by virtue of the writ. It is laid down in *Langdon* v. *Wallis* (Lutw. 181), that the law requires of sheriffs a strict **[524]** execution and observance of the King's writ directed to them; wherefore it was adjudged in *Waller* v. *Weedale's* case (Noy. 107), that if the sheriff levy goods upon a *fieri facias*, and afterwards pay the Plaintiff with his own proper money, still he cannot detain the goods; and, for the same reason, it had also been adjudged, that a sheriff cannot deliver the goods taken by him upon a *fieri facias*, to the Plaintiff in satisfaction of his debt; for which last position was cited, as in point, *Thompson* v. *Clerk* (Cro. Eliz. 504. Noy, 55. S.C.), and *Beaty* v. *Sampson* (2 Vent. 93).

So Holt C. J. says, in *Pullen* v. *Purbeck* (1 Ld. Raym. 346), upon an *elegit* the sheriff may deliver goods to the party; but not upon *fieri facias*. And the practical books, Dalton, Impey, and Tidd, repeat the same rule.

In departing from the official course, the sheriff acts at his peril: and if the goods wrongfully delivered to the Plaintiff in the execution, turn out in the event to have been the goods of the assignees, the sheriff, like every other person, must be answerable in trover for his wrongful conversion; though he may, on account of the nature of his office, have been excusable for the act of taking possession. For these reasons I am humbly of opinion that the sheriff was liable, under the circumstances stated in your Lordships' third question, as well as under those stated in the first and second.

Bolland B.—My Lords. In offering my reasons to your Lordships for answering the first question proposed to the Judges in the negative, it **[525]** will be obvious to your Lordships, that as my view of this matter remains unchanged, it will be difficult for me to avoid in some degree following the same train of argument, I adopted in the Court of Exchequer Chamber, in delivering my opinion upon the writ of error brought on the judgment of the Court of Common Pleas upon the special verdict found upon the trial of this cause. As the opinions of the Judges in the Court of Exchequer Chamber are fully given in the books of reports, I shall consider it my duty to compress into as small a compass as possible the observations I have to submit, and not to occupy more of the time of this house than the importance of the question necessarily requires. The claim of a Plaintiff in an action against a sheriff rests upon a statutory provision, by which the property of a bankrupt at the time of his bankruptcy is subjected to the operation of a commission against him. The case of *Balme* v. *Hutton* was decided in Michaelmas term, in the second year of the late King, in the Court of which I am a member, after a most anxious consideration of all the cases that are to be found in the books that are authorities upon this question. An elaborate judgment was delivered by the learned Lord Chief Baron, as the unanimous opinion of the Court; and I might rely upon that decision as governing the present question, did I not know that a great difference of opinion exists in the minds of the Judges respecting it.

The late stat. 6 Geo. 4. c. 16., by which the law of bankruptcy is now regulated, though it differs in some parts from former acts, furnishes no ground for a difference of construction with reference to the question before me. The cases, therefore, that **[526]** have arisen on former statutes are to be looked upon as authorities.

A sheriff is a ministerial officer: he acts in the execution of his duty, in obedience to a command of one of the superior Courts of Justice: the proceeding is not for his benefit; it is in the King's name: the property at the time of the seizure is in the bankrupt.

Such being the state of things, it does appear to me very great injustice to make this public officer a wrong doer, in consequence of subsequent events, over which he has no control whatever. It is only by relation therefore that he can be made so.

Let me examine the law as to the doctrine of relation. It is laid down in 3 Coke, 29. b., that "no relation should make that tortuous which was lawful, for relations were fictions of law which shall never do wrong." Ventris J. says, "Relations shall not do wrong to strangers; they are fictions in law which are always accompanied with equity" (2 Vent. 200). In speaking of the relation of the act of bankruptcy, Mansfield C. J. observes, "It is in all cases extremely hard, in some cases extremely shocking, and is not to be carried farther than we are compelled." If the sheriff acts honestly, is it not enabling relation to do wrong to extend it to this public officer? and shall this injustice be done to benefit those to whom a degree of negligence may be imputed in not issuing a commission immediately after the act of bankruptcy was committed? But it is said, this hardship upon a sheriff cannot operate in his favour, and instances are adduced in which the law holds him answerable

[Volume XI. of Bligh, N. S. breaks off at this point. The remainder of the judgment is given in 4 Clark and Finnelly at page 760.]

REPORTS OF CASES heard in the House of Lords, on Appeals and Writs of Error, and decided during the Sessions 1827-1830. By P. Dow and C. Clark, Barristers-at-Law. Vol. I.

ENGLAND.

(Court of Chancery.)

DUFFIELD and Another,—*Appellants*; HICKS and Others,—*Respondents*.

[Mews' Dig. xv. 326; S.C. 1 Bli. N.S. 497 (*Duffield* v. *Elwes*); 1 Sim. and St. 239. Applied in *Porter* v. *Walsh* (1895), 1 I.R. 284; affirmed (1896) 1 I.R. 148. Adopted in *Cassidy* v *Belfast Banking Co.*, 1887, 22 L.R. Ir. 68 at p. 76. Considered in *In re Dillon, Duffin* v. *Duffin*, 1890, 44 Ch. D. 76 at pp. 82, 83.]

A father, in contemplation of speedily approaching death, wishing to make a larger provision for a daughter than he had done by his will, delivers or causes to be delivered to her a bond and a mortgage security for a certain sum of money, and a mortgage security for another sum of money. This is a good *donatio mortis causâ*, and the heir or executor is bound to give effect to the intent of the donor. *Per* Eldon (Earl of). "This is the first absolute decision on the question."

The original suit in this case was instituted, October 1821, in the Court of Chancery, for the purpose of obtaining the judgment of the Court upon several questions arising out of the various dispositions made by George Elwes, late of Marcham Park, in the county of Berks, of different parts of his property, by way of settlement, gift, and testamentary arrangement. [2] A very material question, arising out of the will of Mr. Elwes, is still depending; but it is unnecessary, for the present purpose, to enter into any detail of facts and circumstances beyond those which are connected with the particular point which has been decided in this case, or part of the case.

It appeared that Emily Frances, only child of Mr. Elwes, had in 1810, without the knowledge of her father, intermarried at Gretna with the appellant Duffield; and that her father, although soon after reconciled to her, did not by his will, which was made in March 1811, make such a liberal provision for his daughter as he would otherwise have done. But towards the close of his life he became desirous of making a further provision for his daughter: and therefore he, on the 1st of September 1821, in immediate prospect of death, delivered or caused to be delivered, before witnesses and in his presence, by way of *donatio mortis causâ*, a bond, and a mortgage security upon certain premises belonging to Sir Edwin Bayntun Sandys for a sum of £2927, and a mortgage security on the same premises for a sum of £30,000, with intent to transfer to his said daughter the absolute right, upon his death, to the money secured by such bond and mortgage deeds. Mr. Elwes died on the following day. It was taken for granted here that the securities were properly delivered; and the only question was, whether the delivery of such mortgage

securities by way of *donatio mortis causâ*, could, according to law, transfer to the donee the interest so secured.

The bill was filed against the executors and trustees (among other parties) of the deceased Mr. Elwes, and prayed, among other things, "that the said *donatio mortis causâ* to Mrs. Emily Frances Duffield of the [3] said bond and mortgage securities might be established, and that she might be declared entitled to the said bond and mortage deeds, and to the monies secured thereby, and to all benefit thereof; and that the defendants, William Hicks and Henry Chambers, as executors and trustees of the testator, Mr. Elwes, might be decreed to execute proper instruments, to enable Mrs. Duffield, or those claiming in her right, to receive the monies due and to become due on the said bond and mortgages respectively, and to obtain the full benefit of the said securities; and that Mrs. Duffield, or those claiming in her right, might be at liberty to sue in the name of said Hicks and Chambers, in any action or suit to be brought against the obligor in the said bond, and the mortgagor in the said mortgages."

The cause came on for hearing before the Vice-Chancellor, who, on the 17th April 1823, pronounced a decree, the only material part of which for the present purpose is the declaration, "that the said Court being of opinion that a mortgage security cannot by law be given by way of *donatio mortis causâ*, the plaintiff, Emily Frances Duffield, is not entitled to the mortgage-monies secured by the indentures of the 2d and 3d November 1820, and the said bond of the 12th July 1820; and by the said indentures of lease and release, and mortgage, dated the 11th and 12th of July 1820." Against so much of the decree as related to this *donatio mortis causâ*, the appellants appealed to the House of Lords, for the following, among other reasons assigned by Messrs. Sugden and Longley:

1st. Because a mortgage, though in fee and forfeited, still continues a mere security for a debt, and therefore, by the law of England, be made the subject [4] of a *donatio mortis causâ*, by the gift, under the requisite circumstances, of the very deed or instrument creating or securing such debt.

2ndly. Because, whatever may be the law in this respect as to a bare mortgage, the present case has circumstances which distinguish it in favour of the appellants from the gift of a bare mortgage security. For, first, the gift of the mortgage deeds of the 11th and 12th July 1820, for securing the sum of £2927 and interest, was accompanied by the gift of a bond, dated the same 12th July 1820, for the same sum; now it is clearly settled and acknowledged, that a bond may lawfully be the subject of a gift of this nature, whence it should follow by the known rule of law, that where there are several securities for the same debt, an assignment or gift by the creditor of one security is an assignment or gift of the debt; that the appellant, Mrs. Duffield, the donee of the bond, is entitled not only to the bond, of which the present decree deprives her, but to the benefit of the other security for the same debt contained in the accompanying mortgage: and, secondly, the indenture of 3d November 1820 contains not only a release by way of mortgage, but a covenant from the mortgagor to pay the sum of £30,000; this covenant is an obligation by specialty, and is precisely equivalent in law to a single bill or bond for the same sum; the deed also contains an assignment by William Taylor, Sir Charles Hamilton, and William Padwick the elder, to the donor George Elwes, of a previously existing debt of £30,000, therefore the *donatio mortis causâ* of the deed containing this obligation and this assignment must, upon the above principles, carry to the donee not only the benefit of these two securities, but also of the mortgage security for the like sum.

[5] 3dly. Because the deeds themselves unquestionably belong to the appellant Mrs. Duffield, by the gift of her father, and the testator's debts being all paid, and his legacies and annuities paid or amply provided for, there can be no equity in mere volunteers as the residuary legatees are, to take away from the donee those deeds, or to deprive an only child, an heir at law and sole next of kin, of any benefit intended her by her father, which the possession of those deeds may enable her to derive from his property.

For affirming this part of the decree, the following, among other reasons, were assigned by Messrs. Heald and West:

1st. The gift of deeds will not pass the property which is secured by them.

2dly. Whatever might have been the effect of delivering a bond where the debt

was not secured by a mortgage, yet the delivery of a mortgage deed together with the bond, prevents the gift from operating as a *donatio mortis causâ*.

Eldon (Earl of) after stating the case (June 27). The opinion of the Court below upon the question which has been raised in this case is contained in these words of the decree: "That the Court being of opinion that a mortgage security cannot by law be given by way of *donatio mortis causâ*, the appellant, Emily Frances Duffield, is not entitled to the mortgage monies secured by the indentures of the 2d and 3d days of November 1820, and the said bond of the 12th day of July 1820, and by the said indentures of lease and release and mortgage, dated the 11th and 12th of July 1820." This, then, is an expression of the opinion of the Vice-Chancellor, that a mortgage security cannot be the subject of a *donatio mortis causâ;* and if that opinion [6] was correct, it was of course unnecessary to inquire whether the bond and mortgage deeds had in fact been delivered as a *donatio mortis causâ*.

Before I proceed to say any thing farther, I owe it to the able judge who decided this case in the Court below, to state that his opinion might have been influenced by something which had dropt from myself in conversation, in which I expressed considerable doubt whether a mortgage security could by law be the subject of a *donatio mortis causâ:* that might be the case. Little seems to have been said either in the argument or the judgment upon this point. The case of a bond is, at any rate, an exception, as it may pass in consistency with the statute; but there is a difference between a bond, and a bond with mortgage securities, being the subject of a *donatio mortis causâ*, where the title cannot be complete till the death of the donor. I was at first inclined to think that as the bond alone would have passed, it would draw after it the mortgages; but then a bond with mortgage is not a gift complete, not as between the donor and donee, but as to something which, even after the death of the donor, still remains to be done by his representatives to make the donation complete. The question then is, whether the executor or the heir-at-law of the donor is not bound to complete and render effectual the donation? or in other words, whether, where there is the gift of a debt, the executor is not to be considered as a trustee; or, if it be land, whether the heir-at-law is not, by virtue of a trust raised by operation of law, liable to be called upon by the donee to make good the donation? The question is, what the donee can call on the representatives of the donor to do.

If the mortgage securities may be the subject of a *donatio mortis causâ*, it does not appear that any of [7] the parties mean to call for an issue to try whether there was, in point of fact, a *donatio mortis causâ* in this case. But in similar cases it has been common to direct an issue to try the fact.

It may be necessary to state to your Lordships what these securities are which have been the subject of the *donatio mortis causâ* in the present case. There is, first, a bond, dated the 12th July 1820, for securing a sum of £2927, and indentures of lease and release by way of mortgage, bearing date the 11th and 12th July 1820, for further securing the same sum; then there is an indenture of the 3d November 1820, reciting that a sum of £30,000 had been advanced upon mortgage security to Sir Edwin Bayntun Sandys by Taylor, Hamilton and Padwick, trustees under a marriage settlement, and that the money was further secured by bond, and a judgment recovered, and that the trustees had called in the money; after which recital the indenture witnessed, that Mr. Elwes, the donor in this case, had advanced £30,000 to Sandys to pay off this debt, and had by way of security received an assignment of the money, and of the judgment; and further witnessed, that certain premises were conveyed by way of mortgage from Sandys to Elwes, for further securing this £30,000, and there was a covenant on the part of Sandys to pay the money to Elwes.

It appears that Mr. Elwes had been offended by his daughter, but towards the close of his life was desirous to make a larger provision for her than he had before done. It appeared in evidence that Mr. Elwes, while languishing in the sickness of which he died, had, in contemplation of his approaching dissolution, expressed a wish before witnesses to give his daughter all his right and interest in the mortgages already mentioned, and the witnesses made a memo-[8]-randum of that fact. There can be no doubt, therefore, but that the father wished to make this further provision for his daughter. It afterwards occurred to the witnesses that the gift would not be complete without the actual delivery of the instruments to the daughter;

and they were accordingly delivered by one of the witnesses to the daughter in the presence of the father, who, though so near his death that he could hardly utter the word, visibly manifested his satisfaction at what had been done, and pressed the hands of his daughter while she held the papers. It is clear enough, then, that the father wished to give his daughter the money secured by these instruments by delivering them to her; but the question is, whether that intent can be effectuated according to law. It would be a much better improvement of the law than many of these improvements which have been lately talked of, if the *donatio mortis causâ* were struck out altogether; but as it is, we must deal with it the best way we can. The question here is not one as between the donor and donee, but whether the donor has given that which will bind his executor or heir-at-law; and whether, although the interest is not considered as vested by the gift itself, the donee has not a right in equity to call upon the heir-at-law or executor to give effect to the intent of the deceased.

In the case of *Snellgrove* v. *Bailey* (3 Atkins, 213, 214), Lord Hardwicke held, that the delivery of a bond as a *donatio mortis causâ* was sufficient to pass the equitable interest of the bond in the donee on the death of the intestate. The bill was brought by an administrator to have the bond delivered up, and Lord Hardwicke says, "This is not a bill brought merely on the loss of a bond. You cannot sue at law without the bond, **[9]** for though you may give evidence of a deed, at law, that is lost, yet you cannot of a bond, because you must make profert of it. The question is, whether the bond is the proper subject of such a gift; especially considering how far the courts have gone lately in assignments of *choses in action*. Put the case, if a chattel in possession had been bought by the intestate, and the bill of sale taken in a third person's name *in trust*, the legal property would have been in the trustee, and only the equitable interest in the *cestui que trust;* and yet if the *cestui que trust* had delivered it over to the defendant, that would have been a good gift by way of *donatio mortis causâ* as to the equitable property;" and thereupon his Lordship dismissed the bill.

But your Lordships will find that the real question here is not a question having reference to a bond alone, but one involving mortgages in land; and it must be determined whether the delivery of the mortgage deeds, if they were duly delivered, carries with it by way of *donatio mortis causâ* the interests which these deeds are intended to secure: and with respect to that, I take the liberty to say, that a question at present remaining under greater uncertainty than this I hardly know; and I am sorry that in the discussion of the question below, so little reference was made either in the argument or judgment to the various cases having some relation to this subject which have preceded that which is now under your Lordships' consideration. The case of *Hossel* v. *Tynte* was that of a lady who delivered a mortgage deed to the plaintiff, saying, "I deliver this as my act and deed," meaning to secure to him the sum of £1000, which was the amount of the mortgage money. Two questions were raised. 1st, Whether it was a *donatio inter vivos?* 2d, Whe-**[10]**-ther it being a gift of mortgage upon a real estate it could take effect, or was not void by the Statute of Frauds and Perjuries? The report is not very accurate; but Lord Hardwicke did not find it necessary to decide the point in that case, as the Plaintiff was residuary legatee of the lady, and as such would in any event be entitled to the money.

In the case of *Ward* v. *Turner* (2 Ves. sen. 431-7), which is the leading case on this subject, Lord Hardwicke enters at considerable length upon the consideration of donations *mortis causâ;* and there he held that certain receipts for stock were not sufficient documents of title, and that the delivery of them was not sufficient to carry the interest in the annuities. In the argument in that case the case of *Richard* v. *Syms* was quoted, in which Lord Hardwicke had held, that on the gift of a mortgage by the mortgagee to the mortgagor, by the delivery to the latter of the mortgage deeds, if that fact was proved, it was a gift of all the money due on the securities, and not within the Statute of Frauds. The question then arises, how far the Statute of Frauds may apply in this case; and Lord Hardwicke said that at least, as between mortgagee and mortgagor, the delivery to the mortgagor of the documents of debt by the mortgagee was a good gift, by way of *donatio mortis causâ*, to the mortgagor of the money secured by these documents, though the legal estate was in the mortgagee, and that this was not within the Statute of Frauds. Then, when

you consider the difference between an absolute estate in land and a mortgage, and that in the latter case the land is nothing more than a pledge for the money, the question is, whether the gift of the mortgage deeds by way of *donatio mortis causâ* is not a good gift of the money secured; and if so, whe-[11]-ther the land does not follow as an accident, and whether the person having the land is not to be considered as a trustee for the other, and bound to convey so as to supply the requisites of the Statute of Frauds?

That case (Richard and Syms) is a case of great authority, and is reported at length in Barnardiston's Chancery Cases. Lord Hardwicke there says, "In an ejectment where a title is made under a mortgage, if evidence is given that the debt is satisfied, this is considered as defeating the estate in the land which the mortgagee had; and in such cases, especially where the mortgage is ancient, the Court will presume that the money was paid at the day, and will direct the jury to give their verdict accordingly, unless it clearly appears that the money could not be paid at the day: no writing is in these cases necessary, which shows that, even at law, the debt is considered as the principal, and the land as only an accident. Equity goes further, and says, that in all cases where the debt appears to be satisfied, there arises a trust by operation of law for the benefit of the mortgagor: and that case is within the exceptions in the Statute of Frauds, which has been mentioned of trusts arising by operation of law." Lord Mansfield, then Mr. Murray, argued that case before Lord Hardwicke, and Mr. Barnardiston was at the bar at the same time, although afterwards, when Mr. Murray had become Lord Mansfield, when Mr. Barnardiston's Reports were cited, his lordship used to say, "Barnard—what you call him." In that book, however, my Lords, there are some reports of great value. The case is also reported in the Equity Cases Abridged, and reported from a valuable manuscript, as I know, from having had the assistance of a genuine report from the library of my noble friend, Lord Redesdale, [12] who searched his books and his mind to aid in coming to the just conclusion on this point. The present case, however, is the first absolute decision on the point. But, according to both the reports of the case of Richards and Syms, we have Lord Hardwicke's authority for the proposition, that "in all these cases there is a difference both in law and equity between *absolute estates in fee or for a term of years, and conditional estates for security of money.* In the case of *absolute* estates it cannot be admitted of, that *parol* proof of the gift of deeds shall convey the land itself; but where a mortgage is made of an estate which is considered only as a security for money due, the land is the *accident* attending upon the other, and when the debt is discharged, the interest in the land follows of course. At *law*, the interest in the land is thereby defeated; and in *equity*, a trust arises for the benefit of the mortgagor." And his Lordship said, "that if an obligee delivers up a bond with intent to discharge the debt, the debt will certainly be thereby discharged; and if the bond is discharged in the present case, the mortgage will be discharged with it."

In reasoning that case of Ward and Turner, and pointing out the distinction between a mere receipt and a document of title, Lord Hardwicke says,—"Suppose it had been a mortgage in question, and a separate receipt had been taken for the mortgage money—not on the back of the deed, (which was a very common way formerly, and is frequently seen in the evidence of ancient titles,) and the mortgagee had delivered over the separate receipt for the consideration money, that would not have been a good delivery of the possession, nor given the mortgage as a *donatio mortis causâ* by force of that act:"—And from this it may [13] be inferred that Lord Hardwicke was of opinion, that if there had been a good delivery of the possession by the delivery of the proper documents of title, that would have been a good *donatio mortis causâ.*

There is also a case in Burrows (*Martin* v. *Moulin,* 2 Burrows, 978) of some importance on this point. In that case, which was that of a mortgage disposed of by a mortgagee in his will as part of his personal estate, Lord Mansfield says, "A mortgage is a charge upon the land; and whatever would give the money would carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed according to the Statute of Frauds. The assignment of the debt, or forgiving it, will draw the land after it as a con-

sequence; nay, it would do it although the debt were forgiven only by parol; for the right to the land would follow notwithstanding the Statute of Frauds." This I admit is going too far, and I must humbly presume to question the accuracy of Lord Mansfield's doctrine; for the land would not pass by law, though it might in equity. But the doctrine resulting from all these cases is, that if the debt is well given, the person holding the land is in equity a trustee for the person to whom the debt is given.

Lord Hardwicke stated, as one reason why the delivery of a bond was a good gift by way of *donatio mortis causâ* of the money secured by it, that the person who had possession of the bond could alone bring an action upon it—no other having the power; since in action on bond there must be a *profert*. Now, however, some of the doctrines about lost instruments had got from equity into law. However that may be, Lord **[14]** Hardwicke is clearly of opinion that the delivery of a bond as a specialty would do; and if, then, the debt is well given by the delivery of the bond, the next question is, what are we to do with the other securities which are, or not, delivered over? In the present case the bond, the assignment, the covenant and all the deeds are delivered over in such a manner that the representatives of the donor could not get at them; and the question is, whether, considering the difference between an absolute estate in land and a mortgage, the same principle does not apply in the case of a mortgage as in the case of a bond? Upon the whole, then, I am of opinion that the delivery of these securities is a good *donatio mortis causâ*, as raising a trust by operation of law; and that, as so raising a trust by operation of law, they are not within the provisions of the Statute of Frauds. What I would therefore propose to your Lordships, is to alter the decree of the 17th April 1823, in so far as it declares, "that the said Court being of opinion that a mortgage security cannot by law be given as a *donatio mortis causâ*, the appellant, E. F. Duffield, was not entitled to the mortgage monies secured by the indentures of the 2d and 3d of November 1820, the bond of the 12th July 1820, and the indentures of lease, release and mortgage of the 11th and 12th July 1820"—and to remit the cause to the Court below, with directions to proceed accordingly.

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[15] CROKER and others,—*Appellants;* MARTIN and others,—*Respondents.*

[Mews' Dig. xii. 1073; S. C. 1 Bli. N. S. 573. Followed in *Anstey* v. *Neuman*, 1870, 39 L. J. Ch. 770.]

A father by a voluntary deed conveyed certain estates to trustees upon trust to allow him the rents and profits for life; then to the use of his son, his executors, administrators and assigns. Subsequently he makes another settlement of the same premises on the marriage of the son, by which he gives up the immediate rents and profits to the son, and after some further limitations reserves the ultimate reversion to himself. Held, that the voluntary deed remained in force, in as far as it was not revoked by the subsequent marriage settlement; and that the reversion belonged to those claiming under the son, and not to those claiming under the father.

By a voluntary deed of settlement, dated the 19th May 1731, Hodder Roberts conveyed to trustees his lands of Bridgetown and Clonmore, upon trust to permit him the said Hodder Roberts to receive the rents and profits during his life, and after his death to stand possessed of the lands mentioned to the use of his eldest son Randal Roberts, his executors, administrators and assigns; and if Randal should die before attaining the age of twenty-one, to the use of his second son, etc.

On the 29th December 1739, Hodder Roberts, in consideration of the marriage of his son Randal to Mary Thrift, and of £1000 portion brought by the said Mary Thrift, made a different settlement of the same lands, conveying them to trustees in trust to permit him to receive the rents till the marriage, and after that, to permit Randal Roberts to receive the rents and profits for his own use for life, and upon other trusts **[16]** with the reversion, when these trusts should be satisfied, to Hodder Roberts.

Randal Roberts had only one daughter, who intermarried with the respondent Richard Martin, in consideration of which Randal Roberts granted them annuities to the amount of £3000 out of the lands in question, and afterwards conveyed part of them to Richard Martin for a term of 912 years, and the rest in trust for his daughter and her husband Richard Martin, and their daughter Mary Martin.

Hodder Roberts in 1749 made a will, by which, among other things he devised all his estate and interest in the lands, and bequeathed the residue of his personal estate to his daughters, Arabella and Harriet.

The question was, whether the reversionary interest reserved by Hodder Roberts in the settlement of 1739 went to those claiming under Arabella and Harriet, by force of the will of Hodder Roberts, or to those claiming under Randal Roberts by force of the voluntary deed of 1731? In order to determine this point, a bill was filed by the appellant Croker, and others claiming under Arabella and Harriet, daughters of Hodder Roberts, against the respondent Martin and others, claiming under Randal Roberts, who were in possession. This bill was filed in 1796, and in consequence of the marriages and deaths of parties nine other bills were filed at various periods, the last of which was in December 1814. On the 27th of February 1816, the bill was dismissed without costs, and thereupon the plaintiffs appealed.

Argued for the Appellants: The question is, whether the settlement of 1739 is to be taken as prevailing over the limitations in the voluntary deed of 1731, and **[17]** the case of *Cormack* v. *Trapaud* (2 Dow), decided by your Lordships upon the principle of *Doe* v. *Manning,* is in point for us. Held there, that a voluntary deed must yield to a subsequent one for valuable consideration, under statute of Elizabeth, extended to Ireland by statute Car. II.: deed 1739 here was for valuable consideration of the highest degree, proceeding on the marriage of his son with a lady who had brought him a portion. The whole together constitutes one settlement, one bargain. The father had not parted with all his interest in the estate under the settlement 1731, for he had surrendered his life interest under that settlement in favour of his son and his wife, by the deed of 1739, and the son was at least bound to make his election between the two deeds; and having taken the benefit of the deed of 1739, he must be presumed to have adopted that, and yet he now endeavoured to get rid of a part of it. Randal Roberts had repeatedly confirmed the deed of 1739, by which new interests were given to the father Hodder Roberts, on his parting with his life interest in the rents and profits which he had under the deed of 1731. Randal Roberts and his representatives having taken the benefit of the deed of 1739, they must take it altogether, and could not now reject any part of it by setting up the deed of 1731.

For the Respondents: The respondents did not question the abstract proposition of law as laid down on the other side; but the argument is, that the law does not apply in this case. The settlement of 1731 is good as against Hodder Roberts, and is broken through by the deed of 1739 only in as far as the provisions of that deed are for valuable consideration. The settlement of 1739 is not a settlement out and out of the whole in-**[18]**-terest comprised in the deed of 1731; and so far as not settled by the deed of 1739, the property still remained subject to the deed of 1731. The absolute interest was not exhausted, and the ground of their own argument is, that there was a reversion which was not exhausted by the deed of 1739. In that deed Hodder Roberts makes a limitation back to himself; but that he could not do in his own favour, because he was bound by the deed of 1731. They are contending with us for a portion of the property expressly settled on us by the deed of 1731, and which is not in substance settled by the deed of 1739; but it is not to be presumed that the settlor intended to break his faith as pledged by deed of 1731. They say we are bound to elect. Between what are we to elect? Since their own argument is, that the deed of 1739 quite puts an end to that of 1731. As to acts of confirmation, we have acted under the deed of 1739 so far as it alters the deed of 1731, but no further; and we are in possession, under the deed of 1731, of all the property, so far as it was not exhausted by the deed of 1739.

Messrs. Shadwell and Phillimore, for the Appellants; Messrs. Horne and Sugden, for the Respondents.

(2d July.) Lord Chancellor: There is evidence here that Hodder Roberts himself

considered the deed of 1731 as subsisting after the execution of the deed of 1739; and, on the whole, I am of opinion that the decree of the Court below is right.

Judgment affirmed, with £100 costs.

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[19] TAYLOR,—*Plaintiff in Error:* WILLANS,—*Defendant in Error.*

[Mews' Dig. x. 956; S. C. 1 Bli. N. S. 415.]

In an action on a penal statute, one half of the penalty to the informer, the other half to the poor of the parish; and, after verdict for the plaintiff, alleged for error, that although there are two parishes of St. James in the county of Middlesex, that of Clerkenwell and that of Westminster, the record had not distinguished which of them, but only designated "the Parish of St. James in the County of Middlesex." Held, well enough (at least after verdict), as the right parish might recover its moiety of the penalty, by showing that it was the parish in which the offence had been committed.

Action (*qui tam*) brought by Joseph Willans against Taylor, upon stat. 9 Anne, c. 14, s. 2, whereby it is enacted, "That from and after the 1st day of May 1711, any person or persons whatsoever who shall, at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose, to any one or more person or persons so playing or abetting, in the whole the sum or value of £10, and shall pay or deliver the same, or any part thereof, the person or persons so losing and paying or delivering the same, shall be at liberty, within three months then next, to sue for and recover the money or goods so lost and paid or delivered, or any part thereof, from the respective winner and winners thereof, with costs of suit, by action of debt, founded on this act, to be prosecuted in any of her Majesty's courts of record, in which actions or suits no essoign protection, wager [20] of law, privilege of parliament, or more than one imparlance shall be allowed; in which action it shall be sufficient for the plaintiff to allege that the defendant or defendants are indebted to the plaintiff, or received to the plaintiff's use, the monies so lost and paid, or converted the goods won of the said plaintiff to the defendant's use, whereby the plaintiff's action accrued to him, according to the form of this statute, without setting forth the special matter; and in case the person or persons who shall lose such money or other things as aforesaid, shall not, within the time aforesaid, really and *bona fide*, and without covin or collusion, sue and with effect prosecute for the money or thing so by him or them lost and paid or delivered as aforesaid, it shall and may be lawful to and for any person or persons, by any such action or suit as aforesaid, to sue for and recover the same, and treble the value thereof, with costs of suit against such winner or winners as aforesaid, the one moiety thereof to the use of the person or persons that will sue for the same, and the other moiety to the use of the poor of the parish where the offence shall be committed."

William Willans, who lost the money, not having sued in time, Joseph Willans brought the action.—The declaration stated, "that William Willans, on the 20th March 1822, at the parish of *St. James, in the county of Middlesex,* did, at one and the same sitting, *by playing* at a certain game called *Rouge et Noir, lose to* the said Josiah Taylor, etc. and did then and there pay to the said Josiah Taylor, etc." and so on through the several counts upon which the plaintiff, suing as well for the poor of *the parish* in which the offence was committed as for himself, recovered penalties to the amount of £680.—Error brought [21] in the Exchequer Chamber, where, in Hil. Term 1824, the judgment in B. R. was affirmed, and thereupon error brought in Parliament. Plea, as in the Court below, *in nullo est erratum.* The reasons assigned for error were these:

1st. It is essential to describe, with accuracy, the parish in which offences against the 9th of Ann, c. 14, are alleged to have been committed, otherwise the poor of that parish cannot recover the moiety of the penalties for which the verdict may be given; but it is uncertain, upon the present record, whether the offences were com-

mitted in the parish of St. James Clerkenwell, or in the parish of St. James Westminster, which are the only two parishes of St. James in the county of Middlesex.

2d. The statute of the 9th of Ann, c. 14, which is a penal statute, and must be construed strictly, extends only to the cases of parties who lose and win above £10 by playing together at any unlawful game, or by betting together on the sides or hands of persons who are playing at such unlawful game; but it is not alleged upon the present record, that William Willans and Josiah Taylor, the parties who are stated to have lost and won the money, were either playing together at any unlawful game, or were betting together on the sides or hands of persons playing at such game.

3d. No intendment can be made of that which is not expressly averred in a penal action; and it is not averred, that the said William Willans was playing at any unlawful game with the said Josiah Taylor, nor that he was playing at such unlawful game with any other person, and betting with the said Josiah Taylor, nor that he was betting with the said Josiah Taylor upon the sides or hands of any persons who were playing at such game.

[22] In support of the judgment below, the following reasons were assigned:

1st. Because the Court cannot take judicial notice of the names of all the parishes in the county of Middlesex, and cannot therefore know, as matter of law, whether there be or be not a parish called the parish of St. James in the county of Middlesex.

2dly. Because, after verdict, it must be intended that there is a parish called the parish of St. James in the county of Middlesex, in as much as the plaintiff could not have obtained a verdict without proving the offences mentioned in the declaration to have been committed in that parish.

3dly. Because the misnaming of the parish, if it be misnamed, is an error in fact, and not in law, and cannot be assigned together with other errors.

4thly. Because the misnaming of the parish, if it be misnamed, is matter of form only, and cannot by law be assigned for error.

5thly. Because it sufficiently appears by the allegation in the declaration, that the said William Willans did play with the plaintiff in error, in as much as it is averred that the said William Willans did, at one and the same sitting, by playing at *Rouge et Noir*, lose to the defendant (the plaintiff in error) a certain sum of money, which could not have been the case if he had not played with the said defendant (the plaintiff in error).

6thly. That such averment is at all events sufficient after verdict.

(7th June.) Lord Chancellor (Lyndhurst): I don't exactly understand what is meant by the terms of the assignment in error. St. James is the proper name of the parish, whether of Clerkenwell or of Westminster, and is not that all that is necessary on the record? If the money [23] should be given to the wrong parish, the right parish might recover it by showing that the offence was there committed. If the parish was not properly named, you, for the defendant below, ought to have taken advantage of it at the trial, and nonsuited the plaintiff; not having done so, you are not now entitled to take advantage of it in error. The result of the class of cases of this description is, that the proper name of the parish, St. James, or whatever else it may be, is sufficient on the record, and any thing further, such as Clerkenwell or Westminster, or whatever else it may be, is only an additional description. So that you cannot now assign this as error in fact, and *in nullo est erratum* is the proper plea. As to the other point, this is, to be sure, a penal statute, and to be construed strictly; but that is a necessary inference from the allegation in the record that the money was lost by Willans in playing *with* Taylor. As to a case of betting, that must be disposed of when it arises. But it is not this case, and, if not, it must be presumed that the money was lost by playing *with* Taylor.

Judgment below affirmed.

Lord Chancellor: Perhaps you will not ask costs in this case; considering the state of the record, and all the circumstances, you have got enough by this game at cards.

[24] STAIR, Earl of,—*Appellant;* MACGILL and Others,—*Respondents.*

[Mews' Dig. xiv. 675, S.C. 1 Bli. N.S. 662.]

Trust-fund directed by the trustees and testator to be invested after his death in the purchase of lands, to be settled on certain persons mentioned: held by the House of Lords, that after the period of twelve months from the time of testator's death, the interest of the trust-fund, until it is invested in land, shall go to those who would be successively entitled to the rents and profits of the lands when purchased; this being a rule founded on the primary intent of the testator, and resting on principles common to the laws both of England and Scotland.

John, last Earl of Stair, died upon the 1st of June 1821, without leaving heirs of his body. By a trust-disposition, dated 18th December 1815, he disponed to certain trustees, the respondents in this appeal, "all and sundry lands and heritages, (other than and excepting those contained in any deed of entail executed, or that may be executed by me,) and also, all and sundry debts and sums of money, heritable and moveable, owing to me in England or in Scotland, or elsewhere, rents of land, goods, gear, and moveable effects whatever, presently pertaining and belonging to me, or that shall pertain and belong to me, at my death, with all writs relative to the same, (excepting herefrom the furniture in my house of Culhorn:) and that in trust for the uses and purposes after mentioned;" and particularly, "*after my debts and legacies are all paid, and a sum set apart for payment of the annuities, or the same are otherwise well secured*, I appoint my said trustees and their foresaids to lay out *the residue of the trust-funds, and* [25] *interest and proceeds thereof*, in purchasing lands in the shires of Wigton or Ayr, or stewartry of Kirkcudbright, and at the sight, and with the advice and consent of the Lord President of the Court of Session, and of His Majesty's Advocate for Scotland for the time being, to annex the same to my entailed estate, by taking the rights and securities of the lands so to be purchased to the same heirs of tailzie, and under the same conditions, provisions, clauses irritant and resolutive, contained in the disposition and tailzie of my lands of Culquhasen, and others executed by me; and I appoint my said trustees and their foresaids to expede charters and infeftments thereon in favour of the heirs of tailzie, and under the conditions foresaid, and to get the dispositions thereof recorded in the register of tailzies." The trustees are then appointed, in trust for the uses and purposes contained in the trust-disposition, to be his sole executors, universal legators, and intromitters with his whole goods and gear, and other moveables falling under testament, (with and under the exceptions foresaid) and excluding all others from that office.

Besides this trust-deed, which was executed according to the forms of the Scotch law, the late Earl of Stair left a last will and testament, drawn up in the English form. This will was of a much later date, viz. 5th day of June 1819. It was also holograph of his Lordship. By this will, the testator, after making certain bequests, appoints the residue of his personal estate to be disposed of, in the following manner: "and as to all the rest, residue, and remainder of my personal estate in England, which shall not consist of real or government securities, I do direct my executors to convert the same into money, and, after payment of my just debts, to invest such money [26] in government securities; and I hereby give and bequeath all such stock, together with all other stocks, funds and securities of which I may be possessed at the time of my death, to such uses, and for such purposes, as I have, in and by a certain deed and writing, prepared according to the Scotch form, executed by me, and bearing date the 18th day of December 1815 years, declared of and concerning my personal estate; and as to all estates which, at the time of my death, shall be vested in me, upon any trusts whatsoever, or by way of mortgage, I do hereby give, devise and bequeath the same unto the same trustees, (the respondents,) according to the nature and quality thereof, upon the trusts, and subject to the equity of redemption, which, at the time of my death, shall be subsisting, or capable of taking effect therein."

The appellant was nearest heir-at-law of the late Earl both in his real and personal estate, and also his nearest heir male of tailzie and provision; and in 1822 instituted a suit in the Court of Session claiming the interest of the residuary fund,

until it should be invested in land from the time of the disponer and testator's death, relying upon the principle which had guided the decision of certain English cases,—" in which the Courts had said, that with a view to the general interest to be benefited by the will or instrument, as a rule of convenience they would take a period of twelve months from the death of the testator as a reasonable period within which the trustees or executors may have been enabled to collect the property; and that therefore at the end of the twelve months, although the land should not have been actually purchased, they would consider it, for the purposes of the will, as invested so as to give the [27]benefit to those for whom the land was to be so purchased." In February 1823 the Court of Session decided against the claim; and in March 1825, Lord Gifford being Speaker, the House of Lords affirmed the judgment, on the ground that the appellant was not entitled to the interest of the trust-fund *from the time of the testator's death*.

In April 1825 the appellant raised another action, concluding for interest of the residuary fund *from the period of twelve months after the testator's death;* and in February 1826 the Court of Session (1st Division) decided against the claim; " In respect that the testator has directed that the whole produce of the trust-estate, *both principal and interest accruing thereon*, shall be laid out in the purchase of lands; and that the present is the first attempt made in Scotland *for having any part of the trust-estate allotted to the heir, in the meantime*, under such circumstances; and also, in respect there has been no undue delay upon the part of the trustees in laying out the trust-funds, as appointed by the truster."

From this judgment Lord Stair appealed, and in May 1826 the cause was remitted to the 1st Division, with instructions to require the opinions of the rest of the Judges of the Court of Session; and these opinions, with the exception of those of Lord Eldin, Alloway and Cringletie, being adverse to the appellant's claim, judgment was, in March 1827, again given against him, and from that judgment he appealed.

The case was argued at the bar of the House of Lords, on the 15th June 1827, by Mr. Serjeant Spankie and Mr. Keay for the Appellant; and by Mr. Shadwell and Mr. Millar for the Respondents; the Earl of Eldon being Speaker.

[28] Eldon (Earl of): Out of deference to the opinion of the Court below, I propose that judgment in this case should be deferred for a short time. I have also a personal interest in that, since in giving judgment I may have to refer to some judgments of my own in the Court of Chancery; not as meaning that what is law in England should be law in Scotland, but only to see whether the principles on which these cases were decided are not such as will authorize us to say that they are principles applicable equally to the law of England and the law of Scotland. This case must be decided according to the law of Scotland; but we may look at the English cases, in order to see whether in a question of this kind the principles of the law of Scotland and of the law of England are not the same, for the purpose of enabling us to declare what is the law of Scotland upon a material point where no rule has as yet been fixed.

Lord Redesdale: I also wish to have some time for consideration, particularly as it appears from the argument in the respondent's case that a notion prevails somewhere that your Lordships are disposed to make a certain rule of English law a rule of Scotch law, merely because it is a rule of English law. No such thing was ever contemplated. The instrument is to be construed according to the intent of the late Lord Stair, which is the principle of the law of Scotland as well as of the law of England. My doubt is whether the Judges below have not added words to the disposition which are not there; such as, that none of the heirs were to have any benefit from the trust-fund until the money should be invested in land. If it had been so expressed, we must of course have followed that construction.

[29] It is a question whether the Judges below have not overlooked that which forms a rule or principle of law both in this country and in Scotland, that is, the main or primary intent of the disponer or testator; which in this case was, that the benefit of the residuary fund should go to a certain succession of heirs equally. That cannot be done consistently with the construction put upon this instrument by the Court below. This case must be decided according to the law of Scotland; and therefore I throw the English cases which have been alluded to entirely out of con-

sideration with reference to their forming any authority for our judgment in this case. These are only referred to as illustrations, as we refer to the opinions of learned men in the civil law where we have no positive rule of our own. If there were a fixed rule, we would be bound by it; but if there is none, then we may look at these cases, not as being themselves authorities by which we are bound to decide, but in order to see what have been the opinions of learned men as to the principles which ought to govern our decisions in such cases. As for the annuities, express authority is given by the disponer to set apart a sum for their payment.

(June 18.) Lord Redesdale (after stating the case): This question depends upon the true construction of a trust disposition made by the late Earl of Stair, by which he directed that the residue of a trust-fund, and interest and proceeds thereof, should be laid out in the purchase of lands which were to be settled to the same uses and upon the same conditions as his entailed estate of Culquhasen. The residuary fund was considerable, about £200,000, of which the greater part had been invested in the purchase of land; and the **[30]** question was, how the interest of the remainder was to be disposed until invested in land. The present Earl of Stair, who is both heir-at-law and heir of entail of the late Earl, by a suit in the Court of Session claimed the interest of the residuary trust-fund from the time of the death of his predecessor. The trustees defended, on the ground that nothing accrued to Lord Stair until the money should be laid out in land. In discussing this question, which came before the House when Lord Gifford was Speaker, his Lordship thought that Lord Stair was not entitled to interest from the residuary fund from the time of the death of the late Lord Stair, but that a period of twelve months from that time should be allowed to the trustees for getting in the assets and converting them into money. Lord Stair then instituted a second suit, by which he claimed the interest of the residuary fund from and after the expiration of twelve months from the time of the late Lord Stair's death; and the question is simply, what is the true construction of this trust disposition? When the cause came before this House again, your Lordships, with the advice of Lord Gifford, remitted it, in order to have the opinion of the whole of the Judges of the Court of Session, and they, with the exception of Lords Eldin, Alloway and Cringletie, were of opinion that the intention of the late Lord Stair was, that the interest and proceeds should accumulate till the money could be laid out in land, and until it was invested in land the present Lord Stair had no right to the interest of the fund; so that the question is, what is the true construction of this instrument? It appears to me that the Judges below have erroneously thought that Lord Gifford proceeded on the analogy of English law, and that this was an attempt **[31]** to transfer the English into the Scotch law. If they had any notion of this kind they were mistaken, for this is not so much a question of law as of *intent*.

The interest and proceeds were to accumulate during the period allowed to executors to get in the assets, which is twelve months here, and so it is in Scotland. No one has a claim against an executor till the end of twelve months from the death of the testator, and that time is acknowledged by the law of Scotland.

It appears to me that the true construction of this instrument is this: "I give the benefit of this residuary fund to the persons who shall from time to time become entitled to my entailed estate of Culquhasen;" and it would be almost absurd to suppose that the disponer did not mean that it should go to them equally; and yet it might happen, that from the difficulty of collecting the debts and mortgages, and from other causes, the money could not be invested in land for twenty years, or even a much longer period; so that under the construction put on the instrument by the Judges below, neither the present Lord Stair nor his successor might be entitled to any benefit whatever from the trust-fund, although it was the meaning of the disponer that the heirs should have it equally among them. If it had been said that none of the heirs have any benefit from the trust-fund until it should be laid out in land, then we must have followed that construction; and the Judges below seem to have regarded the instrument as if it had included some such words, and to have decided accordingly: but here there are no such words.

Suppose this had happened in the Queensberry Case, and that the executors had not been able to collect the assets for a period of twenty years, would the interests of Lord Stair, or any successor or successors, under **[32]** such a disposition as this, be suspended all that time? Suppose that the disposition and will had been the

subject of a long litigation, was the present Lord Stair to be precluded by that circumstance from deriving any benefit from the trust-fund? A long time might elapse before the assets could be got in, converted into money, and invested in land, owing to circumstances neither in the contemplation nor under the controul of the testator; and he cannot be supposed to have meant that persons whom he favoured should be deprived of the benefit designed for them, owing to such accidental circumstances.

Under that impression, I think the best manner of disposing of this case will be to remit it to the Court of Session, with a declaration of your Lordships opinion. This will be the best way; as when they know your opinion, they can carry the trusts into effect in conformity to that opinion, and according to the law of Scotland.

Eldon (Earl of): I agree with the noble Lord in the opinion which he has expressed; and I agree with him also, that the most expedient course will be to remit the cause to the Court below, with a declaration of the opinion of this House, and an instruction to carry the trust into execution accordingly.

I have now been employed as counsel and as judge in these Scotch causes for forty years, and I say that during all that time it was the acknowledged maxim in this house, that the determination of these causes was to be governed by principles of Scottish and not of English law; and that any attempt to assimilate the Scottish to the English law judicially in this House was to be scrupulously avoided; and that the cases were to be decided exactly as if the Judges were **[33]** sitting in the Courts in Scotland. I mention this, because an opinion seems to have prevailed somewhere, that we were acting on a different principle. That is certainly a mistake; although at the same time it must be confessed that a person accustomed to decide according to English law, may feel more influenced by the principles of English law, than one who is exclusively a Scotch lawyer. But with respect to Lord Thurlow, Lord Roslyn, and myself, the rule which we professed and acted upon, as far as human infirmity would allow, was, that these Scotch causes were to be decided upon principles of Scotch law exclusively. I agree with Lords Eldin and Alloway, both of them very learned Judges, that although the English cases referred to cannot be the ground of decision in this case, which must be decided on the principles of the law of Scotland; yet, at the same time, when we have no precedent in the law of Scotland, we may look at the principles which have governed the English decisions; not with a view to transfer the English to the Scotch law, but for the purpose of enabling us to decide according to those principles which are common to the laws both of Scotland and of England, and to every other law. There are not many cases decided in England on the principle applicable to this case. The first was certainly a very strong one, that of *Hutcheon* v. *Mannington* (4 Bro. Ch. Ca. 491 (*n*); 1 Ves. jun. 366), in which Lord Thurlow was of opinion that it was a rule of law that you are not to look solely at the particular intention of a testator, if you find that consistently with that, the main or primary intent cannot be carried into effect. He considered that as a rule not of equity generally, but as a rule derived from the intent of the testator. That was a strong case; but Lord Thurlow thought that the par-**[34]**-ticular meaning ought to be sacrificed to the primary intention. As to the case of *Sitwell* v. *Bernard* (6 Ves. jun. 520: *Stuart* v. *Bruere*, 6 Ves. jun. 529 (n)), I took great pains on that case; and in deciding upon Angerstein's will, I said that this was a rule, not an arbitrary one, but a rule derived from looking at all that was contained, as Lord Kenyon expressed it, within the four corners of the will, and collecting from thence what was the primary intent of the testator.

I do not agree with those Judges below who thought that the intent of the late Lord Stair was merely to annex property to the Culquhasen estate. I think he intended, besides, that each and every of the heirs of entail should have his share and proportion of the fund, and you must give the will the construction that will carry into effect the primary intent of the testator. If it was, then, the intention of the testator that each should have his share, the words, "to lay out the residue of the trust funds, and *the interest and proceeds thereof*, in purchasing lands, etc." ought not to prevent that intent from being carried into execution; otherwise as this is a title which may last for ever, it might turn out that not one should enjoy any portion of the interest and proceeds of this fund but the ultimate remainder-man. The rule is not a general rule of equity, but one founded on the meaning of the will, and adopted for the pur-

pose of effectuating the main or primary intent of the testator. On these grounds I agree in the proposition of the noble Lord; and I agree with him that the best mode of proceeding is to remit the cause to the Court below, with a declaration of your Lordship's opinion, that the Court of Session, which is the most proper for that purpose, may carry the trusts into execution, having regard to that opinion.

[35] HEMMING,—*Appellant*; GURREY,—*Respondent*.

[Mews' Dig. xv. 394. S. C. (*Hemming* v. *Clutterbuck*), 1 Bli. N. S. 497, 2 Sim. and S. 311 (Mews' Dig. xiv. 1764, xv. 1561). Commented on in *Wilson* v. *O'Leary*, 1872, L. R. 7 Ch. 448, at pp. 455, 456; followed in *Tuckey* v. *Henderson*, 1863, 33 Beav. 175.]

Where two testamentary papers were left by a testator: held by the Lords, affirming a decision of the Vice-Chancellor, that from a similarity of form and expression in the two instruments, and of the annuities, legacies and gifts contained in them, the latter was for the greater part, if not wholly, a substitute for the former.

The question in this case, as far as the judgment of the Lords applied to it, (there was another question below which it is unnecessary here to state,) arose upon two testamentary papers left by the testator, George Hemmings, the first of which was dated 28th May 1780, and was in these words:—

"In the name of God, Amen. I, George Hemming, of Bond-street, in the city of Westminster, goldsmith, being of perfect mind and memory, make this last will and testament: *Imprimis*, I bequeath to my dear and faithful wife, Ann Hemming, £500 sterling per annum, for her life, to be placed in and payable out of the long annuities, and to stand in her name, and in the names of my father Thomas Hemming, and my friends Thomas Ludbey and James Gurrey, in trust for the use of my wife for her life, payable half-yearly; and at her decease to my father Thomas Hemming for his life, remainder to my cousin Richard Hemming, son of my uncle George Hemming, and absolutely for his use, upon his attaining twenty-five years of age, if the forenamed parties are dead, till that time in the same trusts, the party interested to choose a new trustee upon the death of either taking place.

[36] "To Eleanor Gurrey, wife of the aforesaid James Gurrey, I bequeath £50 sterling per annum, for her life, out of the long annuities, and in the same trusts as above, remainder of the term after her death to the children of Eleanor Gurrey, by James Gurrey, share and share alike, upon their becoming of age each child to have their respective share transferred to them; but the foregoing devise is not to take place except James and Eleanor Gurrey do assign their share in an estate called the Barrow, to John Weaver and his wife, as is after directed, in the fullest manner in their power.

"To Jane Gilley and Benetta Gilley I do bequeath £50 per annum to each of them for life, in the same trusts as aforesaid; but in both instances the name of the parties intended to be benefited to stand in the bank books with the trustees; and, in case of the death of either Jane or Benetta, the deceased's interest for the remainder of the term to go to my wife absolutely and at her disposal; but in case of her death previous, then to Thomas or Richard Hemming, as before.

"To Catherine Gilley £250 sterling, provided she assigns all her interest in the Barrow to John Weaver and wife; and I recommend her to place it in the long annuities for her life, and convey it to her children, if any, as she may be married for aught I know; and if so, I hope happily, believing her deserving: To John and Mary Weaver I bequeath the share of James Gurrey, and wife Catherine Gilley, and the two shares I bought of Jane and Benetta Gilley: and I request my wife will assign her share in the Barrow estate absolutely to John and Mary Weaver, for their joint lives, and, at their decease, to their children equally; but I recommend them to sell the estate; but if so, they must place the money in the trusts aforesaid, for [37] the use of their children at their death, and when of age, or forfeit this bequest.

"To my wife's five sisters £50 each, over and above all the foregoing bequests, they giving up all papers they may hold respecting payment of money, especially Jane and Benetta.

"To my dear wife my estate at Edgware, absolutely, as she seemed fond of it; but requests she never builds there to make a residence, knowing, although she likes it now, it would not be suitable for to reside at. If she does not part with it, I recommend it to be left by her to Richard Hemming.

"I leave to Felix Vaughan, son of Samuel Vaughan, £500 in the same trust till of age, then absolutely; hoping he will be advised by my trustees.

"I leave to Thomas Laver, as some return for his father's faithful services, £500 in the same manner as I have done above to Felix Vaughan.

"To my respected friend, Alexander Baxter, esquire, a piece of plate of 100 guineas value, if he be alive at my decease.

"To Mary Mapletoft and Beatrix Pierce, each 100 guineas for their sole use and benefit.

"To my dear wife £3000 absolutely at her disposal, and to her sole use.

"To my dear father, my share of Ingatestone estate; and to him, Thomas Ludbey, and James Gurrey, my three executors, £500 each, and likewise to my wife all my household furniture, pictures, and whatever I may die possessed of, the rest and residue of all my effects, appointing her to act as trustee in conjunction with the above-named; believing firmly she will benefit and show kindness to all those she knew I esteemed, or that were deserving. I likewise bequeath my esteemed friend John Brewster, esquire, 100 guineas. If his [38] death takes place previous to mine, then equally to his children.

"As to my wife, if she does marry again, which I by no means disapprove of I hope she will gain one deserving her, and that will esteem her as she deserves; only advising her to have her fortune settled upon her and her children previous to marriage. Witness my hand this 28th of May 1780."

The other paper was as follows:

"August 26th 1780.—I, George Hemming, of Bond-street, goldsmith, being of sound mind and memory, do make and ordain this to be my last will and testament. *Imprimis*, I bequeath to my dear wife Ann Hemming, formerly Ann Gilley, so much money as will purchase £500 sterling, per annum, in the long annuities, granted by government, and the income thereof to be received by the said Ann Hemming during her life, for her own use and benefit, and, at her death, to my child or children for their own use and benefit, equally. In default of issue, then to my father Thomas Hemming, for his life, and at his death to go to my nephew Richard Hemming, for the remainder of the term, or absolutely at his disposal, when the said Ann and Thomas Hemming are both dead; the principal at my death to be placed in the names of Ann Hemming, my wife, my dear father Thomas Hemming, my valued friend Thomas Ludbey, and my worthy kinsman James Gurrey, in trust for the said Ann, or my children, and Thomas Hemming, during their lives respectively; supposed at or about £9000

"I bequeath to my nephew Richard Hemming, after the four following shares are purchased and assigned over to my executors, all the estate called the Barrow, in the county of Hereford 1000

[39] "I bequeath to John and Mary Weaver, £200 provided they assign their share and right in the Barrow estate to my executors 200

"I likewise bequeath to the said Mary Weaver £50 per annum in the long annuities, for her life, and, at her death, to the issue of her body by John Weaver; in default of issue, then at her disposal . . 900

"I bequeath to James and Eleanor Gurrey, in like manner, £200 for their share in the Barrow estate 200

"I bequeath to Eleanor Gurrey, wife of James Gurrey, £50 per annum in the long annuities, for her life, and, at her death, equally to the issue she may have by James Gurrey; in default of such issue then at her disposal 900

"To Jane Gilley I bequeath £50 per annum in the long annuities, absolutely at her disposal, in lieu of any other annuity I may have granted to her 900

" To Benetta Gilley I bequeath £50 per annum in the long annuities, at her disposal, in lieu of any other annuity I may have granted to her . £900
" To Catherine Gilley, sister of the before-named, I bequeath £300 provided she do make a good assignment of her share of the Barrow . . . 300
" To my dear wife £200 for the same purpose 200
" To my dear wife Ann Hemming I leave my estate of meadow land at Edgware in Middlesex, for her sole use and benefit, but do not recommend her to build at or to reside there; if she finds that my nephew Richard [40] Hemming is deserving, then she may leave it to him, if she approves: but if I should leave issue, then, after my wife's decease, I will and devise this estate to the said issue for ever . . . 1500
" To my dear wife, Ann Hemming, I leave my house in Tottenham Court Road 850
" I leave to my dear wife, to be paid to her within one month from my decease, £200, and desire that all the bequests that relate to her may be settled as soon as possible after my decease, in order that she may be in the receipt of her income 200
" To Felix Vaughan, my nephew, to be placed in trust till of age . . . 500
" To Richard Hemming, my nephew, in the same manner 500
" To Thomas Laver, son of Benjamin Laver, as a token of my esteem, in trust till he is of age 500
" To my respected friend Alexander Baxter, esq. a piece of plate, if he is alive, value of 100 guineas 105
" To Beatrix Pierce and Mary Mapletoft, for their sole use, 100 guineas to each 210

£18,865"

It will be observed that the concluding part of the first will was wholly omitted in the second, which contained no appointment of executors, nor any residuary bequest. Both these papers were proved in the Ecclesiastical Court by the executors named in the first of them.

[41] The suit was instituted in the Court below by the appellant, Richard Hemming, in whose behalf it was contended that the annuity of £500 given by the second instrument was an addition to, and not a substitute for the annuity, to the same amount, given by the first.

The Vice-Chancellor was of opinion, that the second instrument was made not as an addition to, but as a substitute for the first; and this he thought evident from comparing the form and expressions of the two instruments, and from the similarity of the annuities, legacies and gifts contained in them. From this decision Richard Hemming appealed to the Lords.

(June 18) Eldon (Earl of): The main question in this case is whether the appellant, Richard Hemming, is entitled to two annuities of £500 each, or only to one annuity of £500, under the will of the testator George Hemming, who left behind him two testamentary papers, in each of which an annuity of £500 was given to the appellant. The question is whether, as far as respects these annuities, the latter instrument is to be considered as an addition to, or a substitute for the former.

The regular rules applicable to the point may be found in Eden's edition of Brown's Chancery Cases. I notice that circumstance, as it has been argued that of the two instruments the one was a codicil to the other, and not a new will. Looking at all the circumstances, I do not agree with the Judge below that this is a clear case, although on the whole I join with him in the conclusion to which he has come. In all the cases of this description it is a clear rule that the internal evidence of the testator's intent, which may be [42] collected from the body of the instrument itself, is entitled to great weight. Looking, then, at these two instruments with a view to the whole contents of each, and taking the whole together, we have to consider whether the case is not such that it may be inferred that it was the testator's intent that the annuities should not be cumulative, but that the one was only a substitute for the other. The case is doubtful, but on the whole, I think the Vice-Chancellor's judgment ought to be affirmed, but without costs.

[43] AULD (Clerk),—*Appellant;* HAMILTON and others,—*Respondents.*

[See *Downie* v. *M'Lean* 1883, 11 Rettie 47.]

Finally decided that the minister of a parish partly burghal and partly landward, is *de jure* entitled to a manse under the Act 1663. (Note, case of *Moir* and *Belshes, infra* 1 Dow and Cl. p. 55).

The appellant, first minister of the united parish of Ayr and Alloway, applied to the presbytery of the district in 1814, to have a manse assigned to him in terms of the act 1663, c. 21; the presbytery decreed accordingly, and the minister having threatened the heritors with a charge of horning upon this decree, they, together with the magistrates of the burgh of Ayr, brought a suspension in the Court of Session, upon the ground, "that the ministers of Ayr being ministers of a royal burgh, *although with a landward district annexed*, have no legal claim to a manse and office-houses."

Upon report of Lord Craigie, Ordinary, and advising informations, the Second Division of the Court held, by interlocutor of May 13, 1817 (three against two), that the minister had *no* right to a manse under the act of 1663. The minister reclaimed, and the Judges ordered the papers to be laid before the Lords of the First Division, with a request to be favoured with their opinions in writing upon the question, "Whether the minister, independent of all specialties, is by law entitled to have a manse designed to him, as minister of the united parishes of Ayr and Alloway?"

The Lords of the First Division gave their opinions (7 July, 1819) in the following terms:

[44] "Present.—The Lord President, Lords Balmuto, Hermand, Balgray, Succoth, Pitmilly, Gillies, Cringletie.

"The above Judges are unanimously of opinion, that, independent of all specialties, the charger is by law entitled to have a manse designed to him, as minister of the united parishes of Ayr and Alloway.

"In point of principle, the Judges cannot see any distinction between a royal burgh having a landward parish, and burghs of barony and regality having the same. 2d. They consider the point to have been fixed by the judgment of the House of Lords in the case of *Dunfermline*, which they have always understood proceeded on the general principle."

The Judges of the Second Division however, by interlocutor of the 12th November 1819, adhered (three against two) to their previous judgment.

The minister, besides his claim under the act 1663, had alleged certain specialties in his favour, and upon these a litigation of five years duration ensued. It is unnecessary here to go into any details respecting these special circumstances, as, in the judgment above, nothing turns upon them; but it may not be improper barely to state them, since, upon them, a judgment below was given for the minister. The specialties were: 1st. That the parish was composed of the united parishes of Ayr and Alloway; that whatever might be said of Ayr, Alloway was confessedly a country parish; that the minister of every country parish in Scotland was *de jure* entitled both to a manse and a glebe; and that these rights could never be lost to the minister by that parish being united to another parish. 2d. That the parish of Ayr was at one time a parsonage; and it was an undoubted fact, that to every parsonage there was once attached both a **[45]** manse and a glebe. 3d. That the parish of Ayr had a large landward district attached to it. 4th. That there had been, from time immemorial, a glebe annexed to the benefice of Ayr, and that that glebe was still in possession of the minister. 5th. That when Alloway was a separate parish, there was also a glebe attached to the benefice; and though, after the union of the parishes, the glebe was feud out by the town of Ayr, the feu-duty still belongs to the benefice. 6th. That, at an ancient period, there was a manse attached to the parish of Ayr; and that for a long course of years the town of Ayr had paid manse-rent to the ministers of that parish. Lastly, That there was at one time a manse at Alloway.

When judgment was given below in favour of the minister upon these specialties, an objection, first suggested from the Bench, was relied upon by the magistrates and heritors; viz. that though the Court might entertain the discussion of specialties in a process originating with themselves, yet they had no power to do so in reviewing a judgment of the presbytery, which had no jurisdiction in the matter, except under

the act of 1663. The Court, on that ground, by interlocutor of 16th June 1825, suspended the letters *simpliciter*, or in other words, gave judgment against the minister. From these interlocutors of 13th May 1817, 12th November 1819, and 16th June 1825, the minister appealed to the House of Lords.

Argued for the Appellant, that the minister is clearly entitled to a manse under the act of 1663, c. 21; his parish being not exclusively a burgh, but partly burghal and partly *landward*.

The appellant's argument is strongly supported by the other provisions of the statute regarding glebes. The statute in question, like all other legislative enact-**[46]**-ments with regard to manses and glebes, combines and blends these two rights together, and evidently means that the one should be an appendage to the other, and that where there is a right to the one there shall also be a right to the other. The express provision with regard to glebes commences in these terms: "As also, that every minister (except *such* ministers of royal burroughs *who* have no right to glebes) have grass for one horse and two kine, over and above their gleib to be designed out of kirk-lands, and with relief according to the former acts of parliament standing in force." And it is farther declared, "because several kirks have no gleibs as yet designed to them, it is hereby specially provided, that in all designations of gleibs, in corporate acres in villages or towns where the heritor hath houses and gardens, the same shall not be designed, he always giving other lands nearest to the kirk."

In these provisions a distinction is expressly recognized between ministers of royal burghs who have right to a glebe, and ministers who have no such claim. It has been observed that the clause might bear another construction, and mean that ministers of royal burghs have not, *in any situation*, a right to claim glebes; and that the words "who have no right to glebes," are merely used exegetically. But this construction is distinctly excluded by the preceding expressions, "except *such* ministers of royal burroughs who," etc. The exception is thus not general, but limited: and the expressions "*such who*," are plainly Scotticisms for "*such as;*" and the whole clause, therefore, taken together, evidently implies a distinction between one class of ministers of royal burghs and another.

Accordingly Mr. Erskine observes (B. ii. tit. 10. sect. 59), that it is therein "plainly taken for granted, that every minister hath **[47]** right to a glebe, except those in *some* royal boroughs." And if any doubt could remain upon this point, it would be completely removed by the construction put upon the act by the express decisions of the Court of Session, by which it has been found, as Mr. Erskine adds, that "the ministers even of royal burghs, *where any part of the parish lies in the country*, have right to a glebe."

This was first decided in the case of *Anderson* against his *parishioners*, 17th December 1664 (Newbyth MS.), just the year after the act was passed, when its meaning must have been well understood. The case is thus reported, "Notwithstanding the ministers of country parishes, and not those of royal burghs, are, by the act of parliament, to have glebes; yet the Lords found a glebe due to the ministers of a royal burgh, *in respect the act* 21, *parliament* 1663, *only means such burghs as have no landward at all in the parish.*"

The next case in which the right of a minister of a royal burgh having a landward parish, to designation of a glebe, came under discussion, is the unreported decision of the *Heritors of Elgin*, 28th February 1769, where it is said the Court pronounced an opposite judgment to that in the case of *Anderson*. But in the subsequent case of *Fullerton* against *Richmond*, 17th December 1779 (Fac. Coll.), it was expressly observed on the Bench, that the decision in the case of *Elgin* proceeded altogether on specialties; and, accordingly, it was finally determined in the case of *Fullerton*, and has never since been questioned, that the minister of a royal burgh, having a landward parish, is entitled to a glebe.

But if the minister, in such a situation, is entitled to a glebe, he can only be so in virtue of the act 1663; and it is impossible, under the terms of that act, to draw any distinction between the right to a glebe and the right to a manse, since it has already been **[48]** shown that in this, as in all the former acts, these rights are considered by the legislature as co-extensive and relative to each other.

The case of *Williamson* and *Ramsay*, 26 March 1685, is in favour of the minister, (reported by Harcarse and Fountainhall). The case of *Thomson* and the *Heritors of*

Dunfermline, 30 June 1750, reported by Kilkerran and Falconer, is stated by the latter to have turned on a specialty. The cases of the *Heritors of Elgin* v. *Troup*, 28 February 1769, of *Mutter* v. *Earl of Selkirk*, 16 June 1784, (Fac. Coll.) with several unreported cases to which the respondents referred, were all cases of specialties; and even if it were conceded that they meant to settle the general point, they could not be argued upon as having done so, in the face of more recent judgments. In the case of *Dobie* v. *Heritors of Linlithgow*, reported in a note to the report of the Dunfermline case (*vid. post*,) it appeared that the parish of Linlithgow, like that of Ayr, consisted partly of a royal burgh, and partly of a landward parish. The minister obtained an order of presbytery for a manse; the heritors suspended, and the Court at first found the letters orderly, proceeded, reserving to the heritors their relief against the magistrates of the burgh. The magistrates having been subsequently made parties, it appeared that 100 marks yearly had been paid by them to the minister for house-mail; and the Court then found that the minister was entitled to no more than 100 marks yearly from the magistrates in lieu of manse or house, and therefore suspended the letter *simpliciter* as to the magistrates, and assoilzied the magistrates from the action of relief; but on review the Court altered that judgment, and decided in favour of the minister (5th March 1802). Then came the case of Dunfermline, 19th Nov. 1805 (Fac. Coll.), in [49] which the minister was held entitled to a manse, notwithstanding a judgment against his predecessor in 1750, which could not, however, prejudice the right of the successor, who did not represent the previous incumbent, and *nullum tempus occurrit ecclesiae*. Although it is stated in the report in Fac. Coll. that the judgment could not be held to have settled the general question, a reference to the notes* of the opinions of [50] the Judges, taken by one of the counsel in the cause, would show that the great majority of the Judges decided in favour of the minister on the general principle, and that the only diffi-

* Lord Hermand: A minister of a royal burgh having a landward parish, is *de jure* entitled to a manse. The plea of *res judicata* is inapplicable to this case. The benefice is not to be injured by what was done by a former minister. The present charger does not represent him.—Lord Craig: The only difficulty is the *res judicata*; and it ought to be got over, for the reason mentioned by Lord Hermand. The act 1663 restored the act 1649. A minister of a royal burgh having a landward parish, is entitled to a manse. Besides, there is in this case clear evidence that the minister had once a manse.—Lord Justice Clerk: Of the same opinion.—Lord Meadowbank: Cannot get over the *res judicata*. If it were not for that, I could have no doubt of the minister's right to a manse, both upon the general point and specialties.—Lord President Campbell: The act 1663 comprehends all prior enactments, 1592 among the rest. The judgment of our predecessors, with respect to manses in Borrowstoun Kirks, proceeded on a great mistake. Every parochial minister is entitled to his stipend out of the teinds; he is entitled to a glebe; and he is entitled to a manse. The act about Borrowstoun Kirks has nothing to do with parochial ministers. It appears to be Mr. Falconer's opinion, that the act 1663 did not injure the right of the minister of a royal burgh and landward parish to a manse. As to the *res judicata*: Owing to the reservation, the question is still open on some ground or another; and it will be attended to, that "several (several only) of the Lords were of opinion, that the act 1649 was left out of the act 1663 of purpose." The majority was of a different opinion; but "they agreed that the modification of £40 Scots, and the minister's accepting of the same, made it no question." It is clear, however, that the £40 Scots was only a temporary arrangement with the then incumbent; and at the time it was agreed to, that sum might be sufficient. Then, after some further remarks upon this point, he adds, If your Lordships cannot get over the *res judicata*, raise the house-mail to what is an adequate rent; make it £40 sterling, instead of £40 Scots; but I think it would be much better to give him a manse in the ordinary way. In the case of Linlithgow, the minister had also accepted of a manse-mail, and found entitled to a manse. The case there stronger against the minister.—Lord Bannatyne: Clear for the minister on the general grounds, but cannot get over the *res judicata*.—Lord Methven: Of the same opinion.—Lord Cullen: Did not hear his reason, but of opinion that the *res judicata* should be got over.—Lord Woodhouselee: Held the claim not barred by *res judicata*.

culty with some of them was the *res judicata*. The case was appealed; and the House of Lords (9th of March 1812) affirmed the judgment below in favour of the minister. The late Mr. Horner had stated, that the argument at the bar in Dom. Proc. had turned wholly on the general question, and the solicitors, Messrs. Mundell and Chalmer, had represented the decision as resting on the general principle.

The appeal came before the House under very favourable circumstances; since, if the constitution of the court below had then been what it is now, under the act 6 Geo. 4, the judgment would have been for the appellant, by a majority of 10 against 3.

Argued for the Heritors: The appellant being minister of a parish partly burghal has no right to a manse under the act 1663, cap. 21. The act of 1649, cap. 45, ordained that the heritors should build competent manses for their ministers; and then added that burghs, and the heritors of the landward part of the parish, should provide competent manses for their ministers. This act was rescinded by the act 1663, **[51]** but was again re-enacted by that statute, with the *exception* of the clause relating to burghs with landward parishes, and the omission must have been *ex consulto*. This view of the statute 1663, is supported by the decided cases. In the Dumfermline Case of 1750, reported by Lord Elchies, it was found that ministers of royal burghs had no claim to have manses assigned to them under the act 1663, even though part of the parish should be landward. So held also in the cases of the *Heritors of Elgin* v. *Troup*, (28 February, 1769—Fac. Coll. No. 90, p. 163,) and in the case of Montrose, 29 January, 1779, and the case of South Leith. The authority of these cases confirmed by the case of *Mutter* v. *Earl of Selkirk*, 16 June, 1784. The Linlithgow Case, 19 November, 1805, Fac. Coll., was decided in favour of the minister only on a specialty, as was the case of Dumfermline, 1805, several of the Judges having rested on the specialty, that the minister had previously possessed a manse. That case affirmed in Dom. Proc. in 1812, but no competent authority to show that the judgment rested on the general principle. If the minister then has no claim under the act 1663, he cannot, in this process, succeed upon specialties.

Argued for the Magistrates: It is admitted that in parishes entirely burghal the minister has no claim to a manse; and the parishes of Ayr and Alloway are entirely burghal, the whole being held in burgage tenure, or at least having been so before the act of 1649, which it was the purpose of the act 1663 to renew; and proof of this charter of William the Lion, and several other documents were referred to: (as the question on this point has been reserved, it is not necessary to dwell on the particulars here.) But even **[52]** if it should be held that the parish is partly burghal and partly landward, and that in such a parish the minister is entitled to a manse, the burden is thrown on the landward heritors, and there is no authority in law, either by statute or otherwise, for throwing any part of that burden on the magistrates as such, or as representing the community of the burgh.

Sir J. Leach, M. R.: I have attentively read the papers in the Dumfermline Case, and it seems to me to be a decision, that where there is a minister of a royal burgh and a landward parish, the minister is entitled, as of course, to a manse under the act 1663, cap. 21.

Sir C. Wetherel: It is doubtful whether it was a decision on the general principle, or one resting on a specialty. The opinion of Mr. Horner, who had not heard the judgment, and those of Messrs. Mundell and Chalmer, are very loose evidence on that head. There is a course of decisions showing that the minister of a parish partly burghal and partly landward, is not entitled, as of course, to a manse; and when the minister succeeded it was on specialty.

Sir J. Leach, M. R.: I did not form my opinion upon any of the loose statements to which you refer, but on a careful perusal of the papers in the Dumfermline Case, and on that ground I think that the question must have been decided on the general principle that a minister of a burghal and landward parish is entitled, as of course, to a manse under the statute. It appears to me impossible that the general principle should not have been there decided. These loose statements which you have mentioned go, as far they are worth, to confirm the opinion which I have formed on another ground, although they are of no authority whatever. Attend therefore to the Dumfermline Case, **[53]** and show, if you can, that the judgment of the House of Lords there did not depend on the general principle.

Sir C. Wetherel: The minister of Dumfermline had a manse before, and a sum

of money had been paid instead, but as time does not run against the church, a subsequent incumbent was found to be still entitled to his manse.

Sir J. Leach, M. R.: You argue that the decision in the Dumfermline Case turned on a specialty. By what law then is the Presbytery empowered to order a manse, except under the statute 1663? Suppose there was an ancient manse, had the Presbytery any jurisdiction to make a decree on that ground?

Sir C. Wetherel: The point of want of jurisdiction in the Presbytery was not raised in the Dumfermline Case.

Sir J. Leach, M. R.: Then you say that, as there were two grounds, on either of which the decision of the House of Lords might have proceeded, the one in perfect conformity to the law of Scotland, and the other in direct contradiction to it, it is to be presumed that the House decided on the wrong ground. Is that a presumption to be formed? The Presbytery, it is admitted, had no jurisdiction, except under the Act of 1663, and on that ground the House of Lords decided.

Sir C. Wetherel: The proceedings in the court below show that specialties were taken into consideration in the Dumfermline Case, and it is to be presumed that this House decided only on the grounds taken below.

Sir J. Leach, M. R.: This House has decided, in some cases (in the Roxburgh Case, for instance, involving property of immense value), upon grounds **[54]** never suggested nor hinted at in the court below. But to the point here: The Presbytery has no jurisdiction except under the act 1663; under the authority of that act, and of that act only, the Presbytery gives a manse to the minister, and the House of Lords affirms that judgment. Is not that a decision of this House on the general principle? In short, the point is too clear for argument. The House will not suffer its decisions to be impeached at its own bar.

Reply: The respondents themselves contend here, that in reviewing the judgment of the Presbytery, the Court of Review cannot take specialties into account, and yet they say that the Dumfermline Case was decided on a specialty! As to the argument, that all the lands of the parishes of Air and Alloway were held by burgage tenure, the evidence on which the magistrates rely does not show that the whole had at any time been held burgage, and even if it had, a great part of the lands have been since granted in fen. The magistrates then argue that, although they should fail in this, no part of the burden of providing the manse ought to fall on them, but that the whole ought to be borne by the landward heritors. That, however, is a question between themselves; the appellant has nothing to do with it.

Then as to costs: it is not certainly usual for this House to give costs against the respondent in favour of the appellant where the decision of the court below is reversed; but there have been exceptions to that rule under special circumstances, and as the opinions of the great majority of the whole of the Judges of the Court of Session were in favour of the minister, and as he has now been kept out of his manse for fourteen years, this seems to be a case in which the appellant should have costs.

[55] Sir J. Leach, M. R.: This point, as to the whole of the parish being burghal, does not seem to have been raised below, or at least was very little considered. It may be proper therefore, in reversing the judgment of the Court of Session and of affirming the decree of the Presbytery, to make some little alteration in the Presbytery's judgment, so as to leave it open to the magistrates to make what use they can in the court below of their defence.

Ultimately the judgment was that the cause be remitted to the court below, with a declaration that it had been decided by the House of Lords in the Dumfermline Case that the minister of a parish partly burghal and partly landward is entitled *de jure* to a manse under the act 1663, thus setting at rest the general question, and leaving it open to parties to proceed upon any other grounds as they see proper.*

* In the case of *Moir* and *Belshes* (May 14), the minister (Moir) applied to the Presbytery under the act 1663, to have a grass glebe assigned to him out of old church lands belonging to Belshes, and the Presbytery ordered accordingly. Belshes brought this order under the review of the Court of Session, and offered to assign a grass glebe to the minister in another quarter, and this offer was sanctioned by the Court of Session. The minister appealed, and the House of Lords reversed the decision of the Court of Session, and affirmed the judgment of the Presbytery, and found that

[56] IN ERROR.

(FROM THE ENGLISH EXCHEQUER CHAMBER.)

POWELL and others,—*Plaintiffs in Error;* SONETT and others,— *Defendants in Error.*

[Mews' Dig. xi. 481. S. C. (*Powell* v. *Sonnett*) 1 Dow and Cl. 56; and in Ex. Ch. 3 Bing. 381; 11 Moo. 330. Followed in *R.* v. *Johnson,* 1836, 6 Nev. and M. 883; and see *Scott* v. *Bennett,* 1871, L. R. 5 H. L. 248.]

Error assigned—for that it appeared by the record that, on certain issues, the jury, when discharged, had given no verdict at all, and that it did not appear upon the record that both parties had given their consent to such discharge.—Held, by the Lords affirming judgments of the King's Bench and Exchequer Chamber, that this is no error, as the Judges may, of their own authority, discharge the jurors.

Action in B. R. tried in Hilary Term 1825. The declaration contained a variety of counts, and several pleas were pleaded, and issues joined, and verdict for the plaintiffs below (defendants in error) in the material issues, for the defendants on some of the issues, and on others no verdict at all given. Judgment in Easter Term 1825, and error thereon brought in Exchequer Chamber, with an assignment for error, "That it appeared by the record that on the last eight counts of the declaration, and the issues respectively joined thereon, the jury were discharged from giving their verdict thereon: nevertheless it did not appear in and by the record that the plaintiffs in error consented that the jury should be so discharged." Judgment in the Exchequer Chamber in Michaelmas Term 1825, affirming that of the King's Bench, and thereupon error in Parliament, with a similar assignment, and the following reasons stated for reversing the judgment:

[57] 1st. Because after the jurors appointed to try the said cause below, had been sworn to try the several issues joined between the parties in the said cause, and a true verdict give according to the evidence, it was not competent for the Court below to discharge the said jurors from giving any verdict, as to any of the said issues, without the consent of the parties, and it does not appear that the plaintiffs in error consented to their being so discharged.

2nd. Because by such discharging the jury the situation of the plaintiffs in error, as to their claim for costs, has been altered. For by the said jurors having returned a verdict for the defendants in error, on all the issues joined between the parties, so far as they relate to the twelve first counts of the declaration, the defendants in error became entitled to the general costs of the cause deducting the costs of such issues as were found for the plaintiffs in error; but in consequence of the jurors being discharged from finding any verdict on the special issues joined between the parties, as to the eight last counts of the declaration, the plaintiffs in error have been chargeable with the cost of such special issues, instead of the same being deducted as they would have been had the jurors found a verdict for the plaintiffs in error thereon as they ought to have done.

Lord Lyndhurst (Chancellor): The jury found for the plaintiffs below on the material issues, and where would have been the use of going on when the cause was ended?

Tindal (Solicitor-General), and Mr. Patteson: It might be material with refer-

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the minister was entitled to compensation for the time he had been kept out of his glebe subsequent to the order of the Presbytery, and remitted to the Court below to calculate the same as should be just. The grounds of this judgment were not openly stated by the Lord Chief Baron Alexander, who sat in the House when this case was before it; but probably the reason may be, satisfactorily enough, inferred from the observations of Sir J. Leach, M. R. in the above case of *Auld* and *Hamilton*, and from the judgment given in that case.

ence to the costs; and, at all events, it had been held that the jury was bound [58] to give their verdict on all the issues, unless discharged by consent, even although no injury accrued from their neglect.

Messrs. Tidd and Brodrick, for the defendants in error, contended that the judgment ought to be affirmed, for the following reasons:

1st, That the jury having found a verdict for the defendants in error, on the issue joined on the first plea, so far as the same relates to the promises and undertakings in the first twelve counts of the declaration mentioned, with £24,000 damages and costs of suit, and for the plaintiffs in error, on the same issue, so far as it relates to the promises and undertakings in the thirteenth, fourteenth, fifteenth and sixteenth counts, and also on the issue joined on the second plea, as to the promises and undertakings in the last four counts of the declaration; and having also found a verdict for the defendants in error, on the issue joined on the rejoinder to the replication to the plea of the Statute of Limitations, as to the first twelve counts of the declarations, it became, and was wholly immaterial and unnecessary for the jury to find any verdict on the said last-mentioned issue, as to the thirteenth, fourteenth, fifteenth and sixteenth counts, or on the issue joined on the rejoinder to the replication to the last-mentioned plea, as to the last four counts of the declaration, or on the issue joined on the replication to the plea of set-off, as to the several promises and undertakings in the last eight counts of the said declaration mentioned; and the jurors were therefore properly discharged from giving any verdict thereon.

2dly, That the jury having so found a verdict for the plaintiffs in error, on the issue joined on the said first plea, so far as the same relates to the promises [59] and undertakings in the said thirteenth, fourteenth, fifteenth, and sixteenth counts; and also on the issue joined on the second plea, as to the promises and undertakings in the last four counts of the said declaration mentioned, and thereby negatived the supposed causes of action in the said thirteenth, fourteenth, fifteenth and sixteenth, and also in the said last four counts respectively mentioned, could not have found that the defendants in error, and Francisco Bernis, were or were not at the respective times, when those several causes of action did respectively accrue to them, in parts beyond the seas; or that the defendants in error, before or at the time of the commencement of the action, were indebted to the plaintiffs in error, in any sum of money exceeding the damage sustained by the defendants in error, by reason of the not performing of the several supposed promises and undertakings in the last eight counts of the said declaration mentioned.

3dly, That if the jury had found a verdict for the plaintiffs in error, on the issue joined on the rejoinders to the replication to the plea of the Statute of Limitations, as to the thirteenth, fourteenth, fifteenth, and sixteenth, and last four counts of the declaration, or on the issue joined on the replication to the plea of set-off, as to the several promises and undertakings in the last eight counts of the said declaration mentioned, the plaintiffs in error would not have been entitled to any costs thereon. See the cases of *Postan* v. *Stanway*, Extrix. 5 East, 261, and *House* v. *Thames Commissioners*, 3 Brod. and Bing. 117.

4thly, That at Common Law, (as appears by the cases referred to in Com. Dig. Title, Pleader S. 27,) it was sufficient if the substance of the issue were found, or so much of it as would have maintained the action [60] or defence. And since the statute, 4 Anne, c. 16, sec. 4, which allows the defendant to plead several matters, if any one or more of the issues joined on several pleas be found for the plaintiff or defendant, which entitle him to judgment on the whole record, the Court will give judgment thereon, notwithstanding there be no verdict, or a bad imperfect verdict on other issues, the finding upon which in consequence becomes immaterial. See the cases of *Bartlett* v. *Spooner*, Barnes, 461; *Barber* v. *Dixon*, 1 Wils. 44; and *Cossey* v. *Diggons*, 2 Barn. and Ald. 546.

5thly, As it appears by the postea, returned by the Chief Justice, before whom the cause was tried, and is certified by him, as part of the proceedings at the trial, that the jurors were discharged from giving any verdict as to the issues joined on the rejoinder to the replication to the third plea of the Statute of Limitations, so far as the same relates to the thirteenth, fourteenth, fifteenth, and sixteenth, and last four counts of the declaration, and also on the issue joined on the replication to the last plea of set-off, as to the several supposed promises and undertakings in the last eight

counts of the said declaration, it must be presumed that the jurors were duly and rightly discharged from giving any verdict thereon.

6thly, That the plaintiffs in error could not have sustained any damage by the jurors having been so discharged from giving any verdict in the last mentioned issues.

7thly, That it was not the business of the defendants in error, but of the plaintiffs in error, to have the last mentioned issues determined, if they had been so disposed, or imagined that thereby they might be entitled to costs or any other advantage. See *Barnes*, 462.

[61] Lord Lyndhurst (Chancellor): The principle now is, that the consent is unnecessary. There are several modern cases in which the Judges, of their own authority, took upon them to discharge the jurors. A *venire facias de novo* has often been applied for on the same ground, which is substantially the same thing, and has been refused.

Judgment affirmed.

[62] IN APPEAL FROM THE IRISH CHANCERY.

MONTGOMERY,—*Appellant;* REILLY and others,—*Respondents.*

[Mews' Dig. xii. 837; S.C. 1 Bli. N.S. 364; Hay and J. App. liv. See *Hammersley* v. *De Biel*, 1845, 12 Cl. and F. 45, at p. 65; *Jorden* v. *Money*, 1854, 5 H.L.C. 185.]

A father, after having expressed an intention of making a larger provision for his younger children than he had before done, dies without having executed the intention. The son and heir-at-law, apprized of his father's intentions, enters into a correspondence, in which he states a resolution on his part to make a further provision for the younger members of the family. His sister's allowance being £4000, she marries on the faith of this correspondence. Held, a good marriage settlement, and that the son was bound to pay the £4000.

In 1801, the Reverend Hugh Montgomery made his will, which was executed only by two witnesses. In 1807, his circumstances being considerably altered, he expressed his intention of making another will and charging his estate with a larger sum for younger children; but died soon after, without having executed his intentions. The Rev. William George Wakely, a confidential and intimate friend of the deceased, communicated his intention to the appellant his eldest son and heir at law, and the appellant wrote in answer, that he would carry his father's intention into effect, and charge his real estate with that view. By this arrangement the appellant's sister Emily, one of the respondents, was to have a sum of £4000 secured to her on the estates, with interest until it should be paid. On the faith of this promise a marriage took place between Emily and the respondent Reilly, and they, as the appellant afterwards refused to pay in 1822, filed their bill in Chancery for a specific performance of the agreement.

[63] The agreement or marriage settlement, as it was called, was contained in the correspondence between Mr. Wakely and the appellant, before the marriage, and some correspondence between him and Reilly after the marriage.

To render this correspondence intelligible, it is necessary to premise, that the appellant's mother, the respondent the Honourable Georgina Charlotte Emilia Hannah Montgomery, is the youngest of the three sisters of Lord Viscount Bangor; that, in the event of his lordship's dying intestate, and without issue, (an event which from his advanced age, and having been for the last forty-five years a lunatic, is morally certain,) she will, if she survives him, be entitled to a distributive share of his personal property; that the amount of that personal property appears at the time of the examination of witnesses in this cause, to be about £300,000 regularly increasing; and that the share of that sum to which the respondent Georgina Charlotte Emilia Hannah Montgomery would be entitled, is one-sixth, with the probability or chance of being increased, by the death of either or both of her two surviving unmarried sisters, to one-fifth or one-fourth.

On the 25th of July 1816, Mr. Wakely addressed a letter to the appellant, who was then in London, in which he says, among other things, "Your letter did not reach me as soon as it might: you need make no apology to me for writing freely on your family affairs. Before I have any communication with Grey Abbey (the family residence of appellant, in the north of Ireland), let us first completely understand what is to be done and expected; then I shall be able to answer the questions put to me. You expect your mother, brothers and sister to legally [64] convey to you their claim on Lord Bangor's money: do you mean the whole of it, present or to come? Suppose this agreed on, how are you to manage with the minors? Your first determination was £800 a-year for your mother, and £5000 each for younger children." He requests him to be explicit on the subject, and states that the appellant's mother had expressed her surprise that he had not executed a deed according to his first proposal. He then presses for a final adjustment of the business, and says, "It is natural that your family should wish the business finally settled as far as it can be; delay to your sister would be very prejudicial;" (meaning thereby the respondent Emily Georgina Susanna Reilly;) and adds "you are now the father of your family, and it is well; for God has blest you with a clearer understanding than falls to the lot of most people, which will help you to settle these matters as nearly as possible in the way you wish." And he concludes by saying, "I do not mean to write to the North till I hear from you, as I never understood, from any of the family, that you had fully explained your wishes and intentions to any of them. I think I understood you myself; but your answer to those questions will remove all possibility of doubt."

To this the Appellant replied by letter, dated London, 29th July 1816, in which he speaks of the expectations from Lord Bangor's personal estate, and of the circumstance of some of his brothers being minors, as likely to create a difficulty in making a final arrangement at that time; but still, though appearing fully aware of that difficulty, expresses a wish to proceed to a negotiation with the adults on the subject. He then proceeds as follows: "Your kindness emboldens me to make one proposal to you, which I trust will [65] convince you of my readiness to come to a conclusion, and to do every thing that is fair and honourable towards my family. As you, my dear Sir, are now fully acquainted with all my feelings and guides of conduct, if you will be so kind as to desire Arthur to send you a correct copy of my rent-roll, specifying the bad or rather insolvent tenants, as also a full statement of my debts, and any other paper you may require; if you then will be so kind as to compare and balance these, making allowance between actual net income and paper rent-roll, which from experience I feel you are very capable of doing, and am sure are aware is no small sum, even in the best paid estates; if you will trouble yourself with all this, and decide between my family and me, I hereby engage to sign whatever deed may be tendered to me, certified to have been drawn up under your directions." He then mentions several arrangements he had previously in contemplation on the subject, and further adds, "my estate is heavily burdened in addition to the claims of the family; but if any arrangement could be made to give me a certain prospect of future relief, I would not hesitate a moment reducing myself to the most limited income, and at once settling the whole business. The minors certainly offer difficulties; but if the family, who are now of age, sincerely put their shoulders to it, and in short are determined, both now and hereafter, to act an honest and equitable part, I think it might be arranged by your kind interference. Might not a trust be raised? I am willing to allow my whole estate to be so vested; but I will suggest nothing, but leave every thing to your kind arrangement and discretion; again repeating, do you, my dear Sir, with my estate what you please, so as it is kept together; for I well know my father never would submit to its dismemberment:" and encloses [66] in this letter a statement and calculation "to assist Mr. Wakely in forming an opinion on the subject," (*V.* Appendix, No. 3,) which shows the appellant to have taken pains to be minutely instructed as to the amount and circumstances of his property at the time.

On receiving this letter, Mr. Wakely immediately went to Grey Abbey, in order to obtain the necessary information; and, having done so, he addressed a letter to the appellant, dated Grey Abbey, 17th October 1816, which contains the following passage: "My dear William, I fear you think, by this time, that I have neglected you and your last letter; but I found it impossible to get a sufficiently explicit account,

by letter, either of the property, or of what the parties concerned would be at I have seen the rent-roll, etc. etc. Your mother thinks your father's will valid, with respect to the legacy to her of the furniture, stock, etc.; that they were well worth £2000 and more, indeed; that therefore you should add £200 a-year to her jointure of £600, making a clear sum for her of £800 a-year, without the interference of any one. She intends to take with her, when going, the spoons and forks; nothing more. She most readily and freely offers you as follows: to secure to you your share of Lord B.'s fund and to add to it £1500; both to be paid to you immediately on the death of Lord B. We both think that the young people should secure to you the £1500, in case your mother dies before Lord B.: this is a material point in your favour. As you mention that your means will not allow you to do what you first intended, it is now proposed that you pay £4000 (four thousand pounds) to each of the young people, at the death of Lord B.; till that event takes place, to pay them £250 a-year each, as they come of age: this to be so settled now, as [67] that each of them, as they come of age, will be legally entitled to it, and be able to make settlements at marriage, or dispose of their shares by will or otherwise; that, on the marriage of your sister, she should be at liberty to call for the £4000, if it should be thought expedient to get the money, instead of the £250 a-year. You allowed £200 a year for the boys at school, and said you would allow £150 a-year to Charles, to manage for himself: in this there can hardly be any change; as, though £200 a-year may be more than Francis and Sandys cost at present, yet hereafter it will not: it is not intended that they shall be any further expense to you, even for pocket money. As far as I can judge, your rent-roll amounts to £5176 14s. 5½d. exclusive of the demesne and islands; some of this is uncertain, and you will see on the other side an allowance for it. In the roll the slate quarries are put down as producing £200 a-year; this may not be too high an income for them, as I hear they have produced £450, or nearly, a-year formerly.

"This is a statement of what I have said, and what you are to pay:

"To your mother	£800	0	0 a-year.
— 4 of age	1000	0	0
— 3 others	350	0	0
— 2 annuities	132	0	0
— Interest of debt	1516	8	9½
	3798	8	9½
Balance in your favour	1378	5	8
	£5176	14	5½

"From this balance take off £178 5s. 8d. which, as far as I can see, will fully cover the uncertain part; then [68] you have for yourself £1200 a-year, a good demesne, and a house well furnished. I don't say more than, with good management, you might contrive to live on it. I see that part of your income is an annuity from Mr. Echlin: his life ought to be insured for what the annuity cost."

This letter appears to have reached the appellant on the continent; and he immediately replied thereto by a letter from 946 Rue Verte, but without other date, but which appears, from the post-mark and the testimony of the said Reverend William George Wakely, to have been received by him on or about the 16th of November 1819; and which contains, among others, the following passages: "I do not know how to thank you for the trouble you have taken, and the unexampled kindness of settling the affairs between me and my family. I trust you have the satisfaction to have left them contented. Had your decision been unfavourable to me, you may rest assured I should have been satisfied. All I looked for was strict justice, and from your hands I have received it. As to my mother's claims, I must make one or two observations. The will as to the chattels has not certainly the defect which renders it invalid as to the freehold estate, admitted; but I deny its being, by any possibility, beneficial to any of the legatees, because the debts, both simple contract and others, that did not affect the freehold, except on a deficit of assets, amounted in total to a much larger sum than the produce of any chattel property of which my father died

possessed. On my taking upon myself the responsibility of those debts, surely, in common justice, all chattels became mine: in short, without going into particulars, there was an arrear of interest, on one sum alone, of above £3000, and different [69] smaller ones, amounting to at least another thousand; to which add book debts and servants wages: £5000 would not be beyond the total; but in my opinion considerably within it. As that would exceed all proceeds of assets, I need not say that, had I put them to the will, and confined them to take under it, I could have added all bond debts upon which no judgment was entered, and not a penny of which was I liable to, as long as there was a pin of chattels. Upon those grounds I deny my mother's claims, as a right; for which reason, and that they may all fairly understand that what they take I might have withheld, I shall certainly make no objection to my mother having the use of the spoons and forks you mention, or indeed any remainder of the plate she may choose for her life, reversion to me or my heirs. The value is but small; of the reversionary of course nothing: but there are limits at which I must stop in justice to myself. There are stories come to my ears in London about Emily, indeed so openly talked about, that I was asked if it was not actually the case; but as you say nothing of it, though her never having written to me since May last makes me very suspicious, I would fain hope it is not true; namely, that she is going to be married to James Reilly. She long knows my opinion—an opinion drawn from me by herself; and, if she is going to act contrary to that opinion, which she professed to me she would be guided by—in short, if she marries J. R., I can never consider her otherwise than having acted most deceitfully towards me; it will be a marriage I can never acknowledge; she must bid farewell to Grey Abbey for ever. I do not pretend to any right of interference; but as she has an opinion in writing of mine, not expressed in the gentlest terms, I cannot [70] forgive the deceit of drawing out an opinion by pretending to hold the same, when she must have been if this report is true, which I fear much it is, mentally determined, the first opportunity, to act contrary to it. As to my not being able to live on £1200 a-year, I trust I shall always be able to reduce my expenses to my income, when all other control over my purse is removed. £200 a-year is certainly a high average for the quarries; I am not aware of their ever netting £450. I never will myself count them in my rent-roll, considering them as only making up for and equalizing the bad or waste parts of the demesne; they never were averaged at more than £200 at their best times, and last year were a losing concern. I should like to know what the bogs were put at: they never realized their calculated average, but it is a matter of no essential consequence."

In the autumn of 1816, a treaty of marriage was entered into between the respondents James and Emily, alluded to in the foregoing letter, and also in the subsequent correspondence; and it may here be admitted distinctly, that this match never met with the approbation of the appellant; but on the other hand it appears distinctly, from this as well as his subsequent letters, that his disapprobation was never made a ground for withholding from the respondent Emily the provision he intended to make for her, with the other younger branches of the family; and accordingly in a letter of appellant's to respondent James, dated 24th December, in which he declares he will never recognise the respondent James as a brother, he never once intimates an intention of withholding the portion he designed for his sister; but the subsequent letters will put this matter beyond all possibility of doubt.

[71] On the 6th of January 1817, the appellant addressed a letter to the said William George Wakely, dated Brussels; and, alluding to the expected intermarriage of the respondents James and Emily, he says, "A few posts ago I received your kind letter of the 10th December, and would have answered it immediately, but for the unsettled state I was and am still in, about this to me horrible match of my sister's; it is in vain to try, I can never be reconciled to it, or induced in any manner to receive the gentleman as my brother." And after stating that he was himself about to be married, he proceeds as follows: "I am thus explicit, because you have at all times taken such a kind interest in all the affairs of our family, and to show to you that my marriage will not in any manner affect the arrangement you have so kindly undertaken between me and my family, the manner of putting which into execution, to prevent mistakes, I shall now repeat; £4000 each to be secured upon certain lands, principal not payable till after the death of Lord Bangor, interest to commence to

each on their coming of age; my brothers to be settled on marriage, in the manner most agreeable to the parties concerned; my sister's to be secured, first to herself for life, then share and share alike among her children; but in all cases, in failure of issue, reversion to my estate. My mother to have £800 a-year, secured to her for life, and the use of the plate which she has chosen for her life: also I am to be secured my share of Lord Bangor's dividend by my mother, as also £1500 over and above that sum, for the payment of which latter sum my brothers and sister are to become bound, as my mother might die before Lord Bangor: and, to sum up all, they are to assign to me all title or claim which they may have, or fancy **[72]** they have, upon my father's chattels, or the estate, either in virtue of his will, marriage settlement, or any other claim whatsoever. This, I think, is an abstract of the agreement; and when put into the form of a deed, if assented to by them, I am willing and ready to execute it at any time. I will not entangle myself with Mr. James Reilly; if this marriage goes on, I will neither meddle nor make with it or their settlements. What Emily gets from me, she shall take under the same deed as the rest of my family; it shall be therein strictly settled, and Mr. J. R. nor any other person she may choose to marry, shall have nothing to say to it."

To this letter Mr. Wakely replied by letter bearing date the 25th day of January 1817, by which he endeavours to prevail on the appellant not to insist upon having his brothers portions settled as intimated in his letter of the 6th January. On the subject of the marriage between the respondents he writes thus: "The writings are preparing by Keown, relative to your sister and James R.; I communicated your decision, as mentioned in yours of the 6th, to your mother, as to what you would give Emily, and the terms, etc. Reilly settles £1000 (one thousand pounds) in money on your sister, in case she survives him, and a jointure of £260 a-year; her own of course is to be as you determined." And on the subject of his brothers he proceeds thus: "But as to your brothers, this alteration of yours is a very serious one, and probably was not in contemplation when you wrote your last of the 6th instant. If their fortunes are only to be paid on their marriage, and to revert to your estate in case of failure of issue, what are they but poor annuitants? how are they to advance themselves, on any occurrence? they could **[73]** not be possibly put into a more awkward predicament. The plan I sent you from Grey A. did not contain such an arrangement, your consent to which I communicated to the parties concerned. Put yourself, by supposition, into the situation of a younger brother, similarly circumstanced as yours will be, if they are to be annuitants, and you may easily guess what must be the sensations of Hugh, and Edward, and Arthur, on hearing that so very great a change is to take place. I took particular pains that the plan I sent from Grey A. should be clear, but I really do not think you meant this when you wrote last; at all events it is but right that you should immediately explain yourself. Whatever your brothers are to have, they should have the power over when they come of age. Consider the matter, and I am certain you will decide as you ought. I am neither afraid of your head or heart."

To this the appellant replied by a letter, dated 19th March following, by which he relinquishes the desire of having his brothers portions brought into strict settlement, but insists on it as to his sister's. His words are, "As you say you cannot see the business in the same light with me, I most willingly consent to your construction of the agreement, as far as relates to my brothers; but as to my sister, I cannot bring myself to alter one tittle; she must abide the consequences of her unkind conduct towards me."

At the commencement of the marriage treaty between the respondent James and his intended wife, the respondent James, having applied to Mrs. Montgomery, the mother of the respondent Emily, for information as to the amount of her daughter's fortune, was informed by her that it was £5000, to be secured on the appellant's estates, but, at the same time, was referred by **[74]** Mrs. Montgomery to Mr. Wakely, as the person fully acquainted with all the particulars and circumstances of the said fortune, and the person in the confidence of the whole family, especially of the appellant. The respondent James accordingly called on the said Mr. Wakely, who informed the respondent James that the fortune of the respondent Emily was not £5000, but only £4000, to be settled on her brother's estate, and which he had promised by letter to execute a deed to secure, and that he had authority to say so, and

read to the respondent James extracts from his correspondence with the appellant, but did not read all or give copies, because he conceived some of the expressions therein might be deemed offensive, and prevent a reconciliation.

Shortly afterwards the respondent James, being obliged to leave Dublin, he requested his brother-in-law, Francis Hamilton, esquire, barrister, to communicate with the said Mr. Wakely, and to arrange with him the terms of the settlement to be made on the said intended marriage. Accordingly the said Francis Hamilton, on behalf of the respondent James, had several interviews with Mr. Wakely and Richard Keown (the solicitor of appellant); and a negotiation took place, in which the said Mr. Wakely and the said Richard Keown appeared to act for and on behalf of the appellant and his family, and they both assured the said Francis Hamilton, that the sum of £4000 was promised by the appellant to his sister, and that it was perfectly secure, and only required the legal form of a deed to be entered into for the purpose, and which the appellant had promised to execute immediately on his return from the Continent; but as the appellant wished to [75] have it charged on particular lands, not then ascertained, it would be better not to mention the same in respondent's marriage settlement. On the faith of these representations the treaty was concluded; the said Francis Hamilton, having corresponded with the respondent James, pending the negotiation, and informed him of the result.

In the course of the treaty Mr. Wakely recommended that Mr. Keown, who had been the law agent of the late Mr. Montgomery, and was then the law agent of the appellant, and now his solicitor in this suit, should be employed to prepare such settlement; and the said Mr. Keown accordingly had instructions drafted to be laid before counsel; and in the instructions is contained the following paragraph: "Miss Montgomery's fortune, it is presumed, need not be mentioned in this settlement; it is £4000, charged by her brother, or rather to be charged on his estate for her life, with remainder to her issue, failing which, to merge into Mr. Montgomery's estate."

These instructions were sent to James Trail Hall, esq. a barrister of eminence, a relative of the appellant, and the person who had acted as counsel for the appellant and his late father; and, in conformity with the instructions of Mr. Wakely, acting according to the wishes of the appellant, who desired to reserve the right of ascertaining on what part of his estate the portion should be charged, and also according to the wish of the appellant, as expressed in his letter of the 6th of January 1817, that the limitations to which that sum was to be subject should be made in the deed by which such charge was to be made, it was accordingly omitted out of the settlement, which contained only the property of the respondent James, and which was [76] duly executed on or about the 4th day of February 1817 (*v.* Appendix, No. 31), and thereby an annuity, by way of jointure, of £260 a-year, during life, in case she survived her intended husband, and a further sum of £1000 to be paid her immediately on his death, was provided for her, and a covenant to secure to herself and her executors, without the interference of her husband, any sum she might become entitled to by the death of Lord Bangor.

The marriage of the respondents James and Emily was celebrated on the 4th day of February 1817, in the presence of Mrs. Montgomery, the mother of the respondent Emily, and with the full approbation of the said Mrs. Montgomery; but she states in her answer, that she would not have consented to it if she had not conceived her daughter's fortune was to be £4000, as she did not wish her to marry unless her own fortune, added to that of her husband, should be sufficient to support a family in a certain rank of life; and the marriage treaty was concluded on the faith of the appellant's agreement that his sister should have a fortune of £4000.

Before the appellant went abroad in the year 1816, he gave written instructions to his brother and agent, Arthur Hill Montgomery, esq. directing him to pay his mother £1000 a-year, the respondents Emily, Hugh and Edward, £250 a-year, and to retain to himself £300 a-year, (*v.* Appendix, No. 12). This was accordingly done, and, in pursuance of the agreement negotiated between appellant and his family by Mr. Wakely, the annual sums before mentioned were paid, by the said Arthur Hill Montgomery, to the several persons mentioned in the said instructions (including the sum of £250 paid to the respondents James and [77] Emily, until the year 1820), and still continue to be paid to all the parties now living, mentioned in the said instructions, excepting the £250 per annum to the respondents James and Emily.

On the other hand, in pursuance of the said agreement, the appellant got the stock, plate, household furniture, books, pictures, wine and money at Grey Abbey; was permitted to retain every thing which his mother, brothers and sister, were entitled to under the marriage settlement and will of their father; and was also permitted by them to receive, for his own exclusive benefit, all the arrear of pay, prize-money, and personal property of Hugh Bernard Montgomery, who was a captain in His Majesty's third regiment of Foot Guards, and died unmarried, intestate, and without issue, on or about the 1st day of May 1817; and the appellant was also permitted to retain for himself his said brother Hugh's share of the younger children's fortune, charged on his said estate.

During the absence of the appellant on the Continent, his agent, Arthur Hill Montgomery, furnished him with accounts; and, in the year 1820, when the appellant returned to Ireland, and was furnished with the account, he minutely investigated the state of his affairs, and settled all his accounts with his agent, Arthur Hill Montgomery; in all which accounts, as furnished from time to time, the annual sums paid to his mother, brothers and sister, under the aforesaid arrangement, were credited to the agent without any objection. But, on or about the 10th of August, in the same year, the appellant, without having any previous communication with the respondent, wrote to the following effect: "From a statement of the payments which have been made on my account at different times to your wife, since my father's death, they appear to [78] me to exceed the total amount of her claim upon my estate: the sum which appears to be paid up to May 1820, is £1071 10s., while her share of £5000, settled as younger children's portions, together with interest, as directed by my father's marriage settlement, at five per cent., amounts to £883, less a few shillings. As, therefore, it is my anxious endeavour to exonerate my estate as soon as possible from all charges, I have now to request that, as soon as convenient, there may be transmitted to me your joint receipt, in full of all claims upon my estate, together with an engagement that, should counsel, at any future period, advise any further security or form of discharge as necessary, you will satisfy it without further expense to me. Until the above-mentioned receipt, with its accompanying undertaking, be regularly signed and transmitted to me, I must withdraw any allowance which I may be inclined to give my sister, and shall give directions accordingly," and concluded by saying, "any letter directed to me shall be forwarded;" and accordingly he gave directions to his agent not to make any further payment to the respondent, although all the other payments were continued. Immediately after writing the last-mentioned letter, and giving the above directions, the appellant set out from Grey Abbey for the Continent, without waiting for any reply.

The respondent wrote to the appellant, to Florence, to remonstrate, and state he was advised not to give such a discharge as the appellant required; and called upon the appellant to perform his promise. And the respondent received another letter from the appellant, dated Florence, 2d October, 1821, in which he does not deny his agreement, but appears only to insist on his right of having the sum settled as he should direct. [79] His words are: "It is merely necessary to premise, that a greater insult cannot be attempted than the accusation of a desire to evade a promise. I have invariably purposed to charge my estate with £4000 for each individual of my father's younger family; but this sum not to be in addition to any other claim by settlement or otherwise, which they might have against that estate, but it is to be released from all such charges. That £4000 is a sum more than fourfold their legal right, I believe not one of them will pretend to deny; and that it is twice what my father intended for them, I believe they are all equally aware; and it is highly probable that you, long ere this, are conscious of the fact. Thus I cannot but consider that the interference of a court of equity, so far from being to my injury, would be my ultimate resource in case of subtile hostility; though, indeed, I consider the remedy almost as bad as the disease, not being silly enough to suppose the expense of law to be all upon one side: finally, I do not see how, either in law or equity, I can be prevented from arranging the detail of my own free gift."

The Court of Chancery of Ireland decreed for the specific performance; from which Montgomery appealed, for the following reasons:

1st, Because the order to amend and the decree can only be founded on the letter of the 6th of January 1817, for it is only under that letter that the minor plaintiffs

could have any interest in the subject matter of the suit. But that letter forms no part of the case made by the bill—on the contrary, the case made by the bill is in contradiction to it; and on the bill as now amended the minor plaintiffs appear to have no interest in the subject matter of the suit.

[80] 2dly, Because the decree gives the plaintiffs a relief not prayed by the bill, on an agreement not stated in the bill,but on a letter stated by the answer of the defendant, and materially differing from the agreement stated in the bill, and by which letter the defendant insisted he was not bound; and it is against the principles and practice of a Court of Equity to decree against a Defendant upon an agreement stated by him differing from an agreement stated by a Plaintiff, unless the defendant submits to perform the same.

3dly, Because, even if the plaintiffs had by their bill founded their case on the letter of the 6th of January 1817, and that it could amount to an agreement under any circumstances, they should have shown by their bill that it was assented to by the defendant's family, and have offered to perform the terms of it on their parts.

4thly, Because the decree assumes, contrary to the fact, that the defendants Georgina, Edward, Arthur, and John Charles Montgomery, had, *by their answers*, offered to perform the agreement decreed as aforesaid, Whereas they did not by their answers mention or allude to it, or offer to perform any agreement but the agreement stated in the bill, and which agreement is negatived, as well by the evidence as by the decree.

5thly, Because Wakely, who wrote the letter of the 17th of October 1816, and to whom the letter of the 6th of January 1817, was addressed, had no authority to bind or contract for the appellant's family, nor did he profess to do so.

6thly, Because the letter of the 6th of January 1817, was on the face of it only a proposal, and conditional in its nature, amounting only to a treaty which never was completed.

7thly, Because that letter was voluntary, and without consideration, and as such ought not to be enforced in a court of equity.

[81] 8thly, Because the appellant never promised nor authorized any person to promise or represent that he would give his sister, the respondent Emily, £4000, or any other sum, on her marriage with the respondent, James Reilly.

9thly, Because the respondents, James Reilly and Emily his wife, have not shown that their marriage was contracted on the faith of any promise or representation made by the appellant in writing, or by any person lawfully authorized by him to do so.

For the Respondents it was contended, that the decree ought to be affirmed for the following among other reasons:

1st, Because, the agreement stated in the correspondence between the appellant and Mr. Wakely, is sufficiently precise and definite in its terms to be carried into execution by a court of equity.

2dly, Because this is not a merely voluntary agreement, but for valuable consideration. The appellant was to receive in exchange, first, the sum of £5800 charged by the will and settlement of his father; secondly, furniture, plate, stock, crop, books, pictures, all the moveables at the mansion-house of Grey Abbey, together with arrears of rent, money in the house and bank, and debts due, amounting altogether, by the appellant's admission, to a sum of £8167 7s. 10d. actually received: And it is submitted that, although the appellant's father owed debts, chiefly by judgment, and specialty, to the amount of £25,000 or thereabouts, the creditors ought to resort to the fee simple estate, which descended on the appellant, and that the assets would be marshalled in favour of Mrs. Montgomery, who was a specific legatee of the plate and furniture: and, thirdly, £1500 more than an equal share of the **[82]** fund, expectant on the death of Lord Bangor, is secured to him; the present amount of this (if Lord Bangor were now dead) would be to the appellant upwards of £8642 with a reasonable prospect of its being further increased to £10,071 by the death of either of Lord Bangor's unmarried sisters, in the life-time of the said Lord Bangor; and to the sum of £12,214 in the event of the deaths of both of the said sisters, during the joint lives of Lord Bangor and Mrs. Montgomery, together with the chance of its being further increased by the death of any of Mrs. Montgomery's children, in her life-time; and, as a further advantage, in case of the

appellant's sister dying without issue, the sum charged was to merge in his estate. This appears to be not only a valuable, but an adequate consideration for the sum to be charged by the appellant on his estates. At the time of the agreement, there were four of the younger children adults; the sum to be charged certainly on the appellant's estate, therefore, must be at least £16,000, £4000 of which might revert to him; and whether it should ever exceed that sum must depend upon whether the minor brothers of the appellant should live to attain the age of twenty-one years.

It is therefore humbly submitted there is, in this case, such consideration as would entitle the respondent Emily to have the said agreement carried into specific execution, as against the appellant, even if she were still unmarried, more particularly when the relative situation of the parties is considered, the appellant having been at the time *in loco parentis* to his younger brothers and sister; and, as it is said, the court does not weigh in very nice scales the consideration for family agreements, if they be fair and reasonable.

3dly, Because, even supposing this agreement to have been originally purely voluntary, the marriage, [83] which has been contracted on the faith of it, forms a consideration of the highest kind in the contemplation of a court of equity. The parties would not have placed themselves in this situation, if they had not calculated on the wife's portion of £4000, as part of the provision for the family; and it is in evidence that Mrs. Montgomery would not have given her consent to this marriage, if she had not considered that the respondent Emily was to have a fortune of £4000, charged by her brother on his estate, and which, by his letter, he insisted upon being made the subject of strict settlement, so as to secure it as a provision for her and her younger children.

4thly, Because the agreement has been in part performed: the appellant has been permitted to retain the household furniture, plate, linen, books, etc. in the mansion-house of Grey Abbey. Since his father's death, he has never been called upon for any account of his mother's, brothers, or sister's claims under the will or settlement of his father; he has never been called on for any account of the personal fortune of his brother, Captain Hugh Bernard Montgomery, who died intestate in the year 1817; and, on the other hand, he has paid his mother and brothers the annual sums stipulated by the agreement, and continues to pay them to the present day; and he, in like manner paid the respondent Emily, under this agreement, until the year 1820. The appellant does indeed allege (for the first time in his letter to the respondent James, of the 10th August 1820), that the payment of £250 per annum to the respondent, was in discharge of the claim which he alleges they had under his father's will and settlement; but it would be a fraud in the appellant to permit the respondents to act under the delusive impression that they were receiving an annual income, without [84] diminishing the principal sum, or to anticipate the capital of the respondent Emily's fortune, without apprizing them that they were doing so. It is therefore submitted, that the appellant cannot be allowed to put that construction upon his own acts, which would impute fraud to himself; and the payment of £250 per annum to the respondents James and Emily, must be considered as in part performance and execution of the said agreement.

(May 25, 1827) Eldon (Earl of): I cannot well represent to myself this case in any other light than that of one not easy to be dealt with, whether, having regard to the laws of evidence, it be considered as an agreement written antecedent to the marriage, or written after it: looking at the same time at what was done with respect to the property of the testator. The real question, however, is, whether this agreement or family settlement is valid? and although the case is somewhat complicated, I think, on the whole, that the judgment of the Court below should be affirmed with £100 costs.

Judgment affirmed accordingly.

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[85] APPEAL FROM THE IRISH CHANCERY.

TRIMLESTOWN (Lord),—*Appellant;* D'ALTON and others, —*Respondents.*

[Mews' Dig. xv. 234; S. C. (*Trimlestown* v. *Lloyd*) 1 Bli. N.S. 427. Cited (i.) on point as to undue influence (1 Dow and Cl. pp. 94, 95) in *Haddock* v. *Trotman*,

1857, 1 F. and F. 32; and see *Allen* v. *M'Pherson*, 1845, 1847, 1 H. L. C. 191; (ii.) on point as to depositions (1 Bli. N. S. 452) in *Colvin* v. *Fraser*, 1829, 2 Hagg. E. R. at p. 278.]

Where an undue influence is exercised over the mind of a testator in making his will, the provisions in the will, in favour of the person exercising that influence, are void: but the will may be good as far as respects other parties; so that a will may be valid as to some parts, and invalid as to others: may be good as to one party, and bad as to another.

Nicholas, Lord Trimlestown, had, from the year 1797 to the year 1812, prepared several wills and codicils, some of which were executed, and some were not. By his first wife he had issue Thomas, Lord Trimlestown, and Rosalie, Countess D'Alton, two of the parties in this cause. By his second wife, the Lady Trimlestown, another party in this cause, he left no issue living at the time of his death. On the 8th of December 1812, Nicholas Lord Trimlestown executed his last will and testament, the provisions of which were very different from those which had been inserted in his previous testamentary papers—a matter easily accounted for by the various changes which took place in his circumstances. The most material fact in this case was, that by this last will he made a provision for his second wife far beyond any thing which he had previously contemplated.

Nicholas Lord Trimlestown died in April 1813, and his son Thomas succeeded to his title. Lady Trimlestown soon after married Evan Lloyd, another of the parties in the cause. Rosalie, the daughter of Nicholas, [86] had married Count D'Alton, and had issue, who together with their mother were beneficially interested under the last will of Lord Nicholas.

In April 1814 the count, countess, and their children filed their bill in Chancery, to have the provisions of the last will of Lord Nicholas carried into effect. In June 1814 Lady Trimlestown and her husband filed their bill in Chancery, to have the trusts of the will executed. And in July 1816 Thomas Lord Trimlestown filed his bill in Chancery to have the will set aside, as being fraudulent, and therefore void. The ground on which the will was impeached was, that it had been executed by Lord Nicholas under an improper influence exercised over him by his second wife.

In June 1817, the first cause, that in which the Countess D'Alton and her children were plaintiffs, came on to be heard, when the following issue was directed: "That the defendants, Evan Lloyd and Alicia Lady Trimlestown, do, as of this present Trinity term, bring a feigned action in His Majesty's Court of King's Bench in Ireland against the defendant, Thomas Lord Trimlestown, to which the said defendant, Thomas Lord Trimlestown, was forthwith to appear, gratis, and plead the general issue, and admit all matters of form, so as that a trial might be had between the said party by a special jury of the county of Dublin, at the bar of the said Court of King's Bench, during the sittings after the next Michaelmas term, of the following issue, to wit, 'Whether the paper-writing, bearing date the 8th day of December, 1812, in the pleadings in this cause mentioned, be the last will and testament of Nicholas Lord Baron Trimlestown, deceased, or not.'" And it was further ordered, "That the said plaintiffs, Pole Count D'Alton, and Rosalie Countess of D'Alton his wife, be at liberty to appear in the said action to [87] defend their rights and that of their issue, as they may be advised."

The issue was accordingly tried in the Court of King's Bench, but the jury, not being able to agree in their verdict, were discharged: and in March 1819 the cause was tried at the bar of the Common Pleas, when the jury, after considerable hesitation, found their verdict against the will. An application was then made to the Court of Chancery, for a new trial on the ground of misdirection by the Judge, and of evidence having been received which in law was inadmissible. In considering this question, the Court of Chancery had before it the Judge's report of the evidence of two of the witnesses only, who had been examined at the trial; and, by an order of the 14th July 1819, the application for a new trial was rejected. From this order there was an appeal to the House of Lords, and in June 1823 their lordships declared, "That the Lords not having before them in this case, in which a feme covert and infants are parties mutually interested, any report which they can deem authentic of all the evidence given at the trial, are unable to determine whether the verdict com-

plained of by the motion for a new trial ought or ought not to be deemed conclusive." It was therefore " Ordered and adjudged, that the said order of the 14th July, 1819, complained of in the said appeal, be and the same was thereby reversed, and it was further ordered that the cause be remitted back to the Court of Chancery in Ireland, to rehear the motion for a new trial upon a full report from the Judges of the whole of the evidence given at the trial before them, the Lords deeming such report necessary in a cause in which such parties are interested."

A full report of the evidence was then called for by the Court of Chancery, and the report was given in by [88] the two surviving Judges (one who attended at the trial having died in the interval), Lord Norbury and Mr. Justice Moore, one of whom was of opinion that the verdict was not warranted by the evidence, the other, that it was. On the 24th May 1824, the Court made an order for a new trial in the following terms: " It is ordered that the verdict had in the Court of Common Pleas on the issue formerly directed, be and the same is hereby set aside, and it is further ordered that the issue directed by the leading order pronounced in this cause, on the 18th day of June, 1817, be varied; and it is further ordered that the issue now to be tried be whether the paper-writing bearing date the 8th day of December 1812, be the last will and testament of Nicholas Baron Trimlestown, deceased, or not, or if not, whether any and what paper writing or writings is or are his last will and testament." From this order Lord Trimlestown appealed to the House of Lords.

The instructions given for preparing the last will which it was the object of the plaintiffs in this cause, the Countess D'Alton and her children, to establish, and of Lord Trimlestown to set aside, were in the testators own hand-writing, and were as follows:

" Turvey, November the 15th, 1812.

" Instructions to Mr. Kemmis for preparing my Will.

" I. To revoke all former wills and codicils made by me.

" II. To direct that I may be buried in a private manner, in the family vault at Trimlestown.

" III. To entail all my real estates in the county of Meath and King's County, on my son, John Thomas Barnwall (the appellant), and my grandson, Thomas Barnwall, and their issue male, subject, however, to my debts, and to the following legacies, and all my family pictures, together with the Turvey estates, [89] after my beloved wife, Lady Trimlestown's demise; all which I intend to entail strictly on my son and grandson, their issue male, with a power to make a provision of £2000 a-year on any future wife that they may have, and a power to charge the estates with a sum not exceeding £40,000, as a provision for younger children that may be born from such future marriages, with all the usual limitations with respect to the grant of leases customary to entail properties; and in failure of issue male in my son and grandson, I wish to entail the estate of Trimlestown upon the heir male of my family, who is next in succession to my title, as M. Barnwall, of Fyanstown, and his issue male; and the King's County estate, and the reversion of my Turvey estate, after Lady Trimlestown's demise, I wish to entail on my daughter, Countess D'Alton, and her heirs male in succession, by which I mean her son Richard; and in the event of their succeeding, they are positively to take the name and bear the arms of Barnwall; and in failure of my daughter, and her heir male above mentioned, I wish to entail those estates on my own heirs male above mentioned.

" IV. I wish to bequeath to my beloved wife, Lady Trimlestown, all my personal property of every description, save and except my family pictures, which are to be entailed as before mentioned. I also leave to Lady Trimlestown, my wife, the house, demesne, and estates of Turvey, with all the property thereunto belonging, in the counties of Kildare, Roscommon, Longford and Dublin, to enjoy during her natural life, in as full and complete a possession as possible, with power to eject tenants and grant leases, as is usual in such cases; and I also bequeath to Lady Trimlestown, my wife, £5000, to be secured to her on the King's County estate.

[90] " V. I wish to bequeath to my daughter, Countess D'Alton, £600 a-year, during her natural life, for her sole and separate use, and independent entirely on her husband, Peter D'Alton; and to my grand-daughter, Henrietta D'Alton, £5000. To my grandson, Richard D'Alton, £3000. And in the event of Count D'Alton's outliving my daughter, I wish to leave to my grandson, Edward D'Alton, £400 yearly

during his father's life. I wish to name my cousin, Colonel John Oshea, and my brother-in-law, Colonel Henry Eustace, to be the trustees and executors of this my will. "TRIMLESTOWN."

(June 14, 1827.) Lord Redesdale: It appeared in evidence in this case, that the late Lord Trimlestown had executed several papers of a testamentary nature, and among others, a will of date the 8th December 1812: and a bill was filed in the Court of Chancery, in Ireland, to have the provisions of that will carried into effect. In the course of the proceedings, an interlocutory order was made, directing an issue to try the validity of this instrument and a receiver was appointed in the mean time. The issue was rather of an extraordinary kind. It was—that Lady Trimlestown and her husband, Mr. Lloyd, should bring a feigned action against Thomas, the present Lord Trimlestown, to try the question, "whether the paper-writing, bearing date the 8th day of December 1812, in the pleadings in this cause mentioned, be the last will and testament of Nicholas Lord Baron Trimlestown, deceased, or not; and it was added, that Count D'Alton and Rosalie, Countess D'Alton, his wife, be at liberty to appear in the said action to defend their rights, and that of their issue, as they may be advised."

[91] It seemed to me, when the cause was heard, that the justice of the case could not be come at on that issue. The way in which the instrument was impeached was this—that it was executed in consequence of the improper influence of the Dowager Lady Trimlestown over her husband, and that it was, in reality, her will, and not her husband's. On this point a vast deal of evidence was produced, and I doubt whether a great deal of it was not of a description which ought not to have been admitted. Lord Trimlestown had made a will before, and in this last will there was a provision made for Lady Trimlestown far beyond what had been given her in the first will. The verdict was given against the will, and an application was made to the Court of Chancery for a new trial, and the Court, after calling for a report from the Judges of evidence of two of the witnesses only, refused the application; and from that refusal an appeal was brought to this House, and your Lordships were pleased to declare "that the Lords not having before them, in this case, in which a *feme covert* and infants are parties mutually interested, any report which they can deem authentic of all the evidence given at the trial, are unable to determine whether the verdict complained of ought or ought not to be deemed conclusive; and it was therefore ordered and adjudged that the said order of the 14th July complained of in the said appeal be, and the same was, reversed; and it was further ordered that the cause be remitted back to the Court of Chancery in Ireland, to rehear the motion for a new trial upon a full report from the Judges of the whole of the evidence given at the trial before them, the Lords deeming such report necessary in a cause in which such parties are interested."

At length a report of the whole of the evidence was procured from two of the Judges, Lord Norbury and [92] Mr. Justice Moore, with their opinions on that evidence; and it appeared that Lord Norbury thought the verdict was not warranted by the evidence, while Mr. Justice Moore thought that it was. Then an order for a new trial was pronounced, and from that order this appeal is brought before your Lordships, on the allegation that no new trial ought to be granted. When this cause came on for hearing, your Lordships, including the noble and learned Earl (Eldon) who then sat on the woolsack and myself, thought that neither the Court of Chancery in Ireland nor this House could possibly make a decree on this evidence, which did not affect the rights of other parties claiming under the will, although a great deal of it did affect the rights of the Lady Trimlestown. Two other suits were depending in the Court of Chancery in Ireland founded on these testamentary papers, in which Lady Trimlestown and her husband, Lloyd, were defendants; and therefore I cannot better describe the proceedings than by saying that there was a jumble of three causes materially bearing upon each other, and involving interests which could not be decided upon this issue. Upon the whole, then, we thought that there was no use in proceeding in the cause as it stood, and that the only useful plan was to put the case in a proper shape, so as to include the interests of all parties claiming under the will of the late Lord Trimlestown. He had made a variety of provisions in his will, affecting a great many parties, and he had in view a variety of subjects and objects,

besides the interests of Lady Trimlestown. In the evidence on this issue it was attempted to connect that lady with the Countess of D'Alton, by reason of a letter which the countess, who had fallen into distressed circumstances, had written to Lady Trimlestown, thanking her for the provision which had been made for her (the countess) [93] in Lord Trimlestown's will. It is necessary then to put the case in such a shape as to trace and ascertain the progress of this influence of Lady Trimlestown on the mind of her husband, and other material facts. Suppose the last will of Lord Trimlestown to have been executed under the improper influence of Lady Trimlestown, that might be a good reason for its being inoperative as far as she was concerned, but it did not follow that it was inoperative as to the whole of it; and then the question would arise, how far the prior instrument would be affected by this influence? It appeared clear, then, to us that the issue and the trial were not sufficient for their object, as far as the interests of all the parties claiming under the will were affected, and there was no use in sending the matter again to trial on this issue.

The order, therefore, which I would propose for the adoption of your Lordships is of this nature, to refer the whole matter back to the Court of Chancery in Ireland, for the purpose of enabling the Court to direct an issue including the matter of the three causes together, in order to try the rights of all the parties concerned. This is necessary, because your Lordships cannot, at present, make any order except in the cause before you. Your Lordships, then, will probably be of opinion that the cause should be referred back, in as much as, having regard to the whole matter, the merits, as affecting all the parties interested, cannot be properly tried on this issue; and the Court can give no judgment upon it, and therefore there is no use in proceeding further on this issue: and that the parties should proceed as they might be advised, so as to ascertain, on a proper issue, what were the testamentary devises of the testator, and in what manner and in what words such devises were made. My meaning is, that the jury should find [94] specially what parts of the will, or testamentary papers, they found valid, and what not; and that all the parties interested should be called, and that the Dowager Lady Trimlestown should be made defendant in the issue: and that the Court might consider whether one or more issues should not be directed for the purpose of trying the rights of all the parties, by which all the parties should be called, so that the verdict might be such as to enable the Court of Chancery to decide according to the rights of all the parties concerned: that the plaintiffs may have the opportunity of agreeing upon a bill to bring all the parties interested before the Court, as should have been done at the first; and that the Court may, thereupon, do as may be just. We have considered a variety of forms for your Lordships judgment, but it appeared to us that this shorter one would be best adapted to answer the purposes of justice, that is, merely sending back the cause, and stating the reasons why it is so sent back. It is lamentable, certainly, that so much expense should have been incurred to no purpose: but your Lordships attention must not be confined entirely to the question of expense, since, on the cause as it stands, no judgment can possibly be given; and it is therefore necessary that it should be put in a proper train, that the whole provisions of the will may be carried into effect. To go to work in the regular way is the best and most expeditious course, while the irregular and partial plan would, in the end, be found to be the worst and most expensive.

Eldon (Earl of): I do not mean to say one word more than this—that, after the most anxious consideration of the case, I agree in the proposition; being decidedly of opinion, that no verdict that can be given on this issue will enable the Court in Ireland to give such a judgment as it ought to give. If we refuse to [95] grant a new trial, the effect will be to set up the verdict given in the former one; and, if we consent to grant a new trial on this issue, it will only be putting the parties to additional expense, without any object at all: so that all we can do at present is to remit the cause to the Court below, with an intimation of our opinion as to what ought to be done. A great deal of evidence was admitted on the trial, which I doubt, whether it ought to be received; I may even go the length of saying, that I think it ought not to have been received. Besides this, there is a material point here which was not raised below; namely, whether the testamentary papers might not be invalid as to some of the items, and not as to the whole. We had a case not long ago, in which a will was found invalid as to the person who suggested it, but valid as to the other

parties. Part of a will or testamentary paper may be good as to one part and bad as to another; and that renders it important that the jury should find specially in what manner and words the devises were made which they thought valid. Nothing then can be done in any one of these three causes, but the whole must be taken together. It is useless to grant a new trial on this issue, as no verdict could be given on it, that would enable the Court to give a proper judgment. It is necessary, therefore, that the proceedings which have taken place since this issue was directed should be blotted out, that the Court may have the opportunity of directing another issue, which will enable it to reach the justice of the case.

(14th June, 1827.) Ordered and adjudged that the Cause be referred back to the Court of Chancery in Ireland for further consideration thereof, inasmuch as it appears to this [96] House, that having regard to all the circumstances to be collected from the several matters appearing from the Judge's Report to have been offered in evidence on the trial of the issue, directed by the said Order of the 18th day of June 1817, the merits of the whole case as affecting the rights of the appellant in this cause, and of other persons interested in the real estates of Nicholas Lord Trimlestown, deceased, and claiming under or against the several instruments produced in evidence on the said trial, cannot be properly tried on such issue, and that therefore it is not fit that any further proceedings should be had under the said Order of the 24th day of May 1824, complained of in the said appeal: but that the parties interested should be at liberty to proceed as they should be advised for the purpose of bringing before the said Court of Chancery the question, whether by all or any, and which of the several instruments alleged to have been executed by the said Nicholas Lord Trimlestown, deceased, as testamentary instruments, or by any and what parts or part thereof respectively the said Nicholas Lord Trimlestown, deceased, did devise all or any and what parts or part of his real estates, and in what manner, and by what words; and that a proper issue or issues may be directed by the said Court, in such manner as may be necessary, and in which all proper persons may be made parties, so that upon the verdict or verdicts which may be given on the trial of such issue or issues, the said Court may be enabled to pronounce a decree respecting the rights of the appellant in this cause, consistent with his rights, and with the rights of all other persons claiming interests in the real estates of the said Nicholas Lord Trimlestown; and this House is of opinion, that the rights of the plaintiffs in this cause cannot be properly determined on the [97] pleadings in this cause, as the same now stand: And it is further ordered, that this cause be referred back to the said Court of Chancery, for the further consideration of the said Court, to the end that the said Court, having regard to the several matters hereinbefore expressed, may further proceed in the said cause, in such manner as shall be just.

[98] APPEAL FROM THE ENGLISH COURT OF EXCHEQUER.

GLEGG and Others,—*Appellants;* LEGH,—*Respondent.*

and

CHERRY,—*Appellant:* LEGH.—*Respondent.*

[S. C. 1 Bli. N.S. 302. See *Norbury* v. *Meade*, 3 Bli. 211, 261.]

Where a person had a beneficial interest for life in an impropriate rectory, and was in actual possession, held that he was entitled to take the tithes, though the estate was subject to a trust term for securing annuities, and to a mortgage—he having paid the annuities and the interest of the mortgage-money, and neither trustees nor mortgagees interfering with his possession.

Richard Legh, in Hilary term, 1817, exhibited his bill of complaint in his Majesty's Court of Exchequer at Westminster against the appellants, stating, that the respondent was, in and previously to the month of December 1815, seised, or well entitled for his life, of or to the said impropriate rectory or parsonage, and

that as such impropriator, he was at the time aforesaid, and then was, entitled to the tithes before mentioned; and that the appellants had taken tithes of hay, clover, and other grasses, and had refused to pay or account for the same, and praying that an account might be taken of the said tithes during the said year 1816; and that the said appellants might pay to the said respondent what, upon taking such account, should appear to be due to him from the said appellants [99] respectively, the respondent waving all penalties which might have been incurred by the appellants respectively by their subtracting or not setting out the said tithes.

Glegg and the other parties admitted by their answers, that they had paid the tithes to the plaintiff for some time, but that they had discontinued paying them, because they found that the rectory was vested in trustees for several long terms, for securing certain annuities charged upon them; and that as the legal estate was not in Richard Legh, he was not entitled to demand the tithes. And that the legal estate was in certain mortgagees, to whom it had been mortgaged by the trustees. Legh, in answer to a cross-bill filed against him by the other parties, which it is not necessary to notice here more particularly, admitted the outstanding terms and annuities and the mortgage, but stated that all the arrears of the annuities and interest of the mortgage money had been regularly paid up and satisfied; and that neither the trustees nor mortgagees had ever attempted to interfere with his possession; and that he was the only one in equity entitled to take the tithes; and that the terms vested in the trustees were merely collateral securities for the due payment of the annuities. The following is a short extract from the answer:

"Denies it to be true to the best of his knowledge, information, and belief, that there are or is divers or any outstanding terms or term in the said impropriate rectory or parsonage, or in the tithes of the said township of Bosley, or any of them, vested in divers or any persons or person, save as aforesaid, and save as hereinafter mentioned (that is to say), that there is an outstanding term of ninety-nine years, if John Roulls, the younger (who afterwards took the name of Legh, and is now dead), and Harriet, his wife, or either of [100] them, should so long live, granted by a certain indenture of release, dated the 8th day of November 1777, which said term of ninety-nine years, determinable as aforesaid, is now vested, as this defendant believes, in Wilbraham Egerton, of Tatton, in the county of Chester, esquire, and Thomas William Tatton, of Wilkinshaw, in the said county, esquire, for the residue thereof, in trust only, for better securing unto the said Harriet Legh an annuity in the usual manner, but all arrears of the said annuity have been duly paid up to the present time."

"Says that (amongst other estates) the tithes of the said township of Bosley, together with the tithes of other townships within the said parish of Prestbury (being part of and parcel of the premises in and by the said will of the said Charles Legh), were by the trustees of the said term of four hundred years created by the said will of the said Charles Legh and pursuant to the trusts thereof selected and granted by the said trustees, by virtue of certain indentures of demise or mortgage for the residue of the said term of four hundred years, to certain persons as mortgagees, for the purpose of securing £7000 and interest; which said sum of £7000 and interest was levied and raised by the said trustees, and paid and applied in discharge of the several legacies specifically given and charged by the said will and codicil on the said premises thereby devised."

"Says, that by reason of divers mesne assignments, and other acts and assurances valid in the law, the said indentures of demise or mortgage, and the tithes, hereditaments, and premises therein contained, have been assigned to, and are now vested in, William Davenport and John Glegg, esquires, for the residue of the said term of four hundred years, for securing the said sum [101] of £7000 and interest, and then in trust to secure one rent-charge or annual sum of £100 to be paid to the said Mary Bowen, formerly Mary Legh, in the said will and codicil, and also in the said bill of complaint and hereinbefore named at the times and in manner therein mentioned."

"Says, that the said sum of £7000 was advanced by the said William Davenport and John Glegg, and paid by them to the mortgagees out of a large sum of money in their hands, raised by them by the sales of timber off the estates devised by, and as trustees acting under certain trusts contained in the said will of the said Charles

Legh: and that he, this defendant, as tenant for life in possession of the estates devised by the said will, hath been always beneficially entitled to receive and enjoy all interest monies arising from or accruing in respect of the said trust-money or sum of £7000 so raised by the said William Davenport and John Glegg, and advanced and paid by them for the benefit of the estate as aforesaid; and that the respective annuities secured by both the said terms of ninety-nine years, determinable as aforesaid, and four hundred years, and now outstanding, have been respectively duly paid and satisfied up to the present time; and that there are now no arrears or sums of money due in respect of the interest of the said sum of £7000, or in respect of the said respective annuities, or in respect of any legacies or debts charged by the said will and codicil, or secured by virtue of the trusts of the said term of four hundred years."

"Says, that none of the trustees or mortgagees, in whom the said tithes or any part thereof are vested as aforesaid, have taken any steps to enter into the possession or receipt of the said tithes, or any part thereof."

[102] The defendants below also set up a modus, but without effect.

The case of Legh and Cherry was of the same kind exactly, except that the modus was insisted upon at greater length, but not made out.

In July 1821, the Court of Exchequer decreed for the plaintiff Legh in both cases; and from these decrees the appellants Glegg and Cherry appealed, for the following among other reasons:

Because the respondent (Legh) did not in the said cause prove, that he was seised of, or entitled to the said tithes, claimed by the said bill, either for life or any other period.

And because it was proved, that the legal estate and interest in the said rectory and parsonage, was vested in other persons than the respondent, and that the respondent was not entitled to the tithes claimed by the bill.

In behalf of the respondent, Legh, it was contended that the decree should be affirmed:

Because the said respondent having proved that he was in the actual possession of the said impropriate rectory, by receipt of tithes from the several appellants themselves, and the evidence produced by the respondent not having shown a right in any other person to receive the tithes demanded by the respondent, but merely that there were some terms outstanding in trustees, which terms had, up to the time of the filing of the respondent's said answer to the said cross-bill (the only evidence thereof produced by the appellants), been fully satisfied, and no valid ground of exemption from such payment having been stated or proved to exist, the respondent was entitled to have a decree for pay-[103]-ment of the tithes demanded by his said bill in the terms in which such decree was pronounced.

Eldon (Earl of): It is too much to say that a mortgage not in possession should be entitled to the rents and profits of the estate, and therefore the defendants below have no right to refuse the payment of their tithes on that ground. Another ground taken here is that of a modus, with respect to which the Court of Exchequer did not seem much inclined to give an opinion, nor indeed was it necessary here, for although there were some vague and indistinct indications of a modus, there was nothing like that sort of evidence upon which the judgment of a court of justice could be safely founded. I think therefore the Court of Exchequer was right in both these judgments.

Judgments affirmed.

APPEAL FROM THE COURT OF EXCHEQUER

[104] (ENGLAND).

MORGAN and others,—*Appellants*; EDWARDS,—*Respondent*.

[Mews' Dig. v. 1545; S. C. 1 Bli. N.S. 402; 13 Price 782; M'Cle. 541. Discussed in *Worthington* v. *Wigginton*, 1855, 20 Beav. 67, at p. 76; and see *Dillon* v. *Parker*, 1833, 7 Bli. N. S. 325, at p. 349.]

A woman entitled absolutely to certain leasehold premises marries, and by the

marriage settlement becomes entitled absolutely to the same premises, in case she survives the husband. He, by his will, disposes of the premises as if they had been his own, and gives them to his wife for life, and then to her first and second daughters for life in succession. The wife takes some advantages under the will of the husband, in addition to the leasehold premises, but is entirely ignorant of any necessity to elect, and makes no election in fact. The wife makes a will, by which the leasehold premises are left to her eldest daughter absolutely according to her power under the marriage settlement, but in contravention of the husband's will, by which the eldest daughter had only an estate for life. On the death of the eldest daughter, the second daughter claims the property, and is let into possession by the representative of the eldest daughter, in ignorance of his own right. Some years afterwards, the representative of the eldest daughter filed his bill in the Exchequer for restitution to him of the premises in question, on the ground that the wife had a right to dispose of the premises absolutely, and that she was not bound to elect, and never thought of electing under the will of her husband. Held by the House of Lords, affirming a judgment of the Court of Exchequer, that the claim of the representative of the eldest daughter was good, and that this was not a case for election.

Gwen or Gwenllian Jones, was entitled, by lease, of date 1756, from Bridget Bevan, to certain leasehold premises, "to hold to the said Gwen or Gwenllian Jones, her executors and administrators, for a term of ninety-nine years, if she and her daugh-[105]-ters, Margaret, Bridget and Elizabeth, or any of them, should so long live, at the yearly rent of £22."

In contemplation of a marriage between Gwen Jones and Thomas Thomas, a marriage-settlement was made, in January 1758, reciting, "that a marriage was intended to be had between the said Thomas Thomas and Gwenllian Jones; and also reciting, that the said Gwenllian Jones was then entitled to and possessed of a considerable personal estate, consisting of ready money, securities for money, leasehold estates, stock and crop, and other personal effects, of the value of £600 and upwards; and which said personal estate, and the increase thereof, were thereby agreed by the said Thomas Thomas and Gwenllian Jones, to be assigned to the said David Edwards and John Harries, upon the trusts therein and hereinafter mentioned; it is witnessed, that in consideration of the said intended marriage, and for making a provision for the said Margaret Jones, Bridget Jones, and Elizabeth Jones, the infant children of the said Gwenllian Jones; also in consideration of 5s. unto the said Gwenllian Jones, paid by the said David Edwards and John Harries, the said Gwen Jones, with the consent of the said Thomas Thomas, testified in manner therein mentioned, did assign, transfer and set over unto the said David Edwards and John Harries, their executors, administrators and assigns, all and singular the said Gwenllian Jones's ready money, securities for money, goods, cattle, chattels and personal estate and effects whatsoever; also all and every the leasehold messuage, lands, tenements and hereditaments of her the said Gwenllian Jones, and which she was entitled to or held by lease or leases from any person or persons whatsoever or wheresoever situate; and all the rents, produce, increase or other profit or advantage whatsoever, that could or [106] might be had, recovered, obtained or gotten, by and from the said leasehold estate, money, goods, chattels, effects and personal estate aforesaid, or any part or parts thereof respectively; to hold the said leasehold premises, with the appurtenances, unto the said David Edwards and John Harries, their executors, administrators and assigns, from thenceforth for the residue and remainder of the term or terms of years in and by the said lease or leases granted and then to come and unexpired; and to hold the said money, securities for money, goods, chattels, personal estate and effects, unto the said David Edwards and John Harries, their executors, administrators and assigns for ever, upon the trusts following (amongst others), viz. in trust for the said Gwen Jones, her executors, administrators and assigns, until the solemnization of the said intended marriage: and after the solemnization thereof, upon trust as to £300 for the maintenance of and to be divided amongst the said Margaret Jones, Bridget Jones, and Elizabeth Jones, in the manner and at the times therein particularly mentioned; and upon further

trust and confidence, that the said trustees and the survivor of them, and his executors, administrators and assigns, should, with all convenient speed, call in and receive all and every other sum and sums of money, due from any person or persons whatsoever, by any security or otherwise, to the said Gwen Jones, and all and every other sum or sums of money, then ready by her, and which should remain after the raising of the said sum of £300 as aforesaid, and should place and lay out the same, on such securities, in their own names, as the said Thomas Thomas and Gwenllian Jones, his intended wife, should approve of and permit, and suffer the said Thomas Thomas and Gwen Jones, his intended wife, during their joint lives, [107] to take and receive, not only the interest and proceeds of such remaining money, but also the rents and profits of the said leasehold estates, and likewise to take and have the use and enjoyment of all the rest of the personal estate and effects of the said Gwen Jones, and the produce and increase thereof; and from and after the decease of either of them, the said Thomas Thomas and Gwenllian Jones, should assign, transfer and apply, or deliver the said remaining money, and all interest due thereon, and the said leasehold estate and effects thereby before assigned as aforesaid, to the survivor of them, the said Thomas Thomas and Gwen Jones his intended wife, and the executors, administrators and assigns of such survivor."

The premises being thus settled upon the survivor, and the executors and administrators of such survivor—Thomas Thomas the husband, in 1769, made his will, by which he gave the premises in question to his wife for life, and then to her daughters Margaret and Bridget successively for life, and to Elizabeth for the remainder of the term, disposing of the premises as if they were absolutely his own, without regard to the provisions of the marriage settlement. Margaret the eldest daughter had by that time intermarried with the respondent Edwards, and Bridget with the appellant Morgan, and Elizabeth with the appellant Morris. The material clause in the will was as follows: "I also give all the estate which I hold by lease from Mrs. Bevan, to Gwenllian, my dear and beloved wife, for and during the term of her natural life; and from and after her decease, to the said Margaret Jones (meaning the said Margaret, the wife of Thomas Edwards), for the term of her natural life; and immediately from and after her decease, to the said Bridget Jones (meaning the defendant Bridget), for and [108] during the term of her natural life; and immediately from and after her decease, to the said Elizabeth Jones (meaning the defendant Elizabeth, who married Rees Morris), for and during the remainder of the term granted on the said leasehold estate; and the said testator Thomas Thomas, by his said will, gave and bequeathed to the said Gwenllian his wife, all the rest, residue and remainder of his personal estate, goods, chattels, furniture, cattle, implements of household and husbandry, and all his stock and effects, for ever, if she continued his widow, and appointed her sole executrix of that his will."

Thomas Thomas died in 1776, leaving his wife Gwenllian Jones or Thomas surviving, and she in 1785 made her will, by which she appointed her eldest daughter Margaret her sole executrix, and bequeathed her the premises in question and the whole of her property absolutely, in conformity with her powers under the marriage settlement, without limiting the interest of Margaret to a life interest, as prescribed by the will of her deceased husband Thomas Thomas.

Mrs. Jones or Thomas died in 1790, leaving the three daughters surviving, and Edwards the husband of Margaret proved the will of Mrs. Thomas, and he and his wife Margaret Jones entered into possession of the premises.

In 1807 Margaret Jones, the wife of Edwards, died, and then Morgan claimed the possession of the leasehold estate, in virtue of the supposed right of Bridget his wife, under the will of Thomas Thomas; and Thomas Edwards, not being aware of his own right, as representative of his wife Margaret, who had become entitled absolutely under the will of her mother, founded on the provisions of her marriage settlement with Thomas, relinquished the possession into which Morgan entered.

[109] In 1818, however, Thomas Edwards filed his bill in the Exchequer, stating the circumstances, and praying that, "John Morgan and Bridget his wife, might be compelled by the decree, order, and direction of the said Court of Exchequer, to deliver up to the respondent, Thomas Edwards, the possession of the said leasehold premises, and the deeds relating thereto, particularly the said indenture of marriage settlement, bearing date the 31st day of January 1758, and the indenture of lease bearing

date the 16th February 1756; and that the appellants, John Morgan and Bridget his wife, might also account for, and pay to the respondent Thomas Edwards, the arrears of rent for the said premises, or the value of the said premises, to be let for the time during which they had been in the possession of the same."

To this bill Morgan and his wife Bridget, and Morris and his wife Elizabeth, put in their answers, in which they insisted that the will of Thomas Thomas raised a case of election, and that Mrs. Thomas or Jones had elected to take under that will, and was therefore bound to fulfil its provision. That part of the answers were in these terms: "That although by the terms of the said marriage settlement the said leasehold premises were assigned to the trustees therein named, upon trust after the decease of either of them, the said Thomas Thomas and Gwenllian his wife, to assign and deliver up the same to the survivor of them the said Thomas Thomas and Gwenllian his wife, and the executors and administrators of such survivor; and although the said Gwenllian Thomas survived her said husband, and thereby under and by virtue of the said settlement became entitled to the said leasehold premises; yet that the said Thomas Thomas by his said will took upon himself to dispose of the said leasehold premises [110] as his own, and that he also gave to the said Gwenllian Thomas the residue of his personal estate and effects, to the amount of £2000 and upwards, and that the same was of much greater value than the said lease; and that the said Gwenllian Thomas accepted such bequest and took under the said will benefits of greater value than the said leasehold premises, and frequently declared that the said leasehold premises, after her death, would go to her said daughters in succession, one after the other, and therefore the appellants, John Morgan and Bridget his wife, submitted that the said Gwenllian Thomas must be considered as having made her election to take under the said will, and to have thereby confirmed the said bequest of the said leasehold premises; and that the appellants ought not to be compelled to deliver up the possession of the said leasehold premises, nor the deeds relating thereto, nor the said lease of the 16th day of February 1756, nor to account for and pay to the respondent Thomas Edwards the arrears of rent of the said premises, nor the value of the said premises."

In the year 1822, Morgan and the other appellants filed a cross-bill, charging that Mrs. Thomas had derived considerable interests under the will of her husband Thomas Thomas, independently of the leasehold premises in question, and prayed that it might be declared, that Mrs. Jones or Thomas was bound to make her election whether to take under that will, and that she had elected to take under it, and had therefore relinquished her rights under the marriage settlement: and that upon the death of her eldest daughter Margaret, the second daughter Bridget and her husband Morgan in her right, became entitled to the possession of the leasehold premises, etc. The respondent, in his answer, denied that the personal estate [111] which Mrs. Jones Thomas acquired under the will of her husband was of any great value over and above that of the leasehold premises, and that it never occurred to her to make an election; and that, in point of fact, she never had made one. Some witnesses were examined on both sides, but elicited nothing material; and the cause rested substantially on the bills and answers.

Both the said causes came on to be heard before the Right Honourable the Lord Chief Baron of His Majesty's Court of Exchequer, on the 8th day of November 1824, when his Lordship was pleased to decree that the appellants, John Morgan and Bridget his wife, should forthwith deliver up to the respondent, Thomas Edwards, the possession of the said leasehold premises, in the pleadings mentioned, and that the said indenture of lease should be forthwith delivered up by the appellant, John Morgan, to the respondent, Thomas Edwards, or such person as he should appoint to receive the same, together with any other title-deeds, papers or writings, in the possession, custody or power of the appellant, John Morgan, relating to the title of the said leasehold estate; and that the respondent, Thomas Beynon, should forthwith deliver up to the respondent, Thomas Edwards, or to such person as he should appoint to receive the same, the said indenture of settlement, and should execute to the respondent, Thomas Edwards, or to such person as he should appoint, a proper deed of assignment of the said lease. And it was further decreed that the cross-bill should be discharged with costs.

From this decree Morgan and Morris appealed to the House of Lords; and contended that the same ought to be reversed, for the following reasons:

[112] 1st, Because it is clear that the will of the said Thomas Thomas raised a case of election on the part of the said Gwenllian Thomas, as to the said leasehold premises, and to the residuary personal estate of the said Thomas Thomas; and it having been admitted by the answer of the respondent, Thomas Edwards, that the said Thomas Thomas died possessed of personal property more than sufficient to pay his debts, and that his residuary personal estate and effects was possessed by the said Gwenllian Thomas, and applied by her to her use, it must at this distance of time be inferred and presumed, that the said Gwenllian Thomas elected to take under the will of the said Thomas Thomas; and to give effect to his will in regard to the bequest of the said leasehold premises.

2dly, Because if the said Gwenllian Thomas did not intend to give effect to the said Thomas Thomas's will, so far as regards the bequest of the said leasehold premises, it was incumbent upon her to have kept accounts of the personal estate of the said Thomas Thomas possessed by her, and of her payments out of such personal estate, and to have ascertained the residue of such personal estate, so that the appellants, Bridget Morgan and Elizabeth Morris, might be compensated out of such residue for the loss they sustained by the said Gwenllian Thomas not giving effect to the bequest of the said leasehold premises, contained in their favour in the said Thomas Thomas's said will; and by reason of the length of time since the death of the said Thomas Thomas, it is now impossible to ascertain the amount of the residuary personal estate of the said Thomas Thomas.

3dly, Because even assuming that it is not to be inferred or considered that the said Gwenllian Thomas did elect to take under the said Thomas Thomas's [113] said Will, and to give effect to such Will, so far as regards the bequest of the said leasehold premises, yet that the respondent, Thomas Edwards, claiming the said leasehold premises under the said Gwenllian Thomas, is bound to make compensation to the appellants, Bridget Morgan and Elizabeth Morris, for the value of the interest they took in such leasehold estate, under the will of the said Thomas Thomas; and the decree does not give or provide for such compensation.

For the respondent, Edwards, it was contended that the decree ought to be affirmed, for the following reasons:

1st, Because the will of Thomas Thomas did not raise a case of election; and even if it did raise a case of election,—

2dly, Because in all cases of election, a party having two claims has the option of either, and cannot be held concluded by equivocal acts performed in ignorance of the value of the funds, or in ignorance of the necessity of electing.

3dly, Because it cannot be held, that Gwen. Thomas did in her life-time elect to renounce her absolute right to the tenements in question, there being no evidence that she was apprized of any necessity to make election.

AS TO THE DISMISSAL OF THE CROSS-BILL WITH COSTS.

4thly, Because all the facts and circumstances of the case were sufficiently disclosed by the pleadings in the original suit, and it was competent for the appellants to have proved their case (if it had been capable of proof) by evidence in the original suit; or [114] at all events that the costs of the said cross-suit are properly directed to be paid by the plaintiffs therein, as the cross-bill could, in any case, only be necessary as a bill of discovery.

5thly, Because the cross-bill did not pray any account of the personal estate of Thomas Thomas, alleged to be possessed by Gwenllian Thomas, and there was not any personal representative of Thomas Thomas or of Gwenllian Thomas made a party to the original bill or cross-bill.

(May 25, 1827) Eldon (Earl of): I think this decree of the Court of Exchequer ought to be affirmed, but without costs.

Judgment affirmed.

[115] ERROR.

Rev. EDW. DRAX FREE, D.D.,—*Plaintiff in Error;* MONTAGUE BURGOYNE, Esq.,—*Defendant in Error.*

[Mews' Dig. v. 1216. S. C. 2 Bli. N. S. 65; in K.B. 6 B. and C. 27, 538; 9 Dowl. and R. 14; and in Ecclesiastical Court, 2 Add. 414; 2 Hagg. E. R. 456, 662. Adopted on point as to prohibition, in *Mackonachie* v. *Penzance* (*Lord*), 1881, 6 A. C. 445. See Church Discipline Act, 1840 (3 and 4 Vict. c. 86), s. 21; also Clergy Discipline Act, 1892 (55 and 56 Vict. c. 32).]

The Spiritual Court is prevented, by the Act 27 Geo. 3, c. 44, from proceeding against clergymen, as well as laymen, for fornication or incontinence, after the expiration of eight months from the time of the offence committed, *pro salute animae et reformationae morum:* but the Court may take cognizance of charges of that description against clergymen after the expiration of the eight months, with a view to suspension or deprivation, or other punishment merely clerical.—[Plaintiff in prohibition not allowed his costs where, though he succeeded in a minor point, he failed as to the main object.]

Error, to reverse a judgment in *Banco Regis*, in an action of prohibition. Plaintiff in error was rector of the parish of Sutton, in the county of Bedford. Defendant in error was a parishioner and church-warden of that parish.

[116] The defendant in error, in October 1824, exhibited articles against the plaintiff in error, in the Arches Court of Canterbury, for fornication and various other immoralities committed in the years 1810-12-14-15-17 and 22.

The libel commenced as follows:

"In the Arches Court of Canterbury.

"The office of the Judge promoted by Montague Burgoyne, Esq. against the Reverend Edward Drax Free, doctor in divinity.

"In the name of God, Amen.—We John Nicholl, knight, doctor of laws, official principal of the Arches Court of Canterbury, lawfully constituted to you, the Reverend Edward Drax Free, doctor in divinity, rector of the parish of Sutton, in the county of Bedford, in the archdeaconry and commissaryship of Bedford, in the diocese of Lincoln, and province of Canterbury, all and singular the heads, positions, articles, and interrogatories touching and concerning *your soul's health, and the lawful correction and reformation of your manners and excesses*, and more especially for the crime of fornication or incontinence, for profane cursing and swearing, indecent conversation, drunkenness and immorality; for your lewd and profligate life and conversation; for neglect of Divine service on divers Sundays; using the porch of the church of the said parish as a stable, and foddering cattle therein, and turning out swine into the church-yard; for refusing the use of the said church for vestry meetings lawfully called; for converting to your own use and profit the lead on the roof of the chancel of the said church; for refusing and neglecting, and delaying, to baptize or christen divers children of your parishioners; for refusing and neglecting to bury sundry corpses, and for requiring illegal fees to be paid to you for baptisms [117] and burials, do, by virtue of our office, at the voluntary promotion of Montague Burgoyne, esquire, article and object as follows:

"First.—We article and object to you the said Edward Drax Free, that by the Ecclesiastical laws, canons, and constitution of the Church of England, all clerks and ministers in holy orders are particularly enjoined and required to be grave, decent, reverend, and orderly in their general deportment and behaviour in every respect, and to abstain from fornication or incontinence, profaneness, drunkenness, profligacy, or any other excess whatever, and from being guilty of any indecency themselves, or encouraging the same in others, but on the contrary, they are enjoined at all convenient times to hear or read some of the Holy Scriptures, or to occupy themselves with some other honest study or exercise, always doing the thing which shall appertain to honesty, and endeavouring the profit of the Church of God, having in mind that they ought to excel all others in purity of life, and to be examples to other people, *under pain of deprivation of their ecclesiastical benefices, suspension from the exercise of their clerical functions*, or such other ecclesiastical punishment or

censures, as the exigency of the case and the law thereupon may require and authorize, according to the nature and quality of their offences, and this was and is true, public, and notorious, and so much you, the said Edward Drax Free, do know or have heard, and in your conscience believe to be true; and we article and object to you of any other time or place, person, or thing, and every thing in this and the subsequent articles contained jointly and severally."

Then followed the various articles to the number of thirty-one, of which these form the fifth to the twelfth inclusive, related to fornication and incontinence, and **[118]** the last concluded that "the said Edward Drax Free should be duly and canonically punished and corrected according to the exigency of the law."

The plaintiff in error disputed the jurisdiction of the Court, on the ground that it had been enacted by the 27th Geo. 3, cap. 44, that "no suit should be commenced in any Ecclesiastical Court, for fornication or incontinence, after the expiration of eight calendar months from the time when such offence shall have been committed." As to the other charges of immorality, independent of those of fornication and incontinence, the plaintiff in error did not attempt to impeach the jurisdiction; and the only point now to be determined was, whether the Ecclesiastical Court had jurisdiction in respect of such of the articles as imputed to the plaintiff in error the acts of fornication and incontinence.

The Ecclesiastical Court sustained its jurisdiction, and the plaintiff in error applied to the Court of K. B. for a writ of prohibition, and that Court, for the purpose of having the question solemnly decided, ordered him to declare in prohibition; and the action of prohibition having been commenced, and the question raised on the face of the declaration, the defendant in error demurred; and the Court, after argument, decided that the Ecclesiastical Court had no jurisdiction to proceed on the charges of fornication and incontinence, as far as they related to the soul's health and reformation of manners, but that it might take cognizance of these offences with a view to deprivation, suspension, or other punishment merely clerical. The materials, words of judgment, are these: "Whereupon all and singular, the premises being seen, and by the Court of our said Lord the king, now here fully understood, and mature deliberation being thereupon had, it appears to the said **[119]** Court here, that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, so far as the same relate to the proceeding against the said Edward Drax Free, for fornication or incontinence *for the purpose only of his soul's health and the reformation of his manners*, ARE *sufficient in law to bar* the said Montague Burgoyne from prosecuting his said suit in the said Spiritual Court, etc.: and that the declaration aforesaid, and the matters therein contained in manner and form as the same are above stated and set forth, *so far as the same relate to those offences for the purpose of suspension, or deprivation, or other punishment merely clerical*, and also, as to all the other matters charged against him the said Edward Drax Free, in the libel in the court below, ARE NOT sufficient in law to bar the said Montague Burgoyne from prosecuting his said suit in the said Spiritual Court, etc.: therefore it is considered, that as to so much of the said libel as relates to the proceeding against the said Edward Drax Free, for fornication or incontinence, for the purpose only of his soul's health and the reformation of his manners, the said Montague Burgoyne be prohibited from proceeding in the said Spiritual Court, and that as to so much of the said libel as relates to those offences for the purpose of suspension, or deprivation, or other punishment merely clerical, and also, as to all the other matters charged against him the said Edward Drax Free, that the said Edward Drax Free, who as well, etc. take nothing by his said bill, and that the said Montague Burgoyne do go thereof without delay, etc.; it is also considered by the said Court, of our said Lord the King now here, that the said Montague Burgoyne have the writ of our said Lord the King, of consultation of and upon the premises last aforesaid, to the said Sir John Nicholl to be **[120]** directed, and therefore it is signified to the said Sir John Nicholl, that he proceed in the said suit between the parties aforesaid of and upon the premises last aforesaid, etc."

A question arose in the court below, whether the plaintiff in error, having partly succeeded in his prohibition, ought not to have his costs, to which the plaintiffs succeeding in prohibition are entitled under the statute. But as in this case the

plaintiff, although he succeeded in a point of minor importance, had failed as to the main purpose, the Court declined to allow him his costs.

On this judgment the plaintiff in error brought his writ of error returnable before the Lords in Parliament, on the ground that the judgment of prohibition, as far as the suit related to fornication and incontinence, ought to have been absolute and unqualified, and that the Court ought to have allowed the plaintiff his costs.

The cause was heard on the 24th June 1828, and it was contended that the judgment of the court below ought to be affirmed:

1st. Because the said Act of 27 Geo. 3, was intended only to apply to suits instituted in Ecclesiastical Courts against laymen, for the offences in the said Act mentioned.

2dly. Because, even admitting that the said Act of 27 Geo. 3 was intended by the Legislature to apply to suits instituted against clerks, as well as to those instituted against laymen, still it is apparent that the same was not intended to apply or extend to suits instituted against clerks, so far as the same may be instituted against them only as clerks, and for deprivation or suspension, or other punishment merely clerical.

[121] 3dly. Because the said statute, 27 Geo. 3, does not, at all events, prevent the Ecclesiastical Court from taking cognizance of the charges of fornication or incontinence, even after eight calendar months, where such charges are entertained as inductive or prefatory to other charges clearly within the jurisdiction of the said Court.

4thly. And in so far as respects the plaintiff's claim to costs: Because upon the judgment awarded in this case by the Court of King's Bench, the plaintiff was not entitled to costs, either by the common law of the land, or by any of the statutes thereof.

In support of the judgment of the Court of King's Bench on the main question, the cases of *Stader* v. *Smallbrooke* (1 Lev. 138), and of *Townshend* v. *Thorpe* (2 Ld. Ray. 1507), were cited as authorities directly in point.

Dr. Addams and Mr. Denman for plaintiff in error.

Mr. Campbell and Dr. Lushington for defendant in error.

(26th June, 1828) Lord Lyndhurst, (Ch.): This was originally a suit in the Spiritual Court against the reverend doctor Drax Free, upon various charges of fornication and other offences, committed from 1810 to 1822, and the suit was instituted in 1824 nearly two years after the last charge mentioned in the articles. In looking at the articles, I think it was perfectly competent to the Spiritual Court to proceed in the ordinary way, if the articles were exhibited in time, both *pro salute animae*, and for deprivation. In the Spiritual Court, it was contended for Doctor Free, that the statute 27 Geo. 3, **[122]** c. 44, was a bar to the proceeding, but the replication was over-ruled, and then he applied to the Court of King's Bench for a writ of prohibition, and was ordered by that Court to declare in prohibition. The Court of King's Bench was of opinion that the proceeding, as far as it was *pro salute animae* and reformation of manners, was barred by the Act even in the case of a clergyman, after the expiration of the eight months. But a much more important question arose, and that was, whether the statute applied to a proceeding in the Spiritual Court for the purpose of deprivation; and looking at the title, the preamble, and the provisions and enactments of the statute, I concur with the Judge of the Court of K.B. that the limitation of eight months does not apply to the proceeding in the Ecclesiastical Court for the purpose of deprivation.

Then as to the form of the proceeding, I stated that the Spiritual Court, in the ordinary course, might proceed on articles, if exhibited in time, *pro salute animae*, and for deprivation, for either the one or the other, or for both. The Court of K.B. considered the statute a bar to the proceeding as far as it was *pro salute animae*, but their judgment allowed the Spiritual Court to proceed for the purpose of deprivation only. They considered the articles as having two objects, one of which was out of time by the statute, to the other they decided that the statute did not apply, and allowed a consultation.

I think that the Court of K.B. was warranted in this judgment both on principle and authority. The case of *Slader* and *Smallbrooke* (1 Lev. 138) was one in which proceedings were instituted against a clergyman who had forged his orders; and on application for a pro-**[123]**-hibition, the Court of K.B. held that the Spiritual

Court had no power to proceed against the accused with any view to a judgment against him for the crime of forgery, but that the Spiritual Court might inquire into the charge of forgery with a view to deprivation. So, although the ecclesiastical tribunal cannot punish for forgery, it may inquire into the question of forgery with a view to deprivation only. That case applies directly to the present. The Spiritual Court cannot proceed against Dr. Free *pro salute animae et reformatione morum*, yet it may inquire into the question of incontinence with a view to a sentence of deprivation. So in the case of *Townshend* and *Thorpe* (2 Ld. Ray. 507) the Court proceeded on the same distinction. Both cases are similar in principle to the present. The Spiritual Court may proceed for deprivation only, and for that purpose it may proceed in the manner, and with the forms and ceremony necessary for a sentence of deprivation. I think therefore that the judgment ought to be affirmed.

Then as to the question of costs, I had some doubts on that point at the hearing. Before the 8th and 9th of Gul. 3. the plaintiff, though he succeeded, had no costs. By that Act it was provided, that if the judgment was for him, he should have his costs. What is the case here? The judgment is, that the Spiritual Court cannot proceed *pro salute animae*, but that it may proceed for the main object, which is deprivation. That is a judgment at least as much in favour of the defendant in prohibition as in favour of the plaintiff, and it cannot be supposed that in such a case it was the intention of the Legislature that the plaintiff should have his costs. This was a case which the **[124]** Legislature had not in contemplation, and is a *casus omissus*. I agree therefore with the Court of K.B. that in this case the plaintiff in prohibition is not entitled to his costs.

Judgment of the Court below affirmed, with £100 costs.

(For proceedings in the K.B. *vide* 5 Barn. and Cress. 400-765.)

[125]

APPEAL

FROM THE COURT OF EXCHEQUER, IRELAND.

TRANT,—*Appellant;* DWYER,—*Respondent*

[Mews' Dig. viii. 832; S. C. 2 Bli. N. S. 11. As to what is reasonable time under the Irish Tenantry Act (19 and 20 Geo. III. c. 30, Ir.). See *Dyott* v. *Viscount Massareene and Ferrard*, 1874, Ir. 9 Eq. 149; *Ex parte Peyton*, 1888, 21 L.R. Ir. 371.]

Notice in 1810, under the Tenantry Act, by a landlord to a tenant of a lease for lives renewable for ever, to pay his several fines and to renew. Tenant ready to pay his fines immediately on notice; but a difficulty arises respecting collateral matters of encroachment and breach of covenant, and a correspondence on these points takes place between the parties; and, in point of fact, no tender of the fines is made till upwards of three years after the notice: held that, as the landlord knew that the tenant was always ready to pay the fines, and that as the difficulty in the way of renewal arose from a collateral matter, the principle of neglect or unreasonable delay did not apply here, as the landlord might have accepted the fines and renewed without prejudice to his rights as to the collateral points, and that the want of tender, under the circumstances, was immaterial, as the tenant knew that the fines, though tendered, would not be accepted. Adjudged that the tenant was entitled to a renewal, reserving the rights of the landlord as to the collateral matters.

In 1748 Stephen Rice, being seised in fee of the lands of Ballynahow and others, in the county of Tipperary, including a considerable portion of turf bog contiguous to the arable and pasture grounds, demised the lands of Ballynahow to Samuel Hughes, Mary Hughes, and Edward Dawson, at the yearly rent of £150. The lease contained the following covenant against waste: "That said Samuel Hughes,

his heirs or assigns, should not commit or wilfully suffer to be committed any waste on the premises, and should cut his or their turf in straight drains, to be cut sloping one foot narrower [126] for every foot in depth, and agreeable to the natural fall of the land, and of such an equal depth as to preserve an hanging level at the bottom, and to begin at the lowest part of the ground where such drain or drains should from time to time be cut, and that he or they should leave at convenient distances on such drains parts uncut of ten feet in breadth each part for bridges, and bore holes underneath on a level with the bottom of such drains to let the water pass, and that he or they should pay £1 sterling for every perch of bog which should be cut on the premises during said demise other than as is thereby covenanted and that yearly, to be recovered and distrained for as an additional rent."

In 1755 the interest of Stephen Rice in these lands came into the hands of appellant's father, Dominick Trant, who then agreed with Hughes to renew his lease for ever in payment of a renewal fine of £10 on the fall of each life. Samuel Hughes died in 1785, and his interest became vested in Charles O'Neil, who paid to appellant's father the renewal fines due on the fall of the lives of Samuel Hughes and Edward Dawson, two of the *cestui que vies* named in the original lease of 1748, and nominated Francis Annesley Hughes, and Mary Hughes the younger, as the lives to be substituted in their stead. O'Neil afterwards assigned his interest to Cooper Crawford, subject to a mortgage for £2000, which mortgage was assigned to the respondent John Dwyer, who obtained a further mortgage of the equity of redemption from Cooper Crawford for £1000. Cooper Crawford sub-let the lands to John O'Meara.

Dominick Trant died in 1790, while appellant, his son and heir, was a minor. When appellant came of age in 1800, he went to England, where he remained till 1808. In that year Mary Hughes, the elder, one [127] of the lives in the original lease, died. The appellant apprehending that Crawford and O'Meara had encroached on the bog, and cut turf in a manner not authorized by the covenant in the lease of 1748, in December 1810 caused the following notice, under the Irish Tenantry Act, to be served on Cooper Crawford: "Whereas Stephen Rice, formerly of Mount Rice, in the county of Kildare, esquire, deceased, by indenture bearing date the 7th day of January 1748, did demise unto Samuel Hughes, deceased, the town and lands of Ballynahow, in the county of Tipperary, for the lives of said Samuel Hughes, Mary Hughes, otherwise English, his wife, and of Edward Dawson, of Moynard, in the county of Tipperary, gent., at the yearly rent of £150 sterling. And whereas all the estate, right and title of the said Stephen Rice in and to the said lands and premises is now legally vested in me, and you claim all the right, title and interest of the said Samuel Hughes in and to the said lands, together with some agreement for a renewal thereof upon payment of a renewal fine of £10 sterling upon the fall of each life. And whereas all the said lives in said lease of the 7th day of January 1748, are long since dead. And whereas you have taken possession of a large tract of the bog of Lower Dovea belonging to me, and insist upon holding same as part of said lands of Ballynahow, and have cut and disposed of large quantities of turf upon the said bog, contrary to the express covenant in said lease of 7th of January 1748. Now take notice, That I require you forthwith to pay me up all rent due out of said lands, together with the sum of £372 12s. due for renewal fines, septennial fines, and interest due upon the deaths of the said Samuel Hughes, Mary Hughes, and Edward Dawson. And I also [128] require you to restore to me the possession of such parts of the said bog of Lower Dovea as you have so possessed yourself of, and likewise to pay to me the sum of £1 sterling for every perch of turf cut on the said bog contrary to the covenant in said lease of 7th January 1748. And take notice, That unless you forthwith comply with this reasonable request (which I have heretofore repeatedly called upon you to do without effect), I will not hereafter consider myself bound to renew your lease of said premises, and will take such proceedings as I shall be advised to recover the possession thereof, discharged of any lease or claim you may have for a renewal. Dated this 20th day of December 1810."

(signed) *John Trant*

"To Cooper Crawford, esq. and all others concerned."

In this notice the appellant, not being aware of the renewals by O'Neil with his father, miscalculated the fines, but was immediately set right on that point. Upon service of this notice, a correspondence took place between appellant and Crawford relative to the adjustment of the question of the boundary of the bog, and the breaches of covenants previous to granting a renewal,—no reference being then made to any difficulty arising from the nonpayment of renewal fines; and under these circumstances, no tender was, in point of fact, made till 1814. While the correspondence for the adjustment was going on, another life, that of Mary Hughes the younger, fell in February 1812, and in October of that year the appellant declined to renew at all, on the ground stated in the notice, and the unreasonable delay in tendering the renewal fines.

In February 1814 the fines were tendered; and upon refusal by the appellant to renew, Cooper Crawford **[129]** and respondent Dwyer filed a bill for renewal in the Court of Exchequer; and in June 1815 it was ordered by the Court that the cause should stand, with liberty to the appellant to bring an ejectment against Cooper Crawford for the recovery of the portion of the lands alleged to be encroached upon, and also any action of covenant that he might think fit, Crawford being at the same time put under the terms requisite for the due trial of the causes. The actions were accordingly brought, and when nearly ready for trial, Cooper Crawford died, and the suits abated; but the appellant proceeded with an ejectment against the sub-tenant O'Meara, who defended under the terms of the decretal order; and the appellant recovered 234 acres, and in 1817 took possession of the lands so recovered. In 1818 the respondent revived the suit in the Exchequer against the appellant; and in June 1820, the appellant, having neglected to apply to the Court to put the respondent under terms as to the action of covenant, the Court:

"Decreed a renewal of the lease of 1748, according to the covenant contained in the deed of 1755, upon payment of all sums due for rent and renewal fines, to be calculated according to the usual course of the Court, and of all costs of law, and the costs of this cause, etc. so as not to include in the renewal the premises recovered in the ejectment; and Trant was ordered to execute the lease to Dwyer, with a declaration that such renewal was made to Dwyer as mortgagee, as liable to the equity of redemption reserved upon the mortgages of the original lease; and Dwyer was decreed entitled to tack to his mortgages what he should pay in pursuance of the decree; and the decree was to be without prejudice to any action which the landlord Trant might be **[130]** advised to bring against the representatives of Cooper Crawford or John O'Meara, or either of them, for breaches of any covenant contained in the original lease since the same vested in Cooper Crawford."

From this decree the landlord appealed, for these reasons:

1st, Because the respondent, the only party seeking relief in this cause in the court below, must be affected by the gross laches and neglect which have occurred on the part of the tenant in this case in so long omitting to pay the renewal fines, and to take out the required renewal; no tender of any fine for renewal, or of any compensation to the landlord for the tortious acts of the tenant, and those claiming under him, having been made by the respondent, or any other person, until after more than three years from the service of appellant's notice of the 20th December 1810, which expressly required such renewal to be taken out forthwith, which neglect has been aggravated in the present instance by such flagrant and wilful violation of the covenants contained in the said original lease of 1748.

2d, Because the respondent was bound at his peril to act upon the service of said notice to renew so made on Cooper Crawford, his mortgagor, appellant's immediate tenant of the said demised lands, and the only party on whom it was incumbent on appellant to serve such notice; and particularly as appellant, until the filing of respondent's original bill in this cause, was altogether unapprized and ignorant of respondent's title or interest in the said lease.

3d, Because although appellant may by his notice of the 20th December 1810 have demanded a greater sum for renewal fines and interest thereon than he was then entitled to demand, yet the lessee seeking the **[131]** benefit of such renewal, was bound thereupon to have set his landlord right as to his said mistake, and to have ascertained and tendered to him the sum really due for such fines, without further

unreasonable delay, which he did not do, nor tender any sum whatsoever for the said fines for upwards of three years after the service of the said notice.

4th, Because a tenant abusing the trust and confidence which subsists between him and his landlord, wilfully violating the covenants in his lease, and converting the possession with which he has been entrusted into the means and instrument of encroachment on his landlord's adjoining estate, and of defacing the bounds and land-marks of the farm committed to his possession, and after so doing, claiming to retain such encroachment for his own benefit against his landlord, and obliging such landlord to bring an ejectment in order to recover possession thereof, thereby forfeits all claim on such landlord for a renewal of his original lease, as well as all title to assistance from a court of equity to compel same.

5th, Because, even if any renewal of the tenant's interest ought to be decreed in this case, such decree ought at least to have imposed upon him the terms of making full satisfaction or compensation to the appellant for his damages by reason of such breaches of covenant, as also for the mesne rates due to appellant in respect of such wrongful encroachments on his estate, the ascertainment and payment of which damages and mesne rates ought to have been made preliminary to any such renewal, and for the recovery whereof appellant under the circumstances is left without remedy, the legal estate under the lease of 1748 having long ago expired, and with it the covenants contained therein determined. And it was the **[132]** more incumbent on the Court to impose such terms on the party seeking the renewal in this case, since it appeared that said Cooper Crawford and John O'Meara, the under-tenant of the lands, have both died insolvent.

Sixth, Because the said decree, in professing to leave the appellant at liberty to prosecute any action he might be advised to bring against the representatives of the said Cooper Crawford and John O'Meara, or either of them, for breaches of any covenant contained in the original lease since same had vested in the said Cooper Crawford, altogether omits to provide any means whereby appellant might be enabled to maintain any such action, or to recover any fruits from it, such action not being at all maintainable without the aid of the Court imposing terms similar to those contained in the decretal order of the Court of the 2d June 1815, in pronouncing which order it appears to have been the opinion and intention of the said Court that the immediate tenant of the lands should be held responsible for such breaches of covenant committed by his under-tenants.

Lastly, Because the respondent in this case is to be considered as standing in the situation either of immediate tenant of appellant, in which case he must be held responsible for the fraudulent misconduct and waste committed by his under-tenants, and by reason thereof to have forfeited his claim to any renewal of his lease, or else in that of a mortgage creditor of such tenant, in which character he cannot (it would seem) be entitled to any relief in the premises beyond the preservation of his mortgage security for his own benefit alone, which relief ought not to be extended incidentally (as has been done by the decree appealed from,) to give the benefit of a renewal to the representatives of the mortgagor, and to such fraudulent and **[133]** defaulting under-tenants, who had so forfeited their right to such renewal: and the rather in this case, when appellant by his counsel at the hearing below offered, as he now again does, in case this Honourable House should consider respondent entitled thereto, to pay respondent the balance due on the foot of his said mortgage, on having the bill in this case dismissed.

In this case it may be proper to observe that the landlord accepted the rents up to the year 1815.

Argued for the Respondent (26th March 1828: It was in evidence that in this case, the landlord was in fault and not the tenant, as the tenant had always been ready to renew, and pay the fines, but the landlord had refused, and therefore the Tenantry Act did not apply. [Lord Chancellor—The tenant here was always ready to pay the fines: the dispute was about a collateral matter.] There was no clause of forfeiture in this lease, and the final decree reserved the right to the landlord to proceed for damages for breach of covenants, against the representatives of Cooper Crawford. The damages were the principle of the original decree, which proceeded on the ground that the tenant had a right to a renewal; and the landlord might have applied to the court in equity to stay proceedings till the question of damages should be determined, and

he did not; and the Court, although it did not think proper to postpone the renewal, still reserved, by its final decree, the right of the landlord to bring his action for damages for the breach of covenant. As to the question of forfeiture, the cases in Vesey and Price did not apply, and the rents were received from the respondent by the landlord till 1815. The landlord prosecuted his suit for the bog land, which would have been superfluous if the whole had been forfeited. [Lord Chancellor: **[134]** The extent of the bog was never ascertained till the ejectment.] He might have got his rent for the bog land in another way, but what had that to do with the forfeiture? In law and equity forfeitures are odious. Notice should have been given to the respondent, who was assignee of the interest in the term during the whole extent of it.—(Lord Redesdale, in *Barrett* v. *Bourke*).

Argued for the Appellant: The Courts in Ireland seemed determined to oppose the judgment of Lord Thurlow in the case of *Murray* v. *Bateman* (Ridg. P.C. 187), and therefore the judgment in the present case was easily accounted for. If all the lives were gone before the tenant properly applied for a renewal, then the right of renewal was gone; and this was the case in the present instance. Then, had the tenant a good claim for renewal under the Tenantry Act? That Act was passed to relieve in cases of simple neglect; and so it had been held in the cases in Dow, and in the case of Burton and Scriven, not yet reported. It was only in such cases that notice on the part of the landlord was required by the Tenantry Act. In the case of wilful delay and neglect to renew no notice was required, and even under the Tenantry Act the right of renewal was forfeited; and here there was wilful neglect and delay; and then, supposing notice to be necessary, there was wilful neglect and delay after notice. As to this point, even an informal notice by the landlord was material, as calling the attention of the tenant to his duty, as had been held in the cases in Dow; and an improper delay after such a notice was fatal: and in one of these cases, five months delay had been held fatal, and in another, **[135]** nine months; and here there had been a delay after notice from October 1812 to February 1814. So looking at the general rule in Equity, or at the Tenantry Act, the right of renewal in this case was gone. [Lord Chancellor.—Suppose you were wrong in the refusal to renew in the lifetime of Mary Hughes the younger, can you avail yourself of the death of Mary Hughes afterwards?]—We were not wrong. They demanded a renewal, but what renewal? they asked for a renewal with from 200 to 300 acres of bog land not comprised in the original lease. It was ascertained that they were wrong in that, and therefore they were to blame, and not we. We took steps to ascertain the amount of their encroachments, and having done so, we sent them notice that we were ready to renew without including the encroachments; but they did not renew, and they cannot found an equity on their own unreasonable demands. We were not bound to know the interest which Dwyer had in the premises, and were not bound to give him notice; and Dwyer himself acted throughout on the supposition that Cooper Crawford was the person to whom notice ought to have been given. As to the leave to bring our action of damages for breach of covenant, we knew not against whom to bring our action, nor has the Court pointed it out to us; and if a renewal should be at all decreed, it must at least be on the condition that the respondent shall make good all our losses by the breach of covenants.

(2d April, 1828.) Lord Lyndhurst (Chancellor): The facts of this case commence with a lease for three lives, granted by a Mr. Rice to a Mr. Samuel Hughes, of a certain division of lands, called Ballynahow, in the county of Tipperary, upon payment of £150 yearly rent. There was afterwards an agreement to renew the lease upon **[136]** lives for ever, upon certain terms specified. The interest of Rice became afterwards vested in the appellant, Trant, and that of Hughes in a Cooper Crawford, and his under-tenant, a person of the name of O'Meara, and Crawford mortgaged his interest to the respondent Dwyer. In 1787 two of the lives in the original lease had fallen, and the lease was renewed for two other lives, and the proper fines paid. In 1808, Mary Hughes, the last of the lives in the original lease, died. In 1810, Mr. Trant, the appellant, thought that the lessees had encroached unwarrantably on a part of his estate, and had committed a breach of covenant in the manner of cutting turf, and not being aware at the time of the renewal in 1787, he sent the following notice to Cooper Crawford, the tenant. (See the notice *ante*.)

It was found, however, that two of the lives had been renewed in 1787, and that

in 1810, only one fine was due for renewal. In 1812, another of the lives dropped, and, in point of fact, no actual tender of the fines was made till 1814, more than three years after the notice in 1810; and under these circumstances it was contended that this was an unreasonable delay on the part of the tenant, and that therefore the right of renewal, under the Tenantry Act, became forfeited. This was the main question below, and it was the main question here; and there is no doubt but that if the matter had rested there, the delay of three years would be an unreasonable neglect, and the tenant would have forfeited his right of renewal. But immediately after the notice, a correspondence took place between the parties, not with respect to the fines, which were not in contest after the explanation as to the renewals in 1787, but merely as to the encroachment and breaches of covenant. It appears that the tenant was ready at any time to pay the fines, but the landlord was unwilling to **[137]** renew, until he had ascertained how the matter stood with regard to the encroachment, and having found that, in point of fact, there was an encroachment, he refused to renew at all.

Then, under these circumstances, when the tenant was ready, immediately on notice, to pay the fine, the question is, whether the right of renewal has been forfeited? I think your Lordships will be clearly of opinion that it has not. It was useless, under the circumstances, to make a tender of the fine, nor was it at all necessary, for the landlord was aware that the tenant was ready to pay the fine, and the tenant knew, that although he had tendered it, it would not have been accepted.

But then it was argued, that as the tenant had actually encroached on the lands of the appellant, and had thereby occasioned the delay in renewing, he ought not to be allowed to take advantage of his own wrong. But this does not bear upon the case, as the landlord might have renewed without prejudice to the questions of encroachment and breach of covenant; and it was clear that the landlord would not have accepted the fine if tendered. It was remarked, however, that the fines had been tendered in 1814, but that was merely as a preliminary to the commencement of the suit.

Then it was said that another life, that of Mary Hughes the younger, had dropped in 1812; but she died in the beginning of that year, while this correspondence was going on. Then it was said that there was no clear evidence to show that the last of the lives, called sometimes Francis Hughes, and sometimes Annesley Hughes, and sometimes Francis Annesley Hughes, was still in existence; but I think that there is evidence that the Hughes, whether called Francis, or Annesley, or Francis Annesley, in the pleadings **[138]** mentioned, is living; there is sufficient to identify him as the Hughes named in the cause, and, upon the whole, I think the decree right.

Another question arose as to the form of the decree, with reference to the breaches of covenant. The facts as to this part of the case are these: By the original decree the landlord was allowed to bring two actions, one, of ejectment for the lands alleged to have been improperly encroached upon; and the other, for damages for breaches of covenant. The actions were brought, but the tenant, Cooper Crawford, died, and the actions abated; but it was still easy to go on with the ejectment, and that action did proceed against the sub-tenant, O'Meara, and the appellant, by that action recovered 235 acres of land, and so far the suit was effectual. Nothing could be made of the action of covenant without application to the Court; but it was competent to the appellant to have applied to the Court to put the respondent under terms, in order to have that action tried; but he made no such application, and that being the case, it is too late for him to find fault with the decree on that ground now; and I propose that the decree of the Court of Exchequer be, in all respects, confirmed.

Affirmed, with £100 Costs.

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[139] APPEAL FROM THE IRISH CHANCERY.

COLLINS,—*Appellant;* HARE,—*Respondent.*

[Mews' Dig. vii. 218. S.C. 2 Bli. N.S. 106.]

A master, in order to make a provision for a confidential clerk, after his own

decease, insures his life for £3000, he paying two-thirds of the premium and the clerk one-third, and assigns the policy to the clerk. The clerk has a liberal salary, independent of this bounty; the master dies, and in his will is found a letter, stating that the assignment had been procured from him by undue influence on the part of the clerk, and evidence of declarations by the clerk that he had it in his power to ruin the credit of the house, by the manner in which he kept the accounts: held that the assignment, as to two-thirds of the policy for which the master had paid the premium, was fraudulent and void; *et per Lord Lyndhurst* (Ch.) the object of an issue from Equity is attained when the conscience of the equity judge is satisfied that, at the trial, justice has been, upon the whole, substantially done.

Collins, the Appellant was, and had been, for some years previous to the year 1823, confidential clerk to Mr. John Atkinson, Army Agent, Dublin. Collins' salary was increased from time to time till, in 1823, it was £500, and he was in that year taken into partnership by Atkinson, though the profits of the business was not sufficient to pay his salary.

In 1819 Atkinson, in order to make a provision for Collins after his (Atkinson's) decease, intimated an intention to insure his life for £2000 in the London Royal Exchange Assurance Company, and then to assign the policy to Collins. Collins expressed his wish that the sum should be £3000; offering, out of his salary to pay the premium for the additional £1000. **[140]** To this proposal Atkinson acceded, and accordingly insured for the £3000, paying two-thirds of the premium, and Collins paying the other third, and assigned the policy to Collins; and this assignment he confirmed in two years after, that is, in 1821, by a more formal assignment. When Collins was taken into partnership in April 1823, Atkinson, in letters to the correspondents of the house, gave him a high character for integrity and knowledge of the business.

On the 30th October 1823 Atkinson died, having previously made a will by which he made his son, Captain John Atkinson, his residuary legatee, and his son-in-law, the Reverend Charles Hare, the respondent, his sole executor. To this will there was a codicil by which the testator left £100 to Collins when the accounts of the house should be made up. Shortly after Atkinson's death, on his will being opened, the following letter addressed to his son was found inclosed in it:

"Dublin, 15th October 1822. Ely Place.

"My dearest John: As you have told me, that you know that I have insured my life, through one of the office-keeper's, who called for payment for £131 for the policy of insurance, and have asked me in my dying bed, what has become of it, I cannot refuse but tell you the truth, that it was extorted from me by Mr. Michael Collins, by threats and undue influence. The policy for which I pay is for £2000.

(signed) "John Atkinson."

The executor, upon this, demanded that Collins should surrender the policy, at least as to the sum of £2000 for which Atkinson had paid the premium, and, upon a refusal by Collins, he, on the 11th February 1824, filed his bill in Chancery against Collins **[141]** and the Royal Exchange Assurance Company; and the bill, after stating the facts, charged that if any assignment was made of the policy to the appellant, it was obtained by fraud, misrepresentation, and undue influence, and without consideration; and that the same was a trust for the testator; or at all events, that the appellant had himself confessed he was only entitled to one-third part of the policy, the remaining two-thirds thereof being a trust for the said testator, and the respondent as his executor; as evidence whereof the bill charged, that subsequently to such alleged assignment, and down to the time of his death, the testator continued to pay two-thirds of the premium on the policy, which had been admitted by the appellant, who only claimed to be entitled to one-third; and had at one time offered to give up the policy on being paid the third; viz. £1000; which for peace sake, the respondent being willing to give up, the appellant had subsequently retracted.

The bill then stated an offer of reference to arbitration on the part of the respondent, and prayed that the appellant might be compelled to bring into Court the said policy of insurance; and that the Royal Exchange Assurance Company might be restrained from paying over to the appellant the amount of the said policy; and

might also bring into Court the sum of £3000 the amount thereof; and that such sum might be decreed to be part of the assets of the testator; and that the said assignment to the appellant (if any) might be set aside, and decreed to be null and void; or otherwise to be a trust for the respondent, or might stand as a security only for the sum, (if any actually due thereon) to the appellant. And that an account might be taken on the foot, of all dealings between the [142] testator and the appellant, and that subject thereto, the amount of the policy, or so much thereof as respondent should appear entitled to, might be paid over to the respondent; and that the appellant might be restrained from proceeding at law upon the policy, and for general relief.

After injunction to restrain the Insurance Company from paying, and Collins from receiving, the money in question, it was ordered, by consent, that the company should bring the money into Court, which they did, and £1000 was paid to Collins, and the name of the company was struck out of the bill.

The cause having proceeded in the usual course, witnesses were examined on both sides, and the letter of the testator, Atkinson, was admitted in evidence, but rejected on the trial of the issue about to be mentioned. In the discussion in the House of Lords, it was admitted that it was not evidence of the fact that the assignment had been granted by fraud or undue influence, but that it was evidence that the testator thought so. At the first hearing of the cause (April 1825) the Court directed a feigned issue to be tried, in which Hare was to be plaintiff and Collins defendant, and Collins was ordered to produce at the trial the assignment, the person who drew it up, and the attesting witnesses, which he did.

The case was tried before the Chief Justice of the King's Bench, and several witnesses were examined, whose evidence went to show from facts, that came under their own observation, and from the admissions of Collins, that he exercised an undue influence over the mind of Atkinson, but neither was the assignment itself read, nor were those who drew it up, though in attendance, examined on either side.

[143] The Judge's charge, and the verdict were as follow:—"I told the jury, that as neither party had thought proper to prove the policy or assignments mentioned in the leading order, or to examine the witnesses to such assignments, or the person who drew the latter assignment, also mentioned in the leading order, it was impossible for them or me to know any thing of the contents of those instruments, except from the leading order, or of the facts attending the execution of them, or the consideration for executing them, except what might be collected from the conversations in the presence of both parties, which had been given in evidence; and that the question which arose upon that evidence for the jury, was this, Whether John Atkinson executed the assignments in question, as to two-thirds of the sum insured, solely under an apprehension, communicated or suggested to him by the defendant, that the defendant had it in his power to destroy his character, and ruin the credit of his house, by exposing frauds in the public accounts of the house with Government, kept by the defendant for deceased, and that he would do so, unless those policies were assigned to him. I told them, if they believed that John Atkinson was induced by the defendant to execute those assignments under that apprehension, and from no other motive, and that otherwise he would not have executed them, that they were warranted to find that they were obtained by undue influence; and if not, that they ought to find for the defendant. I then read my notes of the evidence to the jury, and they retired for about an hour, and found a verdict, in these words:

> "We find, that in the event of any assignment having been made by the deceased, John Atkinson, of a policy of insurance on his own life, for a [144] sum of £3000, that said assignment, as to two-thirds thereof, was obtained by means of undue influence.
>
> "Charles Bushe, November 17th, 1825."

With this verdict the Chief Justice was satisfied.

Collins then applied to the Court for a new trial, principally on the ground that his witnesses had not been examined; but the application was refused, and on the 2d March 1826, the Lord Chancellor finally decreed that the assignments, so far as related to two-thirds of the policy, were fraudulent and void, and that £2000 were assets of the testator John Atkinson, etc.

From this decree Collins appealed, for the following among other reasons:

1st. Because the ascendancy of a servant over his master ought not to be presumed to result from the relationship between them; and because the nature of this transaction, and its circumstances in the manner and order of their occurrence, are such as not only do not afford any internal evidence or ground for suspicion of fraud, but give the strongest confirmation to the sworn statements of the appellant in his answer, and lead to a contrary conclusion; and therefore, it is humbly submitted, that the Court ought not to have acted, except on the most direct and positive testimony of actual fraud.

2dly. Because no evidence was adduced by the respondent on the hearing of the cause in Equity, which proved a case of fraud against the appellant, in obtaining the assignments in question from the testator.

The respondent's case, as made by the bill, rests upon the allegations of an undue advantage taken of the mental weakness of the deceased, which had been occasioned by bodily infirmity. But his witnesses on the **[145]** contrary, agreed that the deceased was in the enjoyment of good health at the time of this transaction, and laboured under no weakness of mind from that, or any other cause: in fact, it appears that his soundness of understanding, and attention to, and control over his business, continued unimpaired till within a few months previous to his decease. If, however, a solemn instrument be impeached on the ground of the grantor's incapacity, or of fraud, the fact should be proved by evidence directly relating to the transaction. The rest of the respondent's evidence consists of the letter of the testator of the 15th of October 1823, and the testimony of his witnesses as to the language of the appellant at the meeting of Mr. Atkinson's relations on the day of his decease.

The appellant, whilst he submits that on the most obvious principles the letter was not admissible in evidence, and, if admissible, ought not under the circumstances of this case, to have been received in a Court of Equity, humbly contends, that the false and contradictory account it gives of the transaction, and its inconsistency with the feelings of kindness and bounty towards the appellant, which are manifested by the testator in his codicil of the same date, render it impossible to believe that it was the deliberate and voluntary act of the deceased. And with respect to the language imputed to the appellant by the respondent's witnesses, the appellant humbly insists that a Court of Equity ought not to have used it as a ground of judicial inference. First, because a decision ought not to be founded upon facts which are not put in issue in the cause, especially in a Court of Equity, where the injustice of so doing will become more evident from adverting to the nature of the proceedings, and the mode of examination of witnesses established in **[146]** such courts. But, independently of this general principle of justice, the appellant humbly submits that any inconsiderate expressions, such as are imputed to him by the evidence in this cause, regard being had to the occasion when they are stated to have been used, and their being in answer to the threats and imputations cast upon him, cannot be judicially taken against him as an admission of a fact, which on all other grounds it is impossible to believe. Such evidence, therefore, ought not, as the appellant humbly submits, to have influenced the Court in directing the issue; nor ought a verdict, which was founded on such evidence alone, to have been satisfactory to it.

3dly. Because admitting this to be a case where the Court ought not to have refused an issue, and more, it is conceived, cannot be contended for, it was, as the appellant humbly submits, incumbent on the Court to have provided with certainty, that both the form and language of the issue, and the manner and circumstances of the trial should be such, as to bring the true points in the cause before the jury; but, which it is submitted, cannot be gathered either from this issue or the trial. But in fact, regard being had to the nature of the case and the evidence properly admissible in the cause, no issue ought, as the appellant humbly submits, to have been directed; but the bill ought to have been dismissed against the appellant with costs.

For the respondent, it was contended that the decree ought to be affirmed.

1st. Because the said decree of 28th April 1825 is well warranted by the principles and practice of Courts of Equity, and the particular nature of the case itself.

[147] 2dly. Because there was proof sufficient made by the plaintiff in the equity cause, to sustain a decree for setting aside the assignments relied upon by the appel-

lant as to two-third parts of said policy of insurance, and the issue directed was for the purpose of satisfying the conscience of the Lord Chancellor as to the proofs so made.

3dly. Because the direction of issues in a case like the present is conformable to the principles and practice of courts of equity.

4thly. Because the appellant did not object to the issue as directed, but asked for same in preference to a decree against him which would have been pronounced had he declined said issue.

5thly. Because said order of the 3d December 1825 was a right order, inasmuch as said verdict was conformable to law and to justice; was founded upon cogent evidence, and not contradicted by any evidence on the appellant's part.

6thly. Because the decree of the 2d March 1826, is warranted by the said verdict as well as by the proofs and pleadings in the cause.

7thly. Because it would be against public policy and the principles of equity to affirm instruments obtained clandestinely by a clerk from his employer without consideration, and in both instances kept concealed from the confidential attorney and friend, and also the relatives of the grantor.

Argued for the Respondent: The transaction itself afforded intrinsical evidence of fraud and undue influence, since the affair was unaccountable, except upon the supposition, which was warranted by the evidence, that Atkinson acted under the apprehension that Collins would destroy the credit of the house by [148] exposing the manner in which the accounts had been kept; and as to the £100 given to Collins by the codicil, that was given under the same apprehension, and it was in evidence that Collins boasted that it depended on him whether there would be any codicil at all. As to Atkinson's letter, the declaration of a party that there was fraud, was not evidence of the fraud; but it was evidence that the party himself thought the assignment had been extorted, whether it was so or not; and it was evidence also with reference to the language and declarations of the defendant: as to their tendering the witnesses to the assignments for examination, that was a mere trap, for the plaintiff had no occasion to examine them, the existence of the assignments being admitted. It was for the defendant to examine them if he thought proper: (Lord Lyndhurst, Chancellor: It was material that they should be examined for the purpose of repelling the imputation of fraud).

Argued for the Appellant: This was a pure act of bounty to a meritorious servant, done in the way most convenient for the master, and it was a clear rule that fraud was never to be presumed; and here there was even no covenant by which the master bound himself to pay the premium, so that it was optional with him whether to do so or not. Then as to Atkinson's letter, it was admitted as evidence by the Lord Chancellor, though the common law Judge rejected it; and then as to the issue, it was a departure from the whole case as originally set out; for the charge in the bill was that the assignment was altogether a fraud, whereas the issue admitted that it was good as to one-third. This issue ought not to have been directed at all, and then, such as it was, it was not properly tried; for Atkin-[149]-son's letter was read and commented upon by the opening counsel, and had made a strong impression on the minds of the jury, although the Judge had rejected it as evidence, and at the least there ought to have been a new trial.

This was a mere ordinary case of bounty to a valuable servant.

Lord Lyndhurst (Ch.): It does appear to me an extraordinary transaction; he has a high salary, at one time beyond the profits of the house, and I can see no assignable motive for this additional bounty, except the indirect cause mentioned in the evidence of some of the witnesses. So it was put to the jury, and I see no reason to find fault with their verdict. Suppose the House should be satisfied that the reason of the bounty was, that Atkinson had an idea that Collins was in possession of a secret that placed him (Atkinson) in his power, do you think the House can support the transaction? Now mark the summing up of the Lord Chief Justice, that the question was (I read from your case), "Whether John Atkinson executed the assignments in question as to two-thirds of the sum insured, solely under an apprehension communicated or suggested to him by the defendant, that the defendant had it in his power to destroy his character and ruin the credit of his house, by exposing frauds in the public accounts of the house with government, kept by the defendant for the de-

ceased, and that he would do so, unless this policy were assigned to him;" I told them, that "if they believed that John Atkinson was induced by the defendant to execute those assignments under that apprehension, and from no other motive, and that otherwise he would not have executed them, they were warranted to find that they were obtained by undue influence; **[150]** and if not, that they ought to find for the defendant;" and the jury found that the assignment had been obtained by undue influence.

Mr. Horne: But that was not the issue.

Lord Lyndhurst (Ch.): The issue was substantially, fraud or no fraud, and so the Ch. J. put it to the jury.

Mr. Horne: We cannot put the case on what passed at law.

Lord Lyndhurst (Ch.): The evidence was substantially the same both at law and in equity, and on that evidence it is difficult to say that the verdict was not sustainable. The evidence was strongly in support of undue influence.

Mr. Horne: But the fraud originally charged was a fraud as to the whole £3000. The plaintiff's case breaks down as to £1000, and such an issue as this ought not to have been directed. The jury were ignorant of the ground on which the issue turned. Lord Eldon was wont to say, "when I send these things to be tried, I must have them well tried;" and this was no trial at all with reference to the informing the conscience of the equity Judge, and there ought to have been a new trial.

Lord Lyndhurst (Ch.): I remember to have heard an eminent equity Judge (the late Chief Baron Richards) say, when the counsel were quarrelling about the verdict; "Gentlemen, do not trouble yourselves about the verdict; it is to the evidence and to my report that you are to look." In this case the proceeding at law was a trial of skill on both sides, and all that the Equity Court had to do was to be satisfied that justice had been done; and it was not bound to allow the defendant, merely because the verdict was against him, to take another issue, and allow him to produce evidence which he had before withheld. The substantial **[151]** question on the issue was fraud or no fraud, and on that issue the Judge in equity was satisfied that justice had been done.

(8th July, 1828.) Lord Chancellor (after stating the case): There is in point of form something objectionable in this verdict, because it is partly hypothetical, but the material point in the case was tried on the issue, and as the issue was directed for the purpose of informing the conscience of the equity Judge, if the main object was gained it was sufficient. The Judges both at law and equity were satisfied with the verdict, and therefore it must be a strong case indeed that should induce your Lordships to send the matter to a new trial, in opposition to the opinion of the late noble Chancellor of Ireland, who had a much better opportunity of investigating the facts on which the case mainly depended than your Lordships have.

Judgment of the Court below affirmed, with £100 costs.

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[152] APPEAL FROM THE COURT OF CHANCERY.

Hon. WM. POLE T. LONG WELLESLEY,—*Appellant;* WILLIAM RICHARD A. P. T. L. WELLESLEY; JAMES FITZROY H. W. P. T. L. WELLESLEY, and VICTORIA CATHERINE M. P. T. L. WELLESLEY, Infants, by the Hon. PHILIP PUSEY, their next Friend,—*Respondents.*

[Mews' Dig. vii. 1487; S. C. 2 Bli. N. S. 124; in Court of Chancery, *sub nom. Wellesley* v. *Duke of Beaufort*, 1827, 2 Russ. 1. Commented on in *In re Goldsworthy*, 1876, 2 Q. B. D. 82; and see *In re Agar-Ellis*, 1883, 24 Ch. D. 323; Guardianship of Infants Act, 1886 (49 and 50 Vict. c. 27); Custody of Children Act, 1891 (54 and 55 Vict. c. 3); *In re Newton (Infants)* [1896] 1 Ch. 740; *In re A. and B. (Infants)* [1897] 1 Ch. 786; *in re X.* [1899] 1 Ch. 526.]

Jurisdiction of the Lord Chancellor in the Court of Chancery, to control the authority of the parent over the children, or to deprive him of their care and

custody, for proper cause, long acknowledged and acted on, the Court below, now for the first time affirmed, on appeal, by the House of Lords.

In the month of March 1812, Catherine Pole Tylney Long, who was entitled to certain estates in fee, and to others as tenant for life with remainder to her first and other sons in tail male, producing an income of about £40,000 per annum, intermarried with the appellant, William Wellesley; and by her marriage settlement, £13,000 a year was secured to her as pin-money, and subject to the payment of that annuity and some other sums, a life-interest in the estates in fee was given to the husband; a power being reserved to the husband and wife to charge them by way of mortgage with £100,000, and the entailed estates were settled on the husband during the joint lives of him and his wife. The £100,000 were raised; but Mr. Wellesley, notwithstanding, became so embarrassed, that in 1821 he found it necessary to go to the Continent to avoid his creditors, and he and his family **[153]** after some months spent in France, took up their residence at Naples; and there, in May 1823, they renewed their acquaintance with Mrs. Helena Bligh, whom they had known before, and who about that time had come to reside at Naples with her husband. On the 1st of July 1823, Mrs. Bligh left her husband's house, and took apartments for herself in another quarter of the city, alleging as the reason the ill-treatment which she met with from her husband; but rumour ascribed the step to her having a criminal intercourse with Mr. Wellesley, and to contradict this report, Mr. Wellesley made an affidavit before the British Vice-Consul denying the truth of it. Mrs. Wellesley thought Mrs. Bligh innocent, and took her to reside in the house with herself and her husband.

In October 1823 the family proceeded from Naples to Albano, and from thence to Florence, where Mrs. Bligh continued to reside with them till December 1823, when Mrs. Wellesley, though she still believed Mrs. Bligh to be innocent, thought it proper, in consequence of communications received from her own and Mr. Wellesley's relatives about the reports which were abroad that a criminal intercourse was going on between Mrs. Bligh and Mr. Wellesley, to inform Mrs. Bligh that it was absolutely necessary that she should quit the family, and return to her own friends, who were ready to receive her. Mrs. Bligh left the apartments which she occupied, but continued in another part of the hotel without Mrs. Wellesley's knowledge, and was in constant habits of intercourse with Mr. Wellesley. In May 1824 the family went from Florence to Paris, where Mrs. Bligh had arrived before them.

While at Paris, Mrs. Wellesley at length was convinced that a criminal intercourse was carried on **[154]** between Mrs. Bligh and Mr. Wellesley, and wrote to Lord Maryborough, Mr. Wellesley's father, requesting that he and Lady Maryborough would come to Paris, which they did, but were unable to detach Mr. Wellesley from the connection which he had formed with Mrs. Bligh. Shortly afterwards Mrs. Wellesley determined to separate herself from her husband, and come to England, which she did; taking her children, the three infant respondents, with her, by Mr. Wellesley's permission.

Mr. Wellesley remained on the Continent with Mrs. Bligh till June 1825, in the early part of which he was apprized of the intention of Mrs. Wellesley to commence a suit against him in the Ecclesiastical Courts for a divorce, and on the 25th of that month he came to England with Mrs. Bligh, and lived with her in London from that day till the 7th of July, without the knowledge of Mrs. Wellesley. On the 7th of July he went to the house where Mrs. Wellesley resided with her sisters, the Misses Long; but Mrs. Wellesley, on hearing his voice, made her escape from the house with her daughter. Mr. Wellesley had complained that Mrs. Wellesley did not follow his instructions in the management of his children, and had expressed his resolution to get possession of them by force or stratagem, which Mrs. Wellesley dreaded he would effect, and take the children with him abroad; she therefore, on the 8th of July 1825, caused a bill to be filed in Chancery in order to make the infants wards of Court.

Mr. Wellesley and Mrs. Bligh returned to the Continent. On the 12th of September 1825 Mrs. Wellesley died, and on the 30th of that month a bill was filed, in the names of the infants, by the Hon. Philip Pusey, their next friend, setting forth the interests of the **[155]** infants under their grandfather's will, and their mother's

marriage settlement; and praying that the Duke of Beaufort and the other trustees might account in the ordinary manner, that the portions of the younger children might be raised, and that a proper person might be appointed to have the care of the three infants during their minorities, and an allowance be made for their maintenance.

After the death of his wife, Mr. Wellesley applied to the Misses Long to deliver up the children to him. They refused; and Mr. Wellesley, in October 1825, caused a writ of *habeas corpora* to be issued from the King's Bench for the purpose of getting the children into his custody; and immediately thereupon, on the 3d of November, before the writ was returnable, a petition was presented in the name of the infants, praying that Mr. Wellesley might be restrained from proceeding on the writ, as he was residing abroad, and intended to take the children abroad.

Mr. Wellesley, before that petition was disposed of, viz. on or about the 8th day of November 1825, presented his petition to the Lord Chancellor, stating amongst other things, as the facts were, that the appellant was then resident in the kingdom of France, and out of the jurisdiction of the Court of Chancery, and having no establishment fitted to the residence and superintendence of the education of his said three infant children, was desirous of having a proper scheme and plan for that purpose settled and approved of by one of the Masters of the Court, and that the appellant was willing to conform to and to promote such plan for the benefit of the said infant respondents, and praying that it might be referred to one of the Masters of the Court to approve of a plan for the education of, and a proper and suitable establishment for, the said infant respondents, and for their residence.

[156] The two petitions came on to be heard on the 9th day of November 1825, when the Lord Chancellor was pleased to order such reference; and also, that the appellant should not interfere with the management or control of the said infant respondents, but that the said infant respondents should remain with the said Misses Long until the said Master should make his report, or until the further order of the Court; and his Lordship further directed that such order should remain in full force so long as the appellant remained out of the jurisdiction of the Court.

On the 14th of December 1825, and before the above order could be acted on, Mr. Wellesley came to England, and on the 14th of January 1826 presented a petition to the Lord Chancellor, setting forth that it was his positive intention to remain and reside in England; and that having then a proper residence in England, he claimed, as the father and natural guardian of the said infant plaintiffs, the immediate custody of their persons, and the future management and control of their education and maintenance; and the said petition prayed that his Lordship would be pleased to order, that the said order, dated the 9th of November 1825, should be rescinded, and that the Misses Long might forthwith, on a day to be named, deliver over to the care and guidance of the appellant, their father, the said infant respondents.

From January 1826 to February 1827 a mass of affidavits, letters and documents were brought forward at different periods for and against the granting of the prayer of this last-mentioned petition. It appeared that subsequently to the presenting of this petition, Mrs. Bligh came to London, and Mr. Wellesley renewed his intercourse with her, which was much relied on against him. The husband of Mrs. Bligh, in an acton for adultery, recovered damages from Mr. Wellesley.

[157] On the 1st February 1827, the Lord Chancellor made the following order: — "That it be referred to the Master in rotation, to inquire and report what person or persons willing (other than the petitioner, the Hon. William Pole Tylney Long Wellesley) to undertake the same, the custody of the infants, William Richard Arthur Pole Tylney Long Wellesley, James Fitzroy Henry William Pole Tylney Long Wellesley, and Victoria Catherine Mary Pole Tylney Long Wellesley, and the care of their maintenance and education, should be committed, this Court not thinking it proper in the circumstances of this case, to make such order as is prayed by the petition of the Hon. William Pole Tylney Long Wellesley. And it is ordered, that the Masters do inquire and state what are the said infants' ages, and the nature and amount of their fortunes; and do state on what evidence or ground he shall approve of any person or persons to have the care of the said infants' maintenance and education; and all proper parties are to be at liberty to attend the Master thereon: and the Master, in making such inquiries, is to have regard to the fortunes

of the infants respectively. And it is ordered, that the said Hon. William Pole Tylney Long Wellesley, and all other persons, be restrained from removing, or attempting to remove, the said infants, or any of them, from the care and custody of Dorothy Tylney Long and Emma Tylney Long, without the permission of this Court and further order; and it is ordered, that the said Master do state upon what plan the person or persons to whom upon such inquiry as aforesaid he shall report that such care and custody as aforesaid should be committed, propose to conduct and carry on the education of the said infants respectively, and what sum or sums are proposed to be, or can be, allowed [158] and applied for their maintenance and education, out of their fortunes; and to report his opinion upon such plan and proposal for maintenance and education; and thereupon such further order shall be made as shall be just."

From this order, Mr Wellesley appealed to the House of Lords: Because, supposing the Court of Chancery to have in any case the power to take from a father the custody and education of his children, where such father is within the kingdom, and able and willing to maintain and educate them according to their rank and expectations in life (against which, nevertheless, the appellant humbly protests, and leaves the same to the wisdom of your Lordships, and the more especially as he is advised that no order or decree to that effect has ever been made or affirmed by your Lordships upon appeal), yet, in the present case, the appellant humbly submits, that regard being had to the nature and course of the proceedings in the Court of Chancery, and the facts and circumstances of the case, which the appellant craves leave to lay before your Lordships, no such order as that appealed from ought to have been made by the Lord Chancellor, but that the appellant's children ought to have been restored to his custody and control.

Besides the immoral conduct of Mr. Wellesley with Mrs. Bligh and other women, it was relied on in argument as one of the strongest reasons against Mr. Wellesley's having the custody and care of his children, that he (as was alleged) had deliberately accustomed them to profane swearing and the use of the lowest and most vulgar slang; and that in his letters to the male infants he employed such expressions as these: "If the fellow be a sportsman who told you you could not hunt your harriers till next year, *d—n his infernal* [159] *soul to hell*,"—and "play hell and tommy; make as much row as your lungs will admit of; chase cats, dogs, women, young and old, etc. etc." In one of the affidavits it was sworn "that Mr. Wellesley often expressed his intention to let the male infants associate with children of the lowest society and habits, and that it was his particular wish that they should adopt the manners and language of the lowest classes, that they might attain a knowledge of the world, and Mr. Wellesley boasted that he had procured children of the lowest description to come to the back of his house at Paris, to teach his children to repeat oaths and blasphemous language made use of by such vagabonds, and that he made his boys teach them to swear in English," etc. etc.

The cause was heard in the House of Lords, on the 4th July 1828, and several previous days, and the questions argued were; 1st, whether the Lord Chancellor had jurisdiction to make such an order? 2dly. If he had, whether this was a case which justified the exercise of that jurisdiction? The law, and the facts, as far as they are material to the decision of these points have been so fully stated and discussed in 2 Russ. Cha. Ca. 1, and especially in the speech in judgment of Lord Chancellor Eldon, there reported, that it is quite unnecessary to go into any further detail of the argument here.

The following authorities were adverted to: *Duke of Beaufort* v. *Bertie* (1 P. Wms. 705); *Eyre* v. *Shaftsbury* (2 P. Wms. 112); *Ex parte Hopkins* (3 P. Wms. 152); *Butler* v. *Freeman* (Amb. 301); *Powell* v. *Cleaver* (2 Bro. Ch. Ca. 499); *Creuze* v. *Hunter* (2 Bro. Ch. Ca. 499; and 2 Cox, 242); *Skinner* v. *War*-[160]-*ner* (4 Bro. Ch. Ca. 101; 2 Dick. 779); *Wilcox* v. *Drake* (Drake, 651; Jac. 250); *De Manneville* v. *De Manneville* (10 Ves. 52); *Whitfield* v. *Hales* (12 Ves. 492); *Lyons* v. *Blenkin* (Jac. 245); *Lord Westmeath's Case* (Jac. 251); *Shelley* v. *Westbrooke* (Jac. 266).

Mr. Horne and Mr. Brougham for appellant.

Attorney-General and Mr. Pepys for respondents.

(July 4, 1828) Lord Redesdale, (after stating that the jurisdiction had been too long acknowledged and exercised to be now questioned) proceeded thus: From the

whole of the evidence taken together, I think the order was just, if the Lord Chancellor had authority to make it. Can your Lordships doubt but that some restraint on the father is necessary in this case, and that these children should be kept separate from Mrs. Bligh? and in all probability she would be concerned with the care of them if there was no restraint. Mr. Wellesley has placed himself in a situation in which he is not a freeman; and having no doubt about the authority of the Lord Chancellor, I think the order ought to be affirmed. It would be most mischievous if there existed no jurisdiction or authority of this nature, and it would be absolutely necessary for the legislature to interfere to provide a remedy. The eldest son in this case will be, if he lives, a peer of the realm; and then, if there is no authority to interfere between the parent and the children, consider to what an extent the mischief will go. A woman in high life marries a low-born, uneducated, and perhaps, vicious man, and her son is entitled to a very large property, and the father **[161]** is utterly incapable of taking proper care of their morals and education; and is it to be said that there is no power in the realm to interfere in a case of that kind? The control of the parent over the children is, properly speaking, not a power at all, but a trust; and if your Lordships look into the elementary writers, you will find it so described, and the parent is intrusted with the care of the education of his children, because, from natural affection, he is considered as the properest person to discharge that duty. I move "That the order of the Court below be affirmed."

Lord Manners: This is an appeal from an order of the late Lord Chancellor, referring it to the Master to consider of a proper person to be the guardian of the appellant's children. This order is objected to on two grounds—1st, That the Lord Chancellor has no jurisdiction to separate children from a parent, while he resides in this country; 2dly, That if he had that jurisdiction, it is not in this case properly exercised. First, as to the jurisdiction, I think it sufficient to say that it has been uniformly admitted and exercised for a period of more than a century; and I have looked in vain for any instance in which it was doubted by any Lord Chancellor, from the time of Lord Nottingham downwards, and it has now become the established doctrine and practice of the Court, and the law of the land. When a parent applies to the Court of King's Bench for a writ of *habeas corpus* to recover his children, who have been taken from him, the Court asks whether the Lord Chancellor has interfered in the matter, and if the answer be, that he has, the Court will not grant the writ; but the Court, by this refusal, would very much fail in its duty if the Lord Chancellor had no jurisdiction in such matters. It was mentioned **[162]** at the bar as an objection to this power, that you cannot know its extent or its limits, but in that respect it is only like other cases where a discretionary power exists; and you cannot know its limits generally, because that depends on the particular circumstances of each case. I agree, therefore, with Lord Thurlow, and other eminent judges, who have held this to be an established jurisdiction of the Lord Chancellor. As to the second question, whether the power had been properly exercised in this instance—it is to be considered, that to restore these children to the appellant, is, in all probability, to deliver them to Mrs. Bligh, who appears to have intended to institute a suit in the Ecclesiastical Court for a divorce, and probably has delayed it merely on account of the pendency of this cause. I do not say that the mere act of the parent's living in adultery is a good reason for separating his children from him. That question will be determined when it arises; but here the living in adultery is only one circumstance. There is in addition the appellant's most improper behaviour to his wife, and his training the children in vicious habits of profane swearing, almost the only vicious habit of which children at their then age were capable of learning. This fact does not depend entirely on the credit of Doctor Bulkley, but is deposed to by others. As to Doctor Bulkley, whose testimony has been the subject of so much animadversion, there are some parts of his conduct which I do not approve; but as to his credibility as a witness, I think the testimony in his favour preponderates far over that which is produced against him. This habit of profane swearing is a most dangerous one, especially when inculcated or allowed by the authority of the parent. Suppose the appellant had been a testamentary guardian, nobody could be less qualified for **[163]** the duty than he is, and it would be the duty of the Lord Chancellor to rescue the children from his power; and as to this point there is no difference between a testamentary guardian and a parent. The Court will, no doubt, regard

the feelings of a parent, but that is a secondary consideration. The object of this order is to rescue the children from a parent who has disqualified himself from being a proper guardian; and as I have no doubt about the jurisdiction, I do not know in what case it can be more properly exercised than in the case of one who, with respect to his children, has manifested a total disregard of morals, religion, and example.

Lord Lyndhurst, (Chancellor): It is unnecessary for me to say any thing further than that I concur in the opinion of the noble and learned Lords.

Order affirmed.

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[164] APPEAL FROM THE IRISH CHANCERY.

HILL (Sir G. F. FITZGERALD),—*Appellant*: BALL (BENJAMIN),—*Respondent*.

[Mews' Dig. i. 727. S. C. 2 Bli. N. S. 1.]

A. gives bond and judgment to B. for balance of an account; B. assigns the judgment to C.; submission by A. and C., and award that C. is entitled to the benefit of the judgment; and bill filed by C. on the ground of the award; objected by A. that the judgment was given to B. for a much larger sum than was really due, and upon an understanding that it was to stand only as a security for what was actually due; that the award had been made in his absence, and that the arbitrators had not given him credit for several sums which he had paid to B. on account of the judgment; but evidence that the objections of A. had been stated before the arbitrators by his counsel and solicitors: Decree that C. was entitled to the benefit of the judgment for the whole sum, and the Decree affirmed.

In 1793, and for several years after, John Claudius Beresford, and James Woodmason, were bankers and co-partners in Dublin. Sir G. F. Hill having married a sister of Beresford, various pecuniary transactions passed between them without any settlement till 1808, when Beresford called upon Hill to settle the accounts between them, and give his bond for the balance. Soon after, Hill, the appellant, gave his bond for £31,000, conditioned for the payment of £15,500, the balance then due, with a warrant of attorney to enter up judgment.

In 1807 the partnership between Beresford and Woodmason was dissolved, and in January 1808 Beresford formed a partnership, as bankers, with the respondent Benjamin Ball, and others. On that occasion an arrangement was made that the notes and engagements [165] of the old firm should be paid by the new firm, and Beresford being largely indebted to the old firm, in part satisfaction of that debt, delivered over to Ball various securities, and among the rest the bond of Hill the appellant, conditioned for the payment of £15,500. In 1810 judgment on the bond was entered up in the name of Beresford, who in the same year assigned it to Ball, and a memorial of the assignment having been enrolled, pursuant to the Act of the 9th Geo. 2, Ball, under the provisions of that Act, became the owner of the judgment, and entitled as such to issue execution and levy the amount in his own name.

In December 1810 the partnership between Beresford, Ball and the others, was dissolved, and in 1811 Beresford became bankrupt. The appellant refused to pay the amount of the judgment, and, after much discussion and correspondence, the parties agreed in 1812 to submit all matters respecting it to arbitration, and the submission was made a rule of the Court of Chancery. In May 1812, the arbitrators adjudged that the judgment was a good and effectual security for the £15,500, for the payment of which the bond was conditioned, and this award was in June 1812 confirmed by the Court of Chancery. As Hill still refused to pay, Ball sued out an *elegit* against his estates, but was unable to enforce his remedy in that way on account of the prior incumbrances affecting the estates.

In 1817 Ball filed a bill in Chancery against Hill, and other proper parties, stating the circumstances, praying for a decree of redemption and foreclosure, etc.; this bill was amended in 1818, and also in 1819, in order to add other parties, and set up the award of 1812.

The appellant put in his answer to the said re-amended bill, and thereby objected to the said award, [166] inasmuch as for that, amongst other reasons, the appellant was in London during the proceedings under the said submission, and that his defence was not given in in the same manner it ought; and that he objected to the award on his return from London, and was advised to exhibit his bill to impeach the same.

And the answer insisted that the bond for the £15,500 was given without the proper investigation of accounts, upon an assurance by Beresford that it would stand good only as a security for what was really due, which was much less than the sum mentioned in the bond; and also, that after the assignment of the said bond to the respondent, Benjamin Ball, which was made without the appellant's knowledge, the appellant continued to make large payments to the respondent, John Claudius Beresford, on account of the said bond; which were handed over to the assignee of the said bond, but the appellant was never credited for the same as against the said bond, but was told that they were only to be considered as loans or advances to the respondent, John Claudius Beresford. And the said award being founded on an erroneous conception of the case, saddled the complainant with the full amount of the said judgment and interest from the date of the said bond, and gave him no credit for his payments on account thereof; whereas the said bond having been given expressly only to secure the balance of an account not then finally settled, the arbitrators ought to have allowed him to go into the said account, and prove such error or overcharge as he might therein: and the complainant ought to have been allowed credit for divers sums paid before the assignment of the said bond.

It appeared, however, in evidence, that the objections of the appellant had been brought under the notice of the arbitrators in 1812, by his counsel and solicitor.

[167] On the 16th August 1821, the Court below decreed that the respondent, Ball, was entitled to redeem the mortgages, etc. and to the benefit of the judgment, and the proper accounts were ordered to be taken accordingly. From this decree Sir G. F. Hill appealed; because,

1st. Evidence having, on behalf of the appellant, been entered into, to prove that the bonds, dated the 3d of June 1804, for £4200, and the 22d December 1808, for £15,500, were given by the appellant to the respondent, John Claudius Beresford, for securing the balances that might be due at those respective times from the appellant to him, and that various payments were made by the appellant to or on account of the respondent John Claudius Beresford, in respect of last-mentioned bond, which included the sum for which the first-mentioned bond was given; and the award set up by the respondent, Benjamin Ball, not being binding upon the appellant, for the reasons by him stated in his answers to the said bill, the said decree ought to have directed an account of what sums were due from the appellant to the respondent, John Claudius Beresford, or those claiming under him, in respect of the said bond for £15,500, and that the judgment obtained for the same should stand as a security for so much only as should be so found to be due.

2d. For that as to the judgment obtained by the respondent, Benjamin Ball, against the appellant, in Trinity Term 1811, for the sum of £16,585 12s. 6d., the bond upon which such judgment was obtained having been given, together with various other securities, including an acceptance of the respondent, Benjamin Ball, for £10,000 as security for a debt of the respondent John Claudius Beresford to the respondent Benjamin Ball and his partners, and which acceptance [168] the respondent Benjamin Ball did not pay, the decree ought to have declared that the appellant was not bound to satisfy the last judgment, unless the respondent Benjamin Ball paid his acceptance, or that at all events an account should have been directed to be taken, whether the sums of money for which such securities were deposited had been paid, and that the said judgment for the sum of £16,585 12s. 6d. ought to stand a security only for what the appellant, including the said acceptance for £10,000, was liable to contribute towards the payment of such sums of money.

For the respondent it was contended that the decree ought to be affirmed; because,

1st. The award was good at law, and was absolutely confirmed by order of the Court of Chancery in Ireland, in the month of June 1812, and not only had never been disputed before the respondent's bill was filed, but the appellant acquiesced in it, and admitted that he did so.

2d. It was proved in the cause that the appellant's counsel and solicitor attended the arbitrators on his behalf, and no ground whatever has been laid for imputing any fraud or misconduct, either to the arbitrators or to the parties.

3d. The award finally and conclusively determined the matters in dispute between the parties respecting the judgment for £31,000, and the respondent is entitled to the benefit of that determination in taking an account of what is due to him upon that judgment.

(Feb. 1828) Lord Lyndhurst (Chancellor): I see no reasonable ground for this appeal.

Decree affirmed, with Costs.

[169] APPEAL FROM THE COURT OF CHANCERY.

HULLET and CO.,—*Appellants;* KING OF SPAIN,—*Respondent.*

[Mews' Dig. viii. 179, 181, S.C. 2 Bli. N.S. 31. See also *King of Spain* v. *Machado* 1827, 1828, 4 Russ. 225, 560; *King of Spain* v. *Hullett*, 1833, 7 Bli. N.S. 359; 1 Cl. and F. 333. Among the cases in which *Hullett* v. *King of Spain* has been cited, it may suffice to refer to *United States of America* v. *Wagner* 1867, L.R. 3 Eq. 724; L.R. 2 Ch. 582; *Brunswick* (*Duke of*) v. *Hanover* (*King of*), 1844, 6 Beav. 13, 21, 37; and see *Mighell* v. *Sultan of Johore* (1894) 1 Q.B. 149; and *South African Republic* v. *La Compagnie Franco-Belge du Chemin du Fer du Nord* (1897) 2 Ch. 487.]

Machado, as agent for the King of Spain, receives from the French government a sum of money, which that government had agreed to pay to the King of Spain in satisfaction of the claims of certain Spanish subjects on France. Machado brings the money to this country, and deposits a considerable portion of it in the hands of Hullet and Co. of London. The King of Spain applies to Machado for the money, and Machado refuses to deliver it, on the pretence that he is bound to pay only to such subjects of Spain as should be found ultimately entitled to it. Bill in the name of the King of Spain against Machado (out of the jurisdiction) and against Hullet and Co., for discovery, and payment of the money into court. Demurrer to the bill for want of parties, etc. but chiefly on the ground, that it had never been held that a foreign sovereign could sue in equity in this country. Order by the Court below overruling the demurrer, affirmed by the Lords.

A foreign sovereign has a right to sue in this country in equity as well as at law. In this case, the King of Spain is the only party entitled to the money in the first instance.

The bill filed 22d December 1827 stated the treaties of 30th May 1814, 20th November 1815, and 25th April 1818, for the adjustment of the claims upon France of the several Powers who had been engaged in the French revolutionary war; and also separate conventions of the 18th March 1818, and 30th April 1822, between the French and Spanish governments, who had mutual claims on each other, for the adjustment of these claims; and the French government agreed to pay the balance to such person as the Spanish government should appoint to receive it. [170] Don Justo José de Machado was appointed for that purpose, and his name was inscribed in the book of public debt of France for a sum amounting to about £500,000 in British money.

When the Spanish constitutional war broke out in 1823, Machado sold out of the French funds, and brought the money to England. Bills, signed by Ferdinand, were drawn by the constitutional government of Spain on Machado in respect of this money, which he refused to pay, and protested, alleging as his reason that he held the fund for such of the subjects of Spain as should be found entitled to it, when the claims should be duly investigated and ascertained. After the cessation of the war, the Spanish government, by decree, dated 21st March 1824, appointed boards for ascertaining and adjusting the claims on the fund, and securing its proper application and distribution; and communicated this decree to Machado, with much commendation from his Majesty for his refusal to pay the money to the order of the constitutional government. The presidents of the boards directed Machado to deposit the fund in the Bank of England in their name; but this Machado refused to

do, stating that he was ready to pay the persons entitled when the boards should have settled their claims.

The bill then stated, that, in December 1824, Machado deposited about £200,000 of this money with Hullet, Brothers and Co. in the name of his secretary, Achilles de Pereira, who, as the defendants well knew, had no interest whatever in it, and whose name was employed merely to prevent any attachment of the money by persons having claims on the Spanish government; and the bill charged that both Machado and Pereira were residing in the Netherlands, out of the jurisdiction of the Court of Chancery, and that the [171] defendants, Hullet and Co., after settling accounts with Machado, still retained about £100,000 of this money, which belonged to the plaintiff, as head of the Spanish government: and the bill prayed, "that Hullet and Co. and the said Don Justo José de Machado, when he came within the jurisdiction of the said Court of Chancery, might answer the matters of the said bill; and that an account might be taken, by and under the direction and decree of the said Court of Chancery, of all and singular the sums of money which had been paid to or deposited with Hullet and Co. by the said defendant Don Justo José de Machado, in the manner thereinbefore in that behalf stated, and of the funds brought over by him to this country, as thereinbefore mentioned; and that the amount thereof might be ascertained, and paid over by Hullet and Co. to the plaintiff, or his agents in that behalf lawfully authorized to receive the same; or otherwise, that Hullet and Co. might be ordered forthwith to pay the same into the Bank of England, with the privity of the Accountant-general of the said Court of Chancery, in trust in the said cause; and that the said defendant Don Justo José de Machado might in the meantime be restrained, by the order and injunction of the said Court of Chancery, from commencing or prosecuting any action or suit at law, or taking any steps whatsoever, against Hullet and Co. for the purpose thereby of obtaining repayment of the monies so paid to or deposited with them, Hullet and Co., as aforesaid; and that Hullet and Co. might also in like manner be restrained from paying over the monies last mentioned to the said Don Justo José de Machado, or parting with the same, without the direction of the said Court of Chancery in that behalf; and that Hullet and Co. might set forth the claims (if any) which they [172] had, or claimed to be entitled to, upon the said monies so paid to or deposited with them as aforesaid, or upon the said funds so received by the said Don Justo José de Machado by virtue of the said convention of the 30th day of April 1822 as aforesaid, and the particulars thereof, and how they make out the same, and that the said claims might be disposed of by the said Court of Chancery:" And the bill prayed process against Hullet and Co. and against Machado, when he should come within the jurisdiction.

Machado did not appear, but Hullet and Co. appeared to the said bill, and on the 31st day of January last filed a demurrer thereto, and they thereby for cause of demurrer showed, that the respondent had not by his said bill made such a case as entitled him in a court of equity to any relief against them, or either of them: and for further cause of demurrer, they thereby showed, that the plaintiff had not made the said Achilles de Pereira a party thereto, nor prayed process against him; neither had the plaintiff made parties to the said bill, nor prayed process against any or all of the persons who, according to the statements in the said bill, had or were entitled to claim a beneficial interest in the monies in the said bill mentioned, or any part thereof.

The demurrer came on to be argued on the 22d day of March 1828, before the Lord Chancellor, by whom it was over-ruled: and against this order the defendants Hullet and Co. appealed to the House of Lords:

1st. Because it has never been held that a foreign sovereign can sue in courts of equity in England; and according to the principles of such courts, such a plaintiff ought not to be allowed to sue therein, inasmuch as by no possibility can process be issued with effect, or equity done, or a decree enforced against him.

[173] 2dly. Because the pretended rights on which the plaintiff in this bill relies are rights which he claims merely by virtue of his prerogative as King of Spain; and it is not according to the law or constitution of England, that an English court of equity should be made instrumental in enforcing in England the prerogative of a foreign sovereign.

3dly. Because the pretended right of the King of Spain to the monies sought to

be recovered by the bill arises out of a treaty with France, which was inconsistent with the existing relations between each of those countries and His Majesty the King of this country, and an English court of equity, therefore, will not lend its aid to enforce any such pretended right.

4thly. Because this is a bill in equity, according to the statement of which, not one of the parties before the Court has any right to the beneficial enjoyment of the property which is the subject of the suit, and no decree could be made upon it which would do complete justice.

5thly. Because the bill does not bring before the Court all the parties interested in the matters of the suit, and in the questions raised by the statement in the bill, nor any persons who represent those parties or their interests; and particularly because Achilles de Pereira is not made a party to the suit, though the bill states that the monies of which the plaintiff seeks to obtain possession, were paid to or deposited with these appellants in the name of the said Achilles de Pereira.

The cause came on for hearing on the 11th and 18th June 1828;—*Pepys* and *Russel* for the appellants: *Wetherell* (Attorney-general), and *Horne*, for the respondent.

[174] Lord Lyndhurst (Chancellor): The French and Spanish governments had mutual claims on each other, and they agreed to set the claims of the one against those of the other. What is there fraudulent in that?

Lord Redesdale: The French government was the only one which had any pretence to say that the money should be paid only to the persons whose claims should be established.

Lord Lyndhurst (Chancellor): The money was to be paid to the person whom the King of Spain should nominate; he nominates Machado, who, as his nominee or agent, does receive it, and now he says he is not accountable to the King of Spain. Neither the boards of commissioners nor the Spanish subjects had any thing to do with it in the first instance. We cannot presume that the King of Spain will not distribute the money to those who have claims; we cannot enter into that question at all. Machado received the money under the authority of the King of Spain, and to him he is accountable. Suppose the King of Spain had sent jewels here to be set, and the jeweller refused to restore them, would the King of Spain have no remedy at law to recover them or their value? Why should he not have his remedy here as well as any other foreigner? When he sues here as a plaintiff the Court has complete control over him, and may hold him to all proper terms.

Lord Redesdale: When the King of Scotland was Earl of Huntingdon, could he not maintain his action here against his steward for the rents of that Earldom? I am an executor of the Duchess of Brunswick, can I not maintain an action here in her name for what is due to her?

[175] Lord Lyndhurst (Chancellor): It was decided that a foreign sovereign might sue at law, and why not in equity? At all events, this was a bill of discovery, in which the courts of equity had a concurrent jurisdiction. As to parties, it must be admitted, because so stated in bill, that Achilles de Pereira had no interest, and neither the members of the boards, nor the parties who had claims, had any thing to do with the funds in the first instance.

Lord Redesdale (June 18, 1828): I do not know whether your Lordships have any doubt as to this question, but I have none. I have no doubt but a foreign sovereign may sue in this country, otherwise there would be a right without a remedy. He sues here on behalf of his subjects, and if foreign sovereigns were not allowed to do that, the refusal might be a cause of war. This was a transaction between the governments of France and Spain, and Machado was the agent appointed by the King of Spain to receive the money; and if any one had a right to object to pay the money to him in that capacity, or to any one except the parties who might be ultimately entitled, it was the King of France; but the French government made no objection, but paid him the money, and he received it as an agent nominated for that purpose by the King of Spain. He deposits the money in the hands of the defendants Messrs. Hullet and Co.; and one reason—a very slight reason indeed—for their refusal to bring it into Court, according to the prayer of the bill, was, that it had been deposited in the name of Achilles de Pereira, Machado's clerk, who was not made a party. But the

defendants well knew that the name of Achilles de Pereira was employed for the purpose of the deposit by Machado, and that he had no interest in the money, and they even [176] admitted that he had no interest in it, and acknowledged that the person to whom they were accountable was Machado. And who was this Machado? the agent of the King of Spain, and the defendants knew that the money was that of the King of Spain. The defendants had nothing at all to do with these treaties. They had the King of Spain's money deposited with them by his agent, and they were bound to answer.

But supposing other parties had any interest in it, the prayer of the bill merely was, that the money should be paid into Court, and then others who thought they had claims might come and set them up; but that was no reason why the defendants should not make the requisite discovery, and pay the money. There is no ground for the notion, that a foreign sovereign cannot sue in the courts of this country. It appears to me clear that he can sue, and it would be monstrous injustice if he could not. How otherwise could the King of Spain get the money out of their hands? What had they to do with the due distribution of the money? That was the business of the sovereign to whom in the first instance the money belonged, and to the boards which he had appointed for the purpose. The defendants cannot honestly keep this money and refuse to answer, for they do not pretend that it is their own money; and is it not the best and most honest course of proceeding to pay it into Court? If other persons have claims, it is their business to attend to them, and not that of the defendants. Yet I doubt very much whether the Court of Chancery can do more than transfer the money to the King of Spain, or to the boards appointed by him. The claims of the several parties can only be settled by their own sovereign, and although he may be a trustee for others, it is not by the Court of Chancery here that he can be compelled to execute that [177] trust. The sovereign himself is the one who has to see to that. It is enough for the defendants that they have the money from Machado, and that he held it as the agent of the King of Spain. It is sufficiently set forth in the bill, that this Achilles de Pereira has no interest in it, and so it is admitted by the demurrer. I move, your Lordships, that the judgment of the Court below be affirmed.

Lord Lyndhurst (Chancellor): I see no reason to alter the opinion which I gave on this question in the Court below.

Judgment AFFIRMED.

Sir Ch. Wetherell (Attorney-General): Ought not the King of Spain to have his costs?

Lord Lyndhurst (Chancellor): We will not disparage the dignity of the King of Spain by giving him Costs.

[178]

ERROR:

FROM THE KING'S BENCH.

The KING.—*Plaintiff in Error;* YARBOROUGH (Lord).—*Defendant in Error.*

[Mews' Dig. xii. 666. S.C. 2 Bli. N.S. 147; 5 Bing. 163; in K. B. 3 B. and C. 91; 4 Dowl.and R. 790. Adopted in *In re Hull* v. *Selby Ry.* 1839, 5 M. and W. 332; and see *Foster* v. *Wright*, 1878, 4 C. P. D. 446; *Hindson* v. *Ashby* (1896) 2 Ch. 11, 27, 28.]

Lands formed slowly, gradually and imperceptibly, by alluvion on the sea shore, belong, by general immemorial custom, to the owner of the adjoining lands, and not to the Crown. So decided by the House of Lords in concurrence with the unanimous opinion of the Judges.

In the fifty-ninth year of the reign of his late Majesty King George the Third, a commission was issued under the great seal, directed to certain commissioners therein named, directing them to inquire whether there were any and what lands, and how many acres of land, in or adjoining or near to the several towns, parishes or lordships therein mentioned, or any or either of them, in the county of Lincoln, being land in time past covered with the water of the sea, and then by the sea left and not covered with water, which to his Majesty in right of his crown, or in any

other right, did belong and appertain, and which were concealed, subtracted, and unjustly withheld from him; and if so, by whom and how long, and who hath received and taken the issues and profits thereof from the time of such dereliction, or not covering, and to what amount, and in whose possession or tenure the said lands then were or remained, and how much they were worth by the year according to the true value thereof; and all and singular the lands, which by the inquisition to be taken in that behalf should be found to be concealed, [179] subtracted, and unjustly withheld and detained from his Majesty, to enter upon and take and seize into the hands of His said Majesty.

In pursuance of this commission an inquisition was taken, bearing date the 12th day of November in the same year, under the seals of three of the commissioners named in the said commission, and of twelve jurors, whereby they found (amongst other things) that there was a certain piece of land, being salt marsh, lying near or adjoining to the parish or lordship of North Cotes, in the said county of Lincoln; and which said last-mentioned piece of land was bounded towards the south and south-west by the sea-wall or sea-bank of the said lordship of North Cotes, and towards the north-west by part of the sea-wall or sea-bank of certain lands in the lordship of Tetney, and on all other parts by the sea, and containing by estimation 453 acres or thereabouts, and was of the value of four shillings for each acre by the year, of lawful money of the said United Kingdom, according to the true value thereof; and was in times past covered with the water of the sea, but was then and had been for several years past by the sea *left*, and was not covered with water except at high tides, when the sea did flow to the said sea-walls or sea-banks: which said last-mentioned piece of land, from the time of such dereliction, thitherto had been and still was unoccupied; but the herbage thereof had been from time to time eaten and consumed by the cattle and sheep belonging to divers tenants or occupiers of lands situate within the said parish or lordship of North Cotes; which said piece of land (together with other pieces of land similarly described) the said commissioners had therefore taken, and caused to be seised into the hands of His said Majesty.

[180] On the 12th December in the same year, the said commission and inquisition was returned into the Petty Bag Office of the Court of Chancery, and filed there.

In consequence of this inquisition, the defendant in error presented a petition to the Lord High Chancellor of Great Britain, stating the said commission and inquisition, and his title to the manor of North Cotes, and praying for leave to traverse so much of the said inquisition and return thereof as related to the same part of the said unembanked salt-marsh land as was situate within or near adjoining to the said parish, lordship or manor of North Cotes.

This petition was heard before his Honour the Vice-Chancellor, and after considerable discussion, an order made, by which permission was granted to the defendant to traverse so much of the inquisition as related to the land in or adjoining to the manor of North Cotes; and similar permission was granted to the several lords of the manors and owners of lands in or adjoining to which the other pieces of land mentioned in the inquisition were situated.

In pursuance of the said order, the defendant in error, in Easter Term, in the first year of His present Majesty's reign, filed his traverse in the Petty Bag Office in the Court of Chancery, which, setting forth the said commission and inquisition, and admitting that there was a piece of land, being salt marsh, bounded as in the inquisition is mentioned; and admitting the quantities and value thereof as therein also mentioned, and that the said piece of land was then and there, and had been for several years not covered with water, except at high tides, when the sea did flow to the said sea-walls or sea-banks; and admitting that the herbage thereof had been from time to time eaten and consumed by the cattle and sheep belonging [181] to divers tenants or occupiers of lands, situate within the said parish or lordship of North Cotes; states, that from time whereof the memory of man runneth not to the contrary, there hath been and still is a certain ancient manor, called or known by the name of the manor of North Thoresby cum North Cotes, situate within the parish of North Cotes aforesaid, in the said county of Lincoln; and that the said defendant, long before the respective days of issuing the commission and finding the inquisition, to wit, on the first day of July 1758, was seised in his demesne as of fee, of and in the manor of North Thoresby cum North Cotes, and the demesne lands

thereof: and that the same piece of land heretofore, to wit, on the first day of January 1800, and on divers other days and times between that day and the day of the finding of the inquisition, by the slow, gradual and imperceptible projection, alluvion, subsidence and accretion of ooze, soil, sand and matter being slowly, gradually and by imperceptible increase, in long time cast up, deposited and settled by and from the flux and reflux of the tide and waves of the sea, in, upon, and against the outside and extremity of the demesne lands of the same manor, hath been formed, and hath settled, grown and accrued upon and against and unto the said demesne lands of the same manor, and the same part and every portion thereof, when and as the same hath so there been formed, settled, grown and accrued, hath thereupon and thereby at those times respectively in that behalf above-mentioned, forthwith become and been, and from the same several times respectively have and hath continued to be, and still are and is part and parcel of the said demesne lands of the said manor; and the several owners and occupiers of the same manor for the time being, during all the time aforesaid, unto the time of [182] the seisin of the defendant, as aforesaid: and the defendant, during the time he hath been so as aforesaid seised of and in the said manor, from the time of the formation and accretion of the same piece of land, and every part thereof respectively, continually until the time of the finding of the inquisition, respectively were and was seised in their and his demesne, as of fee, of and in the same piece of land, and every part thereof, when and as the same hath so been formed and accrued as aforesaid, as and for part and parcel of the demesne lands of the same manor; and the defendant's traverse concludes thus: Without this, that the said piece of land, or any part or parcel thereof, was by the sea *left* in manner and form as in the inquisition is above supposed and found.

The Attorney-general in his replication traverses part of the inducement to the defendant's traverse as follows: "Without this, that the said piece of land at the times in the said plea mentioned, by the slow, gradual and imperceptible projection, alluvion, subsidence and accretion of ooze, soil, sand and other matter, being slowly, gradually and by imperceptible increase in long time cast up, deposited and settled by and from the flux and reflux of the tide and waves of the sea in, upon and against the outside and extremity of the demesne lands of the same manor, hath been formed and hath settled, grown and accrued upon and against and unto the said demesne lands of the same manor, in manner and form as the said defendant hath above in his said plea alleged; and the defendant in his rejoinder takes issue upon that fact.

The replication of the Attorney-general then takes issue on the defendant's traverse, that the said piece of land was and still is by the sea *left* in manner and form as in the inquisition is above supposed [183] and found; and thereupon also the defendant joined issue.

This case came on to be tried at the Spring Assizes 1823, for the county of Derby, (the venue having been changed from Lincolnshire to Derbyshire, by order of the Vice-Chancellor on the application of the Crown,) by a special jury of the said county, some of the special jurymen having previously had a view of the land in question; when a verdict was found for the defendant.

The Attorney-general, on behalf of the Crown, having applied to the Court of King's Bench for a new trial, the Court directed the facts proved to be stated in a special case for the opinion of the Court, which was accordingly done; and such case came on to be argued in Trinity Term 1824 (Barn. and Cres. 91), when, after full argument, the Court were unanimously of opinion that the verdict was right, and that judgment should be entered for the defendant thereon.

A writ of error in Parliament has now been brought by the Attorney-general on behalf of the Crown, and the following is the error assigned: "That it appears by the said record, that the land therein described was and is land gained from the sea by alluvion, and that in no part of the traverse filed by the said defendant to the inquisition in the said record stated, nor in any other part of the said record doth the said defendant state or allege any custom or prescription, or other sufficient matter, whereby the right and title of our said Lord the King to land so gained, can by the law of the land be barred or defeated; and that the said traverse so filed by the said defendant, and the matters therein contained, are not sufficient in law to bar or [184] defeat the said right and title of our said Lord the King to the land so gained by alluvion as aforesaid:" the common error is also added.

For the Crown it was contended that the judgment of the Court of King's Bench ought to be reversed:

1st. Because it appears by this record, that the land referred to and described therein was and is land gained from the sea by alluvion, which, by the law of England, belongs, of common right, by virtue of his prerogative, to the King.

2dly. Because the right of the subject to land so gained does not appear upon this record to be supported by the allegation of any custom, or by the allegation that there has been an alternate ingress and regress of the sea upon the land in question, or any other legal ground, in opposition to the claim of the Crown.

3dly. Because the title of the Crown, as found by the inquisition remains without answer; and the King is therefore entitled to judgment upon this record, notwithstanding the issues found for the defendant.

For the defendant in error it was contended that the judgment ought to be affirmed:—

1st. Because the land in question being land gained from the sea in manner and form as in the said defendant's traverse is pleaded, and not in such manner as is stated in the said inquisition and by the Attorney-general, became, and was, and still is, the property of the said defendant, as lord of the said manor of North Cotes, by the common law of the land.

2d. Because inasmuch as our said Lord the King hath not any common law, right or title to the piece of land in question, or any part thereof, it was not necessary for the said defendant to state any custom or [185] prescription whereby the supposed right or title of the King to the land so gained could by the law of the land be barred or defeated.

3d. Because the traverse filed by the defendant, and the matters therein contained, are sufficient in law to bar and defeat the supposed right and title of the King to the lands gained in manner aforesaid.

The cause came on to be heard on the 9th July 1828, in the presence of the eleven Judges, and the following authorities were cited: *Rex* v. *Abbot of Ramsay*, and *Digges* v. *Hammond* (Dyer, 326, b.; 2 Roll. Abr. Prerog. (B.) pl. 9, 10); *Rex* v. *Abbot of Peterborough*, and *Rex v. Oldsworth* (Hale De Jur. Mar. cap. 6, Har. Tracts); *Stowell* v. *Zouch* (1 Plowd. 357); *Ball* v. *Herbert* (3 T. R. 263). Callis on Sewers, p. 51; Com. Dig. Prerog. [D.] 61; 2 Bl. Com. 261; and Bracton, *lib.* 2, cap. 2.

Wetherel (Attorney-General) and Tindal (Solicitor-General) for plaintiff in error.

Denman and S. M. Phillips for defendant in error.

Best (Ch. J. C. P.): I thank your Lordships for the permission which you have given me to address you.

(15th July, 1828.) The question which has been proposed for the opinion of the Judges is, whether a tract of land of 400 acres which has been gained gradually, insensibly and imperceptibly by alluvion from the sea, belongs to the Crown, or to the proprietor of the adjoining lands? There is no local custom on the subject; but the Judges are unanimously of opinion, that, by the general custom of the realm, lands gained gradually and imperceptibly from the sea, by alluvion or projection, belong [186] to the owner of the adjoining demense lands, and not to the Crown.

As the King is lord of the sea, so he is the owner of the soil covered by the sea, but that right may be confined in particular places by local custom, and then the custom must be pleaded and proved. But there are general customs from time immemorial, such as the custom of merchants, etc. which need neither be pleaded nor proved, and of which we take notice as if they had been established by public Act of Parliament. We think there is a general immemorial custom of which we are bound to take notice, without pleading—that over the whole of the coast of England, lands gained from the sea gradually and imperceptibly by alluvion or projection, belong to the owner of the adjoining soil.

And the custom is reasonable; for the lord of the adjoining land converts the land as gained from the sea, gradually and imperceptibly as it is gained, into useful soil. When the sea retreats suddenly and leaves a tract of land uncovered, that land belongs to the Crown; but it is otherwise with lands gained gradually and imperceptibly by alluvion or projection. Such land is of no use to the King, but it may be useful to the owner of the adjoining lands, who gradually improves it as it is acquired, and thus may be said to have a title to it by occupation and improvement.

What Locke says in his Treatise on Government, about title gained by occupancy and improvement to land to which another has no title, shows the reasonableness of the custom. The addition is the compensation to the owner of the adjoining lands for the expense and trouble of embankments and improvements, and by those improvements the soil is rendered useful to the community, and the original value of the ground thus gained from the sea is not a tenth part of the value which it acquires by improvements.

[187] Bracton, lib. 2, cap. 2, speaking of alluvion, writes thus: "*Item quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio latens incrementum. Et per alluvionem adjici dicitur, quod ita paulatim adjicitur, quod intelligere non possis quo momento temporis adjiciatur, etc. Si autem non sit latens incrementum, contrarium erit, ut vis fluminis partem aliquam ex tuo predio detraxit, et vicino predio appulit, certum est eam tuum permanere, etc.*" Hale, in his Treatise De Jure Maris, after citing this passage, says, "But Bracton follows the civil law in this, as in some other following places." Bracton, however, the greatest authority of his time, represents it as the law of the land in the time of Henry the Third, that ground gained by alluvion so gradually and imperceptibly that it cannot be known at what particular moment of time any portion is added, belongs of common right to the owner of the adjoining soil; and Hale himself, in his History of the Common Law, says, that the system was considerably improved in the time of Bracton; and much was, no doubt, borrowed from the civil law, without the aid of which a regular system of law could not at that time have been constructed out of the ancient Saxon customs and similar sources. Hale likewise admits, that "if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, *idem est non esse et non apparere*, as well in maritime increases as in the increases by inland rivers."

The authority of Bracton is also followed in 2 Roll. Abr. Prerog. [B.] pl. 9, 10. Rolle mentions two cases cited by Dyer, *Rex* v. *Abbot of Ramsay* (Dyer, 326, b.), and *Digges* v. *Hammond*, in both of which judgment was given for the defendant, although the record did not contain any allegation of a customary or prescriptive title: **[188]** and then he says, pl. 11, "If the salt water leaves a *great quantity* of land on the shore, the King shall have the land by his prerogative, and the owner of the adjoining soil shall not have it as a perquisite:" from which it may be inferred that Rolle thought that land formed gradually by alluvion would go to the owner of the adjoining land, of common right, as a perquisite; and so it has been understood in Com. Dig. Prerog. [D.] 61, and in 2 Bl. Com. 261.

In the case of the *King* against the *Abbot of Peterborough* (Hale De Jure Maris, *pars prima*, cap. 6), cited by Hale, the Abbot was questioned at the King's suit for acquiring thirty acres *marisci in Gosberkille, licentia regis non obtenta. The Abbot pleaded quod per consuetudinem patriae est, et a tempore quo, &, extitit usurpatum quod omnes et singuli domini, maneria terras seu tenementa super costeram maris habentes particulariter habebunt marettum et sabulonem per fluxus et refluxus maris secundum majus et minus prope tenementa sua projecta. Et dicit quod ipse habet quoddam manerium in eadem villa, unde plures terrae sunt adjacentes costerae maris; et sic habet, per fluxus et refluxus maris, circiter* 300 *acras maretti terras suas adjacentes, et per temporis incrementum, secundum patriae consuetudinem &*": and ultimately judgment was given in favour of the Abbot; "*quod, secundum consuetudinem patriae, domini maneriorum prope mare adjacentium habebunt marettum et sabulonem, per fluxus et refluxus maris, per temporis incrementum, ad terras suas costerae maris adjacentes projecta, & Ideo Abbas sine die, etc.*" Hale observes on this—"here is a custom laid, and he relies not barely upon the case without it." But what is the custom laid? Not a local custom, but a general custom of the realm—a *consuetudo patriae*, which, though pleaded, need not have been pleaded, because the judges are bound to take notice of it without its being pleaded.

[189] The subsequent case of *Rex* v. *Oldsworth* (Hale De Jure Maris, *pars prima*, cap. 6) was decided on the same principle as that of the Abbot of Peterborough, although the judgment was for the Crown, because the defendant claimed *relicted* lands, and not land formed by alluvion; and here there is a marked distinction made between lands formed by alluvion, and lands derelict, the former belonging to the subject, the latter to the Crown.

The judgment of the Court below is therefore warranted by the general immemorial custom of the realm, that lands formed gradually and imperceptibly by alluvion, becomes the property of the owners of the adjoining lands. Such is the unanimous opinion of the judges. The reasons now given are mine; and if I have not been able to arrange and state them in a manner more worthy of the importance of the subject, and the attention of your Lordships, I hope the circumstance of my time and labour being at present so fully occupied by very heavy sittings will be considered a sufficient apology.

Lord Lyndhurst (Chancellor): I thank the learned Chief Justice, and the other judges, for the attention which they have paid to this case. I have carefully examined it, and entirely concur in opinion with the learned judges.

Eldon (Earl of): I have had occasion to look into this subject before, and from the opinion which I then formed, as well as from what I have heard of the present case, I fully concur in the opinion which has been just delivered.

Judgment of the Court below affirmed.

[For the proceedings in K. B. *vide* 3 Barn. and Cress. 91.]

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[190] APPEAL FROM THE IRISH CHANCERY.

LORTON (Viscount).—*Appellant;* GORE.—*Respondent;* *Et e contra*, GORE,—*Appellant;* LORTON (Viscount),—*Respondent.*

[S. C. 2 Bli. N. S. 286.]

King, son-in-law and agent of A. Gore, is in the habit of making payments in respect of Gore's debts, sometimes with money furnished for the purpose by Gore, sometimes out of his own funds. King pays £400 in 1761, and £2000 in 1764, in respect of bond debts of Gore, who dies in 1781, leaving King his executor. No claim made by King against A. Gore in his life-time, nor against his estate afterwards till 1819, in respect of these sums. Presumed that the payments were made out of the money of A. Gore, and the claim of King barred by lapse of time.

Marriage articles lost: Evidence that the house of the person in whose custody they ought to be, had been ransacked in 1798, by French troops and rebels, and many papers destroyed. Diligent search afterwards for the articles, which were not to be found: this is a fair presumption that they were destroyed, and secondary evidence of their existence and tenor admitted.

Devise to A. for life, remainder to his first and other sons in tail, remainder to B. for life, remainder to certain of his sons for life, remainder to their first and other sons in tail in their order; proviso, that if B. or any of his sons should become entitled, the estate should be charged with a sum of £2000 for C.; a grandson of B. is the first of B.'s family who becomes entitled in possession, and this held sufficient to support the charge for C.

Annesley Gore of Ballina, in the county of Mayo, had three daughters, the eldest (Elinor) married to Mr. King, the second (Mary) to Mr. Knox, the third (Ann) to Mr. Carey. He had no son. By his will, dated 8th August 1780, he devised his real [191] estates to trustees, in trust for Mrs. and Mr. King for life: remainder to such of their issue in tail male as Mr. King should appoint, and in default of such appointment, remainder to their first and other sons in tail male; remainder to Mary Knox for life; remainder to her husband Francis Knox, sen. for life; remainder to their second son Francis Knox, jun. for life; remainder to his first and other sons in tail male; remainder to James Knox, third son of said Francis Knox, senior for life; remainder to his first and other sons in tail male; remainder to Henry Knox, fourth son of Francis Knox, sen. for life; remainder to his first and other sons in tail male; remainder to Annesly, first son of said Francis Knox, sen. for life; remainder to his first and other sons in tail male; remainder to testator's daughter Mrs. Carey for life; remainder to her husband Henry Carey for life; remainder to their second son for life; remainder to his first and other sons in tail male; remainder to Annesly Carey, their first son for life; remainder to his first and

other sons in tail male; remainder to testator's right heirs." Then followed this passage: "And my will and intention is, that in case and as soon as my said daughter Mary Knox, or the said Francis, her husband, or the sons or son of the said Francis and Mary, or either of them, shall by virtue of the limitations aforesaid become entitled to my said estate, the same shall then be and become charged and chargeable with the payment of the sum of £2000 sterling, to and for the use of the younger children of the said Henry Carey and Ann Carey his wife, in manner following; (that is to say), the sum of £500 to Henry Carey, second son of the said Henry Carey, and the remaining £1500 to the five daughters of the said Henry and Ann, and the survivors and survivor of them, share and share alike." And the [192] testator gave the trustees power to sell a competent part of the estates to pay debts, and appointed Henry King, Francis Knox, and Henry Carey, his three sons-in-law, or the survivor of them, executors of his will.

The testator died in November 1781, and Henry King alone proved the will and acted as executor. Elinor King died in 1789 without issue. Henry King, her husband, died in 1824, having survived Francis Knox the elder, Mary Knox, Francis Knox the younger (who died without issue), and James Knox Gore (appellant Gore's father), third son of Francis Knox the elder and Mary his wife, so that neither Francis Knox the elder, nor Mary his wife, nor any of their sons, did become entitled in possession to the estates of Annesley Gore, and the appellant, Gore, the grandson of Francis and Mary Knox, was the first of the family who became entitled.

On the 2d December 1814, the executors of Francis Knox the elder (then deceased), filed their bill in Chancery against Henry King, and the appellant Gore, then a minor, and others, for the purpose of having the trusts of the will of Annesley Gore carried into execution; and the cause having been brought to issue and heard, the Lord Chancellor on the 25th February 1817, decreed that the will of Annesley Gore was well proved, and that the trusts of it should be carried into execution, and that Henry King was entitled to stand in the place of the creditors of Annesley Gore whose debts he had discharged out of his own funds, and it was referred to the Master to take the usual accounts.

Pending the taking of the accounts Henry King died, and Lord Lorton, his representative, was called as a party.

On the 1st May 1824 the Master made his report, to which various exceptions were taken on both sides; [193] but there were only three material points to which the judgment of the Lords referred. 1st. A claim made by Lord Lorton, as executor of Henry King, to two sums, one of £400 and another of £2000, as having been advanced out of Henry King's own funds in payment of bond debts of Annesley Gore; 2d. A claim by Lord Lorton to a sum of £3000 or thereabouts, with interest in respect of the £5000 marriage portion of Elinor King, of which only £2000 had been paid; 3d. A claim by the Carey's for the £2000 to which they were under the will of Annesley Gore to be entitled in case of the estate's coming into the possession of Francis or Mary Knox, or any of their sons.

As to the first question, it was in evidence that Henry King had frequently acted as agent for Annesley Gore in the payment of his debts, and interest thereon, and extracts from the accounts between them were produced, from which it appeared that Annesley Gore had advanced in his life-time several sums to Henry King for the above purpose, and the claim too, though it was stated to have accrued in 1761 and 1764, was not preferred till 1819. There was no direct evidence, however, that money had been advanced by Annesley Gore to King specifically for the payment of these sums of £400 and £2000; but from the course of the transactions between Annesley Gore and Henry King, and the length of time that elapsed before the demand was made, it was contended that it was barred by the Statute of Limitations before the death of Annesley Gore, and the Lord Chancellor of Ireland by his final decree (July 1824), disallowed the claim.

As to the second claim, being that for the balance due in respect of the £5000 marriage portion; it was objected to it, first, that there was no sufficient evidence of the existence of the original marriage articles, nor of [194] their destruction if they did exist, so as to let in secondary evidence in proof of them. 2d. That the claim was barred by lapse of time, and that payment ought to be presumed. 3d. That Henry King had not performed his part of the contract so as to entitle him to the £5000.

The evidence of the destruction of the original articles was this: Henry King being the executor of Annesley Gore, it was to be supposed that they were in his possession. In 1798 his house at Ballina, in the county of Mayo, was occupied for a considerable time by a party of French troops and rebels who ransacked the house, and scattered the papers about the floors, and many of them were lost. Afterwards the houses of residence of Henry King and his executor, Lord Lorton, were diligently searched for the articles, but they were not found, and it was presumed that they were among the papers which had been destroyed, and the secondary evidence of their existence and tenor was admitted, and that evidence was of this description.

In 1782, soon after Annesley Gore's death, a case in the hand-writing of a Mr. Lyster, Mr. King's solicitor, was laid before Mr. Wolfe, afterwards Lord Kilwarden, for his opinion, whether the trustees of the will of Annesley Gore, might not sell a competent part of the estates, to pay the claim of Henry King in respect of this £5000, and in that case a copy of the articles, of date 1757, was set forth, and was as follows:

"I do hereby oblige myself to pay unto Henry King, esquire, upon his marriage with my daughter Elinor Gore, and said Henry King settling all the estate and money he is now entitled to on the issue of said marriage, and a suitable jointure to the fortune, I give him the sum of £5000 sterling. Witness my hand, 30th June 1757. And if said Henry King recovers [195] the Boyle estate left him by the late Lord Kingsborough, I in that case oblige myself to pay to the said Henry King at my death, provided he also settles said Boyle estate on the issue of this marriage, with an additional jointure on said estate of Boyle proportionably to the sum of £5000 more. Witness my hand the 30th of June 1757.

(signed) "ANNESLEY GORE."

"I do hereby oblige myself to settle all the estate and money which I am now entitled to on the issue of Elinor Gore and a jointure of £500 a year; and if I recover the Boyle estate, I do oblige myself to settle the same on the issue of said marriage, with an additional jointure on said estate of Boyle of £500 a year more.

(signed) "HENRY KING."

The drawing of the case and the copying of the articles were charged against Henry King in Lyster's accounts. At the time of the marriage of Henry King in 1757, he was engaged in a litigation with his brother, Sir Edward King, about certain estates; but in 1761 the matter was compromised, and the agreement was ratified by an Act of Parliament in which the articles were recited. In 1787, about two years before his wife Elinor's death, Henry King executed a deed by which he settled all his real property on the issue of the marriage, and charged the estates with a jointure of £500 per annum, in terms of the articles. In 1788 he instituted a suit in Chancery, which was not proceeded with, for the purpose of enforcing his claim, and the articles were recited in the bill.

Upon this evidence the claim of Henry King to the balance due in respect of the £5000 was allowed by the Court below.

The third claim, that of the Careys to the £2000 to which they were to be entitled on Francis or Mary [196] Knox or any of their sons becoming entitled to the estates, was also allowed, on the ground that the words "son or sons" were not here to be construed strictly; as it appeared to be the intention of the testator that the claim of the Careys should accrue in the event of any of the Knox family becoming entitled to the estates.

From that part of the decree which disallowed the claim of Henry King to the two sums of £400 and £2000 Lord Lorton appealed.

As to the £400:

First. Because it did not appear by any evidence in the cause that bills to that or any other amount were sent by the said Annesley Gore to Henry King; the only evidence relating to the said bills being an entry in the account book of said Francis Moran, which entry is dated the 15th November 1761, and is in the following words and figures —"Bills to Mr. Gore to send to Henry King, esquire £396," which is certainly evidence of nothing more than that those bills were handed to Mr. Gore, but no evidence of what further use they were applied to by him.

Secondly. Because, supposing that it had been proved that said bills had been sent by said Annesley Gore to said Henry King, it would have been necessary to have shown that said £396 were paid on account of the sum specified in said exception.

As to the £2000:

First. Because in general an executor is not bound to insist on the Statute of Limitations in bar of a fair demand, and is no more bound to insist upon it against his own demand than against any other; and as to the fairness and justness of the demand, independently of [197] the aforesaid legal bar, no valid objection was or could be stated thereto.

Secondly. Because that supposing the Statute of Limitations might have been set up as a bar to this demand of appellant, the said Francis Arthur Knox Gore did not rely on it or allege it as a bar before the Master, or in his exceptions to the said report, and therefore ought not to have had any benefit from the said statute at the hearing on the said exceptions.

Thirdly. Because the said Francis Arthur Knox Gore had himself been allowed credit as aforesaid by the said Master, in the account on the foot of the marriage portion of £5000 for the said several sums of money paid to the said Henry King from time to time in the life-time of the said Annesley Gore, in said report specified, amounting altogether to the sum of £2697, the greater part of which had been paid by the said Annesley Gore to the said Henry King between the time of the payment of the said sum to the Bishop of Killala and the death of the said Annesley Gore, and not one of which said sums appears by said Master's report to have been paid on any particular account; and the said payments so made to the said Henry King, subsequent to the payment made by him of said sum of £2000 to the said Bishop of Killala, ought therefore to have been presumed to have been paid to the said Henry King on account of the said sum of £2000 he had so advanced to said Bishop of Killala, or the amount thereof, and might have been so applied.

Fourthly. Because however said sums were to be applied, it appears by the said Master's report that not one of said sums was paid within six years previous to the said Annesley Gore's decease; and therefore his Lordship ought not to have allowed the Statute of [198] Limitations in bar of appellant's right to credit for the £2000 so paid the Bishop of Killala, and the interest thereof, without expressly directing that the appellant should not be charged in any way with the said sums, amounting to said sum of £2697, the Statute of Limitations operating in bar of the whole of the sums comprised in said sum of £2697, upon any principle that it can be held to operate against appellant's having credit for the sum of £2000 so paid by the said Henry King to said Bishop of Killala, and because appellant ought either to have credit for the same so paid by the said Henry King to the Bishop of Killala, or he ought not to be charged with the said sum so paid by the said Annesley Gore to the said Henry King; for if on the principle of there being cross-demands, and a running account between the parties, the items on one side are taken out of the statute, so also must those on the other side.

For Gore it was contended that this part of the decree ought to be affirmed.

As to the £400:

1st. Because it appears by the receipt of the 18th of December 1761, upon which the claim of £400 and interest is founded, that the payment was made by Annesley Gore, and that Henry King was only the agent in making it, and must be taken under the circumstances, and particularly at this distance of time, to have procured from Annesley Gore funds to enable him to make such payment.

2d. Because, if such a debt ever existed, this payment must from the length of time that elapsed between the time of payment and the death of Annesley Gore, nearly twenty years, be presumed to be satisfied, and more especially as Annesley Gore was a man of [199] considerable property, and such presumption is strengthened by the fact of Henry King, who survived the said Annesley Gore a number of years, not having made any claim on the foot of such payment until the year 1819, as before mentioned.

3d. Because it appears that the said sum of £400 was discharged by the application of bills sent by Annesley Gore to Henry King.

4th. Because the balance due upon the bond (after payment of £400) was paid by Annesley Gore, and the security taken up by him and cancelled by cutting off the seal, and under such circumstances, and in such state, the bond came into the hands of Henry King as executor of Annesley Gore, with all his other papers, and upon the death of Henry King came into the hands of appellant as executor of

Henry King; and said King's possession of said bond is consistent with the fact of the discharge of the whole amount thereof by and with the money of Annesley Gore.

5th. Because if such a debt ever existed, it was barred by the Statute of Limitations in the life-time of Annesley Gore.

As to the £2000:

1st. Because the sum of £2000 in this exception mentioned does not appear to have been a payment made on account of, and for the proper debt of Annesley Gore, who was one only of two obligors in the bond, and might have been a payment for the debt of his co-obligor, or of Henry King himself, who held valuable renewal interests as tenant under the see of Killala.

2d. Because if the payment was made on account of Annesley Gore, it should, under all the circumstances, at this distance of time, and especially as no claim was made on the foot of such payment until the year 1819, [200] be presumed that Henry King (who acted as agent for Annesley Gore, in making other payments from the funds of the said Annesley Gore), had made such payment also with Annesley Gore's money, and not from the private funds of the said Henry King.

3d. Because the production of that bond by the representative of Henry King is not in itself evidence that the fact of the payment thereof was made with the money of the said Henry King, inasmuch as the said Henry King acquired possession of all the papers of the said Annesley Gore as his executor, and the said papers afterwards came into the possession of the appellant as executor of the said Henry King.

Gore appealed from that part of the decree which allowed the claim of Henry King to the £5000 portion:

1st. Because there was not a sufficient foundation laid in evidence to entitle Lord Lorton to read secondary evidence of the alleged articles.

2d. Because it did not appear that the £5000 was at any time an existing charge against Annesley Gore's estate.

3d. Because the alleged articles of 1757 rested on mutual and dependent covenants, and the said portion was not to be thereby payable until the said Henry King should settle on the issue of the marriage the estate and money he was then entitled to, and make a jointure for his wife pursuant to his covenant, which covenant does not appear ever to have been duly performed, and therefore it is submitted that no debt existed on the foot of said sum of £5000 claimed by the respondent, even supposing the said alleged articles to have been executed.

4th. Because if the said sum of £5000 was a debt existing from the date of said articles, or at the marriage [201] of the said Henry King with Miss Gore, it was barred by length of time, before the death of said Annesley Gore, which did not take place for more than twenty-four years after the said marriage, and the date of the said articles, and should be presumed to have been paid by the said Annesley Gore.

5th. Because, not being a debt due by the said Annesley Gore, at the time of his death, it could not be a charge on his real estate under his will.

6th. Because, if the execution of the said alleged deed of 1757 made the said sum of £5000 a debt of the said testator, it could only have been a debt due and payable from the execution of said deed of 1787, the said sum of £5000 not being sooner payable, if at all.

7th. Because, supposing the said sum of £5000 to be a charge on the said estates, it does not appear from the said copy of the said articles of 1757, that interest was to be payable on the sum of £5000 therein mentioned, and now claimed by the respondent, Lord Lorton: and there is no evidence of a demand made of said principal sum, or any part thereof, from the said Annesley Gore.

8th. Because, if interest was payable, it is, under all the circumstances, to be presumed, that all interest on the said sum of £5000 was paid during the life-time of the said Annesley Gore, and by the said bill, filed by the said Henry King in 1788, he claims a balance of £3000 only, to be due on the said alleged charge.

9th. Because, even were the settlement of 1787 to be considered as a performance by the said Henry King of his covenant in the said alleged articles of 1757, it would not entitle him or the respondent, Lord Lorton, to interest from the marriage, by relation back.

10th. Because, supposing the said interest to have become in arrear at the death

of the said Annesley Gore, [202] it is to be presumed that the said Henry King, who received the rents and profits of the said estates of the said Annesley Gore, retained the said interest thereof; and at all events, the said decree or decretal order should not have decreed an account to be taken on the foot of the interest of the said £5000, without decreeing an account of the rents and profits received by the said Henry King, who was bound to keep down the interests out of the rents, if the real estate was charged with the £5000.

Mr. Gore also appealed from that part of the decree which allowed the claim of the Careys:

Because the estate of Annesley Gore was only to be charged with the sum of £2000 for them, in the event of Mary Knox or Francis Knox her husband, or the son or sons of Mary and Francis, becoming entitled to the estate, which event has not as yet happened, and it does not appear that the testator intended to charge his estate at all events.

(15th July, 1828) Lord Lyndhurst, (Ch.): This is an appeal from a decree of the Lord Chancellor of Ireland, made on certain exceptions to the Master's report, which are many in number, but through all of which it is not at present necessary to travel, and I shall confine myself, therefore, to the material points.

One of the exceptions raised the question whether certain sums allowed by the Master to persons of the name of Carey were due to them according to the right construction of the will of Annesley Gore. I think the Lord Chancellor of Ireland was correct in the opinion, that in the event which happened there can be no reasonable doubt but that the Careys were entitled to the sums allowed them; and I propose that this part of the judgment be affirmed.

[203] The next material question is on the articles of 1757, and these are short, and in these terms:

"I do hereby bind myself to pay unto Henry King, esquire, upon his marriage with my daughter Eleanor Gore, and said Henry King, settling all the estate and money he is now entitled to, on the issue of said marriage, and a suitable jointure to the fortune, I give him the sum of £5000 sterling. Witness my hand, 30th June 1757: and if said Henry King recovers the Boyle estate, left him by the late Lord Kingsborough, I, in that case, oblige myself to pay said Henry King at my death, provided he also settles said Boyle estate on the issue of this marriage, with an additional jointure on said estate of Boyle, proportionately, the sum of £5000 more. Witness my hand, 30th June 1757. (signed) ANNESLEY GORE, L. S."

"I do hereby oblige myself to settle all the estate and money I am now entitled to on the issue of Eleanor Gore, and a jointure of £500 a year; and if I recover the Boyle estate, I do oblige myself to settle the same on the issue of said marriage, with an additional jointure on said estate of Boyle of £500 a year.

(signed) "H. KING, L. S."

One question argued here was, whether there was sufficient evidence of the execution of these articles. The terms of the exceptions do not sufficiently raise this question, although I think they are sufficiently large to embrace it. The exception is in these terms:

"For that said Master by said report allows a credit to said Viscount Lorton for the sum of £2303, being an alleged balance of a sum of £5000, the alleged portion of Eleanor Gore, one of the daughters of Annesley Gore, on her marriage with the said Henry King, on foot of said alleged portion; whereas said [204] Master was not warranted by evidence or law to allow any sum on foot of said portion."

But although this is sufficiently large to include the point, it does not appear to have been the intention of the parties to agitate the question, and it is stated in the respondent's case, and not denied, that the point was not insisted upon in the Court below; and I have had some conversation with the noble and learned Lord (Lord Manners) who decided the case below; and he states that, according to the best of his recollection, the point was not insisted upon below. The main question there was, whether Henry King was entitled to interest from the date of the execution of the articles on that portion of the sum of £5000 which he had not received, and, if the question as to the execution of the articles was not raised, or was abandoned before, the parties are not warranted to raise it here *per saltum*.

Taking it then for granted that the articles did exist and were duly executed,

as they are not produced, it must be proved, in order to let in the secondary evidence, that they have been lost or destroyed. The articles, as before mentioned, were executed in 1757. In the year 1798, during the rebellion in Ireland, the house of Henry King at Ballina, in the county of Mayo, was occupied by parties of rebels and French troops, who remained in possession of it for a considerable time; and the whole of the house was ransacked, and the papers scattered about the floors, and it may naturally be supposed that many of them were destroyed, and the original articles of 1757 might be among the number. Henry King was executor of Annesley Gore, and would properly have the articles in his possession; and Lord Lorton was the executor of Henry King, and it is in evidence, that upon a decree being made for an account [205] in this cause, the house of Henry King at Ballina, and the houses of Lord Lorton in Henrietta-street, Dublin, and at Rockingham in the county of Roscommon, were searched, and no trace of the original articles could be found. I agree with the Court below that, under these circumstances, secondary evidence of the existence and tenor of the articles was admissible, and that evidence was of this description.

Annesley Gore died in 1781, and in 1782 the trustees under his will laid a case before Mr. Theobald Wolfe, afterwards Lord Kilwarden, for his opinion, whether a competent part of the testator's property might not be sold to pay off this debt. That case was wholly prepared by Mr. Lyster, who had acted as solicitor for Mr. Annesley Gore and Mr. King; and it included a copy of the original articles of 1757. In addition to this, it was proved that the making out the case, and the copying of the original articles were charged for in Lyster's bill of costs, which was proved to have been paid: one can hardly suppose, therefore, that this was not a genuine copy of the instrument. Besides this, in the second year of the reign of Geo. 3, an Act of Parliament was passed for confirming an agreement between Mr. Henry King and Sir Edward King relative to some litigated questions of property between them, and in this Act the articles were recited; and in 1787 Henry King, pursuant to a power reserved to him by the Act, executed a deed by which he settled on his wife, Elinor King, the daughter of Annesley Gore, a jointure corresponding to the stipulation in the articles. Taking all this together, I think that the decree, in as far as it recognizes the existence and validity of the articles, ought to be affirmed; more particularly as it is at least doubtful whether the [206] question was raised or insisted upon in the Court below.

The next material question is that of interest upon the money due under the articles, and that arises out of the construction of the words of the articles, "I do hereby oblige myself, etc. etc."

It should seem that after the execution of the articles by Annesley Gore, there had been some further treaty between the parties, as in the note at the bottom signed by King, the suitable jointure is fixed at £500 per annum.

The transaction then is this: Annesley Gore obliges himself to give a portion of £5000 with his daughter, and Henry King engages to settle upon her a jointure of £500 per annum, and to settle his property on the issue. Henry King had a controversy with Sir Edward King concerning certain estates which had belonged to Lord Kingsborough, and in or about the year 1762 that matter was arranged, and an Act of Parliament passed confirming the arrangement by which the estates which fell to Henry King were settled on himself for life, remainder to the issue of his marriage with Eleanor King in tail, with power to Henry King to charge the estates with a jointure of £500 a year for his wife, and with £6000 as portions for younger children.

If that power had been executed immediately on the passing of the Act, it would certainly be a fulfilment of the contract: but it is not executed till 1787, which, however, was in the life-time of Eleanor King, and then the contract was completely fulfilled on Henry King's part, as far as concerned the real property, and there was no evidence that he was possessed of any personal property. This being the case, as the portion money was not paid when it should be paid, I think [207] the judgment of the Court below correct in allowing interest on the sum unpaid from the date of the marriage.

Then as to the £400, and the £2000, the question was, whether these two sums had been paid by Henry King for Annesley Gore with Gore's money, or with his own

money; in which latter case he would be entitled to stand in place of the original creditors on Gore's estate. Considering the course of the transactions between Annesley Gore and Henry King, and the lateness of the period at which the claims to these sums were set up, I think the judgment of the Court below right in disallowing them. As to the rest of the particulars, I do not think it necessary to go into them, but I have examined the whole of the case, and I think that the decree of the Court below was, in every respect, right, and I propose that the judgment be affirmed.

As to the matter of costs; this is rather a complicated case, and I cannot say that it was improper to bring it here, and therefore I think no costs ought to be allowed on either side, except to the Careys, who appear to be entitled to their costs.

Judgment of the Court below affirmed; but without Costs, except to the Careys.

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[208]

APPEAL

From Judgments of the Scotch Consistorial Court and Court of Session.

MARY BLACK MACNEIL,—*Appellant;* MACGREGOR,—*Respondent.*

[Mews' Dig. vii. 652. S. C. 2 Bli. N. S. 393.]

Mary B. Macneil married to Jolly in a manner unquestionably regular, on 13th June 1816. Summons, in 1813, of declarator of marriage and adherence (restitution of conjugal rights) by Macgregor against Mary B. Macneil alone, founded on alleged irregular prior marriage, followed by a marriage by a clergyman on 23d May 1816. Charge of previous irregular marriage abandoned, and evidence confined to the marriage before the clergyman, on 23d May 1816: 1st, Documents; certificate, or *quasi* certificate, of proclamation of banns, but no banns actually published; entry in book (private memorandum not admissible evidence) of the clergyman; certificate of the clergyman; a bad character, afterwards convicted in criminal court of forging marriage lines or certificates;—2dly, Witnesses; the clergyman's wife and daughter, the only witnesses;—3dly, Admissions of M. B. Macneil, that she went before the clergyman with Macgregor, but did so from undue influence and fear, and denying consent; evidence of facts and circumstances before and after the alleged marriage with Macgregor.

Five children born of the marriage with Jolly in the course of the proceedings. Judgments of the Courts below sustaining the prior marriage with Macgregor reversed, upon appeal, by the Lords; the evidence of the ceremony and consent being considered defective, and the pleading irregular.

A marriage, without actual proclamation of banns, not considered as a regular marriage, though celebrated by a clergyman, and evidence of facts and circumstances to elide (rebut) the presumption of consent admissible.

No opinion (because not necessary to be decided in this case) whether evidence of facts and circumstances can be admitted to rebut the presumption of consent arising from a marriage unquestionably regular.

[209] No opinion (because not necessary to be decided in this case) whether Jolly and the children ought to have been parties to the suit for their interests.

No opinion (because not necessary to be decided in this case) whether, although the declarator had been sustained, it must necessarily have been followed, under such circumstances as appeared in the present case, by a judgment of adherence (restitution of conjugal rights).

No opinion (because not necessary to be decided in the present case) whether admissions, by a party contracting, of a prior marriage, can be received in evidence to destroy the effect of a subsequent marriage contracted by that party.

Doctor Macneil of Stevenston, in Lanarkshire, having no legitimate children, nor

near relation, in the year 1815 took into his house an illegitimate daughter (Mary Black Macneil), who was then twenty-three years of age. In April 1816 he executed a deed by which he left her the house in which he lived, his household furniture, and a bond for £500: and by deed, bearing date the 1st May 1816, he disposed to her, *mortis causa*, and in a revocable form, the whole of his property, heritable and moveable. Miss Macneil continued to reside with her father till his death, which took place on the 15th May 1817.

Malcolm Macgregor, a journeyman printer, who, it was alleged, had for some time carried on illicit intercourse with a step-daughter of the woman by whom Miss Macneil had been nursed, became well acquainted with the lady and her father, and the father reposed considerable confidence in him, and employed him in some instances as a sort of man of business. Macgregor was entrusted by Dr. Macneil with the conveyance of his instructions to his agent, relative to the two deeds of settlement in favour of his daughter, and when they were executed, Macgregor was entrusted with the custody of them.

[210] In 1815 Miss Macneil became acquainted with Mr. Jolly, a young man of the medical profession, who paid his addresses to her, and on the 13th of June 1816 they were regularly married, Dr. Macneil being present and solemnly giving away his daughter. Mr. and Mrs. Jolly resided in Dr. Macneil's house till his death.

In December 1817, some months after Dr. Macneil's death, Macgregor, by an agent, intimated to Mr. and Mrs. Jolly's man of business, that he must have some compensation for trouble, and that unless Mr. and Mrs. Jolly compromised the matter, he would set up a prior marriage of his own with Dr. Macneil's daughter. To this it was replied, that any reasonable compensation for trouble in Dr. Macneil's affairs, would be readily granted, but that a compromise with reference to the property left by the Doctor on the ground of an alleged prior marriage, was totally out of the question.

On the 25th March 1818 Macgregor raised an action of declarator of marriage, and adherence (restitution of conjugal rights) in the Commissary (Consistorial) Court, founding on a private and irregular marriage at the village of Holytown, in the early part of May 1816, celebrated by Dr. Macneil himself, (who was a clergyman), and next, upon a regular marriage celebrated by Joseph Robertson, a clergyman of the Church of Scotland, and minister of a chapel of ease. This Joseph Robertson was, soon after the alleged marriage, tried for forging marriage certificates, etc., convicted, and sentenced to a term of imprisonment, and then to banishment from Scotland for life. The action was brought against Mary Macneil alone, and neither Mr. Jolly, nor any of the five children of the marriage between Mary Macneil and Jolly, born in the course of the proceedings, were cited as parties for their interests.

[211] The irregular marriage laid in the summons as the foundation of Macgregor's claim was abandoned, and the evidence confined to the alleged regular marriage by Joseph Robertson. The Commissary Court (Mr. Commissary Gordon dissenting,) gave judgment on the declarator, (no judgment on the adherence,) that Macgregor had proved his marriage, and this judgment, (Lord Hermand dissenting) was affirmed by the 1st division of the Court of Session, and on the 8th July 1825, that Court, on the petition of Macgregor, granted a sequestration of the estate of Stevenston, until the marriage cause should be finally determined by the House of Lords, to which an appeal was lodged from the judgments of the Courts below.

The summons, and an abstract of the material part of the evidence are subjoined, as being essential to the right understanding of their Lordships' judgment:

Commissary Court. March 25, 1818.

Summons of Declarator of Marriage and Adherence, Malcolm Macgregor, Printer in Edinburgh, against Mary Macneil, sometimes called Mary Black Macneil, the reputed natural daughter of the late Dr. James Macneil of Stevenston, by Euphemia Black, sometime residing in Carnegie-street, Edinburgh.

"James Gordon, Thomas Tod, James Fergusson, and George Ross, esqs. advocates, commissaries of Edinburgh; to
macers, and officers of court, and messengers-at arms, executors hereof, conjunctly and severally, specially constituted, greeting: Whereas it is humbly meant and

shown to us, by Malcolm Macgregor, Printer in Edinburgh, that an intimate acquaintance having for some time subsisted betwixt the pursuer and Mary Macneil sometimes called Mary Black Macneil, the reputed [212] natural daughter of the late Dr. James Macneil of Stevenston, by Euphemia Black, sometime residing in Carnegie-street, Edinburgh, they formed an attachment, and agreed to become husband and wife of each other; and, accordingly, when they were together at Holytown, in the county of Lanark, in spring 1816, on a jaunt, in company with the said Dr. James Macneil, an irregular marriage between them was celebrated by the said Dr. James Macneil, and the marriage was consummated by their spending several nights together in the same bed, at Holytown aforesaid: that, on the pursuer and the said Mary Macneil, or Mary Black Macneil, returning to Edinburgh from said jaunt, which they did in the month of May 1816, they considered it proper that no time should be lost in celebrating *in Facie Ecclesiæ* that marriage which had been irregularly contracted between them at Holytown aforesaid; and, accordingly they were in the month of May 1816, regularly married by the Rev. Joseph Robertson, minister of the chapel in Leith Wynd, Edinburgh: notwithstanding of all which, the said Mary Macneil, or Mary Black Macneil, casting off the fear of God, and forgetting her natural and christian duty and promise made at her entering into said marriage with the pursuer, now refuses to acknowledge her marriage, or to cohabit with him as her husband; therefore, the pursuer, Malcolm Macgregor, ought to have our sentence and decreet, finding and declaring, that he and the said Mary Macneil, sometimes called Mary Black Macneil, defender, are lawful married persons, husband and wife of each other; and decerning and ordaining the said defender to adhere to, and cohabit with the pursuer, and treat and entertain him in all respects as her husband: and further, decerning and ordaining the said defender to make payment to the pursuer of the sum of £100 sterling, as the expenses of this process, or of [213] such other sum, less or more, as the expenses shall amount to, besides the expense of extracting the decreet to follow hereon.—Heretofore, etc.

Given under the hand of our clerk of Court, and seal of office, at Edinburgh, this 25th day of March 1818. George Carphin, Dep."

Facts and circumstances before the alleged marriage:

Mary Hastie, the daughter of the inn-keeper, interrogated, depones, "That when Dr. Macneil, the defender, and the pursuer came to Holytown in May 1816, as above deponed to, it was late at night when they arrived, and the beds in the house were taken down, as was the custom in the house to be done once a year. Depones, that the deponent's mother went to the pursuer and defender, and told them, that from the situation of her house at this time, she had only one double-bedded room to put them into. Depones, that the pursuer upon this stated to the defender, that she might be under no apprehension of going into the same bedroom with him, as he would take her under his protection. Depones, that the defender acquiesced in this arrangement; but as there were no curtains on the bed, she desired the deponent to hang sheets round the bed she was to sleep in; this the deponent did, and the pursuer and the defender accordingly slept in the same room that night. Depones that next morning they and Dr. Macneil left Holytown and went to Glasgow; and upon their return to Holytown the same night, the pursuer and defender were then accommodated with separate bed-rooms, the rooms having then been got into proper order. Depones, that the pursuer on both of the nights in which the parties slept in Holytown, as above deponed to, asked to have three separate bed-rooms; but this could not be effected, for reasons [214] before mentioned on the first night. Depones, that it was not proposed, in the deponent's hearing, that on the night first above mentioned Dr. Macneil and his daughter should sleep in the same double bedded room, in place of the pursuer and defender doing so. Re-interrogated for the defender, depones, that she cannot recollect whether or not Dr. Macneil had previously retired to his bed-room at the time the deponent's mother went into the room to give the information respecting her only having one double-bedded room, as formerly mentioned."

Christian Robertson swears, "I nursed the defender (appellant,) and have been acquainted with her, and occasionally at her father's house ever since. Interrogated,

depones, That she went to the west country with her father in spring 1816. After they came back, I am not sure but she said to me, that Mr. Macgregor the pursuer (respondent,) had been with her there. She said nothing to me about her marriage, or marrying. Mr. Macgregor told me he had been with them in the west country. I asked him if he was going to be married to the defender? (appellant) He said, No; Dr. Macneil says he thinks I will be the man; but I think it will be Mr. Jolly; for I know her pre-engagement to him."

John Carr confirms Christian Robertson, so far as concerns the respondent's knowledge of the appellant's engagement to Mr. Jolly. He says, "That he has been intimately acquainted with the pursuer (respondent,) for thirty years and upwards. Depones, That he recollects, some time about April 1816, of walking down Leith Walk towards Leith, in company with the pursuer (respondent), and John Manderson, a witness cited for the defender (appellant); and upon returning back again, they met, towards the head of Leith Walk, **[215]** Mr. Jolly and the defender. Depones, That the pursuer stopped, and had some conversation with the defender and Mr. Jolly; and upon his joining the deponent and Manderson, the deponent asked him if Mr. Jolly and the defender were married, to which he replied, that they were not married, but that they would shortly be so."

John Manderson, corroborating this witness, depones, "That he has been acquainted with pursuer, though not very intimately, for as he thinks, about five years. Depones, That he recollects going down Leith Walk, one afternoon, with the pursuer and John Carr the preceding witness, some years ago, the deponent cannot exactly say how long, when, either in returning or going down the Walk, they met the defender and Mr. Jolly. Depones, that the pursuer stopt to speak to them, when John Carr and the deponent proceeded. Depones, That the pursuer afterwards rejoined the deponent and John Carr, and the latter put a question to him respecting the defender and Mr. Jolly; to which question the pursuer made some answer, respecting a marriage that was to take place, as he thinks, betwixt the defender and Mr. Jolly. Depones, that this circumstance happened so long ago, that the deponent has a very indistinct recollection of what the pursuer said upon that occasion; but he rather thinks he mentioned the intended marriage above alluded to was to take place in a short time."

Margaret Robertson depones, "That she heard her mother ask the respondent, whether the appellant was to be married to him or Mr. Jolly? When he answered, that Dr. Macneil believed that he (the respondent) was the person to whom his daughter was to be married; but that he (the pursuer) knew Mr. Jolly was to be the man, as the defender had entered into a pre-engagement with him."

[216] Mrs. M'Naughton, Margaret Robertson's sister, swears to the same fact, namely, the respondent's statement, "That Mr. Jolly would be the man, as he (the pursuer) knew of his pre-engagement with the defender."

William Allan gives testimony to the same effect, and depones, "That he never heard any report that the pursuer and defender had been married, till the month of March last, (1818,) when he heard it from the pursuer himself."

Charles Macpherson, printer in Edinburgh, who wrought in the same printing-office with the respondent, depones, "That the appellant was in the constant habit of calling for the respondent; and that the behaviour of the parties led to the general belief that a courtship was going on: that her visits to the respondent at the printing-house were frequent, sometimes twice or three times a week: that she was sometimes accompanied by her father, and sometimes alone. Depones, that when the pursuer came alone to the office, she sometimes called as late as eight or nine o'clock at night, at other times during the day. Depones, that when she called in company with her father, he does not recollect of her calling later than about two or three o'clock in the day. Depones, that on some of the occasions, the pursuer left the office with the defender when she came alone, and did not return again to the office that evening. Interrogated, Whether the defender's visits to the pursuer, and the pursuer's going out with her, occasionally struck the deponent at the time as any thing particular? depones and answers, It struck me that something of a courtship was going on betwixt the parties; and I recollect it furnished the subject of conversation to Mr. Macgregor's friends, both out of and in the office."

[217] Margaret Kinlay examined on 2d July 1819, depones, "That she remembers

that the defender once mentioned to the deponent, that her father, Dr. Macneil, wished to give her, the defender's hand, to Malcolm Macgregor, the pursuer, when they were together at Glasgow; but as she said to the deponent, she, the defender, refused to marry him there, or till they came home, or something to that purpose; but she, the deponent, cannot recollect her precise expressions. Interrogated, Whether then, or afterwards, the deponent had any further conversation with the defender relative to her, the defender's, being married, and, if so, what that conversation was? depones and answers, Some weeks afterwards, to the best of my recollection, I asked her, if her marriage with Mr. Macgregor was done? She answered no; and added, I am going to marry another man I like better. Interrogated, Was the deponent ever asked to be bride's-maid to the defender? depones and answers, Yes. Interrogated, depones, This was at the time of the first conversation, I imagine. Interrogated, depones, She did not say to what person she was going to be married, when she asked me to be bride's-maid. Interrogated, What person did you at that time understand that she was going to marry? depones and answers, I really cannot say: both Mr. Jolly and Mr. Macgregor were coming many times to Dr. Macneil's house. I saw Mr. Jolly three months before I ever saw Mr. Macgregor there. I supposed both of them to be courting Miss Macneil, although I had no authority for supposing so."

The same witness examined on 2d June 1823, depones, "That Dr. Macneil was the landlord of the house she occupied from the year 1816, which was next door to his own house: that one evening in summer, that year, a coach stopped nearly opposite to his [218] door, and a little time after, she saw him go into the coach, and he seemed very infirm, and was helped into it by William Allan and Mr. Jolly; and it appeared to the deponent, that there was also some person in the coach pulling him in: that at the time the deponent saw him, he had one foot on the step of the carriage, and his two arms stretched out upwards, towards the body of the carriage; but whether having hold of the carriage, or of some person in the inside, she cannot say," etc. Afterwards, Depones, She was very much astonished at seeing Dr. Macneil going out of his own house at that time of the evening, and that she immediately went into her neighbour, Mrs. Craig, who lived on the same stair-head with the deponent, and asked her if she knew what could be the cause of it: that Mrs. Craig told the deponent that Miss Macneil was going to be married to Mr. Jolly; upon which the deponent instantly exclaimed, was it possible! that the deponent then said to Mrs. Craig, that she could not believe it possible after Miss M'Neil asking the deponent sometime before to be her bride's-maid at her marriage with Mr. Macgregor." Afterwards, in answer to a cross-question, "Whether Mr. Jolly was much about Dr. M'Neil's house at this time?" she deponed, "I reckon at this time that Mr. Jolly was in the back ground at this time, as it was always Mr. Macgregor that was with Miss M'Neil;" when further pressed, the record of her deposition concludes thus, Interrogated, Whether Mr. Jolly lived in the Doctor's house after his marriage? depones and answers, I really do not know, I have frequently seen him going in and out of the house. Interrogated, What she means by Mr. Jolly being in the back ground? depones and answers, What I mean is this, that Mr. Jolly was a good deal about the Doctor's [219] house before Mr. Macgregor and Miss M'Neil drew up together; but after that, I never saw Mr. Jolly much in the Doctor's company, it was always Mr. Macgregor that was with the Doctor and Miss M'Neil when they went any where. Re-interrogated for the pursuer, What was the particular time to which the witness alludes, when she states, that the pursuer and defender drew up together? depones and answers, It was about the time when the Doctor, Miss M'Neil, and Mr. Macgregor, went to Stevenston, and when she asked me to be bride's-maid.

Facts and circumstances at time of the alleged marriage on 23d May 1816:

22d May 1816.

"Malcolm Macgregor, Printer, Old Church Parish, and Mary Macneil, St. Cuthbert's Parish, daughter of Dr. James Macneil, Edinburgh. That the parties are free, unmarried, of legal age, and not within the forbidden degrees, and he has resided upwards of six weeks in Edinburgh, is certified by James Macdonald, running stationer, Edinburgh; Patrick Neil, printer, Edinburgh.

(signed) MALCOLM MACGREGOR.
JS. MACDONALD."

Note here, that the parties returned to town from Holytown on Monday the 20th May 1816, and the alleged marriage was on Thursday the 23d; so that it was impossible that banns could have been actually published.

Entry in the record of the marriages kept by the Reverend Mr. Robertson, which is in the following terms: "Twenty-third May eighteen hundred and sixteen,—Married Malcolm Macgregor, Printer, Old Church Parish, and Mary Macneil, St. Cuthbert's Parish, Daughter of Dr. James Macneil, Leith Walk.—Town Lines."

[220] "Certificate granted by the minister himself, in the following terms: "Edinburgh, Carruber's Close, May 29, 1816.—These are to certify, that Mr. Malcolm Macgregor, printer, and Miss Mary Macneil, after producing regular marriage lines from the session-clerks of the city, were married, before witnesses, by me,

JOSEPH ROBERTSON, Minister."

Mrs. Margaret Robertson, the wife, being interrogated,—as the first question put to her *in causa*,—"Do you know Mary Macneil, or Mary Black Macneil, the person now pointed out to you in Court? depones and answers, I do not; I do not remember that I ever saw her before." This was rather a fatal answer for a witness, who was adduced solely to prove the appellant's marriage. The respondent, in this situation, thought it necessary to assist his witness: and the examination accordingly proceeds thus:—"Interrogated, Did your husband keep a record or book, in which he entered the marriages celebrated by him? depones and answers, He kept a book, in which, so far as I know, he generally recorded the marriages celebrated by him. And being shown a book produced by the pursuer, and now subscribed by the deponent and judge examinator, as relative hereto, which commences on the 1st of January 1814, and appears to end upon the 26th of November 1817; and the deponent being interrogated, Whether that is the book so kept by her husband, and by whose hand it is written? depones and answers, It is the book which was kept by my husband, and it is wrote by him: And being particularly desired to look at the entry in that book, under the date of 23d May 1816,—"Married Malcolm Macgregor, printer, Old Church Parish, and Mary Macneil, St. Cuthbert's Parish, daughter of [221] Dr. James Macneil, Leith Walk,—Town Lines;" and interrogated, if that entry is in the handwriting of her husband? depones and answers, Yes.

The deposition is as follows:—"Being interrogated, Were you present at this marriage? depones and answers, "Yes." Interrogated, Do you know Malcolm Macgregor, the pursuer, now in the court? depones and answers, "Perfectly." Interrogated, Did you know him before the marriage? depones and answers, "No, I did not." Interrogated, Have you been acquainted with him since the marriage? Depones and answers, "No, I have not." Interrogated, How do you know him to be the person that was then married? Depones and answers, "Indeed I know very little about it. I am very unable to answer questions to-day, I am so unwell."

Miss J. Robertson being shown the book produced during the examination of the preceding witness, and interrogated, depones, "That for more than fourteen years past her father recorded the marriages he celebrated; and the book produced, which she has now seen and examined, is of her father's handwriting." Interrogated, depones, "That the entry under date 23d May 1816, 'Married Malcolm Macgregor, printer, Old Church parish, and Mary Macneil, St. Cuthbert's parish, daughter of Dr. James Macneil, Leith Walk.—Town Lines,'—is of her father's handwriting." Interrogated, depones, "That the deponent was present at this marriage." Interrogated, Do you know the pursuer, Malcolm Macgregor, now in court? depones and answers, "Yes, I recollect the face; he was one of the parties then married; I did not know him before the marriage, nor have I been acquainted with him since." Interrogated, What hour did the marriage take place? depones and answers, "Late in the evening [222] before supper." Interrogated, Was there any candle lighted? depones and answers, "No, I think there was not; I cannot recollect that there was any." Interrogated, Did you see any marriage lines? depones and answers, "I did not see any lines; but I asked my father if there were lines; he answered me, 'That the pursuer had town lines;' I put this question before the ceremony was performed; I had not been present at any marriages for several years before, and had some delicacy about attending as a witness, which led me to put the question." She also depones, "That the deponent had often before been present at the celebration of mar-

riages, and the marriage in question was celebrated in the usual manner, and solemnly, and deliberately."

This last witness spoke to the identity of the woman as well as of the man, but both of them concurred in swearing that the woman did not speak a word during the whole time of the alleged ceremony.

Admissions: "The pursuer (respondent), one evening after Dr. Macneil had retired to his own room,—the 23d of May 1816, it is believed,—came to the house and begged the memorialist (appellant) to accompany him to Mr. Bridges, W. S., who had been in the use of transacting business for Dr. Macneil, and to whom, he said, the Dr. had instructed him to make some communication. The memorialist, who knew that the pursuer was frequently employed by her father in that way, and who naturally enough supposed that her presence might be desirable, consented to go. When they reached Edinburgh it was late; and the pursuer then alleged, that Mr. Bridges would not be in his writing office; but under pretence of going to a house where he might get some refreshment, before conducting her home, and where Dr. Macneil was [223] sometimes in the use of calling for the same purpose when in Edinburgh, the pursuer, instead of conducting the memorialist back to her father's house, persuaded her to accompany him to Carrubber's Close; and having got her to the foot of the stair, where Mr. Joseph Robertson, of the Leith Wynd Chapel lived, he insisted that she should go to Robertson's house with him. Upon her expressing her anger at this attempt, he spoke to her like a desperate man,—said that Mr. Jolly should forfeit his life for her obstinacy,—that he would destroy the doctor's deeds in her favour; and used other violent and threatening language, in the view of intimidating her into a compliance with his request. Agitated and alarmed at the purport of this discourse, she found herself unable to resist, and was led, almost insensible, into Mr. Robertson's house; who, on receiving from the pursuer a present of one or two pounds, proceeded to hurry over a marriage ceremony, without asking her any questions, without any exhortation, without ascertaining that her appearance there was free and unforced, and without receiving any expression or indication of consent. After this disgraceful mockery, the pursuer conducted her home. He did not, however, insist on the privileges of a husband. He knew that no violence would so far intimidate her. There was no consummation of the pretended marriage. Two or three days afterwards, the pursuer repented of his rash and atrocious purpose, and waited upon the memorialist to inform her that what was passed should be forgotten, and was in itself of no consequence."

Janet Nicholson depones, "In spring 1818, I drank tea at the house of Archibald Macnaughton, type-founder, in St. Patrick's-square, in company with Mr. and Mrs. Macnaughton, and Mr. and Mrs. Jolly, that is, Mary Black, they call her Mrs. Jolly; there was no [224] other person present but myself. I cannot recollect the precise time of the year. I was sent for by the defender, and I went home from that company between eight and nine o'clock at night, and it was good daylight when I went home."—Interrogated, Was there any conversation about the defender's marriage in that company? depones and answers, The defender, with whom I had been intimate, said to me, in presence of the company I have mentioned, that she had been married to Mr. Macgregor, but she could by no means think of living with him, and that she preferred Mr. Jolly, and that she would lay down her life for him. I do not recollect all she said, nor the precise words. Interrogated, depones, She asked me if I was married to Mr. Macgregor, and said I ought to have sent her livery; that is, wedding favours. I answered her, That she was married to him, and that she should have sent livery first to me. I was urged to confess that I had been married to Mr. Macgregor. I never made any confession to Mary Black or Mr. Jolly that I had been married to him. Depones, Mary Black, in this company at tea, said that she had been married to Mr. Macgregor by the Rev. Joseph Robertson. I asked her if she had lines? She answers, What do I know? She, Mary Black, mentioned, that Mr. Robertson had said when he married them, How does such an old man get such a young wife? or something of that nature. She said that that marriage was not binding: what the devil signified two or three words of a minister?"

Mrs. Macnaughton: "There was a deal of conversation betwixt Janet Nicholson and Mary Black, she having wished Janet Nicholson much joy, to which Janet Nicholson returned some answer, but I am not certain what it was. Mary Black began

and told Janet Nicholson about her having been before Mr. Joseph Robertson; but how it began I do not recollect [225] exactly. She said she did not know where she was when she went into Mr. Joseph Robertson's; and she said that Mr. Macgregor had used threats to induce her to go to Mr. Robertson's, and said at the foot of the stair, that he would burn her deeds if she did not go, which deeds of her property Mr. Macgregor, she said, had keeping at that time: that she said Mr. Macgregor said he would employ one Macdonald, esq., to stab Mr. Jolly, if she did not go to Mr. Robertson's, and that Mr. Macgregor would go to London."—Interrogated, If she ever heard Mary Black, the defender, say any thing about her marriage not being binding with Mr. Macgregor? depones and answers, "O yes; she said that night that it was not binding; she said, What will two or three words of an outlawed man do?"

Mr. Macnaughton depones, "When Janet Nicholson came in, Mary Black, the defender, addressed her as having been married; to which Janet Nicholson said, That she was married herself to the person she mentioned, which was Mr. Macgregor. —Interrogated, If he ever heard the defender say any thing about the marriage not being binding? Depones and answers, "Yes; I have heard her say it was not binding, on account of Mr. Robertson being afterwards under sentence of banishment by the Court of Justiciary for forging lines."

Evidence of circumstances, etc. after the alleged marriage:

Mr. White, lapidary, depones, That in June 1816, *i.e.* immediately after the marriage, "the pursuer, with whom he has been long acquainted, came to the deponent's shop, and got three gold rings and a brooch of Ayrshire jasper which he had bespoke, and for which he paid the deponent. Depones, That he was accompanied by the defender and Dr. Macneil." He also [226] depones, That "while the rings were making, the defender tried a ring upon her finger, to see if it would suit; she came to my shop with the pursuer when she tried it." And he concludes as follows: "Depones, About the month of June I made a gold brooch of a Brazil stone, by Mr. Macgregor's order, and, as he said, for the defender.—Interrogated, depones, I also furnished, by Mr. Macgregor's orders, a stone for the head of a cane, which he said he was to present to Dr. Macneil. Interrogated, depones and answers, When the jasper brooch was delivered, Dr. Macneil being much fatigued, was in my room with Mr. Macgregor. He said to Mr. Macgregor, This will cost a deal of money, but it does not signify; it will be all yours. Interrogated, depones and answers, There was a glass of rum handed on this occasion. The defender was also in the room. I drank to her, saying, Mrs. Macgregor, your health. She said nothing, but she also drank to me.

Mr. Neill, printer in Edinburgh, depones, "That he is acquainted with the parties in this cause, and was also acquainted with the late Dr. Macneil of Stevenston. Depones, That he carries on the business of printing in Edinburgh, and that the pursuer has wrought with him and his father as printer for upwards of twenty years. Depones, That he has frequently seen Dr. Macneil and the defender calling for the pursuer at his printing-office.—Interrogated, depones, That he recollects, in the summer of 1816, calling at Dr. Macneil's house in company with the pursuer, who had previously informed him of his marriage with the defender. Depones, That upon his return from England, in the beginning of the month of June that year, he was informed by the pursuer of his marriage to Miss Macneil, and the pursuer requested the deponent, that in consequence of his being so, he, the deponent, would [227] call upon her at her father's in Leith Walk, in company with him: that the deponent begged that he would allow him to delay his call till after the rising of the session, in consequence of the great press of business at the time; and he accordingly delayed calling for a day or two after the rising of the session in July, when he called with the pursuer, as deponed to. Depones, That they were cordially received by the defender, and the deponent recollects of her shaking him, the deponent, by the hand, when she received them. Depones, That he recollects of her going for her father, Dr. Macneil; and the deponent recollects, upon the doctor's coming into the room, that he went up to the pursuer, and took one of the pursuer's hands in both of his, shaking hands with him 'in a fondling manner;' and upon the pursuer mentioning the deponent's name to him, the doctor politely came up to the deponent, and shook hands, and conversed kindly with him. Depones, That the conversation was very general, and that there was nothing said, as far as he

recollects, about the marriage of the parties; but he recollects of inviting Dr. Macneil and the parties to come to his house, and that the invitation was accepted by them. Interrogated, depones, That he recollects of some spirits and water being brought into the room before his coming away. Interrogated, Whether any healths were drank upon the occasion? Depones and answers, I most distinctly recollect of drinking the defender's health by the name of Mrs. Macgregor; it was the only opportunity I had of showing what was the object of my visit, which was to visit them as a new-married couple, and I therefore most distinctly recollect it. There was nothing particularly marked in my way of drinking her health, further than that I distinctly **[228]** called her Mrs. Macgregor, and drank to her by that name. Depones, That she returned the salutation, and drank the deponent's health."

A circumstance arose from the want of accommodation at the small Inn at Holytown, which will be found in the deposition of Mary Hastie, daughter of the inn-keeper at Holytown. She depones, "That in October 1816, Dr. Macneil, the respondent, and the appellant, and Mr. Jolly, remained two nights at the inn. Depones, That she, the deponent, then served at table to the party, and she recollects of hearing the pursuer recognize the defender as Mrs Jolly, and drink to her health as such; and this he did during all the time they remained in the house. Interrogated, depones, That during the two days they were at Holytown, as above deponed to, Mr. Jolly, the defender, and the pursuer, all slept in the same bed-room at night, as it was a double-bedded room; in one of the beds of which Mr. Jolly and the defender slept together, and in the other Mr. Macgregor, the pursuer, there being no further accommodation in the house. Interrogated for the pursuer, depones, That she judged that Mr. Jolly and the defender slept in the same bed, as above deponed to, from the circumstance of Mr. Jolly asking of the witness a bed for himself and Mrs. Jolly. Depones, That they all went at the same time into the bed-room; and the deponent was not in the room till next morning, after the gentlemen had left it; and she went in and saw Mrs. Jolly."

There can be no doubt that this evidence is conclusive to establish the fact of the appellant and Mr. Jolly having slept together in the same bed, while the respondent actually slept in another bed in the same room. It has not been pretended even, far less is there **[229]** any evidence, that Mr. Jolly received the smallest hint or surmise to lead him to entertain the slightest doubt as to the lawfulness and security of his marriage. The arrangement, consequently, could not be different; and the evidence given by the girl, who attended, is as strong and direct as the nature of the case could admit of. Here, then, is proof of the most extraordinary personal sanction by the respondent, of the character and *status*, as married persons, which the appellant and Mr. Jolly had held for five months before.

After this scene the parties returned to Edinburgh. Their friendship continued uninterrupted. The respondent visited Dr. Macneil, and the appellant and Mr. Jolly, and recognised them, both in word and in deed, as in a lawful state of matrimony.

Dr. Macneil died on the 15th of May 1817, the respondent being then, as he had been all along, in possession of the Doctor's settlements. Did he alter his conduct then? The appellant appeals to the evidence. Mrs. Margaret Miller depones, "That she was in Dr. Macneil's house on the day of the funeral, when there were various persons present: That the whole company, including the pursuer, (respondent,) considered Mr. Jolly and the defender (appellant,) as the master and mistress of the house, and their healths were drank to as such. Interrogated, depones, That upon this occasion she repeatedly heard the pursuer, Mr. Macgregor, drink to the health of the defender as Mrs. Jolly; and she is perfectly certain of this fact." Here the deponent of herself mentioned, without any interrogatory, that she was also present in Dr. Macneil's house the day before the funeral. Depones, "That the pursuer was there at the same time, and he **[230]** went out alone with the deponent. Depones, That on this occasion the deponent put the question to the pursuer, Who it was that married Mr. and Mrs. Jolly? to which the pursuer answered, That it was Dr. Robertson, minister of South Leith; and the pursuer at the same time mentioned, that he was personally present at the ceremony. Interrogated, depones, That she, the deponent, after the funeral of Dr. Macneil, frequently visited in the house of Mr. and Mrs. Jolly, in which, on two several occasions, she met with the pursuer, on both of which he recognized the defender as Mrs. Jolly. Depones, That, indeed, upon many other occasions, when the deponent happened to meet him, the pursuer recognized the defender to the deponent as the wife of Mr. Jolly."

John Carr: After mentioning what had occurred in April 1816, when the respondent declared that Mr. Jolly was to be the husband of the appellant, he goes on to depone, "That about six or seven weeks after this," (which could not be above a week or two after the marriage), "the deponent happened to be in the shop of a Miss George, in the Kirkgate of Leith. Depones, That Miss George then mentioned to the deponent that Mr. Jolly and the defender had been married by Dr. Robertson, minister of South Leith. Depones, That the first time the deponent saw the pursuer, he put it to him whether this was the case or not; and the pursuer intimated to the deponent that it really was so. Interrogated, Whether the pursuer ever showed the deponent the gloves which he said he had received on occasion of the marriage of the defender and Mr. Jolly? depones, That he cannot charge his memory whether the pursuer did so or not; but he recollects seeing the pursuer have a pair of new gloves, [231] which, according to the best of the deponent's recollection, he told him were the gloves he received on the occasion of the marriage. Interrogated, depones, That the deponent and Mr. Macgregor sat in the same pew in the Chapel of Ease; and that subsequent to the period which has been alluded to, Mr. Jolly and the defender were in the practice of occasionally coming to sit in the same pew, as visitors of Mr. Macgregor. Depones, That he never knew Mr. Macgregor to come along with Mr. Jolly and the defender to the seat, but Mr. Macgregor was generally in it before they came. Depones, That after the service was over, the pursuer always walked away in company with the defender and Mr. Jolly. Depones, That upon one occasion, several months after Dr. Macneil's death, the deponent recollects of being in Mr. Jolly's house to tea, along with a number of other persons, and among the rest the pursuer. Depones, That upon this occasion the deponent recollects that wine and spirits were brought in, and the health of Mr. and Mrs. Jolly was drank by the company, the pursuer being present; but the deponent cannot exactly say that the pursuer personally drank their healths. Interrogated for the pursuer, Whether he can say how often the defender and Mr. Jolly came to the Chapel of Ease, as above deponed to; and whether it was twice or thrice he saw them there? depones, that he cannot exactly say how often, but he is certain that he has seen them there at least a dozen of times."

Margaret Craig depones, "That she was in the service of the late Dr. Macneil, in the capacity of housekeeper, from Martinmas 1807 to Martinmas 1816. Depones, That she repeatedly saw the pursuer in the Doctor's house, from July 1815, when the defender came to the house, till the deponent left the service; [232] and after the defender became Mrs. Jolly, which was on the 13th June 1816, the deponent has seen him repeatedly there at dinner and tea, both in the drawing-room, and in the dining-room or parlour. Depones, That they dined several times in the drawing-room, to avoid disturbing the Doctor. Depones, That upon these occasions she has heard the pursuer drink repeatedly to the defender and Mr. Jolly, by the names of Mr. and Mrs. Jolly; and the deponent recollects, on repeated occasions, of the pursuer asking the deponent, when he called at any time at the door, how Mr. and Mrs. Jolly did, after asking for Dr. Macneil. Depones, That she cannot recollect whether the deponent's husband was present at these occasions, when the pursuer drank to the defender by the name of Mrs. Jolly, but that nobody else was present. Depones, That Mr. Jolly always stayed in Dr. Macneil's house after the defender's marriage with Mr. Jolly."

Her husband, William Allan, being interrogated, "Whether it consists with his knowledge that the pursuer acknowledged the defender and Mr. Jolly as married persons after their marriage? depones, That he has heard the pursuer, on various occasions, drink to them as married persons, betwixt the time of their marriage in June 1816 and the October following, when the deponent went to sea. Depones, That the pursuer has dined different times during that period in Dr. Macneil's house; and the deponent distinctly recollects of the pursuer drinking to them both as married persons." He then goes on to mention a party in which the respondent drank the appellant's health as Mrs. Jolly. Afterwards, upon cross-interrogation, he depones, "That the defender's marriage with Mr. Jolly took place in the month of June 1816, and the deponent was present at the marriage. Depones, [233] That he, the deponent, dined with the defender and Mr. Jolly in Dr. Macneil's parlour on these occasions, when he heard the pursuer drink to the defender and her husband,

by the name of Mr. and Mrs. Jolly: That he does not recollect whether Dr. Macneil was present on all these occasions that the deponent dined there; nor can he say whether he was present on any of the occasions when the pursuer drank to the defender by the name of Mrs Jolly."

Evidence of Jolly's marriage by Dr. Robertson, of South Leith:

Dr. Robertson, after stating that he knew Dr. Macneil by sight, being interrogated, "If he was applied to in June 1816, to come to Dr. Macneil's house, to marry Dr. Macniel's daughter? depones and answers, I was applied to; and I answered that it was not convenient to go to Dr. Macneil's house; but, if they would come to my house in the evening, I would see them there. Mr. Jolly was the person who applied to me at this time, and he showed to me then a certificate of proclamation of banns, in the usual form, otherwise I would not have invited them to my house. Interrogated, If the parties came to the deponent's house in a coach at the time appointed? depones and answers, Yes, they came about half-past seven that evening, which, I think, was the 13th of June 1816. Interrogated, Who were the parties that came in the coach? depones and answers, I was standing at my own window when the coach arrived, and Mr. Jolly was the first person who stept out of it; he then handed out Dr. Macneil, and was followed by Miss Macneil and some of the domestics;" and the witness added, "Dr. Macneil walked up the first flight of steps, amounting to ten, in my sight, with his arm in Mr. [234] Jolly's, without any apparent difficulty; and when they were all assembled in the dining-room, Mrs. Robertson came and told me, and I went in to them. Interrogated, If Dr. Macneil made any observation previous to the marriage ceremony, and what it was? depones and answers, I found them seated; he immediately rose slowly, and hoped I would excuse an old man, who, by reason of some infirmities, was unable to rise so readily, and make so polite a bow, as he was accustomed to do in his younger days. Interrogated, What then took place? depones and answers, I requested him to be again seated; he replied, No; I have come to give away my daughter to Mr. Jolly, and I must do so in the usual manner; on which he stepped forward, took her by the hand, and placed her near Mr. Jolly. Immediately thereafter I offered up a prayer, gave the parties a few exhortations, concluded with thanksgiving, in all which Dr. Macneil seemed to be much interested, for he requested them to remember the exhortation, and to act accordingly. When I found him so disposed, I said I hoped he would be kind to the young people; to which he replied, Sir, I have been kind to them; I will be kind to them still, and nothing shall be wanting on my part to make them happy. I distinctly remember the expression. I then certified the marriage on the lines of proclamation; and my constant form of words are: 'The above designed parties were married before witnesses, by James Robertson, minister.' I then wished the parties much joy, and they left the room as they entered, Dr. Macneil in Mr. Jolly's arm, and the rest followed. Interrogated for the pursuer, If he was acquainted with Mr. Jolly previous to the marriage? Depones and answers, I was not personally acquainted with him previous to the marriage, nor to my know-[235]-ledge had I ever seen him, except in church, as he was a member of my congregation, and I knew there was such a person, though he did not visit my house; and I heard he was a suitor of Miss Macneil's. Interrogated, If he recollects from whom he heard that Mr. Jolly was to be married to Miss Macneil? depones and answers, No; I do not recollect it; but it was the general report of the parish at that time.'

Afterwards, being interrogated, "Who he gave the certificate of marriage to? depones and answers, I gave it to the bride, as I always do. Interrogated, In what form he asked the parties if they were willing to be married? depones and answers, I said to Mr. Jolly, do you take this woman, (they having joined hands), whom you have by the hand, to be your lawful married wife; and do you promise before God, and these witnesses, to be a faithful and a loving husband to her, till God shall separate you by death? Mr. Jolly replied, I do. I then said to the bride, Do you take this man, whom you have by the hand, to be your lawful married husband; and do you promise to be a faithful, a loving, and a dutiful wife to him, till God shall separate you by death? And the conclusion then is, Before these witnesses, I declare you married persons; and whom God, in his good providence, has thus united, let no man put asunder."

Mrs. Robertson again depones, "I recollect the marriage perfectly, but I cannot

say exactly as to the date, but I have no doubt it was about that time." (June 1816). Interrogated, "If the parties came to their house in a coach? depones and answers, Yes, they did. Interrogated, Who accompanied them? depones and answers, Dr. Macneil was of the party, and a person who I understand was housekeeper to Dr. Macneil: and there was a bridegroom man, but I do not recollect [236] his name. Interrogated. If, at the ceremony, Dr. Macneil gave away his daughter? depones and answers, Yes, he did. Interrogated, If any conversation took place between Dr. Robertson and Dr. Macneil, before or after the marriage ceremony? depones and answers, Yes, a good deal. When Dr. Robertson came into the room, Dr. Macneil attempted to get up from the sofa, which he did with great difficulty, and said very politely, he hoped Dr. Robertson would forgive the infirmities of an old man; on which Dr. Robertson went forward and took him by the hand, and said he was glad he was giving his countenance to the young couple, as he knew it was in his power to be of use to them; to which Dr. Macneil replied, he did so with all his heart, as he had already done something for them, and he intended still to do more. Dr. Robertson told Dr. Macneil that he might sit during the ceremony; Dr. Macneil replied, that he had come for the purpose of giving away his daughter, and he would do it. Interrogated, If Dr. Macneil wished Mr. and Mrs. Jolly much happiness after the ceremony was over? depones and answers, Yes, he did so, with great affection. Interrogated, If the parties then went away? depones and answers, Yes, after getting the marriage lines signed."

When the case came on for hearing in the House of Lords in June 1287, the Lords ordered that it should stand over till the following session, that it might be considered whether Mr. Jolly and the children ought not to have been cited as parties, and whether the Courts below ought not to have given judgment on the conclusion of adherence, (restitution of conjugal rights).

[237] Dr. Lushington, for Respondent: It was the rule in these matrimonial cases, that it was not necessary to cite any party except the principal one. Upon a search of the records of the Scotch Ecclesiastical Court since the year 1740, it appeared that this had been the uniform practice, and the same rule had prevailed in the ecclesiastical courts in this country; and when in a suit for a divorce, for instance, only the principal party had been called, all behind were bound, except there was collusion. Both in Scotland and England this practice was founded on the rule of the civil law, and the chief authorities would be found in Hargrave's law tract on the case of the Duchess of Kingston. Mr. Jolly and the children might have made themselves parties to the suit in this instance if they had thought proper, but neither the pursuer nor the Court were bound to call them; and upon the same rule, the learned Judge who had decided the case of *Dalrymple* v. *Dalrymple* had not required that Laura Manners, although interested, should be made a party, and she had only made herself a party when the judgment was under appeal. As to the adherence, no judgment on it was necessary, since that conclusion was a matter of style, and as adherence was by law consequent on the declarator.

Dr. Jenner, for Appellant: Admitting the general rule to be that it was only necessary to cite the *pars principalis*, that rule was not without exceptions. It was not necessary to cite parties who were remotely interested; but here the interests of Mr. Jolly and the children were immediate and most important. The Court below had given judgment only on the declarator, and that alone was appealed from; and of that alone their Lordships, as a court of review, could take [238] notice. On the point of adherence no specific judgment had been given, and yet that was a distinct conclusion in the summons, and judgment ought to be given upon it below before the Lords could entertain the question.

(7th March 1828.) Eldon (Earl of): This case comes before your Lordships again upon a question which has stood over since the preceeding session, as to whether there ought not to have been other parties cited in the suit.

I am extremely glad that your Lordships did allow it to stand over, that this question might be considered before the case was heard on the merits: 1st. Because it was proper to consider whether the general doctrine as to parties was applicable to this particular case: and 2dly. Whether it was not necessary that Mr. Jolly, the second husband, if I may so speak, and the children of Mr. Jolly, who may, perhaps, be considered as the children of Macgregor, should not be cited as parties before your Lordships proceeded to hear this cause on the merits.

This is not a mere action of declarator, unless the prayer of the summons be that which is usual in actions of declarator; and I say so because it is important that some attention should be paid to the prayer of this summons, which is for sentence and decreet, not only "finding and declaring that Macgregor and Mary Macneil, the defender, are lawful married persons, husband and wife of each other," but also "decerning and ordaining the said defender to adhere to and cohabit with the pursuer, and treat and entertain him in all respects as her husband." And one question may be, (I say it without prejudice,) whether he, having acted as in these papers he is said to have done towards his wife, if she be his wife, can [239] now not only support a claim to the civil consequences resulting from the marriage, but also call with effect for a judgment decerning and ordaining the woman with respect to whom he has so conducted himself, to return to him and cohabit with him, and treat and entertain him in all respects as her husband. What would be the case in this country, if a person so conducting himself were to institute a suit for the restitution of conjugal rights, I do not say; but I wish to have that question argued here. And I doubt, indeed, whether a person who makes a present of his wife to another, as this man has done, if she be his wife, ought to be suffered to come into a court of justice with effect for a sentence calling upon her to return to him again, and act with respect to him as a faithful and dutiful wife.

With respect to the authorities which have been cited as to the general rule in cases of this kind with reference to the parties to be called, if you should agree in the general doctrine, but doubt whether it applies to the case now before you, it is not in your power to determine that here; but the cause must be remitted to have that point fully considered, and properly adjudicated. It is indeed insisted in these papers, that it is not necessary that Mr. Jolly should be made a party; but what may be the case with respect to the children does not seem to have been considered below at all, and it may be necessary to send the cause back again.

Another circumstance to be considered is this: in this case, *primâ facie*, you have the father of the children before you, and—in this I may be wrong—if Macgregor is in law their father, then he is their tutor; and if so, this is a curious disposition of parties, [240] for that he would not properly discharge the duties of a tutor is obvious.

The general rule in these matrimonial cases is, that no party is called except the party principally interested; and this is not confined entirely to marriage cases, for it prevails to a certain extent in the Court which I have attended during a great portion of my life; for where an infant tenant in tail is made a party and dies, the remainder men are bound by what has been done with respect to him, as he is the principal party interested. But it is not denied that the Court may in special cases bring other parties before it: and it may be proper now to hear the case on the merits, as that may enable us more clearly to see whether this is a case of that nature.

If, upon hearing the case on the merits, you should now be enabled to reverse the judgment of the Court below, or affirm it, Macgregor can have no cause of complaint against the course adopted; and if your Lordships find that you can terminate this case without further delay, it is highly proper that you should do so, as otherwise the remit to the Court of Session must be attended with considerable delay, and with much misery in the interval to some of the parties.

Another point is very material, and may require much to be said upon it. In the Commissary Court they find facts and circumstances sufficient to elide (rebut) or not to elide, as the case may be, the presumption of matrimonial consent; and they have carried these findings so far as to apply them to marriages regularly and solemnly celebrated. Then, supposing a marriage not to be questioned, on the ground that the consent has been made out by force or fear, you may have to consider whether evidence may be ad-[241]-mitted of other circumstances independent of force and fear, sufficient to elide (rebut) the presumption of marriage arising from consent adhibited in the most solemn and regular manner, even in *facie ecclesiae*. This is a most serious and important point, and one which it may, perhaps, be now somewhat dangerous to decide in either way. I have said so much, however, because I do not, at present, see how this case can be decided without reference to that point.

We are ready now to hear the case on the merits; but let it be kept in view, that this is not merely an action of declarator of marriage for the purpose of enforcing a civil right to property, but also a suit for the restitution of conjugal rights.

[As it has been the design of the Reporter to bring the material part of this case within the shortest compass, consistent with the necessary purpose of giving a complete view of it, he refers, for the detail of the arguments, to the reports in the Courts below, and confines himself to the new matter of argument which was brought forward in the House of Lords.]

Distinction between regular and irregular marriages.

Dr. Lushington (21st March 1828): In cases of irregular marriage, there is nothing which fully indicates consent. Take the instance of a marriage *per verba de presenti*, guarded by no form whatever, the consent must be somewhat doubtful, and even the expressions themselves may leave it a matter of doubt whether they were really meant as expressions of consent *de presenti*; and, therefore, it may be necessary to admit extrinsic evidence as to whether the parties did really mean at the moment to contract an immediate marriage; and yet, in the [242] instance of a marriage of that description, Lord Stowell in the *Case of Dalrymple* said where the words of consent were clear, evidence ought not to be admitted to rebut their import by circumstances. So in the instance of a marriage by a promise *cum copula*, there may be a doubt as to whether the promise to marry was really given. So in the case of a marriage by cohabitation as man and wife, the true rule is, that such cohabitation is an indication of consent to marriage, but that this may be rebutted by extrinsic evidence, otherwise the cohabitation itself would make a marriage, although no such thing was intended by either of the parties. In these instances although the marriages when fully made out are available as to the civil rights of the parties, they are not fully recognised by the law of Scotland, and the parties are by law punishable. No marriage is, by the law of Scotland, regular, unless celebrated before a clergyman. The law prescribes no particular form, but those used by the clergymen of the church are all essentially the same; 1st, there is, an express inquiry as to consent by the clergyman: 2d, there is an expression of assent by the parties: 3d, there is the declaration that they are married persons: and, 4th, there is the nuptial benediction. Here, then, there is something infinitely more certain and binding than in the cases of irregular marriage. I say, that, by the law of Scotland, marriage is not solely a civil contract, and so say Stair and Bankton, and Erskine says something to the same effect. The law was founded on the ancient canon law, which allowed civil rights to irregular marriage, but at the same time held no marriage perfect that was not celebrated before a clergyman (*Maclachlan* v. *Dobson*, Fac. Coll. Dei, 1796); and it is quite clear, that this consent adhibited before a clergyman was considered as the test of consent in the irre-[243]-gular marriages, the question being whether the consent was adhibited in a manner somewhat equivalent. The difference is this; 1st. In the regular marriage there is the presence of an officer to whom the law entrusts the celebration of marriage. 2d. The parties are in the complete knowledge of what is meant to take place, as it is the duty of the clergyman to explain the ceremony, and call for an indubitable consent; and, in such circumstances, silence, a bow, or a curtsey, may be as clear evidence of consent as words. 3dly. There is the invocation of the Deity, rendering the contract a solemn, religious ceremony. No more can be done to render the existence of the consent certain, since the act itself is evidence of it far beyond any evidence that can be brought against it. The law says, "you are bound by what you have, in the most solemn manner, professed to have willingly done, and you shall not be permitted to make use of the institutions of your country to overthrow them." Can any court permit parties thus to prostitute a most solemn and sacred ceremony? it surely cannot; otherwise the consequences may be dreadful to the parties themselves, to their issue, and to the public. For instance, after a solemn regular marriage, the woman repents, she proves unfaithful, and if to that infidelity she adds bigamy, that will be evidence of the absence of consent to the first marriage. That is their argument? and see what may be the consequences to society! To what perjury, subornation of perjury; to what infidelity it may give rise! Some of the judges below seem to think that this doctrine may be true in case of marriages celebrated with regular proclamation of banns, but not

to cases where the marriage is celebrated before a clergyman without actual proclamations of banns. [*Eldon*, Earl of:] Can we consider the case at all in that view, when the Court below has admitted the [244] evidence, and there is no appeal from it?]—We have no occasion to insist upon this point, as we consider our case clear on the evidence; but we have dwelt upon it because your Lordships appeared desirous to have it argued. But with respect to the proclamation of banns, whatever might have been the case originally by the law of Scotland, a marriage celebrated by and before a clergyman is a marriage celebrated in *facie ecclesiæ*, whether there has been actual proclamation of banns or not. When a marriage has been celebrated before a clergyman, the fact of proclamation is not to be traversed, and, if this be an error, *communis error facit jus*. Proclamation of banns is itself no evidence of consent, and the parties may resile after such proclamation, and it seems rather intended to put the public on its guard. The test of a regular marriage is the consent adhibited in the formal and solemn manner before a clergyman; and the few cases cited (*Niven* v. *Cumming*, Fount. 501; *Cameron* v. *Malcolm*, 29th June 1756, Mor. Dict. 12680; *Allan* v. *Young*, 11th August 1773, Rec. Com. Court) as to the evidence having been received to rebut the presumption of consent arising from such a marriage, were cases of either gross fraud, or where one of the parties was of such tender years as to render that party incapable of deliberate consent; and no case has as yet gone the length of holding that a deliberate consent, in a regular form, given by parties capable of consenting, can be rebutted by extrinsic evidence. But suppose it admissible, try it by the test laid down in the case of *Dalrymple*, or suppose all the facts to be admitted, pell mell, there is nothing to rebut the presumption of consent in this case.

Then, as to the interlocutors decerning for adherence. There is a separate action for adherence, which may be met by the misconduct of the party; but that does not apply to the declarator, which is simply a declaration of *status*. The judgment then is good as far as concerns the declarator, and the *exceptio personalis* is out of the question. This is the effect of the canon [245] law, on which the law of Scotland is founded, except as it was altered at the time of the Reformation, and the authorities may be found cited in the case of *Dalrymple*, and in Bell's book on Legitimacy; and as to the adherence, that necessarily follows the establishment of the marriage, unless where the case is such as to warrant a separation, and neither in the ecclesiastical law of England or Scotland is there any precedent for an intermediate state. *Proctor* v. *Proctor*, 2 Dr. Hag. Rep. 291; *Fletcher* v. *Fletcher*, 2 Cox, Ch. Ca. 100 (3 Bro. Ch. Ca. 619). This is the doctrine in England, and the doctrine of the canon law, which is of authority in Scotland in the absence of direct decisions. Adherence must take place where there is no legal separation.

(25th March 1828). *Eldon* (Earl of): I believe I have the concurrence of the noble Lords who have attended the hearing of this case, in the proposal which I am now about to make; that judgment be postponed till after the recess.

In the meantime I wish to dispose of one point raised by myself, with respect to the two parts in the prayer in the summons: the one calling for a declarator of marriage, the other for what we call the restitution of conjugal rights, but which they call an adherence.

I was misled by not having read the petition of appeal. By a late Act of Parliament a party may appeal from an interlocutory order, with leave of the Division, or if there should be a difference of opinion; and upon looking at the petition of appeal, I find that only the interlocutor declaring the marriage is appealed from, and we can do nothing but declare whether this is a marriage, aye or no; with this exception, however, that I apprehend there is nothing to prevent this House from sending the case back again, if it should think proper so to do, requiring the opinion of the court below [246] on the second point also; namely, whether the judgment for the declarator ought to be followed in this case by an adherence or a restitution of conjugal rights.

At the same time, as this cause is of great importance not only to the parties immediately concerned, but to others, it is highly desirable that we should dispose of the cause on the merits now, if we justly can do it. We have consulted together, and it does appear to us due to the importance of this case, that we should deliberate, and yet not long, before we finally determine; and I propose, therefore, that the 25th of April should be appointed for the judgment.

(13th May 1828: Judgment.) The Earl of Lauderdale, after giving a summary view of the facts, circumstances, pleadings and proceedings, as before-mentioned, which to avoid repetition is here omitted, proceeded thus: This daughter of Dr. Macneil was placed at nurse with a woman by one of whose daughters this Macgregor, a journeyman printer, had two children; a situation in which she was not likely to receive any thing like a good education, or become familiar with any habits except such as were calculated to debase her mind. Macgregor, who, though a low, was evidently an artful man, had thus an opportunity of becoming acquainted with Dr. Macneil, and found means to acquire such an influence over the mind of that gentleman, that he boasted of having prevailed upon him to take this daughter home to his own house, for what object is not distinctly stated, but it is natural to think that it was for the purpose of laying the foundation for his future proceedings. Dr. Macneil then settled on his daughter the house in which they lived, and £500, and afterwards his whole property, and the deeds got into the [247] hands of Macgregor; and here we may see the seeds of this disgusting scene. To follow up the design, Macgregor, in May 1816, accompanied Dr. Macneil and his daughter on a visit to the doctor's estate, in Lanarkshire. While on the journey this party stopped at Holytown, where the alleged irregular marriage took place, a marriage not more irregular, however, than that which was alleged to have been celebrated at Edinburgh, as Dr. Macneil was a clergyman as well as Joseph Robertson, and both of them probably the most immoral of that body. No banns were published on either occasion. These proceedings took place in May 1816, and the Commissaries found that there was nothing in the conduct of the parties to contradict the inference that, at that time, a marriage really took place; but, I think there is some such contradiction in the conduct of Macgregor subsequent to the alleged marriage, when he saw the lady and Mr. Jolly in Pilrig-street, and appeared to be highly displeased with her for her behaviour, and said that he abandoned her; and on the other hand, the lady conducted herself then, and at the time of the second marriage, in such a manner as showed that she could have no idea that she had been married to Macgregor a few days before, with the consent of her father. In looking at the general outline of the case, it appears to have been Macgregor's object to place himself in such a situation that he might claim the lady in case she became entitled to her father's property, or abandon her if she did not. And when she really does become entitled to it, then, and not till then, he puts forward his claim and breaks in upon the marriage with Mr. Jolly, overlooking the scandalous nature of an attempt, under these circumstances, to deprive Mr. Jolly of his wife, and to get the children into his [248] power for the purpose of depriving them of their *status* and rights.

A more scandalous case never came before this House. Your Lordships lately had before you the case of a Mr. Wakefield, who laid a scandalous plot to get possession of the property of a young lady whom he had never seen. But the present case is still more scandalous, since Macgregor put himself, as he imagined, in a situation either to take the lady or not, as he might find it convenient; and thus had it in his power, as he thought, to destroy her *status* and that of her children when she had married another without ever once thinking that she was married to Macgregor. Your Lordships thought proper to pass a bill for dissolving the marriage of Wakefield, and if this were really a marriage, you would act inconsistently if you did not pass a bill to dissolve it, in order to prevent Macgregor from getting possession of the fruits of his fraud. But I believe that in this case it will not be necessary to have recourse to this extraordinary remedy. There is no man more sensible of the great talents of the judges of the Court of Session than I am, no man who admires their abilities more than I do. But in my judicial character, I must act according to the best of my own judgment; and if I am wrong, the noble and learned Lords (Eldon and Lyndhurst) who now sit on the wool-sack, and who have paid the closest attention to this case, will set me right.

With your Lordship's permission, I will state the order of the grounds on which I rest my opinion: 1st. I say that, looking at the nature and form of this summons, your Lordships cannot affirm the interlocutors: 2d. If the summons were otherwise, and proceeded not on the Holytown marriage, but on the regular mar-[249]-riage at Edinburgh, there is no sufficient legal evidence to warrant a judicial mind to say that there was a regular marriage celebrated at Edinburgh, or even that there

was any ceremony at all: 3d. Suppose the summons had charged an irregular marriage and a ceremony, it does not appear that there was such a deliberate, free, and unbiassed consent, as to constitute a valid marriage: 4th. I will call your Lordships attention to some of the cases connected with the present, which have been decided below, and in this House. First, then, as to the summons: I do not think it necessary to detain your Lordships in commenting on the conclusion for cohabitation and adherence; but the summons founds on an irregular marriage at Holytown, of which there is not an atom of proof at all, and this is propped up by an alleged regular marriage at Edinburgh, of which there is no sufficient legal evidence. I never saw a more irregular summons: but suppose the summons had proceeded solely on the ground of a regular marriage before Joseph Robertson; where is the evidence that there was any ceremony at all? Those who acted for the pursuer were conscious of the deficiency, and attemptel to patch up one species of evidence by another. First they produced documents, next witnesses, and then they founded on admissions. As to the documentary evidence, there never was evidence of the kind of a more suspicious nature; for it appeared from this that a certificate of the publication of banns, or something which was intended to operate as such, was granted, although it was manifest that no such publication of banns could, by possibility, have taken place within the time specified, which was the interval between the times of the alleged marriages at Holytown and Edinburgh. It was impossible, because no Sunday intervened, and even the date of the register from which **[250]** the certificate was supposed to be taken, is inconsistent with the allegation and the fact. It is the first time that I ever heard of such a thing having been alleged in proof, where it was manifestly impossible that the document could be correct. Such a certificate could be of no avail, even if it were given for a legitimate purpose. Another piece of documentary evidence produced, is the entry in the books of Joseph Robertson, and that is merely a private memorandum of Robertson's, and is no evidence at all. And then a certificate of Joseph Robertson founded on the entry in the book is produced, and is dated the 29th May 1816, whereas the entry is dated the 23d May, and the certificate does not mention the day on which the ceremony took place. Joseph Robertson was a man of bad character, and was subsequently convicted of forging certificates, and yet your Lordships are called upon to give credit to such a document as that. The parties who acted for Macgregor appeared to be conscious that this documentary evidence was very little to the purpose, and they had recourse to witnesses, and these were the wife and daughter of Joseph Robertson; and they were very suspicious witnesses, especially as they were examined on the very day that Robertson was liberated from prison, he being then under sentence of banishment from Scotland for life, of which sentence some mitigation was expected, and, with that view, the witnesses were, no doubt, anxious that his proceeding in this instance should appear as regular as possible. Then Mrs. Robertson is examined, and to the question whether she knew Miss Macneil, who was pointed out to her in court, she answers, "No, I do not; I do not remember that I ever saw her before:" after that answer her evidence ought to have been considered as entirely out of court. She says that she knew Macgregor perfectly, but that she did not know **[251]** him before the marriage, nor had been acquainted with him since: and then when pressed on this point as to how, under these circumstances, she knew him now so well as the person who was married on the 23d May 1816, she answered, "Indeed I know very little about it." Such is the evidence of the wife; and then comes the daughter, who says that Macgregor was one of the parties, though she did not know him either before or since, and that she has no doubt but that Miss Macneil, whom she saw in court, was the other party. This witness concurs with the wife in the fact that the woman did not say a word on the occasion. There is, at all events, but this one witness, and she a very suspicious one, even as to the identity of the parties, and by the law of Scotland one witness is not sufficient (*Dow* v. *Adie*, Rec. Com. Court, 1814).

Then as to the admissions of the lady, judicial and extra judicial; can these be allowed in proof to set up a prior marriage contracted by her, in order to invalidate a second marriage contracted by the same person? If such admissions are to be taken in proof, a wife wishing to get rid of her husband may get another person, by connivance, to bring a declarator of a prior marriage, which may be established by her admissions.

The female sex may be more delicate as to such matters than the male sex; but if this is to be admitted on the part of the female sex, the principle will apply to the other sex; and then, if a husband took a dislike to his wife, he might by a similar process get rid of her, and destroy her *status* and that of her children; and a woman of high rank might thus be ruined by an expedient of which she never dreamt. It has been said that divorces are too easily obtained already in Scotland, but if evidence of this kind were to be received, they would become still more easy and more frequent. The result is, that there was no legal evi-[252]-dence to satisfy a judicial mind that any ceremony at all had taken place. But suppose her admissions could be received, they would not support the case of the respondent, because they must be taken together, and then there would be clear evidence of the want of a free and deliberate consent on her part. Then, on the authority of Hume, Gilles, Clerk, and the other eminent men who had been examined in the case of *Dalrymple*, I say, without fear of contradiction, that in the case of an alleged marriage of this kind, your Lordships are entitled to look at all the circumstances, such as occurred before the time of the alleged marriage, at the time of the marriage, and after that time; not with a view to destroy a valid marriage, but to show that the parties never concluded that they were married. Then, looking at the whole of the circumstances, such as took place before the time of the alleged marriage, at the time, and after it, I maintain that there is not a case in the books in which there is half the evidence that appeared in this—that there was no proper consent to the marriage, and that the parties never felt that any such consent had been given. Macgregor himself always said that he had no chance of this marriage, as he knew the lady was engaged to Mr. Jolly. This appeared from the evidence of Margaret Nicholson and others, and was corroborated by the testimony of a witness beyond all suspicion—the Reverend Doctor Robertson of North Leith, who stated that the general report of the parish, as far as it had reached his ears, was, that the lady was to be married to Mr. Jolly. Then, before the time of the marriage, there was evidence to show that Macgregor himself never thought it would take place. Then what happened at the time of this marriage? It is clear that at the time of the ceremony the lady never said a word. I admit that at a regular [253] marriage, after publication of banns, a nod from the lady may be sufficient evidence of consent. But it was very different in such a case as this, where the alleged marriage took place before no other witnesses than Joseph Robertson, and his wife and daughter, under the circumstances which have been already stated. Then as to what happened after the ceremony. The parties went to the house of Doctor Macneil; but there was nothing in that, for it was a common custom with Macgregor to go and sleep at Doctor Macneil's house. If he had slept with the lady, the servants would in all probability have observed it; and yet not one of them was called to show that he had slept with her. There were two distinct heads of evidence to which they might have been examined—1st, that he slept with her; and, 2d, that at all events he had not slept in his own bed. But not one was called to speak to either point. Then, in the absence of all proof of consummation at Edinburgh, there is no evidence to show that the parties themselves were conscious that they were married. Again, there are no less than eight witnesses who proved that Macgregor, after her marriage with Mr. Jolly treated her on several occasions as Mr. Jolly's wife; that he drank her health as Mrs. Jolly, and accepted of a pair of gloves on the occasion of her marriage with Mr. Jolly. Farther it is in evidence, that Macgregor sat in the same pew with them at church, and then accompanied them home afterwards as their guest for the day. Is it to be believed that Macgregor could be so desperately profligate as this; or, did not the circumstance rather show that he himself was conscious that his marriage with the lady was not binding? But this is not all, for there was the evidence of Margaret Miller, that she had put the question to Macgregor, as to who had married Mr. and Mrs. Jolly; Macgregor answered, [254] that it was Doctor Robertson of North Leith, and that he was present at the marriage. I rather think that this was a mistake, and that he was not present; but it was clear he knew of Mr. Jolly's marriage soon after, and always acknowledged that marriage. From all this it is impossible to believe that the parties could seriously think themselves married. But the case is still stronger. In October 1816, Doctor Macneil and Mr. and Mrs. Jolly went to Holytown, and Macgregor accompanied them; and

from the evidence of Mary Hasty, the maid of the inn, it appeared, that in a double-bedded room, Mr. and Mrs. Jolly slept in one bed, and Macgregor in the other. Could this man think that he himself was married to the lady, and see the adulterers in one bed together? So that the alleged marriage never could have been solemnized, for there never were two people conducting themselves more completely in a way that showed they never considered themselves as married.

Thus far then, I have made out my case on the three first points; 1st. That it is impossible to affirm the interlocutors on this summons: 2d. That there is no sufficient legal evidence that any ceremony at all took place at Joseph Robertson's: 3d. That the ceremony which the evidence attempts to make out was not, under all the circumstances of the case, such as that we can infer from it that true solemn and deliberate consent to marriage which the law of Scotland requires.

Then as to the cases, I shall only cite a few of them, which in spirit appear more particularly to bear on this, and to support the view taken on behalf of the appellant. [His Lordship here mentioned the cases of *Campbell* v. *Cochrane*, 1 Fac. Coll. 299, July 28, 1747. *Macinnes* v. *More*, December 20, 1781. *Taylor* v. *Kello*, February 16, 1786. *Macgregor* v. *Campbell*, **[255]** 28 November 1801, *et presentim*. *Napier* v. *Napier*, November 1800, and June 1801, referred to by Mr. Hume in the case of *Dalrymple* v. *Dalrymple*, Dod. Rep.]

There is one branch of the evidence which I have omitted, but which may deserve a few words, and that relates to some circumstances which took place antecedent to the alleged marriage. Margaret Kinlay, or Shewan speaks of Miss Macneil having informed her, in Spring 1816, that she was going to be married, and asked the witness to be bride's-maid. This was when she was examined in 1819, and then she could not say to whom Miss Macneil said she was going to be married, whether to Macgregor or Jolly; but in 1823, when she was again examined, she distinctly recollected that it was to Macgregor. It is hardly necessary to comment on the evidence of a witness who recollects so well in 1823 what she could not recollect in 1819. Then as to the evidence of White the lapidary, his evidence depends entirely on the circumstance whether when Doctor Macneil said "all will be yours," he directed his eye to Macgregor, or to his daughter, for both were present, and considering that, in a few days after, Doctor Macneil solemnly and openly gave his daughter to Jolly, the probability certainly is, that when he made the remark at the lapidary's, it was addressed to his daughter. As to the evidence of Mr. Neil, the printer who employed Macgregor; he, it seems, went to Doctor Macneil's house on the 16th July 1816, more than a month after the marriage of the appellant with Mr. Jolly, to whom Doctor Macneil had given her away in the most open and solemn manner, and the witness drinks her health as Mrs. Macgregor, a circumstance which either excited no attention, or was passed over as an accidental blunder of Mr. Neil's. These two witnesses must have been deceived or mistaken, or **[256]** considering all the circumstances, they are unworthy of credit.

Eldon (Earl of): If this had not been the most important case that I ever knew come before a court of judicature, I should have been satisfied with what has been already said. But I am anxious that the foundation of the judgment of this House should not be left to suppositions and notions, which it might be, unless care be taken that the real ground on which it rests shall be understood.

When I saw the conclusion for adherence in the summons, I very much doubted whether, even if the declarator were right, any judgment could be given for the adherence; nor indeed does the respondent appear to be at all anxious for a judgment of adherence, his object evidently being the enjoyment of the lady's property. I only desire that it may be understood that whatever may be the judgment of your Lordships on this appeal, the individual who now speaks stands completely neutral as to the question whether, on such a proceeding as this, the appellant would be bound to return to the embraces of Mr. Macgregor.

When an actual marriage does take place between A. and B., that cannot be undone by any probabilities arising from the conduct of the parties afterwards. But on the other hand, although it has been said that it is easy to make marriages in Scotland, nothing is more clear than that by the law of Scotland in cases of irregular marriage, such as *per verba de presenti*, promise, *cum copula*, or habit and repute, the consent must be full and deliberate, and not influenced by force or fraud. When

a marriage is so constituted, it is valid throughout. I give no opinion, as the question is not now before us, although it is one of great importance, [257] whether in the case of a regular marriage in *facie ecclesiae*, evidence can be admitted to show that it is not valid; I give no opinion on that point.

This is an indisputable principle in law, that when a marriage is actually had, it cannot be disentangled by the subsequent conduct of either or both of the parties. When a marriage is once had, it must be sustained, be the consequences what they may. The question, therefore, is, whether the transaction of the 23d of May 1816 was a mere idle ceremony, or an actual constituting of marriage? If it was the latter, the marriage must be sustained, however much we may regret it. But I have the authority of a noble and learned Lord (Stowell,) who long held a prominent situation in the ecclesiastical courts of this country, for asserting that he, after the most anxious consideration of the evidence, could not possibly sustain such a marriage as this.

Then as to the substance of the summons. After having held a judicial seat in this House, and in a superior court below for twenty-five years, I may state, and it may be the last time that I may have an opportunity of stating it, that no one could be more anxious than I have been to decide these cases according to the principles of the law of Scotland; but I do say, that their pleadings ought to be more strictly attended to than they have been. As to the summons, taking that to be the declaration of Macgregor, it is impossible to see how it is connected with the case which he has made out. I pass over some of the circumstances, and begin with the journey to Holytown, in the spring of 1816. Let it be remarked, that before that time Macgregor knew that Mr. Jolly was a suitor to Miss Macneil, and that he thought that Mr. Jolly was preferred. Let it be remarked also, that [258] Doctor Macneil was a clergyman, and he, according to the summons, celebrated an irregular marriage between Macgregor and Miss Macneil at Holytown; and it is alleged in the summons that this marriage was consummated, and that they slept in the same bed; which, in the condescendence however, is softened down to their sleeping in the same room. Give me leave to say, that if they slept in the same bed, that circumstance was capable of proof, and if proved, would have put an end to the whole case. But the testimony of Mary Hastie, the maid of the inn, is the other way; for if he was then married, what difficulty could there be in going to the same bed, unless they proceeded differently in these matters in Scotland from what they did in this country? But what she says is, that there not being, in this Scotch inn, three separate bed-rooms for three persons, and Doctor Macneil having taken care of himself, and gone to bed first in the single-bedded room, a difficulty arose as to how this bride and bridegroom should be disposed of; although it is very likely, that if Macgregor's story were true, one bed might have served. But the presumption from what she says is, that there was no consummation; for they slept in separate beds, although in the same room, and the lady, with true Scotch delicacy, had her bed surrounded with sheets, that her husband might not set the eyes of affection upon her. Then on the 20th of May the party returned to Edinburgh, and the marriage at Holytown being irregular and private, it was thought proper that a regular marriage should take place at Edinburgh. But if the marriage at Holytown was irregular and private, the marriage had at Edinburgh on the 23d of May, to obviate that objection, was the most extraordinary that ever I heard of. "That is a regular marriage (as Mr. Erskine states) [259] where banns are regularly published according to the rules of the church:" but Macgregor thought the best way to remove all objection to the clandestine and irregular marriage was, to get a certificate of banns which never were published, and could not have been regularly published, as no Sunday intervened between the return and the alleged marriage; the return being, according to his own statement in his condescendence, on Monday the 20th of May, and the marriage on Thursday the 23d; and at this regular, public, and indisputable marriage, nobody was present except Joseph Robertson, his wife and daughter; and it certainly was no better than the marriage which was celebrated by Doctor Macneil at Holytown. As to Joseph Robertson's book, besides the objections to it in other respects, why was this private book produced at all? I know that a parish register may be produced in evidence, for it is a public record and kept by law; but how can this private memorandum-book be evidence?

I do not think it necessary to follow my noble and learned friend—for learned I may call him, having often derived much assistance from him in these Scotch cases—through the evidence of Joseph Robertson's wife and daughter. I do not at present consider, whether such a cause as this can with propriety be allowed to proceed without any other parties than the pursuer and defender, or whether the marriage with Mr. Jolly can be affected by any admissions of the woman who was a party to both marriages. But in this case she did make admissions, and if you take them at all you must take the whole together; and then, taking the whole together, she denies that she gave a deliberate consent to this marriage, and if so, can you look at the whole facts and circumstances in order to form your opinion whether she did consent or not? In cases of [260] irregular marriage, whether *per verba de presenti*, by habit and repute, or promise *cum copula*, it is quite clear that you may look at the facts and circumstances, and if so, can you look at them in the case of such a marriage as this? If you look at the text writers, and at the opinions of the eminent Scotch lawyers who were examined in the case of *Dalrymple* v. *Dalrymple*, such as Mr. Hume, Lord Gillies, Sir Islay Campbell, and others—and that is evidence of what is Scotch law—you will find that the proclamation of banns is essential to the constitution of a regular marriage; and if so, this is an irregular marriage. I perceive that in one or two cases evidence of facts and circumstances have been admitted to rebut the presumption of consent arising from a regular marriage, but I give no opinion whether that principle can be properly applied to cases of marriage regularly celebrated in *facie ecclesiae*; but in cases of irregular marriage, which I take this to be, it is clearly applicable. If, however, an irregular marriage is clearly constituted, that marriage is certainly valid; but in such a case, if you have not sufficient evidence of it in the actual ceremony, then circumstances are admissible evidence. Some of the cases have been decided, perhaps, not exactly according to the evidence; but the principle is clear, that you may look at the facts and circumstances. In the cases of marriage between a youth of fourteen and a lady of twelve, I am not sure but more weight has been given to the circumstance of fraud than should have been ascribed to it, considering that the law has said that the parties at that age are capable of consent. But the question here is, whether there was a clear, actual, solemn, and deliberate consent, so as to constitute a marriage at the time of the celebration? and then see what the case is. Before the marriage at Holytown, [261] it is clear that Macgregor knew that Mr. Jolly was a suitor, and that he was the preferred candidate; and there is no proof that the marriage was there consummated. Macgregor says that it was; but I am authorized by the evidence to say that the allegation is false. Then when they come to Edinburgh they resort to this so called regular marriage, in order to remove any doubts that might exist as to the private and irregular marriage: but if such was the purpose, how happened it that the persons most intimately connected with the family never heard of it at the time? We know what happens when parties go to Scotland to get married, and are again married here: the objection of that is, to satisfy the parties themselves that they are married, and to satisfy their relations and friends that a marriage has taken place; but can any one believe, that if Doctor Macneil had really given away the hand of the lady at Holytown, he would not have been present at this second marriage? or that he had become so weak and imbecile in a few days as to be able to do nothing at all? No man having recourse to a regular marriage for such a purpose, would celebrate it with nobody present as witnesses except that man Joseph Robertson, who was a disgrace to his profession, and his wife and daughter. Every one knows the importance which the law of Scotland attaches to consummation; and if a regular marriage were had to support an irregular one, care would be taken to have evidence of the consummation. The respondent alleges that consummation did follow; but there is no attempt to prove it, and I do not believe that consummation did take place.

Then I see no evidence that Jolly ever knew that Macgregor was the husband of the appellant, and on the 13th of June 1816 he married her, and Doctor [262] Macneil, who was said to have performed the marriage ceremony at Holytown, goes with the party to Doctor Robertson's house, and there conducts himself in the solemn, regular, and deliberate manner which has been described by Doctor Robertson and his wife. Believe it who can, that he who so conducted himself was so imbecile from drunkenness, or the breaking down of his constitution, as to destroy the effect of the inference which arises from his not being present at the alleged marriage with Mac-

gregor. I should have told a jury, upon my oath, that they ought to give no credit to this story.

Then comes the fact, that Macgregor had gloves on the marriage of the appellant and Mr. Jolly, according to the usual custom in that part of the island; and if he did not attend the wedding-dinner, it is clear that he was frequently a guest of the parties.

Then in October of the year 1816 Doctor Macneil, who no doubt had recovered from his alleged imbecility, goes to Holytown again, accompanied by Mr. and Mrs. Jolly, and Macgregor. On that occasion, Doctor Macneil having, as before, appropriated to himself the single-bedded room, Mr. and Mrs. Jolly, for whom a bed had been asked, slept in one bed, and Macgregor in another in the same room; and was that to be taken as evidence of his having ever consented to a marriage with this lady?

There is another circumstance to be attended to. This Macgregor was a sort of a man of business, and Dr. Macneil having settled, first a part, and afterwards the whole of his property on the appellant, somewhat in the way of a *donatio mortis causa*, Macgregor gets possession of the deeds. This confidence of Dr. Macneil in Macgregor might have been impaired if he had been told of Macgregor's alleged transactions re-
[263]-lative to his daughter; but Dr. Macneil dies, and then, as dead men tell no tales, so strange tales told respecting the dead may serve the purpose of some of the living. When I first saw this case I confess that the conduct of the respondent appeared to me so disgusting, that I determined that I should not come to a judgment upon it until I had got rid of that feeling, and I made a covenant with myself that no impression should remain on my mind except what might arise from the consideration of the law of the case.

His statement then is, that he has a claim of marriage, and he adds to the declarator a conclusion, that the lady should be restored to him, that they might live happily together; the claim was not brought forward till all these circumstances that I have mentioned took place; but if the marriage of the 23d was valid, you are bound to say so, but even then I doubt whether you would be any party to the restoration of the lady to Macgregor.

Then was there in this case a solemn and deliberate consent to marriage between the parties? I think, from all the circumstances, that there was not; that the whole conduct of the parties shows that there was no such consent, and that her story is not half so improbable as his. It is important to guard against a decision that might have any tendency to upset a marriage really constituted, but it is also important to take care that this most solemn relation of human life, in order to make the contract valid, must be entered upon in a solemn and deliberate manner. The safest way is to reverse the interlocutors; but I doubt whether even if the declarator could be supported, you could go on to the restitution of conjugal rights. I agree generally in the judgment which has been proposed for your Lordships' adoption, but we must take care not to prejudice [264] any other cases, and that our judgment should show on the face of it only what we mean to declare.

Lord Lyndhurst (Chancellor): I rise merely to state that I concur in the view which has been taken of this case by my noble and learned friends; I clearly think that the interlocutors ought to be reversed.

After the manner in which the subject has been treated, and I may say exhausted, it is not my intention to travel over the whole of the ground again. 1st. I am of opinion, after looking at the charge made in the summons, and the evidence adduced, that the charge has not been made out, but disproved. 2dly. I am satisfied that this was not a regular marriage in any way of representing the case; if so, you are entitled to look at the facts and circumstances, and at the conduct of the parties before the alleged marriage, at the time when it took place, and subsequent to that time; and without going into the details, I think that, looking at these facts and circumstances, and, above all, at the conduct of the parties, there never was a full, deliberate and uninfluenced consent given on both sides, and if so, the judgment of the Court below cannot be sustained.

Judgment of the Court below reversed.

[265] MACNEIL *v.* MACGREGOR (*Marriage Case*).

SPECIAL JUDGMENT.

20th Junij, 1828.

Upon due consideration of all the proceedings in this action of Declaration of Marriage, at the instance of Malcolm Macgregor against Mary Black Macneil, particularly of the summons dated 25th March 1818, wherein the allegations set forth are, "That an irregular marriage was celebrated between the said Malcolm Macgregor and the said Mary Black Macneil, by Doctor Macneil, at Hollytown, in spring 1816, which was consummated by their spending several nights together in the same bed, and that they considered it proper, on their return to Edinburgh [266] in the month of May 1816, that no time should be lost in celebrating *in facie ecclesiae that* marriage which had been irregularly celebrated between them, and accordingly they were, in the month of May 1816, regularly married by the Reverend Joseph Robertson, minister of the chapel in Leith Wynd, Edinburgh;" and upon examination of what has been established by evidence in the Courts below, with reference to the facts alleged in the said summons: this House is of opinion that there is no proof whatever of any marriage between these parties having at any time taken place at Hollytown, or of any regular marriage *in facie ecclesiae* having been celebrated between them at Edinburgh in the month of May 1816; and further, this House, taking into consideration all the facts and circumstances proved in relation to the conduct of the parties both before and after the 23d May 1816, is of opinion, that there is not evidence sufficient to justify the conclusion that the said Mary Black Macneil and the said Malcolm Macgregor did, on the 23d day of May 1816, or at any other time, voluntarily and deliberately express that real mutual consent immediately to contract marriage, which by the law of Scotland is necessary to give validity to such an irregular marriage as is alleged to have taken place: it is therefore ordered and adjudged that the several interlocutors complained of be reversed, and that the further proceeding in this action be, and the same is hereby remitted to the Court of Session, with instructions to give directions to the Commissary Court to dismiss the declarator of marriage raised at the instance of the said Malcolm Macgregor, by summons of date 25th March 1818, to assoilzie the defender, the said Mary Black Macneil, from all the conclusions thereof; and this House having so ordered and adjudged, doth not think [267] it necessary to determine upon what has been submitted to its consideration, viz.: whether the several interlocutors hereinbefore mentioned could have been deemed duly pronounced in proceedings to which Robert Jolly and the children of the defender, Mary Black Macneil, were not parties.

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[268] APPEAL

FROM THE COURT OF CHANCERY, ENGLAND.

DUFFIELD and Wife,—*Appellants;* DUFFIELD and others,—*Respondents.*

[Mews' Dig. xv. 413. S.C. 3 Bli. N.S. 260; in Ch. 2. Sim. and St. 544; 4 L. J. (O.S.) Ch. 189. Discussed in *Percival* v. *Percival*, 1870, L. R. 9 Eq. 393. Approved on point as to revocation in *Doe d. Evers* v. *Ward*, 1852, 21 L. J. Q.B. 145, 150. Considered on point as to interest taken under devise in *Holmes* v. *Prescott*, 1864, 33 L. J. Ch. 264.]

G. E. devises his estates at S. and H. to trustees, in trust, "in case there should be but one son of my daughter, who shall attain the age of 21 years, for such son, his heirs and assigns for ever; and in case there shall be two or more sons who shall attain the age of 21 years, then in trust for the second of such sons, his heirs and assigns for ever; and in case there shall be no son (of the daughter) who shall attain the age of 21 years, then in trust for such of the

daughters (if any) as shall attain the age of 21 years, or before that, be married with consent of the trustees, her heirs and assigns for ever," etc.

And as to the residue of the property, of whatever description, which the testator should be possessed of or entitled to at the time of his death, in trust, to convert the whole into money, and invest the produce in the funds for the benefit of testator's daughter's children, in the manner in the will mentioned.

And the testator empowered the trustees to apply what should appear to them to be a competent part of the rents, profits and proceeds of the estates and funds, for the maintenance of such of the children as should be PRESUMPTIVELY entitled, during their minority.

Testator having, after making his will, purchased some additional freehold property, executed a codicil, by which he revoked that part of his will which directed the sale of his residuary freehold property, and directed, "that the son of my daughter who shall first attain the age of 21 years, shall, on attaining that age, change his name for that of Elwes; and I devise to such son, on his attaining the age of 21 years and changing his name to Elwes, all my freehold property, lands etc., his heirs and assigns for ever."

No son of testator's daughter by her said husband, during his infancy, and no daughter, during her infancy and non-marriage, entitled to the rents and profits of the S. and H. estates.

[269] If the younger of the two sons should die in infancy, the elder would not be entitled to such rents and profits during his infancy, and that a third son becoming a second son would not be entitled to such rents and profits during his infancy.

The rents and profits during the infancy of the sons, and the infancy and before marriage of the daughters, belong to testator's heir at law.

As to the maintenance, there being two sons, infants, at the time of testator's death, the trustees should execute the power by applying part of the rents and profits of the premises first demised to the maintenance of the second of such sons during his infancy; and in case the second son died in infancy, and the elder became an only son, the trustees should apply part of such rents and profits to his maintenance during his infancy; and in case a third son should be born during the infancy of the first, the maintenance for the first son to cease, and part of the rents and profits to be applied for the maintenance of such third son; and supposing there were an only son and an infant unmarried daughter, the trustees would have no power to apply any part of the rents and profits to the maintenance of such daughter during her minority.

No son of testator's daughter is entitled to the freehold estates mentioned in the codicil until his attaining the age of 21 years and assuming the name of Elwes; and until the happening of both events, the rents and profits of such estates belong to testator's heir at law.

Per Lord Eldon.—I hope this will be a leading case.

The late George Elwes, of High-street, Mary-le-bone, in the county of Middlesex, being seised and possessed of very considerable real and personal property in the counties of Middlesex, Berks, Suffolk, Essex, etc. in 1802 conveyed his manor of Marcham, and other hereditaments in the county of Berks, to trustees, to secure an annuity of £800 per annum to his wife, Amelia Maria Elwes, (afterwards Hicks,) for the support of herself, and the maintenance and education of his and her infant daughter and only child, Emily Frances Elwes, (afterwards Duffield,) during their [270] joint lives if they should so long continue to live together, with a proviso that in case the daughter should marry under age, or without the consent in writing of the father, the allowance for the daughter should cease, and the trust should be for securing a life annuity of £400 per annum for the wife for her separate use.

In February 1810, the daughter, being then eighteen years of age, married Thomas Duffield at Gretna in Scotland, without the knowledge of her father, and was soon after married according to the English form in Mary-le-bone church.

In March 1811 the father made his will, duly executed and attested, and thereby devised and bequeathed as follows:

"This is the last Will and Testament of me George Elwes, of High-street, in the

parish of Saint Mary-le-bone, otherwise Marybone, in the county of Middlesex, esquire: First, my will is, and I direct, that all my debts and funeral expenses, and the expenses of proving this my will, shall be paid in manner hereinafter mentioned and directed. And whereas by a settlement made previous to my marriage with my dear wife Amelia Maria Elwes, she is entitled to the dividends of £3333 6s. 8d. consolidated three per cent Bank annuities for her life in case she survives me, as or in the nature of a jointure or provision of maintenance and in lieu of dower, and the same Bank annuities are by the said settlement declared to be in trust, from and after my decease and the decease of my said wife, for the child or children of our marriage, in manner therein mentioned: and whereas under and by virtue of the limitations contained in a certain indenture of settlement, bearing date on or about the 7th day of October in the year 1802, and expressed to be made [271] between me George Elwes of the first part, my said wife Amelia Maria Elwes of the second part, and John Elwes, esquire, and Francis Wastie, esquire, of the third part, my said wife is entitled for her life to an annuity or yearly rent-charge of £400, issuing and payable out of the manor of Marcham, in the county of Berks, and divers freehold and leasehold messuages, farms, lands, tenements and hereditaments in the several parishes or places of Marcham, Frilford, Cotwell and Garford, and elsewhere, in the said county of Berks; now I do by this my will ratify and confirm the said jointure and annuity to my said wife. And I give and bequeath unto my dear daughter Amelia Maria Frances Duffield (meaning thereby his daughter the appellant Emily Frances Duffield), the wife of Thomas Duffield, and her assigns, for and during the term of her natural life, all that my leasehold messuage or dwelling-house, with the appurtenances, situate in High-street, Mary-le-bone, aforesaid; and I do declare that the same shall, from and after her decease, fall into the residue of my personal estate hereinafter devised: and I give and bequeath unto my said daughter all my carriages, horses, household furniture and goods, plate, linen, china, stock of wines and other liquors, which shall be in and about the said messuage or dwelling-house, or in or about any other house or houses in which I may dwell or which I may inhabit at the time of my decease. And I give and bequeath unto my brother John Elwes, of Portman-square, in the parish of Saint Mary-le-bone aforesaid, esquire, and Abraham Henry Chambers, of Bond-street, in the said county of Middlesex, banker (meaning the respondent, Abraham Henry Chambers), and their heirs, all that my freehold and copyhold [272] farm and estate situate lying and being in Southwood Park in the county of Suffolk, which I lately purchased from John Pytches, esquire, and the copyhold part whereof I have already surrendered to the uses of my will, and also all that my freehold farm and estate at Haverhill in the county of Essex, to for and upon such trusts as are in and by this my will expressed and declared thereof; (that is to say) *in case there shall be but one son of my daughter Amelia Maria Frances Duffield by her present husband the said Thomas Duffield, who shall attain the age of* 21 *years, upon trust for such son, his heirs and assigns for ever; and in case there shall be two or more sons of the said Amelia Maria Frances Duffield, who shall attain the age of* 21 *years, then in trust for the second of such sons, his heirs and assigns for ever; and in case there shall be no son of the said Amelia Maria Frances Duffield by the said Thomas Duffield, who shall attain the age of* 21 *years, then upon trust for such of the daughters* (*if any*) *of the said Amelia Maria Frances Duffield by the said Thomas Duffield, as shall first attain the age of* 21 *years, or be married under that age with the consent of the trustees or trustee for the time being of this my will, and the heirs and assigns of such daughter for ever;* but if there shall not be any son of the said Aemlia Maria Frances Duffield by the said Thomas Duffield, who shall attain the age of 21 years, nor any daughter who shall attain that age or be married, and the said Thomas Duffield shall depart this life, leaving the said Amelia Maria Frances Duffield him surviving, then upon such and the same trusts for the benefit of the children, as well sons as daughters of the said Amelia Maria Frances Duffield by any second husband with whom she may happen to intermarry, as are hereinbefore [273] expressed and declared of and concerning the said freehold and copyhold farms and estates for the benefit of the children of the said Amelia Maria Frances Duffield by the said Thomas Duffield; but if there shall not be any son of the said Amelia Maria Frances Duffield by such after-taken husband, who shall attain the age of 21 years, nor a daughter who shall attain that age or be mar-

ried with such consent as aforesaid, then upon trust for my brother John Elwes, of Portman-square, in the said parish of Saint Mary-le-bone, in the county of Middlesex, esquire, his heirs and assigns for ever." And the said testator George Elwes by his said will then gave and bequeathed to the said John Elwes and Abraham Henry Chambers such a sum of money in the public stocks of Great Britain as would produce an annual sum of forty pounds, and directed that the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors administrators and assigns, should stand possessed of such principal sum, in trust, to pay the dividends thereof to or for the separate use of Elizabeth Ward, the wife of John Ward, during her life; and after the decease of the said Elizabeth Ward, the said testator willed that such principal sum in the stocks should become part of the residue of his personal estate thereinafter bequeathed; and he gave unto Elizabeth Surman, the mother of the said Elizabeth Ward, an annuity of ten pounds a year for her life; and he gave and bequeathed unto the said John Elwes and Abraham Henry Chambers, their executors, administrators, and assigns, the further sum of £1500 three per cent consolidated Bank annuities, upon trust, that the dividends and interest thereof might from time to time for ever be paid to the minister, churchwardens and overseers for the time [274] being of the parish of Marcham aforesaid, to be by them disposed of yearly in Christmas week in manner therein mentioned, for clothing poor boys and poor girls resident in Marcham aforesaid, and otherwise for the benefit of the poor there; and the testator gave £50 to each of the children of the late John Morehen, therein described, who should be living at the time of his decease; and he gave to each of them the said John Elwes and Abraham Henry Chambers the sum of £500 of lawful money current in England, for the trouble they would have in the execution of that his will, provided they would act in the trusts thereof, but not otherwise. And the said testator then devised and bequeathed as follows; that is to say: "and as to, for and concerning all the rest, residue and remainder of the property of which I shall be possessed, or to which I shall be entitled at the time of my decease, or over which I have a disposing power, whether the same consist wholly or in part of estates of freehold, copyhold or for years, money in the funds, upon mortgage or otherwise out upon security or at interest, debts, or of whatever other nature or kind the same or any part thereof may be, I give devise and bequeath the same and every part thereof unto the said John Elwes and Abraham Henry Chambers, their heirs, executors, [administrators and assigns, upon trust, that they the said John Elwes and Abraham Henry Chambers, or the survivor of them, or the heirs, executors, administrators or assigns of such survivor, do and shall, with all convenient speed after my decease, sell, dispose of and convey all and singular my freehold, copyhold and leasehold estates, with the appurtenances, either together or in parcels, and either by public auction or private contract, as to him or them shall seem best, unto [275] any person or persons who shall be willing to become and be the purchaser or purchasers thereof, or of any part thereof, for the most money and best prices that can be reasonably had or gotten for the same, and to make and execute all such deeds, surrenders, conveyances, assignments and assurances in the law, as shall be necessary or proper for perfecting the sale and transfer thereof; and also do and shall make sale of, and convert into money, all such part and parts thereof as shall consist of money out upon mortgage or other security at interest or] otherwise; and also get in all debts which shall be due and owing to me at the time of my decease, in such manner as they shall think expedient; and I do hereby expressly direct and declare, that the receipt and receipts of the said John Elwes and Abraham Henry Chambers, and of the survivor of them, his heirs, executors, administrators and assigns, for all monies paid under and by virtue of this my will, shall in all cases be a sufficient and effectual discharge and discharges for such sum or sums of money as shall therein respectively be expressed or acknowledged to be received; and the person or persons paying any such sum or sums of money, his her or their heirs, executors, administrators or assigns, shall not afterwards be obliged to see to the application or be in any manner answerable for the misapplication or nonapplication of the same or any part thereof. And it is my will, and I do hereby declare and direct, that the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators and assigns, shall stand and be possessed of and interested in the monies to arise or be gotten in

by the means aforesaid or otherwise, under and by virtue of this my [276] will, in trust, in the first place, from and immediately after my decease, to satisfy and discharge all such debts as shall be due and owing by me to any person or persons whomsoever at the time of my decease, or which shall afterwards accrue due; and in the next place, to pay, satisfy and discharge my funeral expenses, and the expenses of proving this my will, and then to pay and discharge the several legacies and bequests which I have given or bequeathed or shall give or bequeath by this my will, or by any codicil or codicils thereto; and after full payment and satisfaction thereof, in trust, forthwith to lay out and invest such a portion of the residue of the monies to arise and be produced by the means aforesaid, in the purchase of so much and such sum of three per cent consolidated Bank annuities, in the names of them the said John Elwes and Abraham Henry Chambers, or of the survivor of them, his executors, administrators or assigns, as the yearly dividends thereof will amount to the sum of £1000 of lawful money current in England, and upon trust that they the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators and assigns, do and shall from time to time, during the natural life of my said daughter Amelia Maria Frances Duffield, pay or cause to be paid all the dividends of the said three per cent consolidated Bank annuities so to be purchased, as the same shall accrue and be received, into the proper hands of the said Amelia Maria Frances Duffield, or to such person or persons as she in writing signed with her proper hand shall, notwithstanding her coverture, direct or appoint (but so as that the same be not by way of anticipation), for her sole and separate use and benefit, exclusive of and free from [277] the power, control, debts and engagements of the said Thomas Duffield, or any future husband whom she may happen to marry, and wherewith he the said Thomas Duffield or any future husband shall not in anywise intermeddle; and the receipt or receipts of the said Amelia Maria Frances Duffield alone, or of such person or persons to whom she shall so direct or appoint the same to be paid as aforesaid, signed with her or their hand or hands, shall from time to time be a good and sufficient discharge for so much of the said dividends, interest and annual produce as shall be therein expressed and acknowledged to be received; and I do hereby declare and direct, that the said three per cent consolidated Bank annuities so to be purchased as last aforesaid, shall, from and after the decease of my said daughter Amelia Maria Frances Duffield, fall into and be taken as part of my said personal estate, and be disposed in manner hereinafter declared thereof. And as to, for and concerning the then residue of the monies to arise and be produced by the sales hereinbefore directed to be made of my said real and personal estate, upon trust, to lay out and invest the same in the purchase of parliamentary stocks or funds of Great Britain, or upon real securities at interest, in the names of them the said John Elwes and Abraham Henry Chambers, or the survivor of them, his executors, administrators or assigns, upon the trusts and for the intents and purposes, and with under and subject to the several powers, provisoes and declarations hereinafter expressed; (that is to say) in case there shall be only one child of the said Amelia Maria Frances Duffield by the said Thomas Duffield, in trust that they the said John Elwes and Abraham Henry Chambers, and the [278] survivor of them, his executors, administrators or assigns, do and shall pay, assign, transfer or assure the said stocks, funds and securities, and the dividends, interest and annual proceeds thereof, unto such one or only child at or on his attaining the age of 21 years if a son, or at or on her attaining that age, or being married with the consent in writing of the trustees for the time being of this my will, if a daughter: and in case there shall be two or three children of the said Amelia Maria Frances Duffield by the said Thomas Duffield, then that they the said John Elwes and Abraham Henry Chambers, or the survivor of them, shall and do stand possessed of the said stocks, funds and securities, and the dividends, interest and annual proceeds thereof, upon trust for such two or three children, equally to be divided between them, share and share alike, the share or shares of such of them as shall be a son or sons to be paid, assigned, transferred or assured to him or them on his or their attaining the age of 21 years, and the share or shares of such of them as shall be a daughter or daughters to be paid, assigned, transferred or assured to her or them on her or their attaining the age of 21 years, or being married with such consent as aforesaid: and my will is, that in case any one or more of such children, being a son or sons, shall depart this

life under the age of 21 years, or being a daughter or daughters, shall depart this life under that age, and without being married with such consent as aforesaid, then the shares of him, her or them so dying, shall accrue and go to the survivors and survivor of such children, in equal shares and proportions, if more than one, and if but one, then the whole to such one, and be paid, assigned, trans-[279]-ferred or assured to him, her or them, together with and at the same time as his, her or their original share or shares are and is by this my will directed to be paid, assigned, transferred or assured; provided always, that if any or either of such children, being a son or sons, shall happen to depart this life under the age of 21 years, having lawful issue of his or their bodies living at the time of his or their decease or deceases, or born within due time thereafter, then the share or shares of him or them so dying and having issue, shall go and belong to his or their child or children, and shall not survive to or amongst the others or other of such two or three children: and my will is, that in case there shall be four or more children of the said Amelia Maria Frances Duffield, by the said Thomas Duffield, that the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators and assigns, shall stand and be possessed of the said stocks, funds and securities, and the dividends, interest and annual proceeds thereof, upon trust, in the first place, to purchase with a competent part thereof, or otherwise to set apart thereout, the sum of £50,000 three per cent consolidated Bank annuities, and to stand possessed thereof, and of the dividends, interest and annual proceeds thereof, in trust for such son of the said Amelia Maria Frances Duffield by the said Thomas Duffield, who, under the trusts of a settlement now intended to be forthwith made, shall become possessed of an estate tail in the said manor of Marcham, and the messuages, farms, lands, tenements and hereditaments, which shall be comprised in the same settlement; and subject to the payment or setting apart of the said sum of £50,000 three per [280] cent consolidated Bank annuities, my will is, that the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators and assigns, shall stand and be possessed of the then residue of the said stocks, funds and securities, and the dividends, interest and annual proceeds thereof, upon trust for such four or more children (exclusive of such son as last aforesaid) of the said Amelia Maria Frances Duffield, equally to be divided between them, share and share alike, and to be paid, assigned, transferred or assured to them respectively at the same time or times, and with such benefit of survivorship amongst them, and in such manner in all respects as is hereinbefore directed and declared of and concerning the said stocks, funds and securities, and the dividends, interest and annual proceeds thereof, in the event of there being only two or three children of the said Amelia Maria Frances Duffield, by the said Thomas Duffield: and in case the said Thomas Duffield shall happen to depart this life, leaving the said Amelia Maria Frances Duffield him surviving, and without leaving any issue by her, or if he shall leave issue by her, and all such issue being sons shall depart this life under the age of twenty-one years, and without lawful issue, and being daughters shall depart this life under that age, without having been married with such consent as aforesaid, then my will is, and I do hereby declare and direct, that the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators and assigns, shall, from and after such the decease of the said Thomas Duffield and failure of issue as aforesaid, stand and be possessed of and interested in the stocks, funds and securities, in or on which the [281] monies to arise and be produced from the residue of my real and personal estate, hereinbefore devised under the trusts hereinbefore declared thereof, shall be laid out or invested, upon trust to pay the interest, dividends and annual proceeds thereof from time to time, during the natural life of the said Amelia Maria Frances Duffield, to such person or persons as she by any note in writing signed with her own hand shall, whether covert or sole, and notwithstanding her coverture (but so as the same be not by way of anticipation), appoint to receive the same, and in default of such appointment, then upon trust to pay the said interest, dividends and annual proceeds into the proper hands of the said Amelia Maria Frances Duffield for her separate and peculiar use and benefit, not subject or liable to the debts, control, dispositions or engagements of any husband with whom she may hereafter happen to intermarry, and for which her receipts alone shall be good and sufficient discharges: and in case the said Amelia Maria Frances Duffield

shall happen to marry a second husband, and there shall be any issue of her body by such second husband, then my will is, and I do direct, that the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators and assigns, shall, from and after her decease, stand possessed of the said stocks, funds and securities, and the interest, dividends and annual proceeds thereof, upon such and the same trusts, for the benefit of the children of such second marriage, as are by this my will declared of and concerning the said stocks, funds, securities, interests, dividends and annual proceeds for the benefit of the children of the said Amelia Maria Frances Duffield by the said Thomas Duffield; and [282] in case of the decease of the said Amelia Maria Frances Duffield, without leaving any issue of her body, who by virtue of the trusts of this my will shall become entitled to the said stocks, funds and securities, and the dividends, interest and annual proceeds thereof, then I give, bequeath and dispose of the same stocks, funds and securities, and the dividends, interest and annual proceeds thereof, in manner following: (that is to say) I give the sum of £1000 three per cent consolidated Bank annuities to the said John Elwes and Abraham Henry Chambers, their executors, administrators and assigns, upon trust, and to the intent that the interest and dividends thereof may from time to time for ever be paid to the minister, church-wardens and overseers for the time being of the parish of Marcham aforesaid, to be applied by them in the same manner as the interest and dividends of the sum of £1500 like Bank annuities hereinbefore given to them; and I give the sum of £1000 of lawful money current in England to the trustees of the Middlesex Hospital, to be applied for the purposes of that Institution; and I give the sum of £500 of like lawful money to Just Alt, the son of George Alt, now in the Blue-coat school; and I give the sum of £500 of like lawful money to the Reverend William Hicks, of Great Marlow, in the county of Bucks, clerk; and I give the sum of £10,000 of like lawful money to my nephew Henry Elwes, son of my brother John Elwes; and I give to each of the children of the late John Morehen aforesaid, the sum of £200 of like lawful money, and to each of the grand-children of the said John Morehen the sum of £100 of like lawful money: And as to, for and concerning all the then residue [283] of the said stocks, funds and securities, and the interest, dividends and annual proceeds thereof, I give and bequeath the same and every part thereof unto the said John Elwes, his executors, administrators and assigns, to and for his and their own use and benefit, and to be paid, assigned, transferred and assured to him and them accordingly: And my will further is, and I do hereby declare and direct, that the said John Elwes and Abraham Henry Chambers, and the survivor of them, his executors, administrators and assigns, and other the trustee and trustees for the time being of this my will, shall by and out of the rents, issues and profits of the said freehold and copyhold estates by this my will first devised, and by and out of the part or share of and in the said stocks, funds and securities, and the dividends, interest and annual proceeds thereof, to which any child or children of the said Amelia Maria Frances Duffield by the said Thomas Duffield, or by any after-taken husband, shall be presumptively entitled, pay and apply for the maintenance and education of any such child or children, in the mean time and until his, her or their share or portion, shares or portions shall become payable, such yearly sum and sums of money as to them the said John Elwes and Abraham Henry Chambers, or the survivor of them, his executors or administrators, or other the trustees or trustee for the time being of this my will, shall seem meet." And the said testator by his said will empowered his trustees therein named, and other the trustee or trustees for the time being of his said will, from time to time, when necessary, to alter and vary the securities upon which the monies arising from the said residue of his real and personal estate should [284] or might be invested. And the said testator thereby also empowered his said trustees, and other the trustees for the time being of his said will, during the minority of such child of the appellant Emily Frances Duffield as by virtue of the limitations therein contained should be presumptively entitled to the said freehold and copyhold estates first thereinbefore devised, to demise and lease all or any part of the said freehold and copyhold estates for any term not exceeding twenty-one years in possession, and with such clauses and restrictions as therein mentioned. And the said testator nominated and appointed the said John Elwes and Abraham Henry Chambers joint executors of that his will.

Some time after making his will, the testator drew his pen over that part of it which contained the direction for the sale of his residuary freehold, leasehold and copyhold estates (see codicil).

The testator, after making his will, and before executing the following codicil, purchased a considerable estate in fee simple, consisting of the manor of Withersfield, with the perpetual advowson of the rectory of Withersfield, and about 2300 acres of freehold, in the parishes of Withersfield and Haverhill, in Suffolk, and was seised thereof at the time of making his codicil, and of his death.

He then, in March 1821, executed the codicil, which is in these words: "Having some short time back drawn my pen through the first fifteen lines of the sixth sheet of my last will and testament, dated on or about the 1st day of March, in the year of our Lord 1811, and being apprehensive that such rasure, not being witnessed, might lead to litigation: I, George Elwes, do hereby declare by this my codicil to the said will, that the sole intention of such rasure was [285] and is to revoke that part only of the aforesaid will whereby I direct the sale of my freehold property, which sale I accordingly do hereby revoke: And I do hereby direct and appoint, that the son lawfully begotten of my daughter Emily Frances Duffield, who shall first attain the age of twenty-one years, shall, on attaining such age, change his name for that of Elwes; and I give and devise to the said son of my daughter aforesaid, on his attaining the age of twenty-one years, and changing his name to Elwes, all my freehold property, lands, tenements and hereditaments, to have and to hold to him my said grandson, his heirs and assigns for ever: Also I give and bequeath to my wife, Amelia Maria Elwes, for and during the term of her natural life, my dwelling-house situate and being on the Terrace in High-street, in the parish of Mary-le-bone; and I also give unto my said wife contents of the said house: And I do hereby nominate and appoint the Rev. William Hicks, of Whittington Rectory, in the county of Gloucestershire, to be my executor in the room of my late brother, John Elwes, esquire, deceased: And I do hereby ratify and confirm the aforementioned will and testament, dated as aforesaid, except as is before excepted."

G. Elwes made no other settlement of Marcham, or any other part of his property.

On the 2d day of September 1821, the testator, George Elwes, died, without revoking or altering his will, save as aforesaid, and without revoking or altering his codicil, leaving Amelia Maria Elwes his widow, and Emily Frances Duffield his daughter and only child and heir at law, and heir according to the custom of the manors whereof his copyhold estates were holden, and also his sole next of kin.

[286] The plaintiffs, Mr. and Mrs. Duffield, at the testator's death, had and now have living five children; namely, their eldest child and only son, the defendant, George Thomas Warren Hastings Duffield, now of the age of ten years, and four younger children, the infant defendants, Caroline Duffield, Maria Duffield, Anna Duffield and Susan Eliza Duffield.

John Elwes, one of the executors and trustees named in the will, died before the testator; the other executor and trustee therein named survived him.

In October 1821, Mr. and Mrs. Duffield filed their original bill in Chancery, which was afterwards amended, against Amelia Maria Elwes (afterwards Hicks), testator's widow, and against Abraham Henry Chambers, surviving trustee under the will, and the Rev. William Hicks, trustee under the codicil, Francis Const and George Law, who, as executors of John Elwes, testator's brother, had some interest in testator's property, against Robert Greenhill Russel and George Spencer Smith, trustees under the marriage settlement of Mr. Hicks and testator's widow, and against the infant children of the plaintiffs, George Thomas Warren Hastings Duffield, Caroline Duffield, Maria Duffield, Anna Duffield and Susan Eliza Duffield, stating the facts and circumstances above mentioned; and the plaintiffs charged that they were desirous that the just rights and interests of all parties in the testator's property should be ascertained, and that the persons and fortunes of their infant children should be protected and secured under the care and direction of the Court: and the bill also charged that the devises of the Southwood Park and Haverhill estates, and of the residuary freehold estates, were future and executory, and that the intermediate rents and profits during the minority of the children belonged to the plaintiff [287] Mrs. Duffield, as heir at law and customary heir of the testator: and the bill prayed, among other things, that it might be declared that Mrs. Duffield and her husband, in her right, were entitled to the intermediate rents and profits, subject to the maintenance, etc.

Upon the hearing of this cause before the Vice-Chancellor, his Honour directed a case to be made for the opinion of the Judges of the Court of King's Bench, and that the parties should be at liberty to refer to the said will and codicil; and that the questions should be,

1st. Whether the devise of the freehold part of the estate at Southwood Park, and of the freehold farm and estate at Haverhill, contained in the will, is revoked by the codicil?

2d. Did the manor of Marcham pass under the residuary devise contained in the testator's will; and if it did, was such devise revoked by the codicil?

3d. Did the manor of Marcham pass under the codicil to the first son of the plaintiff Emily Frances Duffield, who shall attain twenty-one years, and change his name to Elwes; or to whom does the same belong?

4th. Does the estate at Withersfield and Haverhill, purchased after the testator made his will, pass under the devise in the codicil to the first son of the plaintiff Emily Frances Duffield, who shall attain twenty-one years, and change his name to Elwes, or does it go to the residuary devisee under the joint operation of the will and codicil; or does it descend to the testator's heir at law?

5th. To whom belong the surplus rents and profits of the said copyhold estate at Southwood Park, and of the said freehold farm and estate at the same place, and of the said freehold farm and estate at Haverhill (if the devise of such estates contained in the will was [288] not revoked by the codicil), after providing for the maintenance of the devisee thereof, until a first son of the plaintiff Emily Frances Duffield shall attain twenty-one years, or in failure of such son, till a daughter shall attain that age, or be married with consent according to the will?

6th. To whom do the intermediate rents and profits of such of the testator's freehold estates as are effectually devised by his codicil to the son of the plaintiff Emily Frances Duffield, who shall first attain twenty-one years, and change his name to Elwes, until such events take place, belong?

J. S. Copley, for Plaintiffs.

N. C. Tindal, for the Defendant George Thomas Warren Hastings Duffield.

J. L. Dampier, for the infant Defendants, daughters of the Plaintiffs.

This case has been argued before us by Counsel: we have considered it, and are of opinion,

1st. That the devise of the freehold part of the estate at Southwood Park, and of the freehold farm and estate at Haverhill, contained in the will, is not revoked by the codicil.

2d. That the manor of Marcham did pass under the residuary devise contained in the testator's will, and that such devise was revoked by the codicil.

3d. That the manor of Marcham did pass under the codicil to the first son of the plaintiff Emily Frances Duffield, who shall attain twenty-one years, and change his name to Elwes.

4th. That the estate of Withersfield and Haverhill, purchased after the testator made his will, passed under the devise in the codicil to the first son of the plaintiff Emily Frances Duffield, who shall attain twenty-one years, and change his name to Elwes.

[289] 5th. That the surplus rents and profits of the said copyhold estate at Southwood Park, and of the said freehold estate at the same place, and of the said freehold farm and estate at Haverhill, after providing for the maintenance of the devisee thereof, belong to Abraham Henry Chambers, the surviving trustee under the will of the testator, until a first son of the said plaintiff Emily Frances Duffield shall attain twenty-one years, or in failure of such son, till a daughter shall attain that age, or be married with consent according to the will.

6th. That the intermediate rents and profits of such of the testator's freehold estates as are effectually devised by his codicil to the son of the plaintiff Emily Frances Duffield, who shall first attain twenty-one years, and change his name to Elwes, until such events take place, belong to Abraham Henry Chambers, the surviving trustee under the will of the testator.

J. Bayley, G. S. Holroyd, J. Littledale.

In December 1825, Henry Duffield, second son of Mr. and Mrs. Duffield, was born, and made a party defendant.

The cause having come on for further directions on the certificate of the Judges,

and on 29th April 1826 the Vice-Chancellor pronounced his decretal order, whereof the principal declaratory and mandatory part, connected with the questions in dispute, are as follows; viz.

This Court doth declare, that the said certificate of the Judges of the Court of King's Bench is hereby confirmed, as to their answers to the first and second questions proposed in the said case; and as to the matter of the third, fourth, fifth and sixth questions, [290] this Court doth declare, that the equitable estate and interest of which the said testator, George Elwes, died seised or entitled to in the manor of Marcham, and the other freehold hereditaments comprised in the said settlements of the 7th day of October 1802, and the 15th day of October 1807, passed by the general devise in the said codicil of all the testator's freehold property, lands, tenements and hereditaments. "And this Court doth declare, that under and by virtue of the said will of the testator, George Elwes, the defendant, George Thomas Warren Hastings Duffield, as the only son of the plaintiff Emily Frances Duffield, by her husband, the plaintiff Thomas Duffield, living at the testator's death, took upon the testator's death a presently vested equitable estate in fee, in the testator's freehold and copyhold farm and estate in Southwood Park, and freehold farm and estate at Haverhill, specifically devised by his will, subject to be devested by the death of the said George Thomas Warren Hastings Duffield under the age of twenty-one years, or by the birth of a second son of the plaintiffs: And this Court doth declare, that upon the birth of the defendant Henry Duffield, the second son of the plaintiffs, the said equitable estate of the said George Thomas Warren Hastings Duffield was devested, and the said Henry Duffield took a vested equitable estate in fee in the said Southwood Park and Haverhill estates, subject to be devested in the event of the said Henry Duffield dying or becoming neither the second son nor only son of the plaintiffs before he attains the age of twenty-one years." And in taking the account directed by the decree, of the rents and profits of the testator's freehold and copyhold estates accrued since his death, this Court doth order, that the Master do distinguish which of such [291] rents and profits arose from the testator's freehold and copyhold farm and estate in Southwood Park, and his freehold farm and estate at Haverhill, specifically devised by his said will: and it is ordered, that the Master do also distinguish what part of the rents and profits of the said specifically devised estates accrued previous to the birth of the defendant Henry Duffield, and what part thereof has accrued since that time. "And this Court doth declare, that such of the said rents and profits as accrued before the birth of the said Henry Duffield belong to the said George Thomas Warren Hastings Duffield, subject only to the allowance for his maintenance directed by the said will; and that such of the said rents as accrued since the birth of the said Henry Duffield belong to the said Henry Duffield, subject only to the allowance for his maintenance directed by the said will." And this Court doth declare, that the devise of the said testator's residuary freehold estates to trustees made by his will is wholly revoked by the said codicil. "And this Court doth declare, that under and by virtue of the said codicil, the defendant George Thomas Warren Hastings Duffield, the eldest son of the plaintiff Emily Frances Duffield, upon the testator's death took a presently vested legal estate in fee in all the testator's freehold property, lands, tenements and hereditaments (except only the said Southwood Park and Haverhill estates, specifically devised by his said will), subject to be devested in case of the death of the said George Thomas Warren Hastings Duffield under the age of twenty-one years, but without prejudice to the question how far such estate may be affected in case the said defendant George Thomas Warren Hastings Duffield should not, on attaining his age [292] of twenty-one years, change his name for that of Elwes: And this Court doth declare, that the rents and profits of the said freehold property devised by the said codicil, accrued since the said testator's death, belong to the said George Thomas Warren Hastings Duffield."

From the parts of the decree marked with inverted commas, the plaintiffs, Mr. and Mrs. Duffield, appealed for the following, among other reasons:

1st. Because the devises of the Southwood Park and Haverhill estates made by the will to an only son, to a second son, or to a daughter, of the appellant Mrs. Duffield, are all future and executory, and have none of them hitherto become vested: and the beneficial interests in the surplus rents and profits of those estates, after applying a just proportion towards the maintenance of the presumptive devisee, is

an interest in the testator's real estate undisposed of by his will or codicil, and therefore falls, by way of resulting trust, to his heir at law and customary heir, the appellant Mrs. Duffield.

2d. Because, although the appellants admit that the Court of Chancery has rightly decided that the devise of the testator's residuary freehold estates to trustees made by his will is wholly revoked by his codicil, yet, according to the true construction of the codicil, the respondent, George Thomas Warren Hastings Duffield, did not take upon the testator's death a presently vested legal estate in the testator's freehold property; for, under the language of the codicil, and the true legal construction thereof, no present interest is given to the eldest son of Mrs. Duffield for the time being, during his minority; but a future and executory interest only in the testator's freehold property is devised to such son of Mrs. Duf-[293]-field as shall first actually attain the age of legal majority, and shall, after having attained it, exercise an act of discretion and judgment in assuming and using the name of Elwes. There is a total absence in the present case, both under the will and codicil, of any of those circumstances which in some prior cases have been held to give a vested estate, notwithstanding words *primâ facie* of condition and contingency. The opinion of the Judges of the Court of King's Bench, as certified to the Court below, is clear and satisfactory on this point; and as equity in such cases follows the law, the equitable estate given by the will must receive the same construction as the legal devise in the codicil.

3d. Because the residuary freehold property of the testator, until the vesting of the executory devise, is undisposed of, and consequently descends in the mean time to the testator's heir at law, who thus has a present right to the intermediate rents and profits.

The reasons for affirming the decretal order, on the part of the respondent, the eldest son, George Thomas Warren Hastings Duffield, were these:

1st. With respect to the Southwood and Haverhill estates, it is humbly submitted, that according to the clear construction of the will, the respondent took an immediate vested interest in those estates, liable to be devested in the events mentioned in the decree. Words seeming to import contingency, have in devises of this nature uniformly been held to give a present vested estate subject to be devested; such construction being considered more consistent with the presumed intention of the testator. The respondent was born at the death of the testator, and was then the only son of Mrs. Duffield. The allowance for maintenance out of the rents, during the minority of the devisee, clearly shows [294] that the rents were to belong to him during his minority.

2d. The devise of the residuary freehold estates by the codicil, must receive the same construction upon this point as the devise of the Southwood and Haverhill estates; unless it can be distinguished on the ground that the devisee is required to take the name of Elwes. But even allowing that the devisee, on attaining twenty-one, is bound to comply with this condition, the uncertainty of his complying with it cannot affect the construction of the devise so as to make it future and executory, if the uncertainty of the devisee attaining twenty-one has not that effect. An event may be more or less probable, but cannot be more or less contingent.

A cross-appeal against the order was lodged for the second son, Henry Duffield, and the infant daughters of Mr. and Mrs. Duffield, for the following reasons:

1st. Because the devise of the Southwood Park and Haverhill estates devised by the will of the testator to an only son, a second son, or a daughter of Mrs. Duffield, is not a present vested interest in an only son, second son, or daughter, but is an executory devise, and is limited to take effect when an only son or second son shall attain the age of twenty-one years; and in case there shall be no such son who shall attain that age, when a daughter of Mrs. Duffield shall attain that age.

2d. Because the devise of the other freehold property (except the Southwood Park and Haverhill estates) devised by the codicil of the testator to a son of Mrs. Duffield, who shall first attain the age of twenty-one years, on his attaining that age, and changing his name to Elwes, is not a present vested interest in such son, but is an executory devise, and [295] limited to take effect when such son who shall first attain the age of twenty-one, shall attain that age and change his name to Elwes.

3d. Because the words in the residuary clause of the will are sufficiently extensive to comprehend and pass the intermediate rents, issues and profits of the Southwood

Park and Haverhill estates, and of the other freehold estates devised by the codicil, during the suspense, and until the vesting thereof respectively; subject only to an application of a sufficient part of the rents and profits of the Southwood Park and Haverhill estates, towards the maintenance of the presumptive devisee.

4th. Because the codicil is such republication of the will, as to make the will speak from the time when the codicil was executed, so as to include in the residuary clause of the will the estates purchased between the date of the will and the codicil.

In answer to which, the following reasons were given for the eldest son, G. T. W. Hastings Duffield:

1st. By the effect of the codicil, the testator's freehold estates of which he was seised at the date of his will, other than those at Southwood and Haverhill, are taken altogether out of the operation of his will. The testator, when he made his codicil, had totally changed the purpose for which the estates were by the will devised to the trustees; instead of being sold, and forming one fund with the residue of his personal estate, he intended that the whole of those estates should go to his eldest grandson.

2d. But as to those estates of which the testator was not seised at the date of his will, it is submitted that they cannot possibly be included in the devise to the trustees; and of course that the trustees cannot be entitled to the intermediate rents.

[296] In May 1827, the appeal was heard in the House of Lords, the Earl of Eldon sitting for the Lord Chancellor; and on the 25th of that month and year, his Lordship stated his opinion that it ought to be heard again in presence of all the Judges.

Eldon (Earl of): As far as I can understand this certificate of the Court of King's Bench, the Judges of that Court were of opinion that no son of Mrs. Duffield was entitled till he reached the age of twenty-one years; and the Court of King's Bench gave no opinion as to the resulting trust, that being only for the consideration of a court of equity. They only say, that the intermediate rents and profits belong to the person entitled to the legal estate. The case then went back to the Vice-Chancellor, and he appears to differ from the opinion of the Court of King's Bench. It is quite clear that the equity Judge in these cases may differ from the Judges of the courts of law, and may decide in opposition to the opinions stated by the common-law Judges in their certificate. Lord Thurlow once sent a case for the opinion of the Court of King's Bench, and not being quite satisfied with that opinion when given, he sent to the Court again for a better answer. Lord Kenyon was not very well pleased at this proceeding of his friend Lord Thurlow, but the utility of it was manifested by the result; for the Court gave an unanimous opinion in contradiction to its former judgment. I myself, on one occasion, sent a case for the opinion of the Court of King's Bench, on the question as to what estate a party took in certain premises, and the Court unanimously certified that the party took an estate of freehold. Not being quite satisfied with that opinion, I took the liberty to send the same question for the opinion of the Judges of the [297] Common Pleas, and they unanimously certified that the party took no estate at all. I was impertinent enough to think that they were both in the wrong, and decided on my own view of the case; and with that decision the parties were satisfied, and no more was heard of the case. The number of cases belonging to the class of those which were attempted in argument to be brought to bear on this case, are, from Boraston's case in Lord Coke downwards, no less than one hundred and seventy. But the question here is not exactly the same as in any of these cases. The estate is given here only *when* the son attains twenty-one; but as the judgment now stands, the eldest son is held to be entitled, although he has not attained twenty-one. And then when a second son is born, it shifts to that second; and if the second should die, it then shifts back to the first; and then if the first died, leaving the second, and a third should be born, then it would shift to the third; and twelve sons, if they came into existence, might thus be entitled before they attained the age of twenty-one. And then the daughters, who were not to take under the will till they attained twenty-one, or were married, might be entitled before either of these events, as the principle appears to me to operate; and even the remainder-man might take at times. I have conversed with other noble Lords on this subject, and I cannot feel justified in having this case determined without the attendance of the Judges. It is not sufficient to consider merely the rights of those who are immediately interested in this case. Considering the great number and variety of these

cases of vested and contingent interests, and how few of them ever came to this House, we are bound to look at this case with a view to its effect upon the interests of all other persons. I cannot reconcile it to my sense of duty to [298] determine this question now; and I feel a great difficulty in acceding to the present judgment. At all events, the question ought to be argued before the Judges; and I propose, therefore, that for that purpose, the case be further proceeded in on the second Monday of next session of Parliament.

Lord Lyndhurst (Chancellor): I entirely agree in that opinion. The case was sent to the Court of King's Bench, and has been decided on an opinion contrary to that of that Court; and it would ill become this House to come to a decision upon it without the assistance of all the Judges, which we are entitled by law to require.

Eldon (Earl of): Some questions have not been put to the Judges which ought to have been put.

The case was accordingly again heard, the Judges being present, in April 1828, and the following cases were cited: *Boraston's Case*, 3 Co. 19; *Doe* v. *Moore*, 14 East, 601; *Bromfield* v. *Crowder*, 1 New R. 315; *Doe* v. *Nowell*, 1 Maul. and Sel. 327; *Bullock* v. *Stones*, 2 Ves. sen. 521; *Hopkins* v. *Hopkins*, 1 Ves. sen. 268; *Stanley* v. *Stanley*, 16 Ves. 496; *Gibson* v. *Lord Montfort*, 1 Ves. sen. 491; *Trodd* v. *Downes*, 2 Atk. 204; *Doe* v. *Underdown*, Will. 293; *Denn.* v. *Bagshaw*, 6 T. R. 512; *Grant's Case*, 11 Co. 16; *Snowe* v. *Cutler*, 1 Lev. 136; *Edwards* v. *Hammond*, 3 Lev. 132; *Atkinson* v. *Hutchinson*, 3 P. Wms. 258; *Spring* v. *Caesar*, 2 Roll. Abr. 415, p. 12; *Stephens* v. *Stephens*, Ca. Temp. Talb. 228; *Thorpe* v. *Thorpe*, 1 Lord Ray. 235; *Lord Arlington* v. *Berricke*, 2 Saund. 411; *Oliver* v. *Daniel*, 1 Mer. 500; *Lord* [299] *Cholmondeley* v. *Clinton*, 345; *Howe* v. *Lord Dartmouth*, 7 Ves. 147; *Milner* v. *Slater*, 8 Ves. 305; *Lamb* v. *Bland*, 2 J. and W. 404; *Goodtitle* v. *Meredith*, 2 Maul. and Sel. 5; *Hulme* v. *Heygate*, 2 Mer. 285; *Thelluson* v. *Woodford*, 2 Bos. and Pul. 500; *Warter* v. *Hutchinson*, 1 B. and Cres. 721; *Lord Strathmore* v. *Bowes*, 2 Bro. Ch. Ca. 345; 7 T. R. 482; *Randall* v. *Doe*, 5 Dow, 202; *Holder* v. *Howell*, 3 Ves. 97, etc.

After the hearing, the Earl of Eldon undertook to prepare the questions to be put to the Judges.

Eldon, (Earl of): (After stating the commencement of the proceedings, and the reference to the Court of King's Bench, and the answers.)—The effect of the certificate of the Judges seems to be, that the legal estate in the intermediate rents and profits was in the trustees. It is clear that a Court of Equity can call for the opinion of the Courts of Law, by stating cases for that opinion; and then the Courts of Law consider what alone it is proper for them to consider; that is, to whom the legal estate belongs, or what amounts to a legal estate. If an estate is given to A. B. in trust for C., the Court of Law has only to consider the question with reference to A. B., but the trust belongs to the jurisdiction of the Equity Court. A Court of Equity may send cases to the Judges of Common-law for their opinion as to the law, and to juries for their opinion as to facts, in order to inform the conscience of the Court. But the Judges in Equity, whether they ask the opinions of the Common-law Judges or not, may decide of themselves both as to the law and the facts. I mention this, because in looking at some of the Common-law reports, it seems sometimes to have been thought that the Equity Judges knew nothing [300] about law; and they say, that is only a Chancery decision.

The Judge in Equity sends a case for the opinion of the Common-law Courts. A certificate is returned, without stating the grounds of the opinion. Whether that should be altered or not, I do not know; but in sending to the Judges for their opinion in matter of law, or to a jury upon an issue as to matter of fact, it is clear that you reserve to yourself the right to determine finally and judicially both as to the law and the facts.

This is important in another point of view. Equity looks to the law and the fact. But if the certificate does not express the grounds of the opinion of the Common-law Court with reference to the difficulty which presses on the mind of the Equity Judge, then the Judge in Equity is not at all enlightened by that certificate. I have had an experience of forty-seven years in the Court of Chancery, and I have known certificates returned from the Common-law Courts without its having been once mentioned to them what was the difficulty, or the counsel knowing what was

the difficulty, which pressed on the minds of the Equity Judges. But in order to have the full benefit of the opinions of the Common-law Courts, both as to fact and to law, it is material to see what is the difficulty.

In the present case the Vice-Chancellor sent for the opinion of the Court of King's Bench, and the certificate is in these terms (see the questions and answers, *ante.*)

In these answers, a principal question is as to the intermediate rents and profits; and your Lordships will observe that the answer was the only one which the Common-law Judges could give, namely, that the legal **[301]** estate in the intermediate rents and profits belonged to the trustees: who were entitled to the beneficial interest, it was not for them to say.

Upon the return of this certificate from the Court of King's Bench, the Vice-Chancellor declared that under and by virtue of the will, G. T. W. H. Duffield as the only son of Thomas Duffield living at the time of the testator's death, took, on such death, a presently vested equitable estate in fee, in the Southwood Park and Haverhill estates, subject to be devested on his death under twenty-one, or the birth of a second son; and the Court further declared, that on the birth of the second son, Henry Duffield, the estate of G. T. W. H. Duffield was devested, and Henry took a vested equitable estate in the premises, subject to be devested on his dying or ceasing to be the second or only son of the plaintiffs before he attained twenty-one years of age. The result is, that when there is an only son he takes a presently vested interest; that on the birth of a second son that is devested, and vests in such second son; and it seems to follow, that if the second son died under twenty-one, the estate would go back again and revest in the only son; and that on the birth of a third son, the estate would be again devested, and vest in such son, as being then the second son: so that during these twenty-one years the estate would be continually liable to changes. Then comes a declaration, that the rents and profits, subject to the maintenance, belonged to G. T. W. H. and Henry Duffield respectively, during the times the estates vested in them: and then follows the important declaration that the devise of the residuary freehold estates to the trustees was wholly revoked by the codicil; and that G. T. W. H. Duffield, on testator's death, took a presently vested legal estate in fee, **[302]** in the testator's freehold property (except the Southwood Park and Haverhill estates, subject to be devested on his dying under twenty-one, and without prejudice to the question how far the estate would be affected by his not, when he attained twenty-one, changing his name to Elwes; and that the rents and profits belonged to G. T. W. H. Duffield. Now it is undeniable, that if the conscience of the Judge in Equity is not satisfied, it is his duty to differ from the Common-law Judges; and I remember a case in which Lord Thurlow was not satisfied with a certificate sent to him by the Judges of the Court of King's Bench, and intimated his wish to Lord Kenyon that the Judges should reconsider the case, which they did, and unanimously certified contrary to their previous opinion.

In availing ourselves of the assistance of the Judges on this occasion, we cannot ask them directly whether the judgment of the Court below is right or wrong; but our habit is—whether a wise one or not—so to frame a statement of facts and circumstances for the opinion of the Judges, as to enable us to avail ourselves of the answers of the Judges for the decision of the case before us; so also we cannot ask them any question as to the equity of the case. Such a statement, with the assistance of the gentleman who now sits near me (Mr. Courtenay), I have prepared. The questions arise on certain words in the will of the late Mr. Elwes, which runs thus: "I give and bequeath to [the trustees], and their heirs, all my freehold and copyhold estate situate in Southward Park (the copyhold part whereof I have surrendered to the use of my will), and also my freehold estate at Haverhill, to, for and upon the trusts in this my will expressed and declared; that is to say, in case there should be but one son of my daughter Emily Duffield by her **[303]** present husband Thomas Duffield, who shall attain the age of twenty-one years, upon trust for such son, his heirs and assigns: and in case there should be two or more sons of the said E. F. Duffield who shall attain the age of twenty-one years, then in trust for the second of such sons, his heirs and assigns for ever: and in case there should be no son of the said E. F. Duffield by the said Thomas Duffield, who shall attain the age of twenty-one years, then upon trust for such of the daughters, if any, of the said E. F. Duffield by the said Thomas Duffield, as shall first attain the age of twenty-one years,

or be married under that age with the consent of the trustees or trustee for the time being under this my will, and the heirs and assigns of such daughter." Your Lordships will observe that here there is no provision in terms for a third son, but only by implication from the words, in case there should be no son, then leaving the estates to the daughter. Then after the residuary devise and bequest, comes the clause of maintenance; and the words are, that the trustees "shall, by and out of the rents, issues and profits of the freehold and copyhold estates by this my will first devised, and by and out of the part or share of and in the said stocks, funds and securities, etc. to which any child or children of the said E. F. Duffield, etc. shall be *presumptively* entitled, pay and apply for the maintenance and education of any such child or children, until their shares become payable, such yearly sum, etc. as to them should seem meet." I shall call your Lordships attention presently to the effect of the words "presumptively entitled," but in the mean time it is obvious that some questions ought to be put to the Judges as to the rents and profits undisposed of under the residuary devise and bequest.

[304] The effect of the judgment in Chancery I have already stated to your Lordships; and one question will be, whether, according to law, it is the true construction of the will, that the only son, on the death of the testator, took an immediate vested interest, subject to be devested, and to all the changes which I have mentioned, for the contingencies are the same as to all the sons. You will look at this clause particularly, as it has been argued, from the words "presumptively entitled," that the persons so entitled took a vested interest. I confess, that from these words, I should have argued the case the other way; and that the meaning was, that the persons so presumptively entitled did not take an immediate vested interest. One other question, also, allow me to ask as to the maintenance, and that is, whether it does or does not belong to one son or to more than one. It may belong to more than one if none are entitled to a vested interest before twenty-one; but if the only son is entitled to such a vested interest, what bcomes of the maintenance in case a second son is born? He is then presumptively entitled, and not the first, and you cannot take a maintenance out of the rents and profits of this fund for the eldest son. Then again, on the decease of the second son, the eldest becomes again entitled; and then if a third son is born, he becomes presumptively entitled, and if the eldest is under twenty-one there is no maintenance for him. So your Lordships will have to say how the fund for maintenance is to be applied, not merely out of the rents and profits of this property, but in reference to all the property subject to this disposition. Then another question to be put to the Judges is, to whom the rents and profits belong *ultra* the maintenance, in case your **[305]** Lordships should be advised that the decree is wrong as to the vesting of the interests: and that exhausts the matter as to the Southwood Park and Haverhill estates.

Then as to the codicil, there is one question as to the revocation with reference to this, as matter of legal devise, for the codicil either destroys the devise of the residuary freehold property, taking it out of the trustees, or it does not. He does not, by the codicil, devise immediately to the son, but says that the sole intention of the razure was and is "to revoke that part only of my will whereby I direct the sale of my freehold property, which sale I accordingly do hereby revoke;" not necessarily taking the estate itself out of the power of the trustees; and then he goes on to direct that the son of his daughter who should first attain the age of twenty-one, should on his attaining that age change his name to Elwes; and on such son's attaining twenty-one, and changing his name for that of Elwes, he gives and devises to him all his freehold property. Thus, it will be a question, whether the son took a vested estate before attaining the age of twenty-one, according to the decree, subject to be devested on his not attaining twenty-one, and changing his name for that of Elwes; or if the interest is undisposed of till the son attains twenty-one, to whom does it belong. Then the question will be, whether the declarations in the decree are right: 1st. That this was an immediate devise to the son, subject to be devested. 2d. Whether the son took any interest till he attained twenty-one? 3dly. Whether he took any interest till he changed his name for that of Elwes?

Best (L. Ch. J. C. B.), on the 2d March 1829, read in the House the questions, with the answers, containing the unanimous opinion of the Judges, with his **[306]** own reasons for the conclusions to which they had come. The following is the statement at length, taken from an examined copy:

First Question: "According to the true construction of the testator's will and codicil, as above stated, would any son of the testator's daughter by her said husband, during his infancy, be entitled to the rents and profits of the testator's estate called Southwood Park, or the farm at Haverhill; or any daughter of his said daughter by her said husband, being unmarried and under the age of twenty-one, be so entitled during her infancy, or before she married?"

We think that no son of the testator's daughter by her present husband, during the infancy of such son, nor any daughter of the testator's daughter by her said husband, being unmarried and under the age of twenty-one, would be entitled to the rents and profits of the estate called Southwood Park, or of the farm at Haverhill.

Second Question: "If the younger of the said infant sons should die in infancy, would the elder of such two sons, during his infancy, be entitled to such rents and profits; if he would be so entitled, and a third son should be born of the testator's daughter by her said husband, would such elder son continue entitled during his infancy, or would such third son becoming a second son be so entitled?"

We think that if the younger of the two sons should die in infancy, the elder of such two sons would not be entitled to such rents and profits during his infancy, [307] and that a third son becoming a second son would not be entitled to such rents and profits during his infancy.

Third Question: "If no son of the testator's daughter by her said husband would be entitled to such rents and profits during his infancy, and no daughter of the testator's daughter by her said husband would, during her infancy and before marriage, be so entitled, to whom would the rents and profits of the said premises belong during the infancy of such sons and daughters of the testator's daughter?"

We think that the rents and profits of the said premises would belong, during the infancy of such sons, and during the infancy and before the marriage of any daughter, to the testator's heir at law.

Fourth Question: "The testator having given such power to Elwes and Chambers as aforesaid, and to the survivor of them, out of the rents and profits of the said premises (by his will first devised) to which any child of his daughter should be presumptively entitled, to provide maintenance for such child, and there being two sons of his daughter, infants at the time of his death, can Elwes and Chambers execute such power by applying part of the rents and profits of the said premises for the maintenance of the second of such sons in his infancy; and in case he (such second son) should die in his infancy, the elder of such sons being at the time of such death also an infant and an only son, can Elwes and Chambers in that case apply part of the said rents and profits for the mainte-[308]-nance of such only son, during his infancy; and in case, after the death of such second son in his infancy, the testator's daughter should have a third son born during the infancy of the testator's daughter's first son, could the said Elwes and Chambers, in execution of the said power, apply part of the rents and profits for the maintenance of such third son having become a second son, and would they cease to have a power of applying any part thereof to the maintenance of an only son; or, supposing there was an only son, and a daughter of the testator's daughter unmarried and an infant, would Elwes and Chambers have the power of applying part of the rents and profits for the maintenance of such daughter during her minority?"

We think that there being two sons of the testator's daughter, infants at the time of his death, Elwes and Chambers should execute the power by applying part of the rents and profits of the premises first demised for the maintenance of the second of such sons during his infancy; and in case such second son should die an infant, the elder son being an infant and only son, Elwes and Chambers might apply part of the said rents and profits for such only son's maintenance during his infancy and whilst he continued an only son; and that in case, after the death of such second son in his infancy, the testator's daughter should have a third son born during the infancy of the first, the power of Elwes and Chambers to allow any part of the said rents and profits to the maintenance of the first son would cease, and they should apply part of the rents and profits for the maintenance of such third son; and [309] that, sup-

posing there was an only son, and a daughter of the testator's daughter unmarried and an infant, Elwes and Chambers would not have the power of applying any part of the rents and profits for the maintenance of such daughter during her minority.

Fifth Question: "According to the true intent of the testator, is any son of the testator's daughter entitled to the rents and profits of the freehold estates mentioned in the testator's codicil (assuming that the legal estate in such freehold estate is thereby devised) until and before he attains the age of twenty-one years, and also assumes the name of Elwes; and if not, to whom do the rents and profits of such freehold estates (assuming as aforesaid) belong, under the true effect of the will and codicil, until a son attains that age and assumes that name?"

The Judges are of opinion that no son of the testator's daughter is entitled to the freehold estates mentioned in the testator's codicil until he attains the age of twenty-one years, and assumes the name of Elwes; and that, until a son attains that age and assumes that name, the rents and profits of such estates belong to the testator's heir at law.

All the Judges who were present at the argument of this case, concur in the answers which I have given to the questions proposed to us by your Lordships; but for the reasons which I shall proceed to give, I only am responsible.

These questions refer to a codicil; your Lordships will observe that only the will of the testator has been sent to us. We have, therefore, considered that the [310] codicil referred to by your Lordships' question is that which appears in the printed case.

As the case sent to us states [no] * residuary clause, we have not felt ourselves at liberty to consider the effect of the residuary clause which appears in the printed case, but have formed our opinions upon that which is stated to us by your Lordships. And it not appearing on that statement that the residue of the testator's property is devised to any particular person, we have said that during the contingencies the estates would descend to the heir at law, and do not, as in the case of *Stephens* v. *Stephens* (Cases Temp. Talbot, 228), when the residue was expressly devised to Sir Thomas Stephens, pass under the residuary devise in the will.

The estates in the Southwood Park and Haverhill Farm, given to the second son, and if there be only one son, to the eldest, and if there be no son, to a daughter, do not vest until a second or only son attained twenty-one, or in case of the failure of male issue, until a daughter attained twenty-one or marries with the consent of the trustees appointed by the will.

The testator's other freehold estates do not vest until some son of the testator's daughter shall attain the age of twenty-one years, and take the name of Elwes.

Until these estates become vested, the estates, and the rents and profits derived from them, pass to the heir-at-law of the testator, as estates not disposed of by the will.

Whilst estates remain contingent, those in whom they are at a future time to be vested have no interest in the estates, or the rents and profits of such estates.

Such estates must descend to the heir, if they are not given to any person to hold until the events hap-[311]-pen on which they are to become vested. This point is too clear to require any observation: indeed it was not disputed at the bar. Testators that create contingent estates often forget to make any provision for the preservation of their estates, and for the disposition of the rents and profits in the intermediate period between their deaths and the vesting of their estates. In such cases the estates descend to the heirs, who, knowing that they are to enjoy them only for a short period, and that they have obtained the possession of them from the inattention of, and not from the bounty of the testator, or from the mistake of the professional man who drew the will, will make the most that they can of them during the time that they remain theirs, regardless of any injury that the estates may suffer from their conduct. The rights of the different members of families not being ascertained whilst estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience, and sometimes of injury to them. If the parents attaining a certain age be a condition precedent to the vesting estates,

* See *Percival* v. *Percival*, 1870, L. R. 9 Eq. 393.

by the death of their parents before they are of that age children lose estates which were intended for them, and which their relation to the testators may give them the strongest claim to.

In consideration of these circumstances, the Judges, from the earliest times, were always inclined to decide that estates devised were vested; and it has long been an established rule for the guidance of the Courts of Westminster, in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advan-**[312]**-tage is to be taken of the circumstances occasioning the doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession. To accomplish this purpose, a distinction has been made between the adverbs *if* and *when*, to which the learned of our language, not in the profession of the law, would perhaps not agree: upon this distinction, however, many equitable arrangements of property have been made; upon this distinction the titles of many estates depend; and it will, therefore, be the duty of the Judges to observe it. The condition precedent to the vesting of these estates is so apparent, it is declared in such express terms by the will, that no ingenuity can explain it away, no refinement can get rid of it; and by holding that these estates are vested, we must overthrow the case of *Stephens* v. *Stephens*, which is directly in point to the questions submitted to us, and the authority of which was never questioned. The state of the affairs of this family will not be sooner settled by the artificial contrivance of vesting and devesting the estates, than by keeping them contingent until a final vesting of them can take place agreeable to the disposition made by the testator. How can it be said that the affairs of a family are settled by vesting an estate in an eldest son, and devesting when a second is born; then vesting it in the second, and devesting it on the birth of a third son, and death of the eldest; and by again vesting it in a daughter when there are no sons, and devesting it again on the birth of a son? The only effect of vesting these estates would be to preserve them for the children of sons that die before they attain the age at which the estates would vest.

But is it wise to encourage the marriage of infants, by making a provision for the children, however im-**[313]**-prudently, and however much in opposition to the wishes of their guardians, such marriages may be contracted. The uncertainty of a provision for a family may occasion a pause before the most important step in life be taken, which cannot be attended with lasting inconvenience, and may prevent lasting misery. Children will seldom suffer from estates remaining contingent until their parents attain the age of twenty-one, as few to whom such estates are given will have legitimate children before they are of age. This objection, if of any weight, will only partially apply to this case, for provision is made for daughters who marry with the consent of their guardians, and die before they are of age, leaving issue. As the testator has not made the same provision in favour of the children of those sons who are to succeed to his estates, as he has made for the children of his daughters, and the younger sons, who are to divide with his daughters the residue of his property, it is to be supposed that he did not intend that the families of the first or second sons should inherit, if their parents did not live until their estates became vested. Knowing how difficult it is to get at the intent of parties, when all possible care is taken to express their intent with the greatest precision in the instruments made by them, and what different interpretations, from the different constitutions of men's minds, and from their different habits and education, are put on the same words, I do not much rely on the intent of the testator. I take for my guide what I think is a sounder principle of decision in a case where a testator has expressly secured what he has given to some of his grand-children to their issue, and has not expressly secured the freehold estates to the families of those children to whom he has devised them; namely, whatever his intention may **[314]** be, that intention is not sufficiently expressed for any Court to act upon it, when, by so doing, we must get rid of a condition clearly expressed in the other parts of the will.

It is impossible to say that the words of this will do not import conditions precedent to the vesting these estates. The estates are not given to any particular children by name, but to such children as shall attain the age of twenty-one years:

until they have attained that age, no one completely answers the description which the testator has given of those who are to be devisees under his will, and therefore, there is no person in whom the estates can vest. It is an established principle of law, recognized by all the cases that are in the books, and founded on the nature of things, that estates must remain contingent until there be a person having all the qualifications that the testator requires, and completely answering the description given of the object of his bounty in his will. In *Frank* v. *Frank*, 8 Taunton, 145, it is said, "To make an estate contingent we must have such words as these, I give the estate to *such persons*, who shall at the death of P. F. be the second, third, or fourth sons." The present will has the substance of these words, for the devises are to *such only son* as shall first attain the age of twenty-one; in case there shall be two *or more sons, who shall attain the age of twenty-one*, then in trust for the second of such sons; then in trust for such daughters as shall first attain the age of twenty-one years. The codicil gives the estates to *that son* who shall first attain the age of twenty-one, and change his name to Elwes. In *Frank* v. *Frank*, Gibbs (C. J.) says, "there was a son in *esse* who answered the description in the will." A contingent remainder devised to a first, second, or other son would [315] vest absolutely as soon as such son should come into being, unless there was a clear intent expressed or implied, that it should remain contingent until some later specified time. In the case submitted to us by your Lordships, there is a clear intent expressed that these estates shall remain contingent, until it be seen whether one or more sons would attain the age of twenty-one years; and, if there be no sons, whether any daughter would live to that age, or be married with the consent of the trustees.

The testator has given us an explanation of the terms of the devises of his real estates. In the clause of maintenance he directs his trustees to provide maintenance for the children of his daughter out of the estates or property to which any child shall be presumptively entitled.

A presumptive title is only a possibility; a presumptive heir is one who will be the heir, if no one having a preferable claim be in existence at the time of the death of the person to whom the presumptive heir stands in that relation.

When the testator speaks of his grand-children as presumptively entitled, he must be understood to say, that they have no absolute or vested interest.

In the case of *Stephens* v. *Stephens*, which I have already mentioned to your Lordships, the testator after giving estates to his grandsons William and Thomas, devised the same property "to such other son of the body of his daughter, Mary Stephens, as should happen to attain the age of twenty-one years." There is scarcely any difference in the terms of the devise in that case, and in those in the devises under consideration; the meaning of each is precisely the same. In the case referred to, the Judges of the King's Bench, (Lord Hardwick being then at the head of that [316] court,) certified that the vesting of the estate was suspended until a son, *unborn*, should attain the age of twenty-one years. Lord Chancellor Talbot made a decree according to this certificate, and said that it agreed with his own sentiments, and he hoped that it would be for the future a leading case in the determination of questions of this kind. I believe that his Lordship's hopes were realised; it has been considered as a leading case; and the impugning its authority would shake a principle of law, on which the titles of many estates depend.

It only remains for me to take notice of that part of the will to which your Lordship's 4th question relates; that is the clause which gives to the trustees the power to provide a maintenance for the testator's grand-children. The words of this clause are as follows: "And my will further is, and I do hereby declare and direct that the said John Elwes, and Abraham Henry Chambers, and the survivor of them, his executors, administrators, and assigns shall, by and out of the rents, issues and profits of the said freehold and copyhold estates, by this my will first devised, and by and out of the part or share of and in the said stocks, funds and securities, and the dividends, interest, and annual proceeds thereof, to which any child or children of the said Amelia Maria Frances Duffield, by the said Thomas Duffield, or by any after-taken husband shall be presumptively entitled, pay and apply for the maintenance of any such child or children in the meantime, and until his her or their share or portion, shares or portions, shall become payable, such yearly sum or sums of money as to them the said John Elwes and Abraham Henry Chambers, or the survivor of

them, his executors, administrators, or other, the [317] trustees or trustee for the time being of this my will, shall seem meet."

The trustees are directed to execute this power by providing a fund for the maintenance of each child, out of the property to which such child is, in the language of the will, presumptively entitled. An only son would, under the will, be presumptively entitled to Southwood Park and Haverhill estates.

The testator says nothing about providing maintenance out of the estates left by the codicil to the eldest son, because these he then intended should be sold. As being presumptively entitled to these estates, the only son would be entitled to a maintenance out of the rents and profits of them; when his presumptive title ceased by the birth of a second son, the right to maintenance of the first would be determined. On the birth of a second son, that second son would become presumptively entitled to the Southwood Park and Haverhill estates, and it would become the duty of the trustees to provide for his maintenance and education out of the rents of those estates. Upon the death of an elder son, and the birth of a third, the second would become an elder son, and he would cease to be presumptively entitled to the Southwood Park and Haverhill estates; a presumptive title to which estates would commence in the third son. From this period, the son which was born second, must be maintained out of the estates destined for the first; and the son born third, out of those given to the second. This change in the mode of executing the power must take place whenever a second son becomes an elder, and any son becomes a second. No daughter can ever be entitled to a maintenance out of the estates whilst there is a son in existence, for no daughter will be presumptively entitled until there is a failure of male issue. It may, [318] perhaps, occur to your Lordships, that these changes in the execution of the power of maintenance may render the accounts unnecessarily complicated. Courts of justice are not to consider the inconveniences that may follow from the execution of powers, according to the terms by which they are created.

We can find nothing in the will that would authorize any Court to dispense with an exact compliance with the terms of this power; and we therefore think that it should be complied with to the letter.

(2d March 1829.) Eldon (Earl of): This was an appeal from a decree which came before this House immediately from the Vice Chancellor's Court, without any intermediate appeal to the Lord Chancellor, and it is satisfactory to me that it did so. I entertained an opinion that the decree was founded in error; but when I heard the case argued at the bar, and found that distinctions had been taken in cases subsequent to that of *Stephens* v. *Stephens*, it occurred to me that the best course ought to be taken in order to have that matter settled. I felt it very difficult to frame the questions to be put to the Judges. They have given these questions their most attentive consideration, and their opinions have been most ably stated by the Chief Justice of the Common Pleas, and that leads to the reversal of much of the decree.

I concur in all the answers which have been given by the learned Judges, and hope, as Lord Talbot said of *Stephens* v. *Stephens*, that this will be a leading case.

The reversal of this decree renders it incumbent on us to pay very great attention to the framing of a decree that may be proper for the case. I particularly thank the learned Judges for their answers to the [319] questions as to the maintenance, and I hope that we shall now be enabled to make a decree that will do justice to all the parties, and be reputable to this House.

There are two ways in which we may proceed. The one is to state the law, and remit the case to the Court of Chancery to apply it. The other is, that you yourselves should pronounce the decree, and propose it in the very form in which it is to be carried into execution. This latter course will save some trouble, and may be the most wholesome, and I think my time will not be ill bestowed in framing such a decree in this case, as I think ought to be read in this House. With this view I propose, that the further consideration of the case be adjourned generally, with the understanding that the adjournment shall only be for a very short time.

[320]

APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

LORD DILLON and BUTLER,—*Appellants;* PLASKETT and BRETT,—*Respondents.*

[Mews' Dig. vi. 1163, 1164. S. C. 2 Bli. N. S. 239. Commented on in *Anglo-Italian Bank* v. *Davies*, 1878, 9 Ch. D. 284; and see *In re Potts; ex parte Taylor* (1893), 1 Q. B. 654.]

P. and B. obtain a judgment in Ireland against D. and issue a *fi. fa.* under which his effects in his mansion house at R. are taken. Notice to the sheriff that D. had, some years before, conveyed his estates in the counties of M. R. and W. in Ireland, and of O. in England, and assigned his effects, including the goods in question, for a term in trust for his creditors, and that the trustee was in possession, and the sheriff relinquishes the goods. P. and B. file their Bill, and obtain production of the trust deed, from which it appears that D., under the deed, is entitled to an annuity or yearly rent out of all the estates, of £5000.

P. and B. sue out an *elegit* directed to the sheriff of R. who delivers to P. and B. lands in that county on which the annuity is charged, to the amount of a moiety of the annuity. But P. and B. being advised that they could make nothing of this, on account of the trust, proceed with the suit in equity, and obtain an order restraining the trustee from paying any part of the £5000 to D. without reserving what had been found competent by the Court to answer the demand of P. and B. till the hearing the cause, and further order. From that order, D. and the trustee appealed, but the order affirmed *in Dom. Proc.*

Plaskett and Brett, wine merchants, Westminster, in M. T. 1817, obtained judgment in England against Lord Dillon for £898 10s. and costs, but Lord Dillon having, as far as they knew, no available property in England, and he himself being resident abroad, they instituted proceedings in Ireland on the judgment, and in T. T. 1819, obtained judgment in the Court of [321] King's Bench there, for £1000 Irish, and £27 costs, and on that judgment a *fieri facias* issued to the sheriff of Roscommon, who seized the effects in Lord Dillon's mansion house of Loughlin in that county.

Soon after, (December 1819,) notice in writing was served on the sheriff that the effects had, by a deed dated 4th July 1815, been assigned to the appellant Charles Butler, and two other trustees for the benefit of Lord Dillon's creditors, and were then in their possession, in consequence of which the sheriff relinquished the possession. The plaintiffs (respondents) then searched the Public Registry Office in Dublin, and found that by an indenture dated the 4th July 1815, Lord Dillon had conveyed his real estates in the counties of Mayo, Roscommon, and Westmeath, and assigned his effects (including the effects in question) to trustees, upon trusts mentioned in an indenture bearing even date with that which was set forth in the register.

The plaintiffs then (13th July 1820,) filed their bill in Chancery against Lord Dillon and the trustees, in which after stating the facts, they prayed that the respondents should set forth the contents of the trust deed, and that the plaintiffs might be at liberty to elect whether to accept its provisions, and that if they should not elect to take under it, it might be declared void as against them, etc.

From the answers of Charles Butler (July 1822) the surviving trustee (the other two having died before answer) and of Lord Dillon, it appeared that the whole of his Lordship's estates in the counties of Roscommon, Westmeath, and Mayo in Ireland, and the county of Oxford in England, with the furniture, etc. in the mansion houses were, by indentures dated the 4th July 1815, conveyed and assigned to the trustees [322] for a term, for the payment of the creditors of his Lordship who resided abroad, and to whom an annual rent-charge, payable out of the lands, etc. was reserved.

The plaintiffs who had till then no notice of the trust, and never agreed to it, in November 1823 sued out an *elegit* on their judgment, directed to the sheriff of

Roscommon, who returned that the trustee was in possession of the rent-charge of £5000 payable out of the lands in Roscommon, in trust for Lord Dillon, and that he had delivered a moiety of the rent to the plaintiffs.

But the plaintiffs finding they could have no advantage from this without the aid of equity, filed a supplemental bill, in which they set forth the trust deeds at length, and prayed in the alternative, that a receiver might be appointed to receive the rents and profits of a moiety of the lands specified in the sheriff's return to the *elegit*, to the extent of a moiety of the £5000, and that the plaintiffs might be paid the same or a competent part in satisfaction of their demand, or that a receiver might be appointed to receive the rents and profits of the whole of the lands and premises mentioned in the trusts deeds, and that a competent part thereof might be applied to the payment of the charges having priority, under the trust, to the payment of the £5000 to Lord Dillon, and, after satisfaction of such prior charges, that a moiety of the £5000 or a competent part thereof might be applied in payment of the plaintiff's claim.

Before answer, the plaintiffs (7th December 1824) obtained from the Master of the Rolls an order of reference to the Master, to approve of a receiver of such a competent part of the £5000 as would be sufficient for the purposes of the rights of the plaintiffs; and the Master was directed to report **[323]** what would be a competent part. The Master reported, that he had approved of a receiver, and that £1250 a-year was a competent part of the moiety of the £5000 a-year, and this report was confirmed by his Honour, by an order of 16th December 1824.

His Honour, on application by the plaintiffs, made an order (1st February 1825), by which the trustee, Charles Butler, was restrained till answer, and further order, from paying the £1250 to Lord Dillon, or making any payment to him out of the £5000, without retaining sufficient to pay the £1250.

The trustee having answered, he applied to the Lords Commissioners of the Great Seal in Ireland to remove the receiver and the restraint, and the plaintiffs applied to have both continued, and thereupon the Lords Commissioners made an order, 27th July 1825, continuing both till answer by Lord Dillon, and further order.

After answer by Lord Dillon, the Master of the Rolls made an order (14th December 1825), continuing the restraint till hearing of the cause and further order; and on appeal from this order to the Lord Chancellor, his Lordship, by order, 4th February 1826, affirmed that of his Honour. From this last order, and preceding orders mentioned in it, the defendants appealed to the House of Lords, praying that the orders might be reversed. It was stated in the answers, that Lord Dillon had accepted of £3000 a-year instead of £5000, to which he was entitled under the trust.

Sugden and Lynch for Appellants: The sheriff had no right, under the *elegit*, to seize the rent-charge, but only the lands out of which the rent issued; and neither by *elegit*, nor *fieri facias*, could the sheriff of **[324]** Roscommon seize rents issuing out of so many estates in England and Ireland, and furniture, and other goods in different countries and counties. Equity never allows a suitor to proceed against parties and estates piece-meal; and all the trustees ought to have been parties, and all the property ought to have been proceeded against. The supplemental bill prays another kind of relief than that prayed for by the original bill, and is inconsistent with it. A term of this kind cannot be taken in execution, nor can the sheriff by *elegit* seize such complicated trust estates: *Scott* v. *Scholey*, 8 East, 467; *Metcalf* v. *Scholey*, 2 N. R. 461; *Doe d. Hull* v. *Greenhill*, 4 Barn. Ald. 684; *Bolch* v. *Watt*, 1 P. Wms. 444; *Burden* v. *Kennedy*, 3 At. 739; *Shirley* v. *Watts*, 3 At. 200; *King* v. *Marissal*, 3 At. 192. The result of all the authorities is, that a suitor must proceed as far as he can at law, before he applies to equity: and here the *fieri facias* was as inept as the *elegit*. In the first place, the property is not the subject of execution; and in the second place, one estate could not be taken without the rest. The sheriff, under the *fi. fa.* ought to have returned *nulla bona*: and to the *elegit*, that it could not be executed; but he does execute it, and delivers the land. [Lord Chancellor:—The delivery is not absolute, but only preparatory to an ejectment.]—Another point is the absence as parties not only of the trustees, but also of the creditors entitled to the distribution of this fund, that is, the prior incumbrancers; for the rule in equity is, that a subsequent incumbrancer can only come in on the terms of redeeming the prior incumbrancers, upon a bill for redemption and foreclosure. The

principle in equity is to wind up the whole concern. Another point of a more limited nature, but decisive of the cause, is this, that if the Court permits a judgment creditor to [325] proceed, he must bring before the Court all the parties interested in the subject, which is not done here. The interest of Lord Dillon was so much mixed up with that of the creditors, and of Lady Dillon, that all must be cited. Before a receiver can properly be appointed, the Court must see pretty clearly that the result must be favourable to the claims of the applicant. The sum impounded is also enormous for a debt amounting with interest only to £1000. There was no evidence here that the sheriff's return was filed, and this was a defect which was decisive of the question. *Vid. Ramsbottom* v. *Buckhurst*, 2 M. Sel. 565; *Fenning* v. *Durham*, 1 Barn. Ald. 43.

Horne and Parry for Respondents: In the first place this trust deed must be considered as a fraud upon the creditors, who knew nothing of it, and did not come in under it, and this upon a principle of great importance as between debtor and creditor, which is, that an insolvent debtor shall not, by a deed of his own, be allowed to take his property out of the hands of his creditors; and there is nothing in this case to take it out of the ordinary principles of equity. It appears from the recital of the trust deed, that Lord Dillon was an insolvent debtor; and if he was not before, that deed made him so. If the property was tangible at law, it was made intangible by the debtor; and where a debtor for the purpose of defeating a *bonâ fide* creditor converts property which was tangible into that which is not tangible at law, equity will make the property available to the creditor. The original bill was, no doubt, defective, because the respondents were unacquainted with the contents of the trust deed; and when they saw it, they amended their bill. As to the objection from want of parties, [326] Butler was the only surviving trustee at the time of filing the bill, and if trustees were afterwards appointed, they might be made parties before the hearing of the cause. The question at present was merely respecting this interlocutory order. As to all the other parties interested under the trust deed, the respondents wanted no relief as against them, and they were not necessary parties. The relief prayed for was merely against the £5000 per annum, which Lord Dillon had retained for himself. They say, the sum impounded is monstrous; but they forget that it is necessary to impound at once a sum sufficient to pay the debt and costs, because the whole fund must fall on the death of Lord Dillon. The order now in question leaves untouched the interests of the other creditors, and in that respect it is clear of all difficulty. The application was merely to prevent the trustees paying over this money to Lord Dillon, while the cause was depending. It was no principle nor practice of a court of equity not to appoint a receiver, unless it saw that the result would in all probability be favourable to the applicant. It was enough that the matter was uncertain, and that there was a danger that the fund might be lost. Then, they say, the *elegit* is good for nothing. Admitted: it is enough that we sued out the *elegit* to entitle us to proceed in equity. Mitford, 102, 3d ed.; and on this point, the case of *Vanderton* v. *Miller*, (not reported), decided by Lord Eldon, was another authority. They have insisted that this property is not a subject for an *elegit;* that is a point which we don't mean to argue with them: we concede the point to them, and we say, that as the insolvent debtor has rendered his property not tangible by *elegit*, we are entitled to proceed against him in equity. Then they say, that we ought to have made the prior incum-[327]-brancers parties, and offered to redeem; but that is not necessary, because we are not agitating any question with them. There is, in truth, no redeemable interests under this trust deed; and, at any rate, even in bills to carry into execution the trusts of a will, it is not necessary to make mortgagees parties, unless the plaintiff means to pay off and foreclose. The Court appoints a receiver, with directions to keep down the interest of the mortgages. They say, that the interest of Lord Dillon is so mixed up with that of the creditors under the trust deed, that they cannot be separated; but the fact is, that Lord Dillon is entitled, under the deed, to £5000 a-year, without deduction, and if he has accepted less, it makes no difference in the argument. [Lord Chancellor:—The prayer of your bill goes to affect the estates in England and Ireland, in which the trust creditors are interested. Suppose, then, that we now confirm this order, and the Court below should be of opinion that the creditors should be parties, why then they will be bound by an order to which they were no parties.]

This order affects the rights of nobody but Lord Dillon. *Scott* v. *Scholey*, 8 East, 467, and *Burden* v. *Kennedy*, 3 At. 739, are with us.

The reasons stated on the parts of the appellants for the reversal of the order were:

1st. Because the said annual payment of £5000, being merely an allowance by the permission of the general body of creditors payable out of funds, secured by equitable terms of years and chattels after payment thereout of many prior charges, is of course not extendible at law, and not being extendible at law, is not extendible in equity, for a court of equity only interferes where the subject matter would be liable to execution at law, if a formal impediment were removed; **[328]** but no decree which could be pronounced could remove the impediments which prevent the said annual allowance of £5000 from being liable to an execution at law, nor can a court of equity, by analogy to the legal remedy, give equitable relief; whereas, in this case, the subject, from its nature, is no more subject to legal executions than bank or government stock.

2d. Because, considering the judgment of the respondents as a lien on the reversionary freehold estate of Viscount Dillon, the only remedy to which respondents are entitled in a court of equity, is that of filing a bill to redeem the several incumbrances prior to the life estate of the appellant Viscount Dillon, and the several prior incumbrancers thereon, including the demands of the creditors who have executed the said indenture, and then to stand in the place of such incumbrancers, tacking their said judgment debt, and to foreclose the life estate of the said appellant Viscount Dillon, and which remedy the respondents have not sought by either of their said bills, and have not by either of them offered to redeem the said prior incumbrancers.

3d. Because, if even the said annual payment of £5000 was liable to execution at law, the alleged return of the sheriff on the said writ of *elegit* has never been filed, and the respondents have not supported the statements contained in the said supplemental bill respecting the said *elegit*, inquisition and return, by evidence.

4th. Because, supposing the sheriff to have made such return as in the said supplemental bill is mentioned, such return is erroneous and uncertain, and because the said writ of *elegit* was only directed to the sheriff of the county of Roscommon; whereas the said annual payment is payable out of lands in the **[329]** several counties of Mayo and Westmeath in Ireland, and of Oxford in England, as well as out of lands in the said county of Roscommon, and also out of the said chattels in the said counties of Roscommon and Oxford.

5th. Because it is not usual to appoint a receiver on interlocutory motion, except where the relief sought by the bill is such, that there can be but little doubt that such relief will be granted at the hearing, or in case of fraud and danger.

6th. Because the said several orders have been made in the absence of the several mortgagees and incumbrancers prior to the life estate of the appellant Viscount Dillon, and of the several incumbrances upon such life estate, and of his bond, judgment and simple contract creditors who have executed the said trust deed, and of the other two trustees of the said indenture; and the annual rental of the lands contained in the said sheriff's alleged return is not sufficient to keep down the annual charges thereon prior to the life estate of the appellant Viscount Dillon, and the charges on such life estate prior to the said annual payment of £5000.

The reasons stated in the case for affirming the order were:

1st. The respondents were not parties to, and have never acquiesced in or assented to the trust deeds under which the appellant, Lord Dillon, is entitled to the said annuity of £5000, and a debtor cannot by contract with some of his creditors limit or reserve to himself any estate or interest which shall not be liable to the demands of his other creditors either at law or in equity.

2d. If the said annuity of £5000 was according to law liable to be taken in execution, the respondents **[330]** were entitled to come into a court of equity for the purpose of obtaining the benefit of their execution, there being no means of obtaining the benefit thereof at law, owing to the complicated nature of the trusts under which the said annuity is payable.

3d. If the said annuity was not liable by law to be taken in execution, the respondents were entitled to apply to equity for relief to the extent of obtaining payment of their judgment debt out of the said annuity, the respondents having taken out

execution, and done every thing in their power to obtain satisfaction of their demand at law.

4th. The respondents being, as they humbly submit, in either case entitled to the aid of equity, the Court was justified in appointing a receiver, and restraining the appellants as before stated, the appellant, Lord Dillon, being resident abroad, and having no property whatever except the said annuity, which will cease on his death.

Last. If the appellants felt aggrieved by the order of the 27th of July 1825, the order of the 7th December 1824, the Master's report thereunder, and the order of the 16th of December 1824, confirming such report, or by any or either of them, or anything therein contained, they should have appealed therefrom before.

(21st July 1828.) Ordered and adjudged that the appeal be dismissed, and the orders complained of affirmed, with £150 costs.

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APPEAL

From the Court of Chancery in Ireland.

DAVID and WILLIAM RUTTLEDGE,—*Appellants;* ROBERT RUTTLEDGE,—*Respondent.*

[S.C. 2 Bli. N.S. 352.]

P. R. having a lease (1736) for lives renewable, settles (1743) the lands comprised in it, on the marriage of his son, T. R., to the use of himself for life remainder to T. R. for life, remainder to the sons of the marriage in tail male, reversion to himself in fee. Issue of the marriage, P. R. the younger. P. R. the elder, (1749) purchases the fee of the lands in the lease, and by will (1766) devises the inheritance to T. R. for life, remainder to P. R. the younger, for life, remainder to his sons successively in tail male; and after some other remainders, remainder to D. and W. R. (appellants), the one for life the other in tail—reversion to his own right heirs. And T. R. was empowered, in case P. R. the younger refused to settle his interest in the lease to the same uses as testator had limited the inheritance, at his discretion to deprive P. R. the younger of his life estate, under the will; but this power not executed. Testator dies in 1769; settlement (1770) on marriage of P. R. the younger, whereby the lease is conveyed to trustees, in trust for T. R. for life, remainder to P. R. for life, remainder to the issue of the marriage in tail, reversion to T. R. absolutely. P. R. (1799) dies without ever having had issue, and T. R. conveys the reversion of the lease to R. R. (respondent), his natural son, and dies in 1805. In 1811, D. R. and W. R. become entitled, in possession, to the inheritance of the lands comprised in the lease, as the last remainder-men, under the will of P. R. the elder, and they refuse to renew the lease to R. R. on the ground that it was merged in the fee when that was purchased by P. R. the elder; or that P. R. the younger had elected to take under the will, and allowed his interest in the lease to go with the inheritance; and that [332] the settlement on the marriage of P. R. the younger, under which T. R. took the reversion of the lease, was a fraud on the will, etc. But the Court below decreed a renewal, and the judgment affirmed by the Lords.

In 1736 Peter Ruttledge the elder, obtained from the owners of the fee, a lease of certain lands in the county of Mayo, for three lives, viz:—the lives of Peter, and of his sons Thomas and William, with a covenant for perpetual renewal, at a rent of £160 per annum, and a renewal fine of £1 3s.

In contemplation of a marriage between the son of Thomas and Mary Reddington, Peter Ruttledge, in 1743, covenanted in consideration of the marriage, and £200 out of the marriage portion of Mary Reddington, to convey the lands comprised in the lease to trustees to the use of himself for life, remainder to the use of

the son Thomas, for life, remainder to the first and other sons of the marriage in tail male, with the ultimate remainder to Peter himself. The marriage took effect, and there was issue of it Peter Ruttledge the younger, and four daughters.

In 1749 Peter the elder purchased the fee of the lands included in the lease, and of other lands in Mayo and Galway, and in 1766 made his will, whereby he bequeathed to Thomas his leases for lives and years, and his personal property, and devised all his real estates of inheritance to trustees, to the use of Thomas for life, remainder, as to his Mayo estates, to his grandson Peter the younger, for life, with remainder to his first and other sons in tail male, remainder to Richard Rutledge, son of testator's second son William Ruttledge, (then deceased,) for life, with remainder to his first and other sons in tail male, remainder to William Ruttledge, son of testator's brother Andrew, for life, with remainder to his first and other sons in tail male, **[333]** remainder to David Ruttledge, son of testator's brother James Rutledge, with remainder to his first and other sons in tail male, reversion to testator's right heirs. There was a proviso in the will, that in case Peter the younger should marry without his father, Thomas's, consent, or should refuse upon being required by his father, to settle his interest in the lease under the articles of 1743, to the same uses to which the testator had limited his estates of inheritance, his father, Thomas, should be empowered at his will and discretion to deprive Peter of his life interest in the estates of inheritance under the will; and Thomas was empowered to charge the estates with a sum of £5000 to be applied according to his discretion, and he was made sole executor.

The testator died in 1769, and in 1770 a settlement was made on the marriage of Peter Ruttledge the younger, and Catharine Bloomfield, whereby the lands comprised in the lease of 1736 were vested in trustees to the use of Thomas, the father, for life, remainder to the use of Peter for life, remainder subject to a jointure to the use of the first son of Peter and Catharine, who should attain the age of twenty-one, his heirs and assigns; and in case there should be no issue male of Peter by Catharine, or the issue should die under twenty-one, the lands to be conveyed to Thomas, his heirs and assigns; and Thomas and Peter covenanted to levy a fine, which was levied 1771.

In the year 1787, by a settlement executed in contemplation of a marriage then intended between the respondent and Elizabeth Knox, bearing date the 28th day of August 1787, and made between the said Thomas Ruttledge and Elizabeth his wife, of the first part; the respondent, Francis Knox of Rapper, and Elizabeth Knox, third daughter of the said Francis, of **[334]** the third part; Right Honourable Henry King, of Belleek, in the county of Mayo, William Ruttledge of Foxford, in said county of Mayo, esq., of the fourth part; and John Knox of Castlerea, and Joseph Lambert of Togher, both in the county of Mayo, esquires, of the fifth part; reciting, amongst other things, the said lease of April, 1736, the settlement last mentioned, on the marriage of Peter the younger, and the reversion of the said lease thereby limited to the said Thomas, in failure of issue male of the said Peter; the said Thomas did, in consideration of the said marriage of the respondent, convey the said reversion of the said lease, to the use of the respondent for life, with remainder to the issue of the intended marriage in strict settlement.

Peter Ruttledge the younger, died in 1799, without having ever had issue, leaving his wife, who is still living, and his father, the said Thomas Ruttledge, him survivors.

Two of the *cestui que vies*, in the original lease of April 1736, namely, Peter the elder, and William Ruttledge, having died, the said Thomas Ruttledge on the 13th day of May 1799, executed a renewal of said lease to the respondent, pursuant to the covenant for perpetual renewal contained in said original lease, and thereby substituted the lives of respondent and of Francis Lambert, in the place and stead of the two lives which had so fallen.

By deed, bearing date the 10th day of June, 1799, the said Thomas Ruttledge, in consideration of his love and affection to the respondent, conveyed to him absolutely the reversion of the said lease to which he was entitled, expectant upon the death of respondent without issue male.

In 1805, Thomas Ruttledge died, having previously made his will; and thereby, after ratifying the **[335]** respondent's marriage settlement, he devised the entire

residue of his property of every description to the respondent, who afterwards duly proved the same.

Upon the death of the said Thomas Ruttledge, Richard Ruttledge, the next remainder-man, under the will of Peter Ruttledge the elder, became seised of an estate for life in the said lands, subject to the said lease of April, 1736; and during his life the respondent regularly paid to him the rent reserved by the said lease, and respondent has also regularly paid the jointure of £400 a-year to the widow of Peter the younger.

Richard Ruttledge died in the month of August 1811, unmarried and without issue; and thereupon David Ruttledge, one of the appellants, being the last remainder-man named in the will of Peter the testator, became in like manner seised of an estate for life in the said lands, subject as aforesaid to the said lease of April 1736, and the covenant for renewal therein; the remainder in tail therein being vested in the appellant William Ruttledge, his eldest son.

The said Thomas Ruttledge was one of the lives named in the renewal of the 13th May 1799, hereinbefore stated; and the respondent being desirous to procure a renewal, in consequence of his death, applied to the appellant David, to execute the same, tendering him at the same time all rent and arrears of rent then due, together with the renewal fine, and naming a new life; but the appellant having refused to execute the same, the respondent caused a proper renewal to be prepared agreeable to the lease of April 1736; and having caused it to be engrossed, the respondent executed two parts thereof, and had the same tendered to the appellant David, on the 9th of August 1816, together with a sum of £800, being the amount of the rent due, and also £3 7s. 6d., being the **[336]** renewal fine and interest then due; but the appellant David, refused to accept the said rent and renewal fine, and refused to execute such or any renewal, alleging that he was not bound by the said covenant.

In Trinity term 1819, the appellant David, brought an ejectment in the Court of King's Bench, in Ireland, for the recovery of the lands comprised in the said lease; and thereupon the respondent filed his bill in the Court of Chancery there against the said appellant, stating the facts above-mentioned, and praying, amongst other things, that he might be decreed entitled to have the said original lease renewed, pursuant to the covenant for perpetual renewal therein contained, and that the said covenant might be specifically executed by the said appellant David.

Upon the 9th of February 1820, the appellants filed their joint answer, in which they resist altogether the respondent's right to a renewal of the said lease of 1736; alleging that it merged in the fees of the estate purchased by the said Peter Ruttledge the elder; and also, that said Thomas and Peter the younger, elected to take under said will of said Peter the elder, and thereby relinquished all right and interest in the said lease, supposing the same to be considered as still subsisting.

Issue having been joined, and the before stated facts having been proved in evidence, the said cause came on to be heard before the Lord Chancellor upon the 22d of February, 1821, when his Lordship was pleased to decree the respondent entitled to a specific execution of the covenant for perpetual renewal in the said lease of the 3d day of April, 1736, according to the true intent and meaning thereof; and on payment to the appellant David, of the sum due in respect of rent and renewal fines, that the appellants should exe-**[337]**-cute unto respondent a renewal of said lease for the lives in respondent's bill named, or for such other lives as the master should approve of; and that in case the parties differed as to the amount due in respect of such rent, or as to the form of such deed of renewal, it should be referred to one of the masters of the said court, to take an account of the due to the appellant, in respect of the said rent and renewal fines; and also to approve of a proper deed of renewal, to be executed by the parties pursuant thereto; and that the injunction theretofore awarded against proceeding on foot of the ejectment should be continued until further order.

From this decree David, the tenant for life, and his son William, the tenant in tail under the will of Peter the elder, appealed.

For the Appellants it was contended, that the lease merged in the fee when that was purchased by Peter the elder; that if it did not, it was a breach of trust in Thomas not to have executed his power of putting his son Peter to his election, whether to take under the will of his grandfather, or under his father's settlement,

and that both Thomas and Peter must be considered as having elected to take under the will; and that the settlement made on the marriage of Peter the younger, by which Thomas reserved to himself the reversion, or *quasi* reversion, of the lands comprised in the lease, was a fraud on the will, and also on his son Peter, who was thereby deprived of the power of making any provision for his issue by any future marriage; that the charge of £5000 over-rode the whole of the estates; and that when Thomas executed the power to charge, he was bound to bring in under the will all the interest he had in the estates, and must do it in order to give effect to the power.

[338] For the respondent it was contended, that the lease of 1736 did not merge in the fee purchased by Peter the elder in 1749, for that transaction could not affect the interests of those who had claims on the lease under the settlement of 1743 on the marriage of Thomas, and the testator himself evidently considered them as subsisting interests when he gave Thomas the power to put Peter to his election, whether to take under the settlement, or under the will; that it was left to the discretion of Thomas whether to execute that power or not, and that as he did not execute it, no case of election ever arose; and even if it had existed originally, it could not now be raised after an acquiescence, by all parties, from 1770 till 1816. Peter the younger was tenant in tail of the lands comprised in the lease under his father's settlement; and by the settlement of 1770 he had barred his estate tail, and that was the foundation of the respondent's title to the lease; and it was nothing extraordinary that the deed of 1770 should contain a covenant by Peter to transfer every thing that was necessary to make the whole conveyance stand to the uses intended; and Thomas, the tenant for life, and Peter, the tenant in tail, had full power over the lands comprised in the lease, and to settle them as they thought proper; and the cases of *Crossing* v. *Scudamore*, 1 Vent. 137; *Blake* v. *Blake*, 3 P. Wms. 10 (*n*); and *East* v. *Cook*, 2 Ves. sen. 33, were cited.

The reasons stated in the cases were these—for reversing the decree:

1st. Because by the acquisition of the fee-simple and inheritance of and in the said lands by the said Peter Ruttledge the elder, in the year 1749 as aforesaid, his lease for lives thereof became and was merged, and the rent thereby reserved was extinguished, and **[339]** such lease is not now subsisting for any purpose whatsoever.

2dly. Because the said Peter Ruttledge the elder, having so acquired the fee-simple and inheritance of the said lands, he did by his said will devise the same, and several other estates to the use of the said Thomas for life, and did bequeath all his leases for lives and years, and the residue of his personal estate, to the said Thomas, and did thereby raise a necessity for the said Thomas to elect between the said articles and the said will, and the said Thomas did accept all the benefits accruing by and under the said will, and thereby concluded his election, and the respondent is bound thereby.

3dly. Because the respondent, by claiming the sum of £5000 and interest, which the said Peter the elder, by his said will empowered the said Thomas to charge upon his estates of inheritance in the county of Mayo, and which the said Thomas did accordingly charge in favour of the respondent, has elected to take under the said will, and is thereby precluded from claiming any interest in the said lands, by a title which is opposed to or inconsistent with the said will.

4thly. Because the said lands to and in which the respondent claims such title and interest as aforesaid, were part of the estates of inheritance which the said testator, Peter the elder made chargeable, and the said Thomas did charge with the said sum of £5000 and interest, and the respondent, while he seeks the benefit of such charge on the one hand, ought not at the same time to be permitted to claim under the party who executed the same in his favour, any of the lands themselves which were subject thereto.

5thly. Because the said testator, Peter the elder, in and by his said will expressly declared his intention **[340]** to be, that all his acquisitions should go together, according to the uses thereby limited, and that the said Peter the younger should settle to those uses such interest as he was entitled to in the lands in question, under the said articles of the 10th November 1743, (that interest being a *quasi* estate tail, and the use limited to him by the said will, being an estate for life,) and the said testator, with that view, authorized the said Thomas to deprive the said Peter the younger, his son, of the use for life thereby limited to him in case he should refuse

so to settle the said interest, but the said settlements of 1770 and 1787, and the several subsequent conveyances executed by the said Thomas, are in effect directly opposed to such intention and desire of the said testator, inasmuch as thereby his acquisitions are separated, and made to descend in a different manner and to different persons, and such settlements and conveyances are a fraud upon the said will, and ought not to be supported by a court of equity.

6thly. Because if the said lease for lives was not merged by the acquisition of the fee simple and inheritance by the said Peter the elder, as aforesaid, yet the *quasi* reversion of and in the said lands expectant on the failure of issue male of the said Thomas, was by the said articles of 1736 reserved to the said Peter the elder, and such reversion passed by his will, whereby he limited his estates to such uses as aforesaid, in strict settlement, and the said Thomas being by that will a mere tenant for life, could not make any valid disposition, either at law or in equity, of such reversion as he assumed to do by the said settlement of 1787, under which the respondent claims.

For affirming the decree:

[341] 1st. Because Peter Ruttledge the elder, by the settlement of 1749, became a trustee of the lease of 1736, for the several persons entitled to equitable estates therein under that settlement, and these equitable estates could neither merge in the legal fee subsequently acquired by him, nor be in any respect prejudiced by such acquisition.

2d. Because the testator, Peter Ruttledge, does not by his will make or affect to make any disposition of the lease of 1736, and clearly treats it as a subsisting interest, so that no implied duty of election arises upon the will.

3d. Because the power given by the will of the testator, Peter the elder, to Thomas, to deprive Peter the younger of the life estate, thereby limited to him, in the event of his marrying without his father's consent, or refusing, at the desire of his father, to settle the freehold lease of 1736 to the same uses to which the inheritance was limited, was plainly discretionary in Thomas, and to be exercised or not at his will and pleasure, and as this power never was exercised by said Thomas, the case in which Peter would have been expressly bound to elect, never arose.

(July 28th, 1828.) Lord Lyndhurst (Chancellor): I have spent some time in examining the whole of the circumstances of this case, and without going into the details, I have only to inform your Lordships that I see no reason to find fault with the judgment of the Court below, and move that it be affirmed.

Affirmed accordingly.

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[342] APPEAL FROM THE COURT OF SESSION.

PATTISON and Others (Directors of the Albion Insurance Company),—*Appellants;*
MILLS and Others,—*Respondents.*

[Mews' Dig. viii. 286; xiii. 1103, 1350; S.C. 2 Bli. N.S. 519. On point as to the law applicable to the contract, see *Delaurier* v. *Wyllie*, 1889, 17 Ct. of Sess. 4th Ser 191.]

Before the statute 6 Geo. 1. c. 18, by which the monopoly of insuring marine risks in partnership was given to two companies, (the Royal Exchange and the London Insurance Companies,) was repealed, the Albion Fire and Life Insurance Company, of London, by an Agent at Glasgow, agreed with certain persons at Glasgow for a general insurance on a steam-boat, without any mention of an exception of sea risk, and paid the full premium. The Agent, although apprised by the Secretary of the Albion Company that they did not consider themselves at liberty to insure marine risks, never communicates that circumstance to the assured, and never delivers the actual policy, in which the exception of sea risk was inserted. The steam-boat is lost by fire at sea, and an action is brought in the Scottish Courts on the original contract, concluding in the alternative for a policy conformable to the contract, without the exception of the sea risk, or for payment of the sum for which the steam-boat was

insured. Judgment for the assured, in the Court of Session, on the ground that fire at sea in a steam-boat was not a risk contemplated at the time when the statute 6 Geo. 1. c. 18. passed, and therefore was not within the purview of that statute. This ground repudiated by the House of Lords; but the judgment of the Court below affirmed on another ground, viz. that that part of the statute which gave the monopoly of marine risks to the two Companies, the Royal Exchange and the London, did not extend to Scotland; and that the contract being made in Scotland, and the action founded on that contract, the restriction in the statute did not apply, and the assured were entitled to recover.

On the 4th July 1820, William Mills, and others, as a committee of management for the proprietors of the *Robert Bruce* and *Superb* steam-boats, plying between Glasgow and Liverpool, effected an insurance for **[343]** a year on these vessels, paying the full premium of a general insurance, with the Albion Fire and Life Insurance Company of London, through the medium of Thomas Hamilton, the agent for that company at Glasgow. At that time the Albion Company acted at Glasgow for the Eagle Insurance Company of London, and the sum to be insured between them was £10,000, being £5000 on each vessel. Hamilton divided the risk as follows; with the Albion, £3000 on the *Robert Bruce*, and £3000 on the *Superb;* with the Eagle, £4000 on both vessels; and upon payment of the premium, a receipt in the following terms was given by Hamilton to the assured:—

"Albion Fire and Life Office, Glasgow, 4th July 1820. James Dennistoun, William Mills, Colin Arrott, James Moffat, and John T. Alston, esquires, as a committee of management for themselves and others, having this day effected an insurance of £6000 with the undersigned, on behalf of the Albion Fire and Life Insurance Company of London, on the property specified in the check corresponding with this memorandum, a policy will be forthwith prepared at the office in London for the said insurance; and such policy will be delivered to the assured, or to his, her, or their order, on the third Monday in the ensuing month, or on any subsequent day.

(signed) *P. Thomas Hamilton*, agent for the Company.
Robert Mitchell.

"Premium . . .	£31 10 0
"Duty	9 0 0
	£40 10 0"

[344] Upon this last receipt and obligation there is indorsed and written, in the hand-writing of Mr. Hamilton, or of his clerk Mitchell, the following memorandum and declaration; viz. "*This receipt insures*, as under; viz.

"On the steam-boat *Robert Bruce*, including machinery and apparatus belonging thereto		£3000 0 0
"On the steam-boat *Superb*, as above mentioned		3000 0 0
"Sum insured on the above by the Albion secretary in London . .		4000 0 0
		£10,000 0 0
"Premium on £4000	£21 0 0	
"Duty on £4000	6 0 0	
	£27 0 0	

"£5000 of the above-mentioned sum is insured on the *Superb*, and £5000 on the *Robert Bruce*."

The regular policy was neither applied for nor delivered till after the loss hereinafter mentioned.

On the 24th June 1821 the policy was renewed for another year; and, on payment of the premium to Hamilton, he delivered to the assured a certificate of renewal, and a receipt signed by Phipps, the secretary to the Albion Company, in these terms:

" Albion Fire and Life Office, London, Midsummer, 1821. Renewal certificate on fire policy, No. 56,978, insuring £6000 to James Dennistoun, **[345]** William Mills, Colin Arrott, James Moffat, and John T. Alston, esquires.

One year's premium	£31	10	0
Duty	9	0	0
Total payment	£40	10	0
£4000 insured with the Eagle Company, per policy No. 61,725, premium and duty	27	0	0
	£67	10	0

" 1821.—This is to declare that the above policy has been *renewed*, and that *the insurance granted thereby will continue in force* from the 24th June 1821, to the 24th June 1822. (signed) *Warner Phipps*, Secretary."

On the 24th October 1821, the *Robert Bruce*, while on a voyage from Liverpool to Dublin (undertaken with the permission of the Company, which was not disputed) took fire, and as the fire could not be extinguished otherwise, the vessel was scuttled and sunk on the coast of the Isle of Anglesea, and it was found that the damage exceeded the amount of the sum insured. The loss was intimated to the Company, which refused to pay, and then the regular policy was demanded. The policy produced was found to contain an exception by which the risk was suspended *while the vessel was at sea*. This was rejected, and the assured, after using the necessary arrestments to found the jurisdiction, raised their action on the agreement against the Albion Company, and Hamilton their agent, (it is not necessary to notice another action brought against the Eagle Company,) in the Admiralty Court, contending for a general policy with-**[346]**-out the exception of sea risk, or for payment of the £3000 insured on the *Robert Bruce*, whether a policy should be delivered or not. The summons, after narrating the circumstances concluded in these words:

" That the Albion Fire and Life Insurance Company, and Thomas Hamilton, their agent in Glasgow, ought and should be decerned and ordained, conjunctly and severally, by decreet of the Judge of our High Court of Admiralty in Scotland, *immediately to furnish and deliver to the pursuers a valid and effectual policy of insurance* upon the said steam-boats or packets, for the said sum of £6000 sterling, and that for the period of one year, from the 24th day of June last, 1821, when the premium therefore was paid, and containing in the said policy the usual clauses, and obligation of insurance against the usual risks, as before specified; and, among others, an insurance against the risk of damage occasioned, or which may be occasioned to the said steam-boats or packets by fire at any time, and any where, during the period aforesaid of the insurance; *and whether such policy shall be furnished and delivered to the pursuers or not*, or in whatever terms they may express, or have expressed the same, they, the said defendants ought and should be decerned and ordained by decree foresaid, conjunctly and severally, to make payment to the pursuers of the foresaid sum of £3000 sterling, being the sum insured as aforesaid upon the said steam-boat or packet *Robert Bruce*, with the lawful interest thereof, from the said 28th day of August last 1821, when *the loss and damage was sustained*, and, in time coming, till payment."

The Company pleaded two defences—one of law, the other of fact.

[347] The defence in law was founded on the statute 6 Geo. 1, c. 18, by which the monopoly of marine risks was given to two companies, the Royal Exchange Assurance, and the London Assurance, no others, as companies, being allowed to undertake marine risks, or their obligations being declared to be illegal and void; and fire at sea being a common marine risk, the Albion Company (though the statute 6 Geo. 1, c. 18, has been since repealed) being precluded, at the time when the policy in this case was effected, from insuring against any marine risk.

The defence in fact was, that the Albion Company had not undertaken to insure against fire at sea, but only when in port.

The Judge Admiral, by interlocutor dated May 16, 1822, repelled the defences on the statute on the ground that it did not extend to Scotland; but before giving his

decision on the other part of the case, he appointed the defenders (the Albion Company) to give the pursuers (proprietors of the steam-boat) inspection of the books of Mr. Hamilton, the agent, and allowed the pursuers to produce certified extracts of such of the memoranda in, and other parts of Hamilton's books, as related to the insurance: and he also appointed the parties to condescend on what they offered to prove with respect to the premium as compared with the risk, in case it should be thought proper to consider that question.

The Judge Admiral afterwards, on the petition of the insurers, superseded the consideration of the question on the statute: and several documents having been produced from Hamilton's books, etc. he decided in favour of the insurers on the main point, on the ground stated in this interlocutor:

[348] "The Judge Admiral having considered the minute for the pursuers, with the answers for the defenders, writings produced, and whole process, finds, that the order for the insurance in question, transmitted by the defenders' agent at Glasgow to the defenders at London, is qualified with the condition, that the insurance should not extend to the vessel while at sea: finds, that there is no foundation for the allegation, that there has been a superinduction upon this order: finds, that the policy of insurance afterwards executed contains a similar qualification: finds, no grounds for maintaining that the correspondence between Mr. Phipps and Mr. Hamilton supports the plea maintained by the pursuers: finds, that in these circumstances it is unnecessary to give judgment upon the plea of the defenders, founded on the statute, and under the whole circumstances of the case assoilzies the defenders from the conclusions of the libel, and decerns."

And he afterwards added the following note: "Where the conditions of a policy of insurance are perfectly clear, it appears to the Judge to be irrelevant to make investigations either into the terms of other policies of insurance, or into the adequacy or inadequacy of the premium." The insurers then petitioned for their expenses, which were refused.

The cause was then brought into the Court of Session by mutual actions of reduction, and the conclusions in the summons for the assured were the same as those of the summons in the Admiralty Court. The actions were conjoined, and after some further proceedings, the Court remitted them to the Jury Court upon the following issue:

"It being admitted, that on the 27th or 28th days **[349]** of August 1821, the steam-vessel called '*The Robert Bruce*,' the property of the pursuers, was destroyed by fire, while at sea, on her voyage betwixt Liverpool and Dublin:

"Whether the defenders promised and agreed to insure the pursuers to the extent of £3000, or about that sum, from all loss and damage which might be caused by fire to the said steam-vessel, while at sea as aforesaid, and whether the defenders have failed to perform the said promise and agreement, to the loss and damage of the pursuers?"

Damages laid at £3000.

On the trial of the cause, the pursuers gave in evidence the certificates or receipts and memoranda given to the assured at the time of effecting the joint policies, and also certificates and memoranda previously given to them when they had insured separately, and also letters which had passed between the agent and the company relative to the previous insurance, which letters were in these terms:—

In his letter of this date (Sept. 13th, 1819), Mr. Hamilton, when transmitting what these persons call *the orders* to insure, says to Mr. Phipps, "*I am not disposed to think that the insurers on the Robert Bruce steam-boat*, as *per* fire orders, No. 14 to 22, inclusive, excepting No. 21, *will be satisfied with the introduction of the clause*, '*but not while the same shall be at sea.*' *I think that, in addition to the rivers, the channel ought to be admitted, as this vessel is expressly to ply between Clyde and Liverpool, and will be a great part of her time in the channel.*"

The answer of Mr. Phipps, was: "In answer to your remark respecting the clause which exempts the company from loss on steam-boats while at sea, **[350]** I have to state, that it is a point on which we have no choice. The Royal Exchange and the London Assurance are the only companies which have a right as companies to undertake insurances on vessels while at sea, and no other company can, lawfully, undertake such risk If, therefore, the proprietors of the Robert Bruce *are*

not content to hold our policies, with the exceptions complained of, I will thank you to advise me, and we shall then, of course, consider the insurance not to be renewed after the present."

The pursuers gave evidence that no communications had been made to them of the exclusion of sea-risk in the policy, although the agent was apprized that the matter was material, and that no policy had ever been delivered. The pursuers also gave it in evidence that the premium paid by them was equal to that at which other steam-boats were insured at the time without the exclusion of sea-risk, and that it was the practice of the agents of other insurers to deliver the policies to the assured.

The evidence was admitted, and the Jury found a general verdict for the pursuers against all the defendants, subject to a bill of exceptions on three grounds:

1st. That the evidence given for the pursuers was inadmissible, inasmuch as the policy itself which excluded the sea risk was the only foundation of the contract between the parties, and was the only admissible evidence. 2dly. That although the evidence were admissible, and the agreement to insure proved, yet that the defenders being admitted to be an English company, and the policy itself being admitted to be executed in London, the Judge ought to have directed the Jury to find for the defenders, because any policy **[351]** or agreement for a policy, made by them to insure against marine risk, was illegal and void under the statute 6 Geo. 1, which was then in force. 3dly. That the Jury ought not to have been directed to find a verdict generally against all the defenders, but to have found either against the directors of the company only, or against Hamilton the agent only.

The Court of Session disallowed the exceptions, and pronounced the verdict final (July 11th 1827).

The Court then resumed consideration of the defence under the statute, which had been reserved by the Judge Admiral, and pronounced finally for the assured in the terms and on the *ground* used and stated in the interlocutor (January 22d 1828):

"*In respect the insurance in question is an insurance against the risk of fire on a steam-vessel, which is not a marine insurance contemplated by the said act*, the lords, in the action of reduction and for payment, at the instance of William Mills and others, find that the statute founded on does not apply to this case; repel the defence founded on the said statute, as well as the other defences to the said action, and reduce, decern, and declare, in terms of the reductive conclusions of the libel; and in respect of the said verdict and award, find the defenders, conjunctly and severally, liable to the pursuers in damages, modify the same to the sum of £3000 sterling, and decern for payment thereof, with interest thereon in terms of the libel; and in the action of reduction, at the instance of the Albion Fire and Life Insurance Company, sustain the defences, assoilzie the defenders, and decern: find the Albion Fire and Life Insurance Company, and the defender Thomas Hamilton, conjunctly and severally, liable in the expences of the conjoined processes incurred in this **[352]** and in the Admiralty Courts, allow an account thereof to be put in."

The reason of the Court's deciding on the ground stated in the interlocutor was, that one Judge was rather of opinion that this was an English contract, to which the statute 6 Geo. 1, c. 18, applied. They agreed that this part of the act did not apply to Scotland.

From this judgment the Albion Company appealed to the House of Lords, for the following among other reasons:

1st. Because the original policy renewed by the memorandum of Midsummer 1821, expressly excludes risk of fire at sea, and this was the only contract made by the appellants.

2d. Because it was not competent for the respondents on the trial of the issue to adduce any parole or collateral evidence in order to control and vary the clear import of the written evidence.

3d. Because it was more especially incompetent for the respondents to adduce, for the purpose aforesaid, on the trial of the said issue, parole evidence of the matters and things set forth in the bill of exceptions, the same being (in great part) matters and things which had taken place *inter alios*, and in which the appellants were not concerned.

4th. Because it is inconsistent and repugnant to the whole body of evidence adduced in the cause, to make all the appellants, some of them being principals and some agents, joint contractors, and jointly liable to indemnify the respondents.

6th. Because the contract of insurance founded upon by the respondents was a contract made and signed in England, by a society established there, and from the date of that contract, until and at the time of the loss [353] of the *Robert Bruce*, the statute 6 Geo. 1, c. 18, was in force, and by the operation of that Act, it was incompetent for the appellants to make themselves legally responsible for any risk which might befal the *Robert Bruce* "while at sea."

For the respondents it was contended, that the judgment ought to be affirmed, for the following among other reasons:

1st. Because the whole evidence tendered by the respondents at the trial, and admitted by the presiding Judge, was competent and proper evidence for proving the matters in issue, and did fully warrant and support the verdict returned by the Jury. This was not an action *on a policy*, but *for a policy*, or for damages, in consequence of not obtaining one. The very foundation of the respondents' claim was, that after contracting and onerously paying for a policy to cover a special risk, no such policy was delivered: and *the first conclusion* of their summons, accordingly, is, that the appellants should be ordained to deliver such a policy, on which action might be brought. The cardinal fact which entirely takes away the ground of the appellants' exception is, that no policy was ever delivered by the one party or accepted by the other: and, therefore, it is in vain to say that their contract was embodied in such an instrument, and that the terms of it can only be known from its tenor. The answer is conclusive,—that no such instrument was ever delivered or communicated to the respondents: and that the policy said to have been subscribed by the appellants in September 1820, having been retained in their own hands, and studiously withheld and concealed from the respondents, can never be referred to as evidence of a mutual agreement.

2d. Because the statute 6 Geo. 1, c. 18, had no bearing on the question of fact to be decided by the [354] Jury, but was matter solely for the consideration of the Court of Session.

3d. Because the verdict of the jury was properly returned for the respondents generally, and without distinguishing between the case of the appellant Hamilton, the agent in Glasgow, and that of the other appellants, the office-bearers and partners of the Albion Insurance Company of London: and because the Judge did, justly and legally refuse to direct the said Jury to find alternately, against one or other only of these appellants.

1st. The resident agent or mandatory of a foreign party is, by the law of Scotland, liable, along with his principal, to any judgment or decree obtained in the courts of that country, in the issue of suits maintained for behalf of such party, by such agent or mandatory although confining himself strictly to the terms of his mandate or instructions.

2d. An accredited agent in the general business of a party, whether in the same or in a foreign country, will bind that party to individuals who *bonâ fide*, contract with him in the name of such party, as to all matters falling apparently within the line or course of that general business, although it may happen that, by his private instructions, he was debarred from entering into such transactions.

3d. *No evidence* being produced by the appellants, to show whether the actings of the agent, in his dealings with the respondents, were or were not within his powers or instructions, the justice of the case required that the verdict should be against both, conjunctly—their ultimate claims of relief, as against each other, being left entire, on the application of such verdict.

[355] In regard to the interlocutors of 22d and 25th January 1828, repelling the defence founded on the act of 6 Geo. 1, c. 18, and finally decerning in the reduction, and for expenses.

4th. Because the statute in question (which has been since repealed) plainly did not extend to Scotland, and was intended only to give the two favoured companies a monopoly of marine insurances in the English market: while the property insured, in the present instance, was Scottish property, and the contract for insurance entered into in Scotland, in a public office or place of business in Glasgow, and by

parties who were not bound to know, and could not be affected by the provisions of any foreign law. The act is manifestly applicable to England alone; as the necessary actions for giving effect to it are directed and authorised to be brought in the courts of Westminster only; whereas, in another branch of the very same statute (commonly called the Bubble Act) which was meant to extend to Great Britain and Ireland, the relative actions are allowed to be brought in the Courts either of Westminster, Edinburgh, or Dublin; and when it was afterwards thought expedient, that its provisions should be made operative in the American Colonies, it was found necessary to pass an additional or supplementary statute (the 14 Geo. 2, c. 37,) expressly extending them to these colonies.

5th. Because it is humbly conceived that the monopoly of the favoured companies did not extend to the insurance of steam-vessels, which had no existence at the date of the statute, and are exposed to hazards of a particular description, and substantially diverse from any that could then be contemplated as the objects of marine insurance. Monopolies and restraints on the [356] employment of capital and industry are always to be construed as narrowly as possible, and never to be extended, by mere implication and analogy, to cases which they did not originally comprehend.

6th. Because the risk of *fire* in any combustible subject, is not properly or in its own nature a *maritime risk*, or naturally comprehended among the perils of the sea, even although the subjects to which it attaches may be occasionally on that element; and, therefore, a separate insurance against that single risk, and especially upon a subject so peculiarly exposed to it as a vessel or machine moved entirely by steam, cannot be justly included in the general prohibition of marine insurances, or "insurances on ships or merchandize at sea, or going to sea," contained in the statute in question.

7th. Because, even if the appellants were themselves disabled by the statute from granting the respondents a policy extending to the whole voyage, they were bound by their onerous contract, to have *procured* such a policy from one or other of the companies favoured by that act, and are bound to repair to the respondents the loss arising from their failure or omission so to procure it. By taking the respondents' money (a sum of money proved to have been fully equal to the value of an unlimited policy,) they obviously became bound to procure and deliver such a policy. The respondents, who did not know, and were not bound to know any disabilities which might attach to them by the law of England, might, indeed, understand that the appellants were themselves to fulfil this engagement, by executing and delivering such a policy in their own names. But they, who pretend that they knew the law of England, and were [357] bound to know it, cannot be permitted to say, that they had any such understanding. They are barred from so construing the contract, by every principle of consistency and common honesty; and, considering that it is now *finally established* by the verdict of the Jury, that they did covenant and agree to deliver to the respondents a policy covering them from risk of fire while the vessel should be at sea, as well as while in port or in rivers, and as it is plain that such a policy might, at all events, have been procured from one or other of the privileged companies, it seems undeniably to follow that it was their duty so to have procured it; and that they have been justly subjected in reparation of the damages arising from their omission. They might have met the first and leading conclusion of the respondents' summons, by delivering such a policy; but as they have not chosen to do so, they cannot be relieved from the other alternative, of paying the damage that has ensued.

(24th June 1828) Lord Lyndhurst (Chancellor), after stating the case:—Various questions have been agitated in this case, one objection was that the agreement or policy, if it included a marine insurance, was void by the act of the 6th Geo. 1, c. 18, which, although since repealed, was in force at the time the contract was made, and there was much argument both here and in the Courts below, as to whether that statute extended to Scotland. The Court of Session was of opinion that it did not apply to Scotland, and in that I am disposed to agree with them.

But a more material point is—whether this was not to be considered as an English contract, and not a Scotch one. On this point there was a difference in the Court below, but they decided the case on another [358] ground, and the terms of their final judgment were these:

"Having considered the defence, founded on the act 6 Geo. 1, c. 18, which was reserved by the Judge Admiral, and having now heard counsel thereon, *in respect the insurance in question is an insurance against the risk of fire on a steam-vessel, which is not a marine insurance contemplated by the said act*, the Lords, in the action of reduction and for payment, at the instance of William Mills and others, find that the statute founded on does not apply to this case: repel the defence founded on the said statute, as well as the other defences to the said action, and reduce, decern, and declare, in terms of the reductive conclusions of the libel; and in respect of the said verdict and award, find the defenders, conjunctly and severally, liable to the pursuers in damages, modify the same to the sum of £3,000 sterling, and decern for payment thereof, with interest thereon in terms of the libel; and in the action of reduction, at the instance of the Albion Fire and Life Insurance Company, sustain the defences, assoilzie the defenders, and decern: find the Albion Fire and Life Insurance Company, and the defender Thomas Hamilton, conjunctly and severally, liable in the expenses of the conjoined processes incurred in this and in the Admiralty Courts."

I confess that I do not concur in the judgment on that ground: first, if I look to the words of the act of parliament, they are very general words. It appears to me impossible to say that a steam-boat fire risk is not a marine risk to which the act applies. The risk of fire is quite common in ordinary marine policies, and comes under a general policy, and it seems to me extraordinary that this should be otherwise, merely [359] because there has been some alteration in the mode of propelling these vessels. The decision, I think, is erroneous on that ground, but I don't say that it may not be sustained on other grounds. I have consulted other noble and learned Lords, and I wish to take a short time to consider whether the case ought to be sent back again, which is to be avoided if possible, or whether it may not be decided as it stands, excluding the ground on which the Court below has founded the judgment.

(June 27th) Lord Lyndhurst (Chancellor): After looking at the whole of these papers, I think that although the judgment cannot be sustained on the ground on which the Court below has rested it, there is still sufficient to warrant your Lordships in concurring in the judgment on a different ground. It is admitted, that the Albion Company had an establishment at Glasgow, and that they were in the habit of entering into contracts of this nature there. The proprietors of this steam-vessel applied to Hamilton, the Company's agent at Glasgow, and this was the agreement between the parties:

"Albion Fire and Life Office, Glasgow, 4th July 1820. James Dennistoun, William Mills, Colin Arrott, James Moffat, and John T. Alston, esquires, as a committee of management for themselves and others, having this day effected an insurance of £6000 with the undersigned, on behalf of the Albion Fire and Life Insurance Company of London, on the property specified in the check corresponding with this memorandum, a policy will be forthwith prepared at the office in London for the said insurance; and such policy will be delivered to the assured, or to his, her, or their order, on the [360] third Monday on the ensuing month, or on any subsequent day. (signed) P. Thomas Hamilton, agent for the Company.
Robert Mitchell.

Premium	£31	10	0
Duty	9	0	0
	£40	10	0"

Upon this last receipt and obligation there is indorsed and written, in the handwriting of Mr. Hamilton, or of his clerk Mitchell, the following memorandum and declaration; viz.

"*This receipt insures*, as under;—viz.

"On the steam-boat *Robert Bruce*, including machinery and apparatus belonging thereto £3000 0 0

" On the steam-boat *Superb*, as above mentioned . . .				3000	0	0
" Sum insured on the above by the Albion secretary in London .				4000	0	0
				£10,000	0	0
" Premium on £4000	£21	0	0			
" Duty on £4000	6	0	0			
	£27	0	0			

" £5000 of the above-mentioned sum is insured on the *Superb*, and £5000 on the *Robert Bruce*."

This contract is made at Glasgow, it is dated at Glasgow, and it is signed by Hamilton, agent for the **[361]** Company at Glasgow. It is plain that this is a contract for a general policy. There is no limit whatever as to place; no exception that the policy should be suspended while the vessel was at sea; but it is as general as possible. At London, however, a clause was added to the policy itself, suspending its operations while the vessel was at sea; but this was not communicated to the assured. They insured for another year, and there was no evidence whatever that the exception in the policy was ever shown to them. The vessel was soon after destroyed by fire, while at sea, and the assured applied to the agent at Glasgow to make good the loss, and then they were told, for the first time, of the exception in the policy. They then proceeded in the Admiralty Court, where the judgment was against the pursuers. That judgment they brought under the review of the Court of Session, and an issue was directed to try the question of fact, whether the contract extended to the risks of fire while the vessel was at sea, and the verdict was for the pursuers. A bill of exceptions was then tendered, and signed by the Chief Judge of the Jury Court, and it appears on these papers. There was only one material point argued before the jury, and that was, which of the two, the agreement or the policy, was the contract between the parties. For the Company it was contended that the policy was the real contract; that it was so in London, and that it was so in this case. But then there is this difference, that the pursuers insured on the original agreement, and on that they brought their action, and they had a right to demand a policy conformable to the agreement. If they had known of the exception in the policy, the case might have stood on a different footing; but they knew nothing of the exception, and no communication of it **[362]** appears to have been ever made to them. They say, " We agreed with your agent for a general policy, and that agreement you are bound to fulfil." Then when a renewal takes place they pay their money, not for a policy with an exception of which they knew nothing, but upon the terms of the original agreement; and therefore, when it was contended in the Jury Court that the foundation of the contract was the policy, the whole argument proceeded on a fallacy, and the jury were perfectly justified in the verdict which they found.

Then comes the question of law, whether the Act of 6 Geo. 1 c. 18, which was in force at the time of this contract, and which rendered the insurance of marine risks by any other companies than those of the Royal Exchange and London Assurance Companies null and void, was not a bar to this action; and that raises the question whether that Act extended to Scotland. That part of the Act which gave it the name of the Bubble Act, specifically extended to Scotland, as it enacted penalties which were to be recoverable in the Scottish Courts; but as to the other part of the Act, the case is different, for, besides that it staggers one a little to suppose that these two companies were to have a monopoly of marine risks, to the exclusion of all other companies over the whole of the island, there are no penalties whatever to be recoverable in the Scotch Courts on this part of the Act.

And here another question arises: supposing the Act does not extend to Scotland, still it is said to be a bar to this action, because it is founded on a policy by an English Company. The Company is certainly an English one, but it is to be considered where the original contract was made. The policy was executed in London, but the action is not on the policy, but on **[363]** the agreement. The original contract is made in

Scotland; and if I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them. The action is for the infringement of the original contract. They say however, that that was an agreement which they could not perform: but they did agree to perform it, and were bound to make compensation; and I think that they might even have made a perfectly valid policy in Scotland, although I do not say exactly in what form. The Court below, being a Court both of law and equity, had a right to consider that as done which the Company undertook to do, and on these grounds I think the judgment was right.

But then, although three of the four Judges below, before whom this case was heard, were of opinion that this was a contract made in Scotland, one Judge doubted; and this led them to decide the matter on another ground, which was, that the general insurance did not apply to the risk of fire on board steam-vessels at sea. In that I very much differ from them; and although I admire the great talents and learning of the Judges of the Court of Session, I think the judgment cannot be sustained on that ground. But it may be affirmed on the ground that the action is upon an agreement formed in Scotland, and that the Act of Geo. 1. did not, as to this matter, extend to Scotland.

Affirmed accordingly.

The special Judgment is as follows (27th June 1828):

"It is declared, that although this House is of opinion that the insurance upon which the respondents sought to recover damages is a species of insurance to which the statute 6 Geo. 1, c. 18, [364] does apply, yet inasmuch as this House is further of opinion that the said statute, as to that part of it to which the interlocutor of the Court of Session of the 22d January refers, does not extend to Scotland, the said appeal, upon the facts of this case, ought to be dismissed, and the interlocutors affirmed: it is therefore ordered and adjudged that the appeal be dismissed, and, with the above declaration, that the several interlocutors complained of be affirmed."

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[365]

APPEAL

From the Court of Exchequer, England.

SPONG,—*Appellant;* SPONG and Others,—*Respondents.*

[Mews' Dig. xv. 1259, 1659, 1660; and S. C. 3 Bli. N.S. 84; and, in Ex., 1 Y. and J. 300. Approved of in *Conron* v. *Conron*, 1858, 7 H. L. C. 168. Distinguished in *Cornwall* v. *Saurin*, 1886,17 L.R. Ir. 595; and see *Robertson* v. *Broadbent*, 1883, 8 A. C. 812; *Bank of Ireland* v. *M'Carthy* (1898) A. C. 181.]

J. S. devises to his son T. S. certain real estates specifically, and charged with certain specific burdens, and bequeaths certain pecuniary legacies, and made his real and personal estates liable to the payment of the legacies, and made T. S. his residuary devisee and legatee, and sole executor. Held by the Lords, reversing a decree of the L. Ch. B. of the Exchequer, that the real estates specifically devised to T. S. were not liable to contribute to the payment of the pecuniary legacies.

The material question in this case was whether the pecuniary legacies given by the late Mr. John Spong, of Aylesford, in Kent, and charged upon his estates real and personal, were, according to the true construction of the will, a charge upon certain real estates specifically devised to his son Thomas, who was also the residuary devisee and legatee, and sole executor.

The testator, John Spong the elder, was, at the times of making his will and of his death, seised in fee simple of divers real estates, situated in the counties of Kent and Middlesex, and elsewhere, of very considerable value, and was also, at the time of his death, possessed of personal estate and effects to a very considerable amount.

By his will, which is dated the 20th day of Aug. 1814, and is executed so as to pass freehold estates, he gave and devised to his wife, Rosamond, the possession of the dwelling-house in which she then resided, and also [366] of the cottage adjoining, free of all rent, so long as she should continue his widow, sole and unmarried; and also bequeathed to her all his furniture and wines, and moveables of every description, not consisting of money or securities for money, in and about his said dwelling-house and cottage, outbuildings, garden and premises, for her natural life, she continuing sole and unmarried; and after her decease, or her marrying again, he gave, devised and bequeathed the said dwelling-house, cottage, furniture and wines, which should not be previously used by her, together with the other articles specifically bequeathed to her as above, unto and to the use of his son, the appellant, his heirs, executors, administrators and assigns, for ever. He also gave and bequeathed to his wife and her assigns, for the term of her natural life, a yearly rent-charge of £400 to be chargeable and charged on, and issuing and payable out of the lands thereinafter mentioned; (that is to say), the yearly sum of £300, part thereof, to be chargeable and charged on, and issuing and payable out of the lands by that his will thereafter given and devised unto his said son, the appellant; and the yearly sum of £100, the remaining part of the said yearly rent-charge of £400, to be chargeable and charged on, and issuing and payable out of his the testator's mill and premises at Snodland, thereinafter by that his will given and devised unto his son William Spong; and he directed the several provisions made for his wife by that his will should be in full satisfaction of all dower; and after directing a bond executed by his son John Spong, for £1000, to be given up to be cancelled, and releasing all other debts due to him by his son John Spong, not included in the open account current then subsisting between them, and after also giving and bequeathing to his executor [367] (the appellant) a sum of £4000 to be by him invested in his name in the funds, upon trust to pay the dividends to the respondent Letitia, the wife of the said respondent John Spong, for her sole and separate use during her life, and after her decease to her husband, the respondent John Spong, for life, so long as he should not alter the same; and from and after the decease of Letitia Spong, and John Spong her husband, then he gave and bequeathed the said principal sum of £4000 upon trust, for the benefit of their children in the manner therein particularly mentioned, and in default of children to sink into the residuum of the testator's personal estate:— he devised certain freehold and leasehold estates to his son Thomas Spong (the appellant) in the following words:

"I give and devise unto my son Thomas Spong, his heirs and assigns, all and every my freehold and leasehold estates at Millhall, East Malling, Aylesford, Burham and Ditton and Sandgate, in the county of Kent, and Acton in the county of Middlesex," (then follows a particular description of the estates,) "together with the appurtenances; to hold the said estates and premises by this my will devised to my son Thomas Spong, unto and to the use of my said son Thomas Spong, his heirs and assigns for ever, subject to the annual payment of £300 to my said wife during her life, part of the said yearly sum of £400 by this my will given to her, and the annuity or yearly sum of £100, hereafter given, in trust for my daughter Rosamond Spong."

The testator then goes on to devise to his executor certain estates in the parishes of Aylesford and Burham, upon trust, to permit and suffer the testator's son, Daniel Spong, and his assigns, to have, hold and enjoy, [368] and receive and take the rents, issues and profits thereof, for his life, with remainder to the use of the child or children of the said Daniel Spong, in manner therein mentioned, with remainder to the use of his said son the appellant, his heirs and assigns for ever; and he devises Snodland Mill and other hereditaments unto and to the use of his son William Spong, of Snodland, his heirs and assigns for ever, subject and charged with the annual payment of £100, part of the yearly rent-charge of £400, before given to his wife; and he devised and bequeathed unto his executor thereinafter named, and his heirs, during the natural life of his daughter Rosamond Spong, a yearly rent-charge of £100, to be issuing and payable out of the estate and premises devised to his said son Thomas Spong, the appellant, as aforesaid, and to be paid to his said daughter Rosamond, in manner therein mentioned. He also bequeathed to his executor the sum of £2000, to be by him invested in his name in the public funds or real

securities, upon trust to pay the dividends to his daughter, the respondent Martha, the wife of Major William Rowen, for her separate use, and after her decease upon trust for the benefit of her children (if any), in manner therein mentioned. He also bequeathed unto his said daughter Martha Rowen, the further sum of £1000, to be paid to her, her executors, administrators and assigns, within twelve months next after her decease. He also gave and bequeathed to the respondents William Abington and Elizabeth Bowles, therein described as the two children of his deceased daughter Elizabeth the wife of William Bowles, esquire, the legacy or sum of £1000 each, when they should respectively attain the age of twenty-one years; and to John Spong the younger, the son of the testator's son John Spong, the [369] sum of £500, to be paid him when he should attain his age of twenty-one years.

And the testator ordered and directed the several legacies and sums by that his will given and bequeathed, or which he might thereafter give or bequeath by any codicil or codicils to that his will, and which should not be otherwise directed to be paid, to be raised and paid, or put out and invested, as the case might require, within twelve months next after his decease.

The testator then, by the following words, charges his legacies on all his real and personal estate: "And I do hereby expressly charge and make liable my real and personal estate to and with the payment of the aforesaid several legacies."

As to all the rest, residue and remainder of his real and personal estate and effects, whatsoever and wheresoever, of what nature and kind soever the same did or might consist, not thereinbefore by him given and bequeathed, he gave, devised and bequeathed the same to his son Thomas Spong, his heirs, executors, etc., absolutely; and made his said son Thomas sole executor of his will.

The testator died in January 1815, without having altered or revoked his will, and Thomas proved the will, but found that the whole of the real and personal estates of the testator were not sufficient to pay his funeral expenses, debts and legacies, without including the real estates specifically devised; and therefore the £4000 bequeathed for the benefit of John Spong and Letitia his wife were not invested nor paid, and other legacies remained unpaid for the same reason.

John Spong the son, and Letitia his wife, and others interested, filed their bill in the Exchequer against the executor, Thomas, praying that the usual [370] accounts might be taken; that the executor might be decreed to make good the loss incurred by the Plaintiff John Spong and Letitia his wife, by the non-investment of the £4000; and that a competent part of the whole of the real estates of the testator might be sold to make good the legacies, etc.

The executor, by his answer, stated the deficiency of the assets to answer the pecuniary legacies, without including the real estates specifically devised; and that, although he had applied the whole, as he had done part, of such specifically devised estates to the payment of the legacies, etc., there would still have been a deficiency.

On the 19th December 1826, the cause was heard before the Lord Chief Baron; and the counsel for the plaintiffs insisted that the testator had by his will charged his real estates specifically devised with the payment of his pecuniary legacies, while the contrary was insisted upon by the counsel for the executor, Thomas Spong, the appellant.

On the 29th of January 1827, the Lord Chief Baron pronounced the decree now appealed from, by which the Court declared, ordered, adjudged and decreed, that the aid will be established, and the trusts thereof performed and carried into execution; and it was further ordered and decreed by the Court, that it be, and it was thereby referred to Richard Richards, esquire, one of the Masters of the said Court, to take an account of the respective values of the several real estates of which the said testator was seised at the time of making his will, and the time of his death. And it was further ordered and decreed by the Court, that it be, and it was thereby referred to the said Master, to take an account of the debts, legacies, and funeral and testamentary expenses, and of the personal [371] estate of the said testator, John Spong, come to the hands of the said Thomas Spong, his executor, or of any other person or persons by his order or for his use, and how the same and every part thereof had been applied and disposed of; and upon taking such accounts, if it should appear that the personal estate of the said testator was not sufficient for the payment of the said legacies, then the Court declared that the said testator, John Spong, had by his said will

charged so much as should remain unsatisfied upon the whole of his said real estates, whether specifically devised or otherwise, and also upon his personal estate specifically bequeathed. And it was further ordered by the Court, that the said Rosamond Spong, the widow, be at liberty to elect whether she would claim her dower out of the real estates of the said testator, or whether she would take under the will of the said testator, John Spong; and that the said Master should inquire and report to the Court accordingly. And it was further ordered by the Court that it be, and it was thereby referred to the said Master, to inquire and report to the Court whether the said defendant William Spong had paid off any mortgage made by the said testator, John Spong, on any of his real estates in the pleadings of this cause mentioned, and the said Master was to be at liberty to state any special circumstances that might arise in making such inquiry to the Court as he should think fit; and in taking which said accounts, and making the inquiries before directed, all parties were to produce before and leave with the said Master (upon oath if required), all deeds, books, papers and writings, in their or either of their custody or power, which in any manner related to the said real and personal estates, accounts and inquiries, and were to be examined upon interrogatories touching the same as **[372]** the said Master should direct; and the said Master was thereby armed with a commission, as well for the examination of the said parties as of witnesses, in aid of the said accounts and inquiries, and one or more commission or commissions was or were to issue into the country for that purpose, if necessary; and if any special matter should arise, the said Master was to be at liberty to state the same to the Court in a separate report, as he should think fit; and it was further ordered, adjudged and decreed by the Court, that the said Master should tax all parties their costs of the suit, up to the hearing of the cause, and the said Master was to make his report therein with all convenient speed, and the cause was to be continued in the paper of causes to be further heard upon the coming in of the said report, until which time the consideration of how and by whom the said costs, so directed to be taxed as aforesaid, should be paid, and the subsequent costs, and all further directions therein, were thereby reserved, and in the mean time any of the said parties were to be at liberty to apply to the Court, as there should be occasion.

Against this decree the executor appealed, except in so far as it directed an account of the personal estate, and allowed the widow to elect whether to claim her dower out of the real estates or take under the will, and particularly called the attention of the Lords to the following parts of the will:

1st. The devise to the testator's wife of the possession of the dwelling-house, and the bequest to her of the furniture and moveables in it during her widowhood.

2d. The precise and accurate manner in which the annuity of £400 given to the wife for her life is charged upon those real estates, specifically devised, **[373]** which are intended to be charged therewith, and the care evinced by the testator in directing what proportion of the annuity each of the different estates is to bear.

3d. The direction by the testator that the several provisions made for his wife shall be in lieu of her dower, as to which she was not (like the other devisees and legatees) a mere volunteer.

4th. The direction to deliver up to the respondent John Spong his bond for £1000 and to release him from all other debts; which the appellant submits is a specific legacy to him of that debt of £1000 and the other debts. Also in a subsequent part of the will the specific legacy to the appellant, Thomas Spong, of the testator's farming stock, book debts, and other particulars contained in an inventory, and afterwards the release to the testator's son Daniel Spong of all debts in the testator's ledger, which debts then amounted to £6000.

5th. The devise to the appellant of all the testator's freehold and leasehold estates at Millhall, etc., in the same sentence; and the express declaration that he shall take them subject to the annual payment of £300, part of the annuity of £400 given to the testator's wife, and of the annuity of £100 given to his daughter. The appellant is anxious that this devise to him of a specific part of the testator's real and personal estates, expressly subject to specific charges, and the inference to be drawn from it, should be considered not only by itself, but also in connection with the residuary clause in the will, by which the appellant is made general residuary devisee and legatee of both the real and personal estates, this portion of the real and personal

estates having been first withdrawn [374] from it in order to be given to him specifically, and subject to specific charges.

6th. The devise to the testator's son William Spong in like manner of Snodland Mill, expressly charged with the annual payment of £100, part of the widow's annuity of £400.

And lastly, The express direction by the testator that the legacy of £4000, and such other of his pecuniary legacies as were not to vest immediately on the testator's death, should, in case all the objects for which they were designed should fail, sink into and be taken as part of the residuum of his personal estate.

The appellant trusted that the decree of the Court below would be reversed (except as above mentioned), for, amongst others, the following reason:

Because it is an established rule that a specific legatee is not bound to abate with general legatees even for the payment of debts, still less to contribute to the payment of general legacies; and because a specific devisee is in such respects to be at least as much favoured as a specific legatee; and because the testator in the present case evidently intended the specific devisee of his "freehold and leasehold estate situate at Millhall," etc. not to be more affected by the general charge than he intended the specific legatees to be; and if the specific legatees were not, according to the established rule, liable to contribute in favour of the general legatees, it seems to follow that the specific devisee was not; and so strongly did the learned Judge feel this necessary conclusion, that he, in order to preserve consistency in his decree, declared the specific legatees liable to abate equally with the specific devisees. The general rule was, however, admitted by the learned Judge; but he thought that the testator [375] had manifested an intention, and that such intention ought to prevail against the general rule. The appellant respectfully submits that no such intention appears; on the contrary, he submits that the testator, in subjecting the devised estates to certain stated charges, must, upon the true principle of construction, *expressio unius est exclusio alterius*, be considered as having indicated the extent of the charges which the specifically devised estates should bear.

It is however observable, that though by the terms of the decree the specific legacies are charged rateably with the specifically devised real estates, it was stated in the course of the judgment that there was no distinction between a residuary and a specific devise of real estate, for that every devise of land is specific; and that the testator in this case, having charged his real estate generally, no distinction can be taken between such parts as are specifically devised and such parts as pass by the residuary devise, but that all must be equally liable. In answer to this observation, the appellant submits that, though it be true that every devise of real estate is in some sense specific, as a residuary devise of real estate will only pass such real estate as the testator had at the time of making the will, and will not pass real estates subsequently acquired, nor yet real estate specifically devised, the devise of which has lapsed;—yet it is not a specific devise in the ordinary sense of the word; that is, specifically or particularly devised by express or specific description, and so separated from the general real estate as to denote a more anxious purpose of bounty, as to that portion of it, in favour of the specific devisee, than could be ascribed to him as to his residuary devisee.

[376] It is clear from the cases of *Clifton* v. *Burt*, 1 Peere Williams, 678, and *Haslewood* v. *Pope*, 3 Peere Williams, 322, and many others, that a specific devisee of real estate is entitled to as much or even to more favour than a specific legatee. The language of the Court in *Clifton* v. *Burt* is, that if a specific personal legatee shall not contribute towards a pecuniary legatee, *much less* shall a specific devisee of land.

The only case to be found in the books at all similar to the present is expressly in the appellant's favour; it is the case of *Joy* v. *Campbell*, 1 Sch. and Lef. 328 [see 3 Bli. N. S. 110]. That case, or at least one direct point of it, appears to be precisely the same as the present; and the opinion of the Lord Chancellor was expressed decidedly against the liability of the real estate specifically devised.

By the respondents it was contended that the decree ought to be affirmed, for the following, among other reasons:

1st. Because by express words specific legacies, as well as lands specifically devised, may be charged with payment of pecuniary legacies, and there are cases in which it has been held that a specific legatee must abate in favour of a pecuniary legatee.

2d. Because, where legacies are charged upon the real estates, not by implication but by express general words, no part of the real estates can be exempted from the operation of those express words by any thing short of express words of exemption: whereas in the present case there are no words in any part of the will to restrict the generality of the express charge.

3d. Because the general doctrine, that specific legacies do not abate in favour of pecuniary legacies, depends on a principle quite inapplicable to the question whether any part of the real or personal assets is [377] exempted from an express general charge of legacies on real and personal estate.

The following cases were cited:—*Sayer* v. *Sayer*, 2 Vern. 688; Pre. Ch. 392; *Brown* v. *Allen*, 1 Vern. 31; *Lewin* v. *Lewin*, 2 Ves. sen. 415. 417; *Long* v. *Short*, 2 Vern. 756; *Hanby* v. *Roberts*, 51. 127; *Birmingham* v. *Kirwan*, 2 Scho. Lef. 444. 448; *Aldriche* v. *Cooper*, 8 Ves. 396; *Kightley* v. *Kightley*, 2 Ves. 328; *Powell* v. *Robins*, 1 Ves. 200; *Ellison* v. *Ayrey*, 1 Ves. 111; 2 Ves. sen. 568, 9; *Webb* v. *Webb*, 2 Vern. 111. 140, 1 P. Wms. 132; *Austen* v. *Hussey*, 6 Ves. 475; *Davis* v. *Gibbs*, 3 P. Wms. 26. 29; etc.

Fonblanque and another, for the appellant.

Sugden and another, for the respondents.

Lord Manners (April 13, 1829): In this case a bill was filed against the appellant, Thomas Spong, executor of John Spong, deceased, by the respondents, who were legatees under the will; and the bill prayed that, in case the personal estate of the testator should not be sufficient to pay the legacies, a competent part of the real estates should be sold for that purpose. Thomas Spong, besides being executor, was the residuary devisee and legatee of the real and personal estates of the testator, and had also certain real estates specifically devised to him; and the question between the parties was, whether the real estates specifically devised to Thomas, were liable to contribute to the payment of the pecuniary legacies. The Lord Chief Baron thought that they were, and decreed accordingly, and from that decree the appeal is brought.

The question arises on the will of John Spong, deceased, whereby, etc. etc. (states the will as before set forth).

[378] It appears that the Chief Baron lays it down as a proposition, that there was no distinction between a specific and residuary devise, and that if the one is liable to make good the pecuniary legacies, so is the other. But I cannot agree in that proposition. In the first place, with respect to a specific devise, the testator separates that part of his property from the rest; but that is different from a residuary devise, for there the devisee takes the real property, subject to the payment of the pecuniary legacies. Then, in the case of a specific devise, the devisee takes a particular thing; but in the case of a residuary devise, he takes only such part of the real property as remains after the legacies have been satisfied.

The general rule is that specific devisees and legatees shall not contribute. It was argued by one of the counsel at the bar, that there was no distinction between creditors and pecuniary legatees, as to an implied charge on real estate. But Lord Alvanley was of a contrary opinion, as he stated in *Kightley* v. *Kightley*, 2 Ves. jun. 328, and *Shalcross* v. *Finden*, 3 Ves. 739. This, to be sure, is an *obiter dictum* of Lord Alvanley, and not a decision; but even as an *obiter dictum*, it is very strong.

I stated, at the time of the hearing of this case, that I would not give a final opinion on it in the absence of the noble and learned Lord on the woolsack. He is now present, and I have communicated with him on the subject of the case, and also with Lords Eldon and Redesdale, and they agree with me in opinion.

As to the case of *Joy* v. *Campbell*, 1 Sch. Lef. 339, Lord Redesdale said, that when the fund for the payment of legacies consist only of property passing under a residuary bequest to B., after a specific bequest to A., it is against principle to charge that [379] from a subsequent part of the will, for it is as much a legacy as any other, and it cannot be considered that the testator meant to give that specifically, and yet to subject it in the same manner as if it formed part of the residue; and I asked the noble and learned Lord, what he meant by the words, "*it is against principle*," and his reply was, that it was an established rule that specific devisees or legatees should not contribute to pecuniary legacies. Where the intention of the testator is clear that they should so contribute, then the intention must be followed; but there is no such clear intention in this case, and then the general rule is that specific devisees and legatees are not bound to contribute to the payment of pecuniary legacies.

Another observation is, that the testator himself appears to have understood and marked the distinction, with reference to liability to contribute, between the specific and residuary devises and bequests; and the case comes under the general rule that the specific devisees and legatees shall not be bound to contribute: and on the whole, I submit that the decree, as far as it is appealed from, should be reversed.

Reversed accordingly.

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[380]

ERROR,

From the Court of Exchequer Chamber, Ireland.

R. BALL,—*Plaintiff in Error;* MANNIN, Lessee of L. S. Ball,—*Defendant in Error.*

[Mews' Dig. iv. 81; S.C. 3 Bli. N.S. 1. The modern test of contractual capacity in the case of insane persons is given in *Imperial Loan Co.* v. *Stone* [1892], 1 Q. B. 599. See also *Baldwyn* v. *Smyth* [1900], 1 Ch. 588.]

On a question whether a deed was void in law, on the ground of unsoundness of mind in the person by whom it was executed, the Judge directed the jury that the question for them to try was, whether J. S. B. was a person of sound mind or not; and that, to constitute such unsoundness of mind as should avoid a deed at law, the person executing must be incapable of understanding and acting in the ordinary affairs of life. Exception to this—for that the Judge ought to have directed the jury that the unsoundness must amount to idiotcy, in the strict legal definition of the term. But the Judge's direction held by the Courts below to be good, and the judgment affirmed by the Lords.

Judge's direction objected to, on the ground of ambiguity; but as this point was not brought under the notice of the Judge, nor made matter of exception at the time of the direction given, held that it could not afterwards be relied on.

John Ball being seised in fee of certain lands in the county of Kilkenny in Ireland, on the 10th July 1762, conveyed them to trustees to the use of himself for life, remainder to his daughter, Dorothea Margaret, (who had privately married Richard Shinton,) for life, remainder to her heirs in tail male, etc.

In 1778, R. Shinton, the husband of Dorothea Margaret, died, leaving issue, John, their eldest son, who was of an imbecility of mind from his infancy, [381] nearly approaching to idiotcy; Launcelot, their second son, (father of defendant in error); Richard, their third son, etc.

Soon after the death of Shinton, who had assumed the name of Ball on marrying Ball's daughter, his widow intermarried with Richard Ball, an attorney and a relation of the family, by whom she had an only son, Abraham, (father of the plaintiff in error).

In 1785, John Shinton Ball, the first tenant in tail of the lands above mentioned, was prevailed upon by his mother and her second husband to levy a fine and suffer a recovery, and to bar his estate tail; and, by deed to lead the uses, the lands, subject to a life annuity for John Shinton Ball, were settled for the benefit of Dorothea and her second husband, and their issue.

In 1794, John Shinton Ball died, and his brother, Launcelot Shinton Ball, the second son of Dorothea by her first husband, exhibited his bill in Chancery to have the trusts of the settlement of 1762 performed, and to set aside the deed of 1785 as fraudulent; but was advised to get the bill dismissed at that time, and to suspend proceedings till the death of his mother, the tenant for life.

In 1809, on occasion of and previous to the marrying of Abraham Ball, who claimed to be entitled to the estate, with Jane Wemyss, Launcelot S. Ball caused notice to be given to the father of the lady that he (L. S. B.) was tenant in tail of the estate expectant on the death of his mother, and that he intended to assert his claim.

In 1813, Richard Ball, the second husband, died, and the son, Abraham, died in 1814, leaving issue, Richard Ball, (plaintiff in error). In 1818 Dorothea died, and in 1819 L. S. Ball brought his ejectment [382] in which action, for some reason of form, a juror was withdrawn; and in the same year L. S. Ball died, leaving issue L. S. Ball, lessor of defendant in error.

L. S. Ball, the son, in 1821 brought his ejectment, and the cause was tried on 6th

August 1823, when it was agreed by the counsel for the parties on each side, that the sole question to be tried should be (as set forth in the record): "Whether a certain deed executed by the said John Shinton Ball in his lifetime, bearing date the 17th day of October 1785, was or was not valid at law, as the deed of him the said John Shinton Ball, which deed had been executed by the said John Shinton Ball and the other parties thereto, for the purpose of leading the uses of a certain fine and common recovery levied and suffered by the said John Shinton Ball in his lifetime, of the lands in the said ejectment mentioned, as remainder-man in tail thereof in conjunction with his mother, Dorothea Ball, the preceding tenant for life of the said lands; and that if the said deed should be found to be not valid, as the deed of the said John Shinton Ball, that then a verdict should pass for the lessor of the plaintiff in this case as heir male of the body of Launcelot Shinton, his father, deceased, who in his lifetime was next remainder-man in tail of the said lands, and in such right entitled to the said lands on the death of his mother, the said Dorothea, the tenant for life, (the said John Shinton Ball, his elder brother, being then dead without lawful issue of his body); and on the other hand, if the said deed should be found to be valid as the deed of the said John Shinton Ball, then that a verdict should pass for the defendant: and it having been further admitted and agreed by the counsel on each side for the said **[383]** parties, that the said John Shinton Ball had died in the month of December 1794, and had not left any lawful issue of his body, and that Richard Ball, the second husband of the said Dorothea Ball, had died in the year 1813, and that the said Dorothea had died in the year 1818, leaving the said Launcelot Shinton, the father of the lessor of the plaintiff, her then oldest surviving son by her first husband, and Abraham Ball, father of the defendant, her son by the said Richard Ball, her second husband, her surviving; and counsel for the lessor of the plaintiff having thereupon opened the case on his behalf in order to maintain the said issue, on his part produced several witnesses, who, being duly sworn, deposed that the said John Shinton Ball, at the time of his executing the said deed, was not in their opinion competent to execute the same, and further deposed to acts and conduct of the said John Shinton Ball as evidencing his mental incapacity; and having given such evidence, and the said deed of the 17th October 1785 having been read in evidence, the said counsel thereupon closed the plaintiff's case; and counsel for the defendant thereupon, after stating the case on his behalf, called several witnesses to maintain the said issue on his part, who being sworn and examined, deposed, that in their opinion the said John Shinton Ball at the said time was competent to execute the said deed, and further deposed to acts and conduct of the said John Shinton Ball as evidencing his mental capacity, and deposed that the said John Shinton Ball was certainly not an idiot: and thereupon the case and evidence having been closed on both sides, and it having been admitted and agreed by the counsel for each of the parties, that the **[384]** alleged incapacity of mind of the said John Shinton Ball did not arise from lunacy, no evidence having been given of lunacy in him, the learned Judge in his charge commented and observed upon the evidence given on each side, and told the said jury, that the question for them to try was, whether the said John Shinton Ball was a person of sound mind or not; and that, to constitute such unsoundness of mind as should avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life; that it was not necessary that he should be without any glimmering of reason, but that it was sufficient if he was incapable of understanding his own ordinary concerns, and that, as one test of such incapacity, the jury were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him; whereupon counsel called on the learned Judge, and required him to tell and direct the jury, that in order to avoid said deed at law, the unsoundness of mind of the said John Shinton Ball must amount to that degree of unsoundness which constituted idiotcy, according to the strict legal definition of an idiot. But the learned Judge refused so to tell or direct the said jury on the said trial, but, on the contrary, directed them as before stated; wherefore the counsel for the said defendant, on his behalf, excepted to the said opinion and direction of the learned Judge on the said trial;" and, at the request of the counsel for the plaintiff in error, the learned Judge who presided at the said trial put his seal to a bill of exceptions to the above effect, tendered by them.

[385] It will be observed that, at the time of the ruling, no notice was given to the

Judge that there was any objection to the direction on the ground of its being too vague, general, and uncertain.

The matter having been argued upon the said exceptions before the Court of King's Bench in Ireland, that Court, on the 8th February 1825, overruled the said exceptions, and judgment was thereupon entered for the defendant in error.

The plaintiff in error being dissatisfied with this judgment of the Court of King's Bench, brought his writ of error returnable in the Exchequer Chamber in Ireland, insisting "that in the record and proceedings aforesaid, and also in the matter recited and contained in the said bill of exceptions, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the Honourable Mr. Justice Jebb, the learned Judge before whom, and so forth, at and upon the trial of the said issue so joined between the parties aforesaid, did direct and tell the said jury so impannelled to try the said issue, that the question for them to try was, whether the said John Shinton Ball was a person of sound mind or not, and that, to constitute such unsoundness of mind as should avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life; that it was not necessary that he should be without any glimmering of reason, but that it was sufficient if he was incapable of understanding his own ordinary concerns; and that, as one test of such incapacity, the said jury were at liberty to consider whether he was capable of understanding what he did by making the deed in question, when its general purport was generally explained to him. And **[386]** there is also error in this, to wit, that the learned Judge, upon the trial of the said issue, did refuse to tell and direct the said jury, though called upon so to do by counsel for the said Richard Ball, that, in order to avoid the said deed so executed by the said John Shinton Ball at law, the unsoundness of mind of the said John Shinton Ball must amount to that degree of unsoundness of mind which constituted idiotcy, according to the strict legal definition of an idiot. And there is also error in this, to wit, that by the record aforesaid it appears that the verdict aforesaid was given upon the said issue for the said Patrick Mannin, whereas the said verdict, by the law of the land as to the said issue, ought to have been given for the said Richard Ball," etc.

The Court of Exchequer Chamber affirmed the judgment of the Court of King's Bench; and thereupon Richard Ball brought his writ of error returnable in Parliament, for the following, among other reasons:

1. Because no other ground of personal disability, arising from defect of capacity in a party, is known or recognized in the law than idiotcy and lunacy, including under the latter head all cases of occasional and temporary derangement and incapacity, and nothing short of one or other of these can by the law of the land inflict disability on the subject, or nullify his deed and contract; and the latter ground having been admittedly excluded from consideration in the present case, there remains no other except the former, on which the deed in question could be denied its proper effect and operation.

2. Because idiotcy, in the view of the law, implies a total absence and deprivation of the faculty of reason in the party, and is not a question of degrees, but of the nature and quality of the mind and faculty, directly **[387]** at variance with the language and direction of the learned Judge in his charge to the jury in this case.

3. Because, although the jurisdiction exercised in matters of lunacy and idiotcy by the Lord Chancellor, or other person under the authority of the royal commission, is a legal one, yet the view and object of the Judge, in the exercise of such jurisdiction, is very different from that of a court of law, in deciding upon the validity or nullity of a party's deed; and therefore the language employed by the person exercising the jurisdiction in lunacy, when instituting an inquiry to ascertain a party's competence to manage his own affairs, in order to judge whether he needs the protection of a curator or tutor, is no precedent or authority for a court of law in judging of the validity of his deed.

4. Because the direction given by the learned Judge in his charge to the jury in this case was vague and indefinite, and calculated to mislead them as to the proper object of their inquiry, directing them, as he did, *as a test to determine the validity of the deed in question*, to try and "consider whether the party was capable or not of understanding and acting in the ordinary affairs of life, and of understanding his own ordinary concerns;"—and although, if the jury were of opinion that the party was capable of understanding and knowing the nature and effect of the deed he executed, and did in fact know the same, his deed ought to be

held valid and effective at law, however incompetent they might consider him to have been to understand and act in the ordinary affairs of life.

Lastly, Because the exceptions so taken to the Judge's charge and direction, by the counsel for the plaintiff in error, expressly extend as well to his direc-[388]-tion to the jury as to his opinion in refusing to direct them in the manner and to the effect required by them on the occasion of his said charge; and for this purpose the language of his charge is set out in their said bill of exceptions. And therefore the plaintiff in error is at liberty to insist on his objection to the said direction in this case.

On the part of the defendant in error, it was contended that the judgment ought to be affirmed, for the following, among other reasons:

1. Because the learned Judge who tried the cause was correct in stating, that to constitute such unsoundness of mind as would avoid a deed at law, the party executing such deed must be incapable of understanding and acting in the ordinary affairs of life, and that it was not necessary that he should be without any glimmering of reason.

2. Because it is not necessary at law, in order to avoid the deed of John Shinton Ball, that there should be proved to have existed that unsoundness of mind which constitutes idiotcy, according to the strict legal definition of an idiot.

3. Because it is not competent for the plaintiff in error to go out of the particular exception pointed by his bill of exceptions, and to object to other and different parts of the direction of the learned Judge who tried the cause; a court of error being bound to proceed "*according to the exception:*" and

Lastly, Because if the plaintiff in error were at liberty to depart from the particular exception taken by the bill of exceptions, the direction of the learned Judge who tried the cause is unexceptionable.

The cause was heard in the House of Lords on the 16th March 1829, and the following authorities were cited: *Bennett* v. *Vade*, 2 At. 324; *Ex parte Barnes*-[389]-*ley*, 3 At. 168.; *Lord Donnegal's Case*, 2 Ves. sen. 401; *Ridgeway* v. *Darwin*, 3 Ves. 65; *Beverley's Case*, 4 Co. 126; *Thompson* v. *Leach*, 2 Salk. 427, and Lord Ray. 313; *Warre* v. *Miller*, 4 Barn. Cres. 538; *Corder* v. *Silk*, 3 Camp. 33; *Jonson* v. *Medlicott*, 1 P. Wms. 130 (n.)

Lord Tenterden: This case comes before your Lordships on a bill of exceptions to the directions of a learned Judge. The Courts of King's Bench and Exchequer Chamber, in Ireland, have decided that the direction was right, and we are called upon to review the judgment; and in considering the question, we have to look solely at the bill of exceptions itself, and confine ourselves to what we there find.

One of the counsel for the plaintiff in error rested much of his argument on the ground that six Judges were of opinion that the jury might have been misled by the charge. That is an argument which cannot prevail in this House; for if all the Judges had been of that opinion, and your Lordships were of a different opinion, it would be your Lordships' duty to act on your own opinion, though contrary to that of the twelve Judges. Courts of error would be established in vain if they were to be influenced by the opinions of the Courts below, instead of being governed by their own. I thought it right, in this instance, to throw out these few words on that point.

Now as to the contents of the bill of exceptions, and the question of law arising from them. This is an action of ejectment brought to try the title to the lands specified in the pleadings; and it was agreed by the counsel concerned for the parties on each side, that the sole question to be tried should be, whether a certain deed executed by the late John Shinton Ball, [390] in his lifetime, bearing date 17th October 1785, was or was not valid in law, as the deed of him the said John Shinton Ball, etc.; and if the said deed should be found to be not valid as the deed of the said John Shinton Ball, that then a verdict should pass for the lessor of the plaintiff in this case, as heir male of the body of Launcelot Shinton, his father, deceased, who in his lifetime was next remainder-man in tail of the said lands, and in such right entitled to the lands after the decease of his mother, the tenant for life (the said John Shinton Ball, his elder brother, being then deceased without lawful issue of his body); and on the other hand, if the said deed should be found to be valid as the deed of the said John Shinton Ball, then a verdict should pass for the defendant. That having been the question, the record goes on to state that the counsel for the lessor of the plaintiff produced several witnesses, who being duly sworn and examined, deposed that the said John

Shinton Ball, at the time of executing the said deed, was not in their opinion competent to execute the same; and further deposed to acts and conduct of the said John Shinton Ball, as evidencing his mental incapacity. And then the record states that the counsel for the defendant called several witnesses, who deposed that, in their opinion, the said John Shinton Ball, at the said time, was competent to execute the said deed, and further deposed to acts and conduct as evidencing his mental capacity, and deposed that the said John Shinton Ball was certainly not an idiot. The record further states that it was agreed that the alleged incompetency of mind of the said John Shinton Ball did not arise from lunacy, no evidence of lunacy having been given; that is, that John Shinton Ball was not an insane person, who had occasionally lucid intervals, or a person whose [391] mind was at one time sound, and at another not, but that the state of mind, whatever it was, was uniform, and that the incapacity, if any, was not temporary but permanent.

This being the evidence, the learned Judge commented and observed upon it, and told the jury, "that the question for them to try was, whether the said John Shinton Ball was a person of sound mind or not;" and undoubtedly that was the question, and the direction was perfectly correct. But the learned Judge goes further, and tells the jury what it was that constituted unsoundness, and that, to constitute such unsoundness of mind as would avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life; and perhaps in that he went too far, but that was a matter of which the plaintiff in error was not, under this bill of exceptions, entitled to complain.

Then the learned Judge goes on to say that it was not necessary that the person executing should be without any glimmering of reason, but that it was sufficient if he was incapable of understanding his ordinary concerns, and that, as one test of such incapacity, the jury were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general import was explained to him. The counsel for the defendant below objected to this, and required the learned Judge to tell and direct the jury, that in order to avoid the said deed at law, the unsoundness of mind of the party executing must amount to that degree of unsoundness which constituted idiotcy, according to the strict legal definition of an idiot, but this the Judge refused to do. The proposition was that the Judge ought to have told the jury that they had no right to consider any [392] description of unsoundness except what constituted idiotcy according to the strict legal definition of an idiot. If the Judge ought to have done so, then he was wrong, as he told the jury that the question for them to try was whether John Shinton Ball was of unsound mind or not. Now I believe that in the commission for inquiring whether lunatic or not, the jury have not been strictly limited to the inquiry whether lunatic or not, but that if they found that the party was of unsound mind, it has been held a sufficient finding. The strict legal definition of an idiot, in an old book which I have brought down with me, is, that if a man can repeat the letters of the alphabet, or read what is set before him, he cannot be taken to be an idiot. But you would say that this was contrary to common sense; for as to repeating the letters of the alphabet, or reading what is set before him, a child of three years old may do that. Then the question is whether the party was of sound mind or not, and that is the question here. To be sure the Judge goes on to say that, as one test of capacity or incapacity, the jury was at liberty to consider whether the party was capable of understanding what he did by executing the deed in question, when its general import was explained to him; and surely that is one good test, and there is nothing irregular in that. But the question is whether, taking the whole direction together, it is right, and I think it is.

But I say that, if the direction had been as vague and general as has been contended, the counsel ought to have brought that point distinctly to the notice of the Judge at the time, and have made it a distinct point of objection; for if he had done so, the Judge might have removed the ambiguity; but as that was not made a point of objection or exception at the [393] time, the plaintiff in error cannot avail himself of it now.

I move, therefore, according to the form of your Lordships House, that the judgment of the Court of Exchequer Chamber be reversed, meaning that it should be affirmed.

Lord Plunkett: I entirely concur with the noble and learned Lord, and for the same reasons.

On the point of ambiguity, I am clearly of opinion that the counsel, in order to be able to found upon it afterwards, must, at the time, bring it distinctly to the notice of the Judge as a point of objection, as then the Judge may correct it. If, upon its being brought in that manner under the notice of the Judge, he refuses to clear it up, then it may be made the subject of exception, as well as any other matter of law.

Judgment affirmed.

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[395]

APPEAL

FROM THE COURT OF CHANCERY, ENGLAND.

(*Vid.* 1 Dow and Cl. p. 268.)

DUFFIELD and Wife,—*Appellants;* DUFFIELD and Others,—*Respondents.*

Best, C.J.C.P. (now Lord Wynford), in delivering the opinion of the Judges in the above case, has the following observations: (p. 310.)

"As the case sent to us states [no]* residuary clause, we have not felt ourselves at liberty to consider the effect of the residuary clause which appears in the printed case, but have formed our opinions upon that which is stated to us by your Lordships. And it not appearing on that statement that the residue of the testator's property is devised to any particular person, we have said that during the contingencies the estates would descend to the heir-at-law, and do not, as in the case of *Stephens* v. *Stephens* (Cases [396] Temp. Talbot, 228), when the residue was expressly devised to Sir Thomas Stephens, pass under the residuary devise in the will.

"The estates in the Southwood Park and Haverhill Farm, given to the second son, and if there be only one son, to the eldest, and if there be no son, to a daughter, do not vest until a second or only son attained twenty-one, or in case of the failure of male issue, until a daughter attained twenty-one or marries with the consent of the trustees appointed by the will.

"The testator's other freehold estates do not vest until some son of the testator's daughter shall attain the age of twenty-one years, and take the name of Elwes.

"Until these estates become vested, the estates, and the rents and profits derived from them, pass to the heir-at-law of the testator, as estates not disposed of by the will.

"Whilst estates remain contingent, those in whom they are at a future time to be vested have no interest in the estates, or the rents and profits of such estates.

"Such estates must descend to the heir, if they are not given to any person to hold until the events happen on which they are to become vested," etc.

It therefore was found necessary to put further questions to the Judges; and on the 23d June 1829, the questions and answers were stated by the Lord Chief Baron Alexander, as follows:

The Judges who heard the arguments in the cause of *Duffield* v. *Elwes*, one only excepted, have taken into their consideration, in pursuance of your Lordships' order, the additional questions on which it has been your Lordships' pleasure to require their opinion. In consequence of one of those learned persons having [397] ceased to be a Judge, and of there being no difference of sentiment among those who have considered it, it has become my duty to state what their opinion is.

The questions are:

"Upon its being assumed that the decree or decretal order ought to be reversed so far as the same declares that any son of the daughter of the testator would have a present vested interest in or be entitled to the estate at Southwood and Haverhill, in the will mentioned, or the rents and profits thereof, before he attain the age of twenty-one years, or have a present vested interest in or be entitled to the freehold estates devised by the codicil, or the rents and profits thereof, until he attains the age of twenty-one years and takes upon himself the name of Elwes, according to the testator's direction, and assuming that some son of the testator's daughter will hereafter acquire a vested interest therein—

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* See *Percival* v. *Percival*, 1870, L.R. 9 Eq. 393.

"To whom do the rents and profits of the freehold and copyhold estate of the testator at Southwood and Haverhill, in the will mentioned, and the rents and profits of the freehold estates, in the codicil mentioned, go and belong respectively until some son of the testator's daughter shall acquire a vested interest therein respectively, having regard to the whole words, contents, and effect, of the testator's will and codicil?

"And assuming that the testator purchased copyhold estates after the date of the will, are such copyhold estates, having such regard as aforesaid, to be considered as devised by the testator?"

[398] My Lords, in order to be more clearly understood, I will remind your Lordships of the provisions in the will and codicil, which give rise to these questions.

The testator gives by his will to his brother John Elwes and Abraham Henry Chambers, and their heirs, a freehold and copyhold estate in Southwood Park in Suffolk, and a freehold estate at Haverhill in Essex, upon the trusts following: that is to say, in case there shall be but one son of his daughter Duffield by her then husband, who shall attain the age of 21 years, upon trust for such son, his heirs and assigns, for ever; and in case there shall be two or more sons of Mrs. Duffield who shall attain the age of 21 years, then in trust for the second of such sons, his heirs and assigns, for ever.

The testator then proceeds to dispose of these estates at Southwood and Haverhill, in Suffolk, and Essex, upon the event of this contingency not happening. These provisions are not material to the present questions. He gives some pecuniary legacies, and then proceeds to dispose of his residue. This clause is of the utmost importance, and is in these words (see p. 274).

This devise is made upon trust, with all convenient speed after his decease, to sell and convey all and singular his freehold, copyhold, and leasehold estates, and to sell and collect his money out upon mortgages or other securities, and get in debts. All these are to form a consolidated fund, which the trustees are to be possessed of upon the trusts which he specifies. It is not essential to detail these trusts; it will be sufficient to say that they are to discharge his debts, funeral and testamentary expences, to satisfy all legacies which he had given or should thereafter give, to invest a sum in 3 per cent. consolidated annuities, in the names of his trustees, sufficient to produce £1000 per annum, which [399] was to be paid by them to his daughter, Mrs. Duffield. The residue was to be laid out upon securities, upon trusts which he describes, for the children of Mrs. Duffield, but which I do not deem it important particularly to mention.

This will was dated on the 1st March 1811. It remained unaltered for 10 years. In 1821 his intentions underwent a change. It appears that he drew with his pen a line across that provision by which he had directed a sale of his freehold, copyhold, and leasehold estates, and of other property, and having done this, he proceeded by a codicil, duly executed, to testify what his then intentions were. This codicil is dated 3d March 1821, and being of the highest importance to the present questions, warrants me in occupying a few minutes of your Lordships' time by reading it (see p. 284).

These are the whole of the circumstances of which it is material to remind your Lordships.

The first question respects rents and profits of the freehold and copyhold estates at Southwood and Haverhill, in Essex. We are to assume that the specific devise of these estates is not immediate and vested, but future and contingent; that it does not draw along with it the rents and profits intermediate between the death of the testator and the happening of the contingency; and we are desired to signify our opinion to whom, upon the whole frame of these testamentary dispositions, these intermediate rents and profits go and belong.

My Lords, we are of opinion that they go and belong to the surviving trustee of the testator's will, by force of the residuary clause which I have already stated. This clause is as comprehensive as can be imagined. It extends in express words to the residue of all the [400] *property* to which he should be entitled at his decease, or over which he has a disposing power, to the residue of his estates of *freehold*, copyhold, or for years; and then, after some further enumeration, and lest something

should escape, he adds, of whatever other nature or kind the same or any part thereof may be.

There can be no doubt that these words would pass the intermediate rents not specifically disposed of.

It is not essential to the effect of a residuary clause that the testator should have had in his immediate contemplation the property to which his expression applies. Its very nature and object is to envelope every thing, whether present at the moment to the mind of the testator or not.

In *Stephens* v. *Stephens* (reported in Forrester, p. 228), a leading case on the subject of executory devises of the same description with this, a residuary clause was held, by the Court of King's Bench, with Lord Hardwicke at its head, to pass the intermediate rents and profits. Many other cases, if necessary, might be cited to the same effect.

It would not have been safe to have come to the conclusion I have intimated, without examining whether there is any other provision in the will, to narrow and limit the residuary clause, so as to exclude these intermediate rents.

One only passage has been mentioned, the direction for sale. It is said, the testator could not mean an interest such as this to be sold, that it would be a strange direction to be applied to property of this description, and therefore that he could not intend to include it in his residuary bequest.

Observations of this sort oppose but a feeble obstacle to the necessary effect of clear words. They merit attention when the words are equivocal and ambiguous, [401] and where from the indistinctness of the language used you must give it any meaning, from necessity of resort to probability and conjecture. But here the language is plain and explicit; and if upon any such reasoning this interest were withdrawn from the residuary clause, the testator's language would not be construed, but contradicted.

My Lords, I feel that these observations may be deemed by your Lordships unnecessary; because in truth the fact in which this doubt originates fails almost entirely. The will, though it did originally, does not now direct any part of the freehold to be sold. The codicil revokes the power of sale as to the freehold, and confirms the will. The will, therefore, must be read as if there was no such direction to sell, and therefore that circumstance at this day interposes no obstacle to the true construction of the words used in the residuary clause.

We are of opinion that, by force of the residuary clause, the legal interest in the intermediate rents and profits of the Southwood and Haverhill estates belongs to the surviving trustee of the testator's residuary estate.

The second question respects the intermediate rents of the freehold estates devised by the codicil to the son of Mrs. Duffield who shall first attain twenty-one, on his attaining that age.

The Judges are also of opinion that these rents and profits belong to the surviving trustee, by force of the same residuary clause, bound, as the former was, by the trusts declared in the will.

It is without question that the legal fee simple of the estate out of which these rents and profits are to arise, was devised, by the residuary clause in the will, to the trustees.

[402] That devise must remain at this day in full force, except in so far as it is altered by the codicil.

We must look, therefore, at the codicil in order to ascertain how far it has altered the devise of these freehold estates, and to what extent it leaves them vested in the original devisees undisturbed.

There are only two provisions in the codicil which touch the freehold in question. The first is the revocation of the direction to sell this estate; the second is the contingent and executory devise to the first son of Mrs. Duffield attaining twenty-one, when that event shall happen.

How far do either of these curtail or limit the absolute gift in fee simple of the estate itself, contained in the previous will, to the trustee, upon the general trusts reposed in him by the testator?

It is obvious that the revocation of the direction to sell has no effect whatever of this nature. It left the legal estate in fee, as well as the beneficial trusts, absolutely

untouched, and amounts only to an arrangement respecting the mode in which the trusts are to be executed.

The contingent and executory devise in the codicil is a revocation *pro tanto* of the devise in the will of the same estates. It is an indirect revocation. The last revokes the first because they are inconsistent, and for that reason only. It revokes therefore to the extent in which they are inconsistent, and no further. Now how far are they inconsistent?

The gift is " of his freehold estates to the son of his daughter who shall first attain twenty-one."

We are to assume that this devise is contingent and executory ; that nothing vests till the event happens ; that no estate or interest, either legal or equitable, passes until a son attain twenty-one. What becomes of it in **[403]** the meantime? The prior devise found in the will remains unrevoked. The estate or interest continues where the will had placed it, that is, in the trustees.

We are of opinion, therefore, that until the contingency shall happen which is to vest the freehold estate in a devise by force of the codicil, the rents and profits of that estate go and belong to the surviving devisee in trust of the residue named in the will.

The last Question is thus put by your Lordships:

" And assuming that the testator purchased copyhold estates after the date of the will, are such copyhold estates, having such regard as aforesaid, to be considered as devised by the testator? "

We are of opinion that any copyhold purchased by the testator *mesne* between the will and the codicil passes by the will.

The will has the effect upon this subject which it would have had if it had been made at the date of the codicil. For many years this has been the rule. The cases are too numerous to require that any of them should be mentioned.

A codicil confirming a will brings the will down to the date of the codicil. As the codicil bears date on the 3d of March 1821, so in effect does the will. Then as the residuary clause devises all his copyhold estates, the estates supposed in the question, being at that time his copyhold estates, must pass by it.

There have been some cases in which the republication of a will by a codicil has not had this effect. The case of *Strathmore* v. *Bowes*, in the 7th vol. Term Reports, is one. In these cases it was manifest from the language of the codicil that the testator did not intend to pass his lands purchased after the will.

[404] Nothing of that kind is to be found in this codicil. It must therefore have the usual effect, and the will must pass these copyholds.

Eldon, (Earl of): The Judges having given their opinions in answer to the questions put to them on this and the former occasion, it is sufficient for me to say that I concur in all those opinions.

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[405]

APPEAL

FROM THE COURT OF CHANCERY OF IRELAND.

BLAKENEY and Wife,—*Appellants;* BAGGOTT,—*Respondent.*

[Mews' Dig. vii. 241 ; viii. 774, 827 ; xiv. 1773 ; S.C. 3 Bli. N.S. 237. See *Butler* v. *Miller*, 1867, I.R. 1 Eq. 195.]

F. C. tenant for life, with power to lease for 31 years, and M. C. his son, tenant in tail. F. C. makes a lease of the lands of O. his attorney, for three lives, of which M. C. is one. M. C., while an improvident young man, executes an agreement, written on the counterpart of the lease in the hands of O., by which, in consideration of £20, he confirms the lease granted by his father, and engages to renew it for an additional three lives. The agreement is dated 1749, and the first three lives expire in 1817, and then the representative of O. claims a renewal for other three lives, pursuant to the agreement, and files his bill for specific per-

formance. But the bill dismissed; for the agreement is of too doubtful and suspicious a character for a specific performance, and the time elapsed under circumstances which did not imply acquiescence; and the judgment affirmed in *Dom. Proc.*

By marriage settlement, dated the 10th July 1716, Francis Cuff became entitled to certain lands in the county of Galway for life, with remainder to his first and other sons in tail male, with power to Francis Cuff to make leases of the same for 31 years in possession, at the most improved rent.

By lease, dated 15th October 1745, Francis Cuff demised the lands to Samuel Owens, his attorney, for three lives, at a yearly rent of £40.

[406] In December 1749, Michael Cuff, the son of Francis, having come of age, by an agreement with Owens, and written on the back of Owens's counterpart of the lease, engaged, in consideration of a sum of £20, to confirm the lease made by his father, and after the expiration of the lives, to renew the same for a further term of three lives. The agreement was not registered till June 1760.

In 1760, Francis Cuff died, and Michael, the son, afterwards, in the same year, conveyed the lands to trustees to the use of himself for life, remainder to his two daughters and only lawful issue, Catherine Anne and Wilhelmina Cuff, in tail male, as tenants in common.

In 1775, Catherine Anne intermarried with John Lloyd Baggott, and after their death, their son, Thomas Neville Baggott (the Respondent), became entitled to his mother's undivided moiety of the lands, and purchased the other moiety at a sale under a decree of the Court of Chancery, in 1814.

On the death of Samuel Owens, in 1780, his only son, Samuel Lea Owens, became entitled to his interest in the demised premises, and on his death in 1813, his daughter, Catherine Anne, became entitled under his will to his interest in the premises, and intermarried with Robert Blakeney (the Appellant).

Samuel Lea Owens was the last of the lives in the lease, from Francis Cuff to Samuel Owens, and soon after his death Blakeney and his wife applied to Baggott for a renewal of the lease for other three lives, pursuant to the agreement of 1749, between Michael Cuff and Samuel Owens, and Baggott having refused to renew, they, on the 18th April 1817, served the usual notice, and made the usual tender of rent, with a view to a suit for specific performance.

Accordingly, on the 15th December 1820, Blakeney [407] and wife filed their bill in Chancery for a specific performance of the agreement, to which Baggott put in his answer, and admitted that at the time he purchased the undivided moiety of his wife's sister, he had notice of the agreement indorsed on Owens's counterpart of the lease from Francis Cuff, but that it was stated at the time that the agreement had been fraudulently obtained and could not be enforced, and admitted that this interest might have been sold cheaper in consequence of the agreement, as a purchaser might be exposed in consequence of it to the trouble and expense of a suit in equity.

Evidence was given that Samuel Owens was the law-agent of Francis Cuff, and of the value of the lands, to show that rent of £40 was not the most improved rent that could have been had for the premises in 1745, and that the £20 paid to Michael Cuff was almost a mere nominal consideration.

On the 10th June 1825, the cause came on for hearing, and the bill was dismissed, each party abiding his own costs, and on the 17th February 1826 this decree was confirmed on rehearing.

From these decrees Blakeney and Wife appealed to the Lords.

Sugden (afterwards Solicitor-General), and Pepys, for Appellants:

The confirmation of the lease, and the agreement of 1749, formed one entire transaction, and the consideration was paid for both.

Then as to the lapse of time, if a lessor suffered a lessee to enjoy for 60 years, and then brought an ejectment, equity would protect the interest. The question of lapse of time did not depend on any statute of limitations, but on the injustice of retracing these long [408] passed transactions. After an acquiescence of 80 years, equity would not suffer the question of the validity of the agreement to be discussed. So in a late case, where a trustee had purchased for himself, and this had been acquiesced in for 18 years, Sir W. Grant had refused to open up the transaction, though in its

origin it was clearly invalid. *Moth* v. *Atwood*, 5 Ves. 845, *Morse* v. *Royal*, 12 Ves. 371, 372, 374, 377, were decided on the same principle, as was that of *Scott* v. *Dunbar* (not reported), which was decided in this House on the 20th February 1826.

[Lord Lyndhurst, (Chancellor): The acquiescence might be under the first covenant, but what acquiescence has there been in the second? The first was to ratify, the second to renew, and there might be a good consideration for the one and not for the other.]

It was objected that Owens was the law-agent, but he was the agent not of the son, but of the father.

As to the consideration, the question ought not to be agitated after such a lapse of time.

[Eldon (Earl of): It is stated in your case that the agreement was made for a sum of money. There is no evidence of that whatever. In these Irish causes we have to look into the whole of the proceedings to hunt down the facts stated in the cases. What is that but to mislead the House? There is hardly one of them that ought to be laid on the table.]

The case stated the substance of the bill and answer.

As to the point of notice, the Respondent purchased with full notice of the agreement, and subject to it, and had no right now to question it; *Lord Kensington* v. *Phillips*, 5 Dow, 61. The party selling had no interest in the dispute, and the purchaser purchased with notice of and subject to the agreement, and at a **[409]** cheaper rate than he otherwise would have purchased, on account of the agreement, and had no good claim to that for which he had not paid. Every objection which was made on the other side might be answered, had it not been for the lapse of time.

Lord Manners: I took it as a fact that £20 was the consideration, and it was so stated and not denied, though it was not distinctly in evidence.

Horne, for Respondents: The short but decisive objection to the agreement of 1749 was that it was founded in fraud. It was in proof that Owens was the law-agent of Francis Cuffe, and he might be fairly presumed to know that he was only tenant for life under the settlement of 1716; and yet there was no person who looked at the lease but must at once suppose that Francis had the fee. Michael, an improvident young man, must have been made to suppose that his father had the absolute disposal of the property, and he saw that the lease was granted for three lives, of which he himself was one; so that it appeared that he, as heir of his father, could not possibly have any advantage from the reversion. Under this impression he confirmed the lease, and made the agreement of 1749, and with such an impression he must have thought £20 or even £5 a god-send. Both in the lease and in the memorial Michael was described as the son and heir of the father, and the reversion was taken to the father and his heirs and assigns; so that the son could have no idea that his father was only tenant for life, and he himself tenant in tail. Then the agreement was in the form of an indorsement on the back of the lease, and even that was not produced in evidence, but the matter rested on secondary evidence; and there was no indorsement on **[410]** the counterpart: and the indorsement on his own lease was kept in his pocket till 1760.

Then as to the lapse of time, in dealing with a reversion a considerable lapse of time must be contemplated, and all that had been said about lapse of time had no application to this case; the supposed right to a renewal did not accrue till 1817, and it was incumbent on one who claimed to have the benefit of the agreement, to have full and complete evidence of consideration when the right accrued.

The reasons stated in the case for the appellant were,

First: That the said article, for the specific performance of which Appellants filed their bill, had been acquiesced in and acted upon by all the parties interested, for a period of fifty-seven years at least, namely, from the death of Francis Cuffe, in May 1760, to the death of Samuel Lea Owens, in March 1817. The case of the Respondent himself establishes an acting under the article of 1749, and an acquiescence in its fairness by Michael Cuffe, the tenant in tail, and his assignees, for fifty-seven years, viz. from 1760, the time of the death of Francis Cuffe, the tenant for life, to the year 1817, when the last of the lives named in the lease of 1745 died: inasmuch as the lease of 1745 was by the Respondent's case utterly void as against Michael Cuffe, who became seised in tail in 1760; and if so, no acceptance of rent could set it up, and the tenure, the possession, and payment of rent for these fifty-seven years, is by the

Respondent referred to the lease of 1745, which lease could only be valid, as against Michael Cuffe and his assigns, by virtue of the article of 1749.

Second: That the said article constituted one entire agreement entered into for the one consideration, namely, the sum of £20, and the rent and so forth **[411]** agreed to be paid; and that there is not any principle of equity warranting the holding said article valid so far as it covenants to ratify the lease of 1745, and invalid and void so far as it covenants to renew that lease.

Third: That as to one moiety of the lands and premises in said article, the respondent is a mere volunteer, namely, under a voluntary settlement made after marriage, and without consideration. That, as to the other half moiety, the said Respondent is a mere purchaser, with full and even express notice of this article, and even an abatement in the price, on account of the interest subsisting under this article.

Fourth: That it is not possible now to restore to the parties their relative situation at the time of the making this contract.

Fifth: That there was no sufficient evidence in the case to impeach this agreement for fraud or any other cause rendering it void in a court of equity.

Sixth: That as Michael Cuffe, the tenant in tail, who in the year 1760 acquired the fee and settled the estate by a deed, under which the respondent derives, did not impeach said article of 1749, it would be against every principle of equity to permit the assignees to avoid that article, particularly after the lapse of sixty-seven years, after the death of all the parties, and the loss of all evidence as to the contemporaneous circumstances of the contract.

Seventh: That the decree complained of, if not erroneous on the grounds before stated, was clearly wrong in not directing that the sum paid as part consideration for the article of 1749, with interest thereon from the year 1749, should be refunded.

Eighth: That the article of the 11th December 1749 never having been impeached by respondent, or any of the parties aforesaid, and no bill having been **[412]** filed to impeach the same, it should, according to the rules of equity, be considered as a fair and subsisting agreement.

The reason stated in the case for the respondents, was,

Because the contract sought to be carried into specific execution, (if any such were ever executed), is indefinite, unreasonable, and fraudulent, and there has been no confirmation of it, so as to dispense with proof of the fairness of the transaction.

Lord Manners (2d March, 1829): I will state the grounds on which I decided this case in the Court below. This was a proceeding instituted in the Court of Chancery, in Ireland, for the specific performance of an agreement for the renewal of a lease for three lives, and the Court was of opinion that it was not a case in which it ought to interfere to enforce a specific performance.

The facts were these:—In 1745, Francis Cuffe, being tenant for life, with power to lease for 31 years, at the most improved rent, demised the land in question for three lives, at a rent of £40 a year, to Samuel Owens, his attorney. In 1749, articles of agreement were indorsed on that part of the lease which was in the possession of Owens, by which Michael, the son of Francis, engaged to confirm the lease granted by his father, and to renew the lease for a further term of three lives. The consideration was not mentioned in the memorial of the agreement registered in 1760; but it was admitted on both sides that it was £20. In 1760, Francis Cuffe died, and soon after the articles were registered. No great importance was attached, in considering the case, to the delay in the registration; but yet, in the absence of all evidence to account for it, it was a little suspicious, considering that in Ireland it was from the date of the registration that they had **[413]** their priority, and it was rather singular that in a transaction of this kind, if it was fair, the registration had not been made as soon as it conveniently could be.

In 1760, when Francis Cuffe died, Michael settled his interest in the lands on his wife and daughters; that settlement was made for valuable consideration, and in furtherance of the object of the will of the father of his wife, under which he derived considerable advantages; and under that settlement the respondent, who married one of the daughters of Michael Cuffe, derived his title.

Michael died in 1763, and the last of the lives in the lease of 1745 fell in 1817, and the bill for the specific performance of the agreement of 1749, for a further

renewal for three lives, was filed in 1820. The Court did not think that, under the circumstances, a specific performance ought to be decreed, and dismissed the bill.

If this had been a recent transaction it is manifestly impossible that a specific performance could be decreed. Here was an improvident young man, dealing with his expectancies, making an agreement with an attorney to ratify a lease which was void at law, and to renew for a further term of three lives, for a consideration of £20, which was so grossly inadequate, and the whole transaction savouring so strongly of fraud, that the matter could not stand the test of a court of equity.

Then the question was, whether length of time and possession did not take the case out of the ordinary rule of equity, and preclude the right to impeach the fairness of the transaction. As to the possession, it was to be referred to the lease of 1745, and the subsequent renewal was not to take place till after the lease of 1745 had expired. But it was said that the lease of 1745 could not have been available against Michael, [414] except under the article of 1749, and that the confirmation of the old, and the agreement for the new, lease, constituted one entire transaction, and that both the old and the new lease should stand. I thought they were two distinct matters, the one being the act of the father, the other that of the son, dealing with his expectations, and that the one might be fair and the other not. Then consider the character of the agreement for the renewal, and that the only consideration was a sum of £20. If valuable consideration had been given, I admit, that without reference to whether that consideration was adequate or not, the transaction might be taken to be one and entire. But it appeared to me that the consideration was something so extremely low and frivolous, that it could not reasonably be taken to be a valuable consideration, and that it was rather an indication of fraud on the one hand, and improvidence on the other, and that the agreement was therefore one to which the Court could not give effect.

The same reasoning applies to the other moiety. That moiety was purchased with notices, and it was contended that it was so purchased with the conviction that the purchaser would be compelled to renew. It did not appear so to me when the cause was in the Court below, nor does it appear so now. He who sold wished to exonerate himself, and might have therefore sold the cheaper. But that would raise an equity only between the vendor and the purchaser, with which the lessee had nothing at all to do.

I was of opinion in *Macquarrie* v. *Andrews*, that in a case of this kind the lessee had nothing to do with the matter, but that the equity arose only between the vendor and purchaser, and that if relief ought to be granted in the one case, so it ought in the other.

These were the grounds on which I thought that the [415] case was of too doubtful a nature for a court of equity to interfere. If ever there was a case in which evidence of fairness, if any such there was, ought to have been treasured up, it was in the case of a transaction like this. As it stood, the case was too doubtful to come within the principle of specific performance, and the length of time elapsed under circumstances which did not imply an acquiescence.

The only other point is the question which has been raised as to the interest of the £20 since 1749. But this is not a bill by the respondent to set aside the instrument, and the question does not properly arise. He wants no relief in equity; he has the legal estate. Whether a bill to set the agreement aside would be entertained by a court of equity, is at least doubtful. Lord Thurlow said that he would not entertain a bill to set aside an instrument which was a piece of mere waste paper. If the transaction had really been fair, a bill should have been filed to perpetuate the testimony of witnesses. As the case stood, I thought myself bound to dismiss the bill, leaving the appellant to any other remedy to which he might by law be entitled.

In this judgment the Lord Chancellor and the rest of the House concurred, and on the 10th June 1829 ordered and adjudged that the decree complained of be affirmed.

[416] ERROR:

FROM THE COURT OF KING'S BENCH.

EDWARD VIGOR FOX,—*Plaintiff in Error;* BISHOP of CHESTER,—*Defendant in Error.*

[Mews' Dig. v. 1234; S.C. 3 Bli. N.S. 123; 6 Bing. 1, and in K.B. 2 B. and C. 635; 4 Dowl. and Ry. 93. The sale of next presentations and agreements to exercise rights of patronage in favour of particular persons are now rendered invalid by the Benefices Act 1898 (61 and 62 Vict. c. 48), s. 1 (1) (*b*); (3); but (s. 1 (7)) in a family settlement a life interest to the settlor may be reserved. See also *Walsh* v. *Bishop of Lincoln*, 1875, L. R. 10 C. P. 518.]

Bargain and sale of a next presentation, the incumbent, to the knowledge of both parties, being *in extremis*, but without the privity of, or view to the nomination of any particular clerk: held by the House of Lords, reversing decisions of the Court of Great Sessions of Chester and of the Court of King's Bench, that this is not simony so as to entitle the Bishop to reject the clerk subsequently presented.

Thomas Joseph Trafford being entitled to the advowson of the rectory of the church of Wilmslow, in the county and diocese of Chester, by indenture of bargain and sale, bearing date the 12th of November 1819, conveyed the same to Edward Vigor Fox, the plaintiff in error. The then incumbent, the Rev. Mr. Bradshaw, was at the time of the execution of the indenture, to the knowledge of both parties, *in extremis*, and not expected to live long, and in point of fact he died in a few hours after. It did not appear, however, that either of the parties had at the time any particular clerk in view for the next presentation, nor that the Rev. George Uppleby, the clerk who was afterwards presented, knew any thing of the transaction. When Mr. Uppleby was presented by the plaintiff, the Bishop refused to admit him, and thereupon the plaintiff brought his *quare impedit*, in the Court of Great Sessions of Chester, setting forth his title to present, and how derived.

The defendant craved oyer of the indenture made [417] between the plaintiff and Trafford, whereby it was witnessed, that in consideration of £6000 paid to Trafford by the plaintiff, the former had granted, bargained, sold and demised, and by the said indenture did grant, etc. all that the advowson, donation, right of patronage, presentation, and free disposition of, in, and to the rectory and parish church of Wilmslow, with the rights, members, and appurtenances thereunto belonging: *habendum*, for ninety-nine years, if Trafford should so long live. With a proviso that when and so soon as he the said Edward Vigor Fox, his executors, etc. should have presented to the said rectory or church of Wilmslow, by reason of the same having become vacant or void by the death, resignation, deprivation, eviction, promotion or cession of J. Bradshaw the incumbent, or otherwise, or through the wilful neglect or default of him the said Edward Vigor Fox, his executors, etc., the said rectory or church should have been suffered, as to the presentation or right of presentation thereto, to lapse, he the said Edward Vigor Fox, his executors, etc., should and would at any time or times thereafter, at the request and proper costs and charges of the said Thomas Joseph Trafford, or such person as he should appoint, re-assign the said advowson to him the said Thomas Joseph Trafford or such person as aforesaid, for all the residue which should be then unexpired of the said term of ninety-nine years, free from all incumbrances by the said Edward Vigor Fox, his executors, etc.

The Bishop then pleaded several pleas, the main point of which was, that the contract between the parties was a device and contrivance to evade the policy of the law, and that it was corrupt and simoniacal, and therefore void. The cause having been brought to issue and having come on for trial, the jury found a [418] special verdict, in which they set forth that before and on the 12th day of November, in the year of our Lord 1819, the said Thomas Joseph Trafford was seised of the manor and advowson within mentioned, and that before and on the said 12th day of November, in the said year of our Lord 1819, the within named Joseph Bradshaw was the in-

cumbent of the within named church, in the pleadings within mentioned. And that the said church was then full of the said Joseph Bradshaw, to wit, at the parish of Wilmslow, within mentioned, in the county of Chester within mentioned; and that the said Joseph Bradshaw, so then being such incumbent of, and filling the said church as aforesaid, was, before and upon the said 12th day of November, in the said year of our Lord 1819, afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then greatly despaired of; and that he was and continued so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be greatly despaired of until the time of his death, and that the said Joseph Bradshaw so being such incumbent as aforesaid died of the said mortal disease, on the said 12th day of November, in the said year of our Lord 1819, at half-past eleven o'clock at night of the same 12th day of November, to wit, at the parish aforesaid, in the county aforesaid. And that on the said 12th day of November, in the said year of our Lord 1819, at ten minutes before three o'clock in the afternoon of the same day, and whilst the said Joseph Bradshaw was such incumbent as aforesaid, an agreement was made and concluded, between the said Thomas Joseph Trafford, so being seised of the said manor and advowson as aforesaid, and the said Edward Vigor Fox, for the sale, by the said Thomas Joseph Trafford to the said **[419]** Edward Vigor Fox, of the next turn or presentation of the said church, for and in consideration of £6000 of lawful money of Great Britain; that on the said 12th day of November, in the said year of our Lord 1819, and immediately after the making of such agreement, they, the said Thomas Joseph Trafford and Edward Vigor Fox, in pursuance of such agreement, and in order to carry the same into effect, and as an expedient to convey the next presentation alone, sealed and delivered the within mentioned indenture, bearing date the 12th day of November, in the said year of our Lord 1819, and of which said indenture the said Bishop hath within had oyer, and which is within set forth upon such oyer thereof, to wit, at the parish aforesaid, in the county aforesaid; and that the said agreement was made, and the said indenture was sealed and delivered in the life time of the said Joseph Bradshaw; and that the said Joseph Bradshaw, at the time of making the said agreement, and also at the time of sealing and delivering the said indenture, was afflicted with the said mortal disease, and in extreme danger of his life, and that his life was thereby then greatly despaired of. And that the said Thomas Joseph Trafford and the said Edward Vigor Fox, at the time of making the said agreement, and also at the time of sealing and delivering the said indenture, well knew and believed that the said Joseph Bradshaw was afflicted with the said mortal disease, and was in extreme danger of his life, and that his life was thereby then greatly despaired of at the parish aforesaid, in the county aforesaid; and that the said agreement was made and concluded, and the said indenture was sealed and delivered without any knowledge or privity whatsoever of the said George Uppleby, and without any intention to present the said George Uppleby to the said **[420]** church when it should become vacant, but whether or not, etc.

Upon the argument on this special verdict, which took place on or about the 4th June 1822, the Court of Great Sessions at Chester were divided in opinion, but in order to carry the cause up to a higher tribunal the judgment was entered for the defendant by consent.

On a writ of error, the judgment of the Court below was affirmed in Hilary term, 1824; and this writ of error is brought to reverse both judgments.

The question raised by this special verdict is, whether the sale of a next presentation, the incumbent being *in extremis*, within the knowledge of both contracting parties, but without the privity of or a view to the nomination of the particular clerk, be alone, without other circumstances, void, on the ground of simony.

The statute of 31 Eliz. c. 6, s. 5, enacts,

"And for the avoiding of simony and corruption, in presentations, collations and donations of and to benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions and inductions to the same;

"Be it further enacted by the authority aforesaid, That if any person or persons, bodies politic and corporate, shall or do at any time after the end of forty days next after the end of this session of Parliament, for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement,

grant, bond, covenant or other assurances, of or for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration; that **[421]** then every such presentation, collation, gift and bestowing, and every admission, institution, investiture and induction thereupon, shall be utterly void, frustrate, and of none effect in law; and that it shall and may be lawful to and for the Queen's Majesty, her heirs and successors, to present, collate unto, or give or bestow every such benefice, dignity, prebend and living ecclesiastical, for that one time or turn only: and that all and every person or persons, bodies politic and corporate, that from thenceforth shall give or take any such sum of money, reward, gift or benefit, directly or indirectly, or that shall take or make any such promise, grant, bond, covenant or other assurance, shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend and living ecclesiastical, and the person so corruptly taking, procuring, seeking or accepting any such benefice, dignity, prebend or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice, dignity, prebend or living ecclesiastical."

Mr. Sergeant Cross, for plaintiff in error, relied principally on the case of *Barrett* v. *Glubb*, 2 Sir W. Black, 1052, decided in C. B. about fifty years ago, a case the authority of which had never been questioned from that time till now. It was an issue from Chancery, and Sir W. Blackstone stated the point decided in these words: "On the purchase of an advowson in fee, the incumbent being *in extremis*, but without any privity of the clerk, the next presentation is not void as being on a simoniacal contract." There was no case to give colour of support to the judgment of the Court below, except that of *Sheldon* v. *Brett*, which consisted of two or three lines in a small **[422]** note-book of Sir H. Winch, published fifty years after his death, which contains this notable piece of law, that the sale of the next avoidance when the incumbent was sick and ready to die, was simony.

The following cases were cited: *Smith* v. *Shelburne*, Cro. El. 685; S. C., Moore, 916; *Sheldon* v. *Brett*, Winch, 63; *Stephens* v. *Wall*, Dyer, 282 (b), 1 And. 15; *Bishop of Lincoln* v. *Wolverston*, 5 Burr. 1504; *Doctor Hutchinson's Case*, 12 Co. 101, 3 Inst. 154; *Mackaller* v. *Todderick*, Cro. Car. 337. 353. 361; *Grey* v. *Hesketh*, Amb. 263; *Barrett* v. *Glubb*, 2 Sir W. Black. 1052; *Greenwood* v. *Bishop of London*, 1 March, 252; *Winchcombe* v. *Bishop of Winchester and Another*, Hob. 165, Noy, 25, S.C.; *Kitchen* v. *Calvert*, Lane, 102; *Brookesby's Case*, Cro. El. 174, 1 Leon. 165; *Baker* v. *Rogers*, Cro. El. 788; *Bishop of St. David's* v. *Lucy*, 12 Mod. 237; *Walker* v. *Hamersly*, Skin. 90, 3 Lev. 115, S.C.

For the plaintiff in error it was contended that the judgments of the Courts of Great Sessions and of the King's Bench ought to be reversed, for the following among other reasons:

That by the law of England, the patronage or the right of presenting to a benefice is a property or estate capable of being conveyed in fee, for life, for years, for any number of turns, or for the next turn only, whilst the church is full; when it is empty, incapable of being conveyed, because it is like the rent of an estate become in arrear, which is a chose in action, and cannot be assigned. But the church is full as long as the incumbent is alive; and is equally so whilst he is in his last sickness, as in full health.

The patron, therefore, of a living may be changed at any time till the last moment of the existence of an incumbent, and a new patron substituted; and neither **[423]** the common nor statute law imposes any restriction in this respect on lay patrons.

It is the exercise only of the right of presenting by the patron for the time being which is a public trust, and as such controlled by law: which sufficiently guards the interests of the church, by providing that the existing patron shall not nominate from corrupt motives, or by reason or in consequence of a corrupt contract.

This restriction arises from the statute 31 Eliz. c. 6, and from this statute only: and the question turns entirely upon the construction to be put upon its provisions. It is a penal statute, and it creates forfeitures; and therefore, according to the acknowledged principle of law, must be construed strictly, and not extended by a supposed equity.

This statute avoids the presentation which the patron for the time being makes, for any money, reward, gift, profit or benefit, arising directly or indirectly, or for any promise of such reward, directly or indirectly. It is direct or indirect reward, not direct or indirect presentation, which it prohibits in express terms.

That in the present case, Mr. Fox, the plaintiff in error, was the patron at the time of the actual vacancy, and he selected the clerk without any communication with Mr. Trafford; and his selection was not influenced or produced by money or reward, directly or indirectly. The presentation by the actual patron is not tainted with the least suspicion of simony.

To bring the case within the provisions of the Act, it must be contended, as it was in the Courts below, that Mr. Trafford was to be considered as the patron presenting the clerk, and receiving the reward for that purpose, and the plaintiff in error as the mere instrument to carry such presentation into effect. But there [424] is nothing in the finding of the jury to warrant such a conclusion.

It is admitted, that the grant of a next presentation during the life of an incumbent may be void, on the ground of simony; but that is where the contract is really simoniacal; a contract for the presentation *by* the patron of a *particular clerk*, for money, and the conveyance of the next presentation is a contrivance or instrument to carry it into effect, and is so found by the jury. This will be illustrated by the case of *Winchcombe* and *Puleston*, the leading case on the subject; the pleadings are in Winch's Entries, 887, and fully explain the nature of the transaction. The contract was made between the clerk to be presented and the patron, the incumbent being then sick of a grievous disease, and expected every day to die, that in consideration of £90, to be paid by the clerk to the patron, he should procure him to be presented to the church when vacant, and to assure such presentation he should grant the next avoidance to a person, a familiar friend of the clerk, specially nominated and appointed by him in confidence to make the presentation, with the intent that the clerk should be presented; and it is averred, that in performance of this contract the grant was made, and the contract was so found by the jury. Here was a clear simoniacal contract: and the substituted patron was the mere instrument to carry the contract into effect, and to appoint the particular clerk. The case of *Closse* v. *Pomroy* is nearly to the same effect; and is another instance of a contrivance to carry into effect a simoniacal contract.

That, if the presentation do not appear upon the face of the pleadings to be clearly simoniacal, that is, a presentation by the existing patron, of the clerk, for reward, it is a question for the jury whether each [425] transaction be or be not a shift or contrivance to carry a simoniacal contract into effect; as, under the statutes against usury, if there appear on the face of an instrument a loan, and a reservation of illegal interest, the Court can give judgment against its validity, but if the transaction does not appear on the face of it necessarily to be usurious, it is a question of fact for the jury, and whether it be a shift or contrivance or not. In both the cases, the really simoniacal or usurious contract ought to be shown by a special plea when a special plea is required; and in all cases found by the jury.

That the defendant has not pleaded in this case, and the jury have not found, that there was any corrupt or simoniacal contract that Trafford should present the clerk, and that the grant of the next presentation was a mere contrivance to carry it into effect.

That in the absence of such a finding, the Court cannot make any presumption against the validity of the grant. Simony as well as fraud is not to be presumed, but found.

That if it were competent for the Court to make any presumption, the facts pleaded and found do not warrant any such presumption in this case.

If it had been found that money was to have been given to Trafford, if Uppleby should be presented, or that it was the purpose or even intent of the plaintiff to have presented Uppleby, it might have been argued that the grant was made for that purpose, and if so, the grant may possibly be said to be an instrument to carry into effect the particular appointment; and the clerk may possibly be said to have been presented by the former patron. In such a case the substituted patron has no power of selection, but is a mere instrument, and the appointment, made virtually by the old patron, is an appointment made for reward. But if [426] there is no intention or purpose to present any particular clerk, the new patron is a free agent, may select whom he

pleases, and if he select any clerk, without reward, he is not within either the letter or spirit of the Act. The selection of the clerk, the object aimed at by the statute, is free from all taint. The old patron parts with and the new patron purchases the right of selection, by means of the grant, and that of right is fairly and properly exercised.

That the judgment of the Court of King's Bench proceeds in a great degree upon the ground that Courts have a right to consider what is an evasion of a statute, a power which, it is humbly conceived does not apply at least to the case of a penal statute creating forfeitures, and if allowed to be exercised, would lead to great doubt and uncertainty in the law.

That, upon referring to decided cases, there is none in which it has been held that the grant of a next presentation, the incumbent being *in extremis*, is void, a short note in Winch, 63, excepted, in which mention is made of its having been so adjudged in Chancery, but under what circumstances does not appear; it may have been so adjudged on the special facts.

That, on the other hand, there is a solemn decision of the Court, that by the grant of an advowson, when the incumbent was on his death-bed, and it was uncertain whether he would live over the night, with full knowledge in the contracting parties, the next presentation did pass, and was not avoided by simony, which is a direct authority for the plaintiff in error. If the grant of next presentation, when united with all other future presentations, was not void, the grant of the next presentation alone could not be so. This decision has never yet been questioned until the present case.

[427] For the defendant in error, it was contended that the judgments ought to be affirmed, for the following among other reasons:

First: Because simony was an offence by the common law of the land, antecedently to the statute of 31st Eliz. c. 6; and the transaction, as stated upon the record, was a corrupt and simoniacal contract for the sale of the next turn or presentation, under the special circumstances of the case. (1 Institute 17 B. 3 Institute 156. *Mackaller* v. *Todderick*. Cro. Car. 361. *Winchcomb* v. *Pulleston*, Hob. 167. *Bartlett* v. *Vinor*, Carth. 252.)

Secondly: Because the presentation in the present case was substantially a presentation by Mr. Trafford the seller, and was by him a presentation for money.

Thirdly: Because the transaction in question was a shift and contrivance to evade the provisions of the statute of the 31st Eliz. c. 6.

Fourthly: Because it was a presentation by Mr. Trafford, for money, of such clerk as Mr. Fox might nominate; and because a contract to such effect is simoniacal, though it may have passed without the privity of the clerk who may afterwards happen to be presented; the privity of a clerk is not a necessary ingredient in a corrupt or simoniacal contract, as has been established by several authorities, and particularly in *Doctor Hutchinson's case*, 12 Rep. 100; and in the case of *Baker* v. *Rogers*, Cro. Eliz. 788.

Fifthly: Because, by law, no grant can be made of the next presentation when the church is empty; of which rule, though it has been sometimes said that the reason is, that the presentation is then a fruit fallen, or that it is a mere personal privilege, or that is severed from the advowson, and would pass to the executor, the true and substantial reason is public utility, and the better to guard against the mischiefs of simony, as was expressly laid down by Lord Mansfield, Chief Justice, **[428]** and Mr. Justice Wilmot, in the *Bishop of Lincoln* v. *Wolforstan*, 3 Burrough, 1504; and because the contract in the present instance was made upon the footing and understanding of the church being full in name and form only, but vacant in substance and reality. (*Brookesby's Case*, Cro. Eliz. 174 S.C. 1 Leonard, 167. 3 Leonard, 256. Dyer, 282).

Sixthly: Because the law, of which the object and policy is the presenting to benefices, with cure of souls, of men of learning and piety, and the preventing of scandal to religion and prejudice to the church, by preferments either of improper persons or from corrupt motives, will not endure the danger which would arise from the sale of the right of presentation when the incumbent is at the point of death, where the contracting parties know that fact, and where the contract is made with a view to and upon the terms of an immediate presentation.

Seventhly: Because there is no mischief intended to be guarded against by the

rule of law prohibiting the sale of the next presentation when the church is empty, which might not be equally incurred if such presentation could be sold when the incumbent is on his death-bed, and known to be so both to the buyer and to the seller.

Eighthly: Because the statute 31 Eliz. c. 6, ought to receive a liberal construction, in order to reach the evil for the remedy of which it was passed and because the deed set forth in the record was only a contrivance to pass an immediate presentation for money, in violation of the policy and evasion of the provisions of the statute.

Lastly: Because in *Sheldon* v. *Brett*, Winch, 63, it was expressly decided, that a grant of the next turn for money was simoniacal, when the parson was sick in his bed, and ready to die.

[429] Eldon (Earl of): I rise, my Lords, with the permission of the Lord Chancellor, to propose the question to be put to the Judges, in this very important case; for it would be very important though there had been no other cases bearing upon it, and it is of great importance, regard being had to some cases which have been already decided.

As to the case of *Barrett* v. *Glubb*, I think it a very strong case indeed, and it is one which I have often had occasion to consider.

That case has the authority of Lord Chancellor Bathurst, and that of the Court of Common Pleas, when Lord Chief Justice De Grey sat in court, and of other eminent Judges. I happen to know that when Lord Ch. J. De Grey sat with Lord Bathurst, hearing a case in the Court of Chancery, his Lordship said that he never liked equity so well as when it was like law, while Lord Mansfield on the other hand said that he never liked law so well as when it was like equity. In that case Lord Bathurst thought that the agreement might be carried into specific execution, if, under the circumstances, the law would allow it; and the Judges of the Court of Common Pleas were of opinion that, under the circumstances, the advowson might be sold.

It was argued in this case that there was no fraud in fact found by the jury, but then there may be a fraud on the law, or, as my friend the Solicitor-General expressed it, an insult to an Act of Parliament; and the question will be, regard being had to the law as to simony, if simony had any thing to do with this case, and whether this was a fraud on the law, and whether the circumstances were such as to bring it within the principle of those cases which were held to be a fraud [430] on the law, although in the language and text of the law no such fraud was mentioned.

Your Lordships are not in the habit of putting the question directly to the Judges, whether a decision is wrong or not; but there is a mode by which, *salva dignitate*, we can get their opinions so as to assist us in deciding the case before us.

The question I propose to put is, "Whether, on the whole matter, the right to present, on the death of Bradshaw, was by law in Edward Vigor Fox."

Fox v. *The Bishop of Chester.*

The question which your Lordships have been pleased to put to the Judges in this case is:

> "Whether, upon the whole of the matters stated or referred to in the special verdict, the right to present to the rectory or parish church of Wilmslow, upon the death of the Reverend Joseph Bradshaw, was by law vested in Edward Vigor Fox, the plaintiff in error."

The Judges who heard the argument at your Lordships' bar are unanimously of opinion that, upon the whole of the matters stated or referred to in the special verdict, the right to present to the rectory or parish church of Wilmslow, upon the death of the Reverend Joseph Bradshaw, was by law vested in Edward Vigor Fox, the plaintiff in error. The patronage of churches was at first yielded by the bishops to the lords of manors who founded or endowed them, and annexed to the manors in which the churches were situate.

By the grant of a manor, the advowson appendant to it passes to the grantee. Many of these advowsons have since been severed from the manor to which they were appendant. Although advowsons, when in gross, [431] as those which are separated from the manors to which they belonged are called, are a species of spiritual trusts, yet they have been said by Lord Kenyon and other Judges to be trusts connected with interests; and they certainly do not lose the temporal character

which originally belonged to them, but may be sold either in perpetuity or for the next or any number of avoidances. If the perpetual advowson be sold when the church is void, the next presentation will not pass; and if the next avoidance only be sold after the death of the incumbent, the sale is altogether void. It may be wise to carry the restraint on the sales of this species of property still further, and to say the next avoidance shall in no case be sold: undoubtedly much simony is indirected committed by the sale of next presentations. If it is proper to prevent the giving of money for a presentation, it seems equally proper to prevent the sale of that which gives the immediate right to present. But the Courts of Law have never thought that they were authorized to go this length; and even in cases where the purchase of the next presentation seemed to bring a party nearer to simony than in any other, it was found necessary to have the aid of the Legislature to prevent such purchases. A clergyman might buy a next presentation and present himself, before the passing of the statute of the 12 Ann. c. 12. The preamble to the second section of that Act states that "some of the clergy have procured preferments for themselves by buying ecclesiastical livings;" and then the section provides, that if any one who shall, either directly or indirectly, take or procure the next avoidance for money, reward, gift, profit or benefit, shall be presented or collated (which words limit the operation of the Act to clergymen), that it shall be **[432]** deemed simoniacal. It seems to me that if the terms of the statute of Elizabeth could be extended by Equity, that the case of a clergyman buying a presentation with the intention of presenting himself, might have been reached without any other act of Parliament. If such a case as this was not within the statute of Elizabeth, the case on which your Lordships have desired our opinion cannot be affected by that statute. The church in the present case was full: no clergyman was privy to the agreement; and the living was not intended by the plaintiff in error, at the time he bought the presentation, for the clerk that he afterwards presented. I would observe that persons have recovered who *appeared* to be dying. The special verdict only states that the incumbent, at the time of the sale, *was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby greatly despaired of, and that he was so afflicted with such mortal disease and in extreme danger of his life, and his life was and continued to be greatly despaired of until his death*, which happened at half past eleven at night of the day on which the sale was completed. Many who are afflicted with mortal diseases, and are from such diseases thought to be in imminent danger of dying, live for a considerable time, and the effect of the diseases are sometimes so far suspended, that the persons so afflicted become again capable of performing the duties belonging to their station in life. If this conveyance was void it must have been void at the time it was executed, and would remain void in whatever hands and under whatever circumstances the right of presentation might have passed: now if this incumbent had been restored to apparent health, and the vendee had sold the presentation to another person ignorant of **[433]** the circumstances under which the first sale was made, it would be most unjust to hold that the second sale was void, and yet this would be the necessary consequence of a decision that the first sale was simoniacal.

Whilst the law permits the next presentation to livings to be sold during the life of the incumbents, as long as the incumbent is alive the sale is good. Every one who purchases a next presentation contemplates the death of the incumbent; if this contemplation made the sale void, no sale of a next avoidance could be good. If the death of the incumbent and the prospect of using the presentation may be contemplated, the time when the death is to happen cannot be material. This case has been compared by the Counsel for the defendant in error to those of contemplation of bankruptcy which is injurious to creditors. A transfer of goods or payment of money in contemplation of bankruptcy was, before the 6 Geo. 4, void; by that Act such a transfer or payment is an act of bankruptcy, because such transactions are direct frauds on the creditors of the bankrupts. But the death of an incumbent may be contemplated, and the purchasing of the next avoidance in consequence of such contemplation is no fraud upon any one; the cases therefore have no resemblance to each other. The making the legality of the transaction to depend on the state of the incumbent's health would give occasion to much expensive litigation, and probably to much false swearing, and would keep churches for a long time void. The

affairs of men are best regulated by broad rules, such as exclude all subtle disputes, all doubtful unsatisfactory inquiries. It would be difficult to establish a rule that should settle what degree of probability of the approaching death of an incumbent should [434] prevent the sale of the next avoidance of a benefice, and more difficult to ascertain by evidence when an incumbent was within that degree. I submit to your Lordships that the most convenient rule is that which I conceive the law has already established, namely that the right to sell the presentation continues as long as the incumbent is in existence. The judgment of the Court below is, according to the words of the Chief Justice, "founded on the language of the 31 Eliz. c. 6, and the well known principle of law, that the provisions of an Act of Parliament shall not be evaded by shift or contrivance." The words of the fifth section of the Act are, "that if any person shall, for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement, bond, grant, covenant or other assurance, of or for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly, present or collate any person to any benefice, or give or bestow *the same* for or in respect of any such corrupt cause or consideration." This clause applies only to the person presenting to the living; if he has received no reward or promise of reward, the presentation is not affected by the terms of the Act. The plaintiff in error, who made the presentation, received no reward or had any expectation of reward for making this presentation. I agree that if some other person had received a reward for the plaintiff in error, and was to account to him for it—if the plaintiff in error was not the real purchaser of the avoidance, but the person presented or some one in his behalf—these and many other things might be considered as frauds on the Act, and have avoided the contract. But such things should have been shown by the pleadings, and [435] found by the jury: all that appears on this record is that the plaintiff in error bought the next avoidance of a living that was full, and that without any corrupt consideration he used the right of presentation which he had purchased. All this he had a right to do. There is no circumstance found that shows this is a fraud on the Act, unless it be a fraud on the Act to buy the presentation to a living which the seller and buyer expect will soon become vacant: presentations are bought and sold every day with this expectation. There is no legal authority to support the judgment of the Court, except a short and loose note in Winch's Reports, of Hutton saying what used to be done in Chancery; on the other hand, the case of *Barrett* v. *Glubb* is directly opposed to the judgment of the Court of King's Bench. It was thought that case had not the weight of a judicial decision, because it was not acted upon: but it was acted upon. Lord Bathurst decreed the conveyance of the advowson which supported the presentation, and gave the purchaser and his clerk their costs. The seller must have acquiesced in this decision or he would have presented his *quare impedit:* and if the Common Pleas had retained the opinion that they had certified to the Chancellor, he might have carried it by bill of exceptions to the King's Bench. When the Chancellor decreed a conveyance, without doubt it was such a conveyance as gave the purchaser a legal title from a time before the death of the incumbent, by making the assignment take effect from the time of the contract to assign; there was therefore no occasion for any injunction, as was supposed by the King's Bench. The question, by the conveyance decreed, was fairly raised for another court of law, if the party had not completely acquiesced in the judg-[436]-ment of the Common Pleas, confirmed by that of the Chancellor. There are no other cases on the books which bear much on the question proposed to us by your Lordships.

For the reasons given in support of the Judges' answer to that question, I only am responsible.

Thereafter the following judgment was pronounced and read (3d June 1829):

Ordered and adjudged, that the Judgment given in the Court of King's Bench, affirming a Judgment of the Court of Great Sessions at Chester, be REVERSED; and that the Judgment given in the said Court of Great Sessions at Chester, be also REVERSED.

[437] IN ERROR.

FROM THE COURT OF KING'S BENCH.

JOHN, THOMAS and GEORGE ROAKE,—*Plaintiffs in Error;* DENN, on the Demise of NOWELL and ATKINSON,—*Defendant in Error.*

[Mews' Dig. x. 1452; S.C. 4 Bli. N.S. 1, 6 Bing. 475, and in C. P. 2 Bing. 497, and in K.B. 5, B. and C. 720. Considered in *In re Mills*, 1887, 34 Ch.D., 190, 191, and see *Lake* v. *Currie*, 1852, 2 De G., M. and G. 547: *Harvey* v. *Harvey* 1875, 32 L.T. 141: *In re Walsh's Trusts*, 1878, L.R. 1 Ir. 320: and the Wills Act, 1837 (1 Vict. c. 26), s. 27.]

Tenant in fee of one undivided moiety, being tenant for life of the other undivided moiety, with power of appointment in fee, devises as follows: "I hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew, John Roake, for his life, on condition that, out of the rents thereof, he do from time to time keep such estates in proper and tenantable repair." Held by the House of Lords, in concurrence with the unanimous opinion of the Judges, that this is not an execution of the power.

This was an ejectment in the Common Pleas, on the above demises, against the plaintiffs in error, of divers messuages, corn-mills and lands, in the parish of Godalming and county of Surrey. The defendants (now plaintiffs in error) pleaded the general issue. The cause was tried at the Surrey spring assizes, in 1823, before the late Chief Baron Richards, and the jury found a special verdict, which stated:

That in November 1749 Miles Poole died seised of the tenements in question in fee, and they descended to his two daughters and co-heirs, Sarah, the wife of Thomas Scott, and Elizabeth, the wife of Henry Roake.

[438] That, by indentures of lease and release, in April 1750, between Thomas Scott and Sarah his wife, and J. P. Roake and Elizabeth his wife, of the first part, George Johnson of the second part, and William Hill of the third part, the premises were conveyed to Hill in fee, to make him tenant to the praecipe in a recovery which was suffered and made to enure, as to one undivided moiety, to the use of T. Scott for life, remainder to the use of his wife Sarah Scott for life, with power of appointment, by deed or will, in fee, and for want of such appointment, to the use of the child or children of Scott by Sarah his wife, in tail, remainder to the use of Elizabeth Roake for life, remainder to her child or children in tail, remainder to Scott in fee; and as to the other undivided moiety, to the use of Henry Roake for life, remainder to the use of Elizabeth his wife for life, with power of appointment in fee, and in default thereof, remainder to the child or children of Henry Roake by Elizabeth his wife, in tail, remainder to the use of Sarah Scott for life, remainder to her children in tail, remainder to Henry Roake in fee.

That in 1758 T. Scott died without issue, and that in 1763 Sarah Scott married John Trymmer, and that John Trymmer died without issue in 1766, leaving his wife Sarah surviving.

That in 1775 Elizabeth Roake died, leaving Henry Roake, her husband, and John Roake, her son and only child by Henry Roake, surviving, and without having made any appointment.

The special verdict then stated, that on the 6th and 7th of September, 1775, deeds of lease and release were executed between the said Henry Roake of the first part, the said John Roake of the second part, the said Sarah Trymmer, widow, of the third part, B. Parnell of the fourth part, and James Morgan of the fifth [439] part; by which, after reciting that the said Sarah Trymmer had agreed to purchase of the said John Roake his interest in the undivided moiety of the said premises, subject to the said Henry Roake's life interest, the same moiety was conveyed to Parnell in fee, to make him a tenant to the praecipe in a recovery to be suffered to the use of the said Henry Roake for life, remainder to the said Sarah Trymmer in fee.

That the said Henry Roake died on or about the 15th December, 1777; and that

the said Sarah Trymmer, on the 6th of June 1783, made and published her will, in writing, in the presence of and attested by three credible witnesses, and thereby gave and devised all her freehold estates in the city of London and county of Surrey, or elsewhere, in the words following; that is to say,

"I hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew, John Roake, for his life, on condition that, out of the rents thereof, he do from time to time keep such estates in proper and tenantable repair; and on the decease of my said nephew, John Roake, I devise all my said estates, subject to and chargeable with the payment of £30 a year to Ann, the wife of the said John Roake, for her life, by equal quarterly payments, to and among his children lawfully begotten, equally at the age of twenty-one, and their heirs as tenants in common; but if only one child shall live to attain such age, to him or her, at his or her age of twenty-one; and in case my said nephew, John Roake, shall die without lawful issue, or such lawful issue shall die before twenty-one, then I devise all the said estates, chargeable with such annuity of £30 a year to the said Ann Roake, for her life, in manner aforesaid, to and [440] among my nephews and nieces, Miles, Thomas, John, James and Sarah Penfold, and Susannah Longman, or such of them as shall be then living, their heirs and assigns for ever."

The special verdict then stated, that the said Sarah Trymmer, on the 4th December 1786, died without revoking her said will, the said John Roake being then living and her heir at law; and that the said Sarah Trymmer had not at the time of making her said will, or at the time of her death, any other freehold lands, tenements or hereditaments in the county of Surrey, than those mentioned in the declaration.

That by indenture quadrupartite of the 26th April 1787, between the said John Roake, nephew and heir at law, and also the devisee for life named in the will of the said Sarah Trymmer, of the first part; the said Miles Poole Penfold, Thomas Penfold, John Wornham Penfold, James Penfold, Sarah Penfold, spinster, and Susannah Longman, spinster, the said nephews and nieces and devisees in reversion named in the said will of the said Sarah Trymmer, of the second part; the said B. Parnell of the third part; and Thomas Holland of the fourth part; after reciting among other things the death of the said Sarah Trymmer on the 4th of December 1786, and that a recovery had never been suffered pursuant to the deed of the 7th of September 1775, it was agreed that the said Thomas Holland should recover the said tenements with the appurtenances against the said B. Parnell, as tenant to the praecipe in a recovery, to enure to the same uses as those expressed in the said Sarah Trymmer's will, or such of them as were capable of taking effect.

That a common recovery of one moiety was suffered accordingly.

That by an indenture of the 5th of November 1789, [441] and duly executed, between the said John Roake and Richard Nowell, Roake covenanted to levy a fine of the tenements mentioned in the declaration to Nowell and his heirs, to the use of Roake and his heirs, and that a fine was levied accordingly in Michaelmas term 30 Geo. 3.

That by indentures of lease and release of the 3d and 4th of July 1797, and duly executed, the release being made between the said John Roake and Elizabeth his wife of the first part, the said Richard Nowell of the second part, and John Radcliffe of the third part; the premises were conveyed to Nowell in fee, to make him tenant to the praecipe of a recovery to be suffered for the purpose of barring all estates tail and remainders and reversions to the use of such person or persons as the said John Roake should appoint, and for default of appointment, to the said John Roake in fee.

That a common recovery was suffered accordingly.

The special verdict then stated, that by indentures of lease and release and appointment, made the 20th and 21st of May 1802, between the said John Roake of the first part, the said Richard Nowell of the second part, John Atkinson of the third part, William Smith of the fourth part, and William Atkinson of the fifth part; the said John Roake, in consideration of £1220 purchase money, £582 2s. 2d. of which was paid to William Smith, and £637 17s. 10d., the residue, to Roake, appointed and granted and released all the tenements in the declaration mentioned to such uses as Richard Nowell should appoint, and in default of appointment, to Nowell for life, remainder to J. Atkinson as a trustee to bar dower, remainder to the heirs of Nowell.

That the said John Roake died on the 13th of February 1803, and left the defendants, John Henry Roake, [442] Thomas William Roake, Elizabeth Roake, and George Roake, who were his only children, him surviving; and that the said John Henry Roake was born on the 20th November 1787, the said Thomas William Roake on the 25th of August 1789, the said Elizabeth Roake on the 4th of March 1793, and the said George Roake on the 12th of May 1795.

The special verdict then stated the demise on the 2d of July 1811, by Nowell to the plaintiff below, John Denn, on which the action of ejectment was brought, and the special verdict found, which was argued twice; first in Trinity term 1824, and secondly in Michaelmas term in the same year, when the Court took time to consider their judgment, and in Trinity term 1825 gave judgment for the defendants in the ejectment.

The questions stated to be argued were:

First. Whether, under Mrs. Trymmer's will, the children of John Roake took contingent remainders, and were barred by the fine of Michaelmas term 30 Geo. 3.

Second. Whether, as to a moiety, Mrs. Trymmer's will was a valid execution of the power of appointment reserved by the deed of 26th April 1750; and whether the estate tail which John Roake took under that deed, in default of appointment by the said Sarah Scott (afterwards Sarah Trymmer), was barred by the recovery suffered in Trinity term 37 Geo. 3. But the argument was confined by the Court to the question on the execution of the power of appointment; the first question having been decided on this same will, in the House of Lords, in the case between Randoll and others, plaintiffs, and the now plaintiffs in error, who, with their deceased sister, were the defendants in error in that case. The same question had also then [443] been decided in the case of *Doe* v. *Nowell*, 1 M. and S. 327, between the same parties as in the present case, except the nominal plaintiffs. Although the judgment of the Court of Common Pleas was not given, as appears by the record, until the 14th June, Trinity term 1825, the opinion of the Court was pronounced in Hilary term 1825, and the defendant, Nowell, prematurely brought his writ of error, tested the 10th February, and returnable in fifteen days of Easter, the first return of the following Easter term in the King's Bench, on which he assigned general errors in Michaelmas term 1825, and the now plaintiffs in error joined in error, and the same was argued in Trinity term 1826; and the Court having taken time to consider, afterwards, during the same term, reversed the judgment of the Court of Common Pleas. (See B. and C. vol. 5, part 3, p. 720.) Upon which judgment of reversal, the defendants below brought the present writ of error in the House of Lords, and have assigned general errors, and the special error in the record arising from the fact above mentioned; namely, the return of the writ of error, which was brought by the plaintiff below, on the judgment of the Court of Common Pleas, before the judgment was given; and the plaintiffs in error (the defendants in the original ejectment) prayed that the judgment of the Court of King's Bench might be reversed, for the following, among other reasons:

1. In matter of form. There was such a defect in the writ of error in the King's Bench, as was not amendable or curable under the statute 5 Geo. 1, c. 13, and the writ of error ought to have been quashed. (See *Wright* v. *Canning*, 2 Strange, 807; *Canning* v. *Wright*, 2 Lord Raymond, 1531, S.C.; *Vice* v. *Burton*, 2 Strange, 891, S.P.; and in addition to those cases, [444] *Rejeindoz* v. *Randolph*, 2 Strange, 834; and *Wilson* v. *Ingoldsby*, 2 Lord Raymond, 1179.) In the last case, the Court said, though the record was transcribed after judgment given, the record was not to be considered as removed; and in *Vice* v. *Burton*, the plaintiff in error took the exception after failure of an objection in argument in error:—and in *Rejeindoz* v. *Randolph* the writ of error returnable before judgment given was quashed, and the plaintiff in error paid costs. In *Somerville* v. *White*, 5 East, 145, the writ of error, though returnable before the judgment given, operated as a supersedeas upon the judgment, because the judgment, when signed in the same term, relates back to the first day of term; and in *Hill* v. *Tebb*, 1 N. R. 298, it was held that a writ of error might be made returnable before the day on which the judgment is actually signed, if the writ of error and judgment are of the same term: the reason of the two last decisions seems to confirm the authority of the cases before cited, the writ of error and the judgment in each of those cases not being of the same term. The judgment in the action is the

true foundation of the writ of error, (*Gravall* v. *Stimpson*, 1 B. and P. 479), and the error objected in this case is similar to that of bringing an action before the cause of action accrued, which would be ground for a writ of error.

2. On the merits. The will of Sarah Trymmer was a good execution of her power, on the authority of the case of *Standen* v. *Standen*, 2 Ves. jun. 589. For at the time of making her will, she had no freehold estates in the county of Surrey, except the undivided moiety of the tenement in the county of Surrey, which was subject to her power of appointment. Consequently her will would have been totally inoperative at law as to any tenements in the county of Surrey, unless it **[445]** were allowed to operate as an execution of the power. It appears from the printed reports of this case, in 2 Bingh. 497, *Doe* v. *Roake*, and 5 Barn. and C. 720, *Denn* v. *Roake*, that the Courts below reasoned upon the assumption that Sarah Trymmer was seised in fee of one undivided moiety of the tenements in the county of Surrey, and was seised of the other moiety for life, with a power of appointment; whereas it is apparent, upon the face of the special verdict, that she was not seised in fee of one moiety, inasmuch as the recovery intended to be suffered in pursuance of the deeds of September 1775 was not suffered till after her death, consequently the legal estate conveyed by those deeds remained vested in Parnell, and never did vest in Sarah Trymmer.

The defendant in error prayed that the judgment might be affirmed, for the following, among other reasons:

1. As to the question of form, because the plaintiffs in error having joined in issue on the writ of error, are estopped and precluded from objecting to the irregularity, if any, in the proceedings.

To have availed themselves of the insufficiency of the writ of error, they ought to have put a plea on the record applicable to the case.

2. As to the merits, because Mrs. Trymmer did not express any intention to exercise her power: and it is a rule of law that general words shall not amount to an exercise of a power of appointment unless the language of the instrument has reference to the power, or would, in the genuine and legal import of the language, fail of effect unless it amounted by construction to an execution of the power.

In this case no reference is made in the will of Mrs. Trymmer to the power, and the language of her will **[446]** has full operation by its application to property of which Mrs. Trymmer was seised in fee.

The case was argued in May 1829, the Judges being present, and on the merits the following cases were cited:—*Clere's* (*Sir Ed.*) *case*, 6 Co. 17; *Maddison* v. *Andrew*, 1 Ves. sen. 57; *Andrews* v. *Emmot*, 2 Bro. Ch. Cas. 297; *Langham* v. *Henny*, 3 Ves. 467; *Ex parte Caswall*, 1 Atk. 559; *Nannock* v. *Horton*, 7 Ves. 391; *Bennet* v. *Aburrow*, 8 Ves. 609; *Bradley* v. *Wescott*, 13 Ves. 445; *Jones* v. *Tucker*, 2 Mer. 533; *Jones* v. *Currie*, 1 Swanst, 66; *Coates* v. *King*, Privy Council, 1821, (cited in *Roake* v. *Denn*); *Morgan* v. *Surman*, 1 Taunt. 289; *Roach* v. *Wadham*, 6 East. 289; *Dillon* v. *Dillon*, 1 Ball and Beatty, 77; *Hales* v. *Margerum*, 3 Ves. 299; *Commendam Case*, Hob. 159, 160.

The Lords did not think it necessary to give any judgment on the question of form; and on the merits, the following question was put to the Judges:—"Whether the will of Sarah Scott, or Trymmer, was a good execution of her power of appointment."

On the 16th February 1830, the Lord Chief Baron, Alexander, delivered the opinion of the Judges.

Lord Chief Baron: The Judges, my Lords, find no difficulty in this case, and there is no difference of opinion among them. The question put to us by your Lordships is, "Whether the will of Sarah Scott, or Trymmer, was a good execution of her power of appointment." The facts of the case, as stated in the special verdict are, that in 1749, Miles Poole was seised in fee of certain tenements and premises in London and the county of Surrey. After his death the estates descended to his two daughters, one of whom was married to Thomas Scott, the other to Henry **[447]** Roake. In 1750, Scott and his wife, and Roake and his wife, suffered a recovery, and it was by the conveyance declared that the recovery should enure to the following uses, viz.: 1st, as to one undivided moiety of the tenements, to the use of Scott for life, remainder to the use of Sarah his wife for life, remainder to the use of such persons as Sarah Scott should by deed or will appoint, remainder to the children of Sarah Scott and her husband in tail, etc.; remainder to Mrs. Roake for life,

remainder to her children in tail, etc.; with other remainders not necessary to detail: the moiety of Mrs. Roake and her husband was settled to Roake for life, remainder to his wife for life, with a similar power of appointment as that to Sarah Scott (or Trymmer, as she was called, from her having married a second husband of that name, a fact not material here,) remainder to their child or children in tail, etc. In 1758 Scott died without issue, and his widow married John Trymmer, who in 1766 also died without issue, leaving Sarah surviving. The special verdict then stated that in May 1775 Elizabeth Roake died, leaving her husband Henry Roake, and her son and only child John Roake, surviving, and without having made any appointment. In September 1775, Sarah Trymmer purchased from her nephew John Roake, with the concurrence of his father Henry Roake, and subject to the life estate of Henry, the undivided moiety of the Roakes in fee. The verdict then stated that Henry Roake died in 1777, and Sarah Trymmer then became entitled to the moiety of the Roakes in fee, with her own original moiety as tenant for life, with power of appointment in fee.

Such was the situation of Mrs. Trymmer, when in 1783 she made her will, and that part of it to which your Lordships' question refers is in these words: "I **[448]** hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew John Roake for his life, on condition that, out of the rents thereof, he do from time to time keep such estates in proper and tenantable repair."

This is all that is material, but I will read the rest of this passage, not for what it contains, but in order to show what it does not:

"And on the decease of my said nephew John Roake, I devise all my estates, subject to and chargeable with the payment of £30 a year to Anne, the wife of the said John Roake, for her life, by equal quarterly payments, to and among his children lawfully begotten, equally at the age of twenty-one, and their heirs as tenants in common; but if only one child shall live to attain such age, to him or her at his or her age of twenty-one. And in case my said nephew John Roake shall die without lawful issue, or such lawful issue shall die before twenty-one, then I devise all the said estates, chargeable with such annuity of £30 a year to the said Anne Roake for her life, in manner aforesaid, to and among my nephews and nieces," etc.

We are of opinion that this will is not an execution of the power reserved to Sarah Scott, or Trymmer, by the settlement of 1750. There are many cases bearing on this question, and there are few subjects on which the decided cases have been so uniform in establishing the law.

Of all the cases, commencing with *Sir Edward Clere's case*, in 6 Rep., and coming down to the present time, there is not one instance in which a power of appointment has been held to be executed by a will, unless there is a reference in the will either to the **[449]** power or to the property which is the subject of it, or unless the instrument be totally inoperative without supposing an execution of the power. The testatrix in this case had the absolute property in a moiety of these tenements, and the devise of that moiety is quite sufficient to satisfy the words of the will; the words are perfectly satisfied on the supposition that she meant to devise only that undivided moiety in which she had the absolute property.

It has been argued that this is a question of intention, and so it is, but then there are rules by which the intention is to be collected, and it would be dangerous to leave a question of this kind to loose and vague conjecture; and on that principle Sir W. Grant, M. R., acted in the case of *Jones* v. *Tucker*, 2 Mer. 533.

The only matter that can raise a doubt on the subject, is the condition imposed by the devise on the tenant for life to keep the premises in tenantable repair. But we are of opinion that this is not a sufficient indication of intention to dispose of the undivided moiety over which the testatrix had only a power of appointment; and we cannot give a different opinion without contradicting a long series of decisions. There is no incongruity in supposing a tenant for life, under these circumstances, to be bound to keep the tenements in repair for the benefit of those in remainder; and upon the whole, we are of opinion that this will does not operate as an execution of the power.

Lord Chancellor: There does not appear to be any real difficulty in this case. The history of this case is this: It was an action of ejectment brought in the Court

of Common Pleas to try the title to certain tenements and premises in the county of Surrey, and a special verdict was found on which the case came before the [450] Court, and judgment was given for the defendants; but on error brought in B. R., that judgment was reversed. The judgment in B. R. came on error here, and as the Courts below had differed, it was thought proper to call for the attendance of the Judges generally to hear the case argued. After the case was argued, this question was put to the Judges: Whether the will operated as an appointment on that moiety of the property which the testatrix held as tenant for life with power of appointment? The Judges have now given their unanimous opinion, that the power has not been executed. The state of the facts in a few words is this: the testatrix had one moiety of the property in fee, the other as tenant for life with power of appointment in fee; and the question is, whether the will operated as an appointment of that latter moiety. The only material words of the will are, "I hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew John Roake, for his life, on condition that, out of the rents thereof, he do from time to time keep such estates in proper and tenantable repair." The law, as applicable to this point, rests on a long series of cases from *Sir Edward Clere's case* (6 Rep. 17) to this time. If the will does not refer to the power nor to the subject of it, and if the words of it may be satisfied without supposing an intention to execute the power, then unless the intent to execute the power is clearly expressed, it is no execution. Here there is no reference to the power, and the property in fee is sufficient to satisfy the words. There is not sufficient therefore to satisfy me, and I am bound to see that I am clearly satisfied, that the testatrix by her will intended to execute the power: and whatever my private opinion may be as to the particular case, [451] although that may not be decidedly in accordance with the general law, I cannot consistently act upon it. I am of opinion, therefore, that the judgment of the Court of King's Bench ought to be affirmed.

Lord Wynford: It is not my intention to trouble your Lordships at any length with reference to this case; but I believe that nine hundred and ninety-nine persons out of a thousand would say, on reading this will, that the testatrix did intend by it to pass her whole property, and this is a question of intention. I agree, however, with the Lord Chief Baron that there are certain rules by which the intention is to be collected, but I think they are bad rules, and I hope they will not long continue to be binding on the Judges. I know that it was decided in *Sir Edward Clere's case*, that a will cannot operate as an execution of a power unless it refers to the power or the subject of it, or unless the will can have no operation without supposing that an execution of the power was intended. But I conceive that here the estate or subject of the power is referred to in the will, and that this is a case that never occurred before. It is difficult sometimes even for lawyers to know and apply the law in certain cases, and yet you are to suppose that this poor woman knew that as to an undivided moiety of these tenements she had the fee, and as to the other moiety that she was only tenant for life, with a power of appointment, and that special words were necessary to pass that moiety! The words of the will are, I give, and devise *all my estates* in London and Surrey, and she adds a condition to repair, yet it is said that these words may be satisfied by supposing that they refer only to that moiety which she had in absolute property; but I defy any ingenuity to show that the words applied only to the one moiety [452] and not to the other; that the tenant for life was to repair one moiety and leave the other unrepaired. The testatrix is clearly speaking of the whole of her property, and this will may be held to apply to all, and to be an execution of the power, in perfect consistency with the doctrine of *Sir Edward Clere's case*. This is my own opinion, but as long as I sit here I will not insist upon acting on my opinion when it is in opposition to the opinions of all the Judges; and therefore I agree that the judgment of the Court of King's Bench ought to be affirmed.

Lord Tenterden: My opinion, my Lords, is in accordance with that of the Judges. I think that it is the better course to abide by general rules and principles, and not to be led aside by subtle distinctions and considerations of hardships in particular cases; otherwise one uncertainty will arise after another, and the end will be inextricable confusion.

Judgment of the Court of King's Bench accordingly affirmed.

[453] IN ERROR.

FROM THE COURT OF EXCHEQUER CHAMBER, IRELAND.

HARDING,—*Plaintiff in Error;* POLLOCK and another,—*Defendants in Error.*

[Mews' Dig. viii. 694; S. C. 3 Bli. N.S. 161; 6 Bing. 25. As to appointment of clerks of the peace in Ireland, see County Officers and Courts (Ireland) Act, 1877 (40 and 41 Vict. c. 56), ss. 8, 9; as to England, see *For* v. *Harcourt*, Shower P. C. 158; Eng. Rep. 1 H. L. 107 and note thereto.]

The right of direct appointment to the office of Clerk of the Peace is, by law, in the *Custos Rotulorum*, and not in the Crown.

In the year 1768, his late Majesty Geo. 3 appointed, by letters patent, Charles, Earl of Drogheda, to be *Custos Rotulorum* of the King's and Queen's counties in Ireland, and the Earl, in 1772, appointed Edward Moore Dowden to be clerk of the peace for the King's county, which office Dowden held till the time of his death in 1789. In that year the Earl appointed Henry Harding, the plaintiff in error, to the office of clerk of the peace for the King's and Queen's counties. By letters patent, dated July 1798, his late Majesty Geo. 3 granted, among other things, the office of clerk of the peace of the King's county to the defendants in error.

In Michaelmas term 1818 the defendants in error brought an action for money had and received, in the Irish Court of Common Pleas, against the plaintiff in error, to recover the emoluments of the office, and the plaintiff in error pleaded the general issue, and another plea not material. On special verdict, the Court of Common Pleas, in 1821, gave judgment for the defendants in error, which judgment was affirmed by the Court of Exchequer Chamber in 1823, and from [454] that judgment the plaintiff in error brought his writ of error returnable in Parliament.

For the plaintiff in error, in the House of Lords, some irregularities in the proceedings of the Court of Common Pleas, and some inconsistencies in the special verdict, were urged as reasons for a *venire de novo*, and it was also relied on, with the same view, that the fact, whether the defendants in error had been admitted to the office, was left doubtful; and to show that a patentee of the Crown required admission to entitle him to sue, the following authorities were cited:—1 Mod. Rep. 122; *Witham* v. *Lewis*, 1 Wils. 48. 55; *Duncomb* v. *Winkfield*, Hob. 254; *Kynaston* v. *Mayor of Shrewsbury*, Str. 1051; *Harwood* v. *Goodright*, Cowp. 91; *Grant* v. *Astle*, Doug. 703; *Parker* v. *Wills*, 1 T. R. 733.

But the great point in the cause, and that on which the judgment of the Lords turned, was, whether the right of direct appointment to the office of clerk of the peace was in the *Custos Rotulorum*, or in the Crown. For the plaintiff in error, it was contended that it was in the *Custos*, and the following authorities were cited: *Lambard's Eirenarchia*, 387: 12 Ric. 2, c. 10; 37 Hen. 3, c. 1; 10 Car. 1 (Irish), Sess. 2, c. 19; *Snow* v. *Firebrass*, 1 Sa. Ch. 439; 3 Bac. Abr. title *Office*, letter (C.); 1 Rol. Abr. 230, plac. 9; *Mitton's case*, 2 Co. Rep. part 4, 32; 33 Hen. 8, c. 13; 2 Co. Inst. c. 17, p. 30 (referring to M. Charta); Greenwood revised, p. 5; *Harcourt* v. *For*, 1 Show. 426. 506. 516. 550; 1 Will. and Mar. c. 21; *Owen* v. *Saunders*, 2 Salk. 467; 4 Com. Dig. 115; *Rex et Reg.* v. *Evans*, 4 Mod. 31; 4 Vin. Abr. title *Clerk of Peace*, letter (A.) plac. 8; Wood. Inst. 481: Dalt. Just. c. 185, p. 513; Jenk. Rep. 216; (Irish Acts, 13, 14 Geo. 3, c. 26; 23, 24 Geo. 3, c. 39; 23, 24 Geo. 3, c. 41; 35 Geo 3, [455] c. 29; 36 Geo. 3, c. 25; 40 Geo. 3, c. 80); *Rex* v. *Court Ferguson*, 1796, 1799; *Rex* v. *Justices of King's County and Clarke*, 1799, 1800; *Rex* v. *Falkiner and Justices of Tipperary*, 1799 (these three last cases are Irish, and not having been before reported, copies from the records were given in the appendix to the case for the plaintiff in error); 1 Geo. 4, c. 27; Siderfin Rep. 74; 1 Salk. 18.

For the defendants in error it was contended that the right of direct appointment, without the intervention of the *Custos*, was, by law, in the Crown, and the following authorities were cited:—2 Co. Inst. 496; Co. Lit. 90 C.; *Gentleman's Case*, 6 Co. 11; Stat. West. 2d, c. 30; *Rowell* v. *Prior*, 2 Salk. 459; *Clarke* v. *King*, 3 T. R. 47; *Rex* v. *Murphy* (Irish), Hil. term, 13 Geo. 1; *Rex* v. *Westcott*, Show. P. Ca. 127; Brooke Abr. title *Prescription*, plac. 4; *Scraggs* v. *Coleshill*, Dyer, 175; 2 Roll. Abr.

264, plac. 4; Com. Dig. title *Prescription* (A. B.). And it was contended that the authorities relied on for the plaintiff in error, when rightly understood, made for the defendants in error, and not against them.

On the 18th May 1829, the Judges of England, who were present in the House when the case was argued, severally delivered their opinions; and (Mr. Justice Bayley *dissentiente*) the opinion of the rest was, that the right of appointment was, by law, in the *Custos Rotulorum*, and not in the Crown.

And on the 10th of June 1829, the House of Lords, in conformity with the opinion of the majority of the Judges, adjudged that the judgment of the Court of Exchequer Chamber should be REVERSED.

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[456]

APPEAL

FROM THE COURT OF EXCHEQUER IN IRELAND.

VESEY,—*Appellant;* BODKIN,—*Respondent.*

[Mews' Dig. viii. 911; S. C. 4 Bli. N.S. 64; reversing 1 Jones, 139. See *Barron* v. *Moore*, 1828, 1 Ir. Law Rec. (O.S.) 251; and *Hussey* v. *Domville*, I. R. (1900) 1 Ch. 417.]

Tenant pays money into court, under the Tenantry Act [19 and 20 Geo. III. c. 30, Ir.], to save his forfeiture. The six months allowed by the statute expires on the 18th January 1824, on Sunday. The tenant files his bill to redeem, in the Exchequer, on Saturday the 17th; and the Court not being then sitting, and none of the Barons being in town, one of them, residing near Dublin, makes an order, dated the 17th, to pay the money into the Bank of Ireland. This order is on the same day left with the Accountant-general, and the money is paid to his account on the 19th, and he certifies its being paid in of that date. The Court, on the motion of the tenant, makes an interlocutory order on the Accountant-general, to alter the date of his certificate from the 19th to the 17th; but this order reversed on appeal, as standing in the way of a thorough investigation of the merits at the hearing.

This was an appeal from an interlocutory order of the Irish Court of Exchequer, made in a suit between landlord and tenant, of date the 7th May 1825.

The appellant, who was the landlord, had brought ejectments against the respondent, the tenant, to get possession of the lands for nonpayment of rent, and the writs of *habere* were executed on the 18th July 1823. The six months allowed to the tenant by the Tenantry Act, to redeem, on payment into Court of the rent in arrear and costs, expired on the 18th January 1824, which was a Sunday; and on Saturday, the 17th, [457] the tenant filed his bill to redeem; but as the Court was not then sitting, and none of the Barons were in town, one of them was applied to at his country-house, near Dublin, and he, by an order dated the 17th, directed the money to be lodged in the Bank of Ireland to the account of the Accountant-general. The order was left with the Accountant-general on the 17th, at five in the afternoon. The Bank of Ireland was then shut; but whether the money was ready to have been paid in at any time on Saturday, was a question. It was paid in on Monday the 19th; and the Accountant-general gave a certificate that it was paid in on the 19th, pursuant to an order of the 17th.

Soon after the filing of the bill some notices passed between the parties, and some attempts at compromise were made, which came to nothing.

The landlord answered in June 1824, and in February 1825 the tenant amended his bill, and insisted that even if a forfeiture had accrued, the landlord had waived it by his offer to compromise. The landlord, by his answer of the 2d March 1825, denied this, as the offer had not been accepted.

In May 1825, the tenant moved the Court for an order to the Accountant-general to alter the date of his certificate of the lodging of the money, from the 19th to the 17th, on an affidavit of belief that the money was ready to have been paid in on

the 17th, and that the absence of the Barons from town was the cause of its not being paid. The landlord's solicitor made an affidavit to his belief that the money was not ready to be paid on the 17th, as the tenant's attorney, who was to pay it, did not come to town on the 17th. The tenant's attorney made no affidavit.

On the 7th May 1825, the Court made the order for altering the date, without prejudice to any other **[458]** equity which the landlord might have at the hearing of the cause.

In July 1825, the landlord, under an order made by the Lord Chief Baron, at chambers, without prejudice, had the money out of court; and in December 1826 he moved the Court to rescind the order of the 7th of May 1825, but the Court declined to make any order to that effect.

In January 1823, the landlord appealed from the order of the 7th May 1825.

For the appellant it was contended, that it was necessary for him to get rid of the order and certificate of the 7th May 1825, because that order stood in the way of a fair trial of the chief, if not the only equity of the case at the hearing; for the payment was there stated to be of the 17th of January 1824, whereas in point of fact it was not made till the 19th; and on the affidavits it was very far from being clear that the tenant was ready with the money on the 17th, although the Court had been sitting on that day. The taking out the money was no waiver of the right of forfeiture, for it was without prejudice to the ultimate rights of the parties; and indeed, whichever way the question of forfeiture should be determined, the landlord would be entitled to the money.

For the respondent it was contended, that the order of the 7th May was without prejudice; and the Court below thought itself justified on the affidavits in making that interlocutory order, considering that the payment on the 19th was, under the peculiar circumstances of the case, a good payment under the statute. But suppose that were not so, still the landlord had by his own act precluded himself from making the objection, for the money had been paid into court to save the forfeiture, and for that purpose only, and as such **[459]** did or could the landlord take it out of court, and having taken it out, he thereby waived his right to insist on the forfeiture.

Lord Wynford: If this appeal should be dismissed, the Court below will act on its own order, and take it that the payment was made on the 17th, which probably would conclude the whole cause. But on looking at these affidavits, it is impossible not to see that it is necessary that the question should be sifted much more thoroughly than it can be on these affidavits, for it appears at least very doubtful whether the tenant's money was ready to be paid on the 17th. The rescinding of this order will be no prejudice to him, provided he can by sufficient evidence show at the hearing that his money was ready to be paid on the 17th, and probably to ascertain that point the Court may think it proper to direct an issue.

Lord Chancellor: I am of opinion that the Court below was not justified in making this order on these affidavits.

Order REVERSED.

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[460]

APPEAL

FROM THE IRISH COURT OF CHANCERY.

Sir ARTHUR CHICHESTER,—*Appellant;* M'INTIRE, Esquire,—*Respondent.*

[Mews' Dig. i. 733; viii. 765; S.C. 4 Bli. N.S. 78. See *Collier* v. *Mason* 1858, 25 Beav. 200: *Ormes* v. *Beadel* 1860, 2 Giff. 166.]

Two parties, treating for a lease, agree by articles in writing that the amount of rent shall be settled by arbitration; the arbitrators, in case they disagreed, to have power to call in a third party, and his decision, with that of one of the arbitrators, to regulate the rent. The arbitrators disagree, and an umpire is appointed. He, in making his valuations, takes into account an agreement made with himself by the lessee, to lay out a considerable sum in repairs.

which agreement or obligation the lessor, by the original agreement between the parties, has no power to enforce. The arbitrator for the lessee agrees to the valuation, not as the result of his own judgment, but after consulting the lessee, and at the instigation of the lessee's wife. The House of Lords, reversing a decision of the Court below, held that, under these circumstances, a specific performance ought not to be granted.

The respondent had held the lands in question in this case under a lease for twenty-one years, as subtenant to a Mr. Carey, who held the lands from the Marquis of Donegal. The respondent's lease expired in 1819, but he held over till the latter end of 1821, by which time the appellant, Sir Arthur Chichester, had acquired such an interest in the land (it did not exactly appear what) as to entitle him to grant a long lease of them. The respondent applied to the appellant for a lease for forty-two years, commencing from [461] November 1821, and the respondent was willing to grant it, but they could not agree on the rent, and therefore they agreed that the amount of rent should be settled by arbitration; and as this, according to the final judgment, forms the foundation of the case, the articles are set forth in terms: "Articles of agreement made, concluded and agreed upon between Sir Arthur Chichester, of Green Castle, in the county of Donegal, baronet, of the one part, and Robert M'Intire, junior, of the city of Londonderry, merchant, for and on behalf of Charles M'Intire, of Green Castle, his father, of the other part: Whereby it is agreed, that the said Sir Arthur Chichester shall grant a lease unto the said Charles M'Intire, of all that and those that part of the quarterland called the Eleven Balliboes, commonly called Green Castle, with the offices, houses and edifices thereon, and the lands thereunto belonging, numbered from one to twenty-three inclusive, and containing, by a survey made by Alexander M'Arthur, land surveyor, 87 acres, 2 roods, and 21 perches, Cunningham measure, together with a sufficient quantity of turbary for the consumption of and to be used on the premises, provided the said Sir Arthur Chichester is entitled so to do, excepting and reserving thereout Nos. 11, 12 and 13, containing by the said survey 13 acres, 2 roods, 21 perches, like measure, all situate, lying and being at Green Castle, in the County of Donegal, for the term of forty-seven years, to commence from the 1st of November last, at such yearly rent as shall be put upon the same by the Reverend John Staples, of Upper Moville, on the part of the said Arthur Chichester, and William Moody, esq. of Newtown Limavady, on the part of the said Charles M'Intire; [462] and in case the said John Staples and William Moody shall not agree in the premises, that they shall be at liberty to call in a third person, whose decision, with one of said arbitrators, shall regulate said lease, so to be executed by the said Sir Arthur Chichester to the said Charles M'Intire; and such lease is to be conformable to, and contain the usual clauses, covenants, reservations and agreements, as those hitherto granted of the said lands and premises by the Marquis of Donegal, under whom the said Sir Arthur Chichester holds the same; and also a covenant to prevent the wilful injury and destruction on the old Castle on said premises convenient to the residence of the said Charles M'Intire, marked No. 10 in the map of the said premises, save and except such as may be occasioned by the decay of nature. And the said Sir Arthur Chichester doth hereby for himself, his heirs, executors, administrators and assigns, covenant, promise and agree, to and with the said Robert M'Intire, junior, on the part of the said Charles M'Intire, his executors, administrators and assigns, that he the said Sir Arthur Chichester shall and will, at the costs and charges of the said Charles M'Intire, execute such a lease and counterpart thereof unto the said Charles M'Intire, when and so soon as the said yearly rent shall be ascertained by the persons hereinbefore appointed for that purpose conformable to the agreement, and subject as hereinbefore mentioned. And the said Robert M'Intire, junior, on the part of the said Charles M'Intire, doth hereby for himself, his executors and administrators, covenant, promise and agree to and with the said Sir Arthur Chichester, his heirs, executors, administrators and assigns, that he the said Charles M'Intire shall and will, at [463] his and their own costs and charges, accept of and execute a lease and counterpart, pursuant to the said agreement, of the lands and premises, for the term and to commence as aforesaid, when and so soon as the said yearly rent shall be ascertained, and as the said lease shall be tendered for that purpose by the said Sir Arthur Chichester, his heirs, executors,

administrators and assigns, and subject to such yearly rent as the persons so nominated shall agree upon; the first half yearly payment of such rent to be made on the 1st day of May next. In witness whereof, the said parties to these presents have hereunto subscribed their names, and affixed their seals, this 15th day of December, in the year of our Lord 1821."

The arbitrators could not agree; the one appointed by the appellant fixing the rent at £150 per annum, the one for the respondent at £43 or £44. They chose a gentleman of the name of Arthur Sampson for the umpire. The umpire named £60 per annum as the proper rent. The respondent's arbitrator hesitated, and before he determined went to consult the respondent, who appeared to be unwilling to give the £60, but his wife was of opinion that it ought to be given, and under her authority the respondent's arbitrator assented to the £60, and the following award was made: "Whereas, by a submission entered into and duly executed by and between Sir Arthur Chichester, of Castle Carey, in the county of Donegal, baronet, of the one part, and Robert M'Intire, junior, on the part of Charles M'Intire, of Greencastle, in the said county, esquire, of the other part, it was agreed, that the value of the house and farm of Greencastle, containing seventy-four acres by survey, as now and formerly enjoyed by said Charles M'Intire, and of which [464] the said Sir Arthur Chichester is landlord, should be submitted to the award and determination of the Reverend John M. Staples, of Moville, in the county of Donegal, and William Moody, esquire, of Newtown Limavady, in the county of Londonderry; and in case they should not agree, that then the said value should be left and submitted to the award and determination of said valuators, and such third person as the said John M. Staples and William Moody should appoint; and that a lease for a term of forty-seven years, commencing at November 1821, should be granted by said Sir Arthur Chichester, at such yearly rent as should be fixed on and determined by said arbitrators and umpire, or the majority of them. And whereas the said John M. Staples and William Moody, having viewed said house and farm, and not having agreed, did nominate and appoint Arthur Sampson, of Sheephill, esquire, in the county of Londonderry, umpire; and said Arthur Sampson accordingly viewed the same. Now we, the said William Moody and Arthur Sampson, being the majority of said arbitrators, having carefully examined and considered the subject matter left to our decision, do award, order and adjudge the said house and farm to be worth the sum of £60 sterling, which we award, determine and adjudge to be the annual rent at which the same shall be held for the said term of forty-seven years by the said Charles M'Intire. In witness whereof," etc.

The appellant refused to make a lease on the terms mentioned in the award, and the respondent, on the 31st of December 1822, filed his bill in the Irish Chancery, for a specific performance, to which the appellant answered that the award was made on [465] erroneous grounds; a large deduction of rent having been made on account of a sum of £800 or £900 to be laid out by the tenant on repairs; whereas the respondent was bound to have kept the premises in repair by the covenants of his former lease. The appellant also set forth an extract of a letter from the umpire to the gentleman who had been appointed the appellant's arbitrator, of which the following extract is material:

"Sheephill, 23d of Feb. 1823.

"Dear Sir: After mature consideration and consultation with my father, before whom I laid your written opinion, Mr. Moody's, my own valuation and observations made on the spot, I feel confident that my award of £60 is a fair rent for the house, farm, etc. at Greencastle. Mr. Moody has, after some hesitation, agreed to it, and we have both signed a document to that effect. I understand that young M'Intire thinks the rent too high; and I doubt not but Sir A. Chichester and you will think it too low, after the claim you thought yourself justified in making of £150. This is then the reward I am to expect for my trouble;—it is however all I wish for, as it proves the justness of my decision. I think it right to explain to you, and Sir A. Chichester, the motives upon which I found my estimate in opposition to your's: that *M'Intire is able to pay what he undertakes, and resident on the premises, which in these times must be considered as an advantage;* that the acreable rent of a farm to a farmer is not *worth more than* £44; that the dwelling-house,

etc. *is in so bad a state from the all-destroying hand of time, as to require it to be re-built;* and Mr. M'Intire *has agreed to lay out* £800 *or* £900 for this purpose."

With this extract, the evidence of the umpire after-[466]-wards given in the cause exactly corresponded; and the respondent's arbitrator being examined as to the cause why he had agreed to the £60, when his valuation had been only £43 or £44, he stated that he consulted the respondent, and that he agreed to the £60 at the solicitation of the respondent's wife.

By a decree of the 14th July 1824, the Court referred it to the Master to inquire and report whether, at the time of the agreement, the respondent was, in his own person, bound to repair the premises; and the Master reported that he was not.

By a decree of the 2d December 1825, the report was confirmed, and the respondent was declared entitled to a specific performance, on the terms mentioned in the award; and the appellant appealed.

A great deal of evidence was given below, and a great deal of argument used, both below and above, as to the value of the premises, and as to whether the respondent was bound by his former lease to repair, and other matters; but the main point relied upon above by the Solicitor-general for the appellant was, that the umpire's ground of judgment in awarding so inadequate a rent, was an agreement by the respondent with the umpire himself to lay out £800 or £900 in repairing the premises, and that this was an agreement without authority from the appellant, and one which those who made the award had no right to take into account, because it was an obligation which under the original agreement between the parties, the appellant had no power to enforce. The respondent's arbitrator also had misconducted himself; for he himself stated that he gave the £60 not as the result of his own judgment, but by the instigation of the wife of one of the parties interested.

[467] Lord Chancellor: This case has been argued on a great many grounds; but the facts, as far as they are material with respect to the proposition which I am about to submit to your Lordships, may be brought within a short compass [states them briefly in substance as before stated].

The umpire being chosen, he and the arbitrator for M'Intire fixed the rent at £60. In a day or two after, the umpire wrote a letter, in which he stated the grounds of his decision, and one was that the premises were out of repair, and that M'Intire had agreed to lay out £800 or £900 on them, and that he had fixed the rent at £60 on the foundation of that engagement. But there is nothing in the original agreement between the parties which made this engagement with the arbitrators binding on him. He was under no obligation to lay out this £800 or £900. If he laid out £100 or whatever sum was necessary for his own occupation and enjoyment of the premises, it was all that he was bound to do: so that the ground on which the umpire rested his decision was founded neither on fact nor justice.

But this is not all. The arbitrator for M'Intire, taking the lands without the houses, thought that the proper rent was £43, and he hesitated in coinciding with the opinion of the umpire that it should be £60; and he went and consulted Mrs. M'Intire, and made her consent the ground of his decision. So that, although it was stipulated that, in case of disagreement between the arbitrators, the rent should be settled by the umpire and one of them, the respondent's arbitrator so far misconducted himself that he rested his decision not on the result of his own judgment, but on the will of one of the parties interested.

The award in such a case is not one on which [468] a Court of Equity can give the remedy which is here applied for. This is not a proceeding at law on the award, but an appeal to the extraordinary jurisdiction of the Equity Court, for special relief beyond the law, namely, the specific performance of the agreement for a lease on the terms stated in the award. I cannot come to the conclusion that, under the circumstances of this case, the respondent is entitled to the relief which he claims; and therefore I propose that the judgment of the Court below be reversed.

REVERSED accordingly.

[469] APPEAL

FROM THE COURT OF CHANCERY.

WILLIS and WIFE,—*Appellants;* ROBINSON and others,—*Respondents.*

[Mews' Dig. vii. 1368, 1369; S.C. 4 Bli. N.S. 101.]

T. B., entitled under one will to an estate tail, expectant on the death of two elder brothers without issue or recovery suffered, and entitled under another will to an estate for life, with a remote remainder in tail, proposes to covenant that on his marriage with L. C., a ward of Court, in case either of the limitations in his favour in the wills shall take effect, he will charge the estate to which he shall become entitled with an addition of £8000 to the fortune of younger children. The same Master to whom the proposal is submitted settles the covenant in the marriage articles with words of *inheritance* not occurring in the proposal, viz.: "that in case he shall become seised of or entitled to all or any of the manors, hereditaments or estates devised by such wills, or by either of them, or of any other lands, etc., *for any estate of inheritance in possession or otherwise, capable of being settled or bound in law or equity,*" he will charge the estate as aforesaid; and this is approved by the Court.—T. B. becomes entitled in possession *to the life estate only,* and on claim by a younger child that the £8000 should be declared to be a charge on the life estate, and reference to a Master, he reports that the limitations under which T. B. covenanted to charge the estates with the £8000 never took place. The report confirmed by decretal order of the Court below, and the judgment affirmed by the Lords.

The question in this case depends on the construction of certain words in proposals submitted in view of marriage, and in marriage articles purporting to be [470] made in pursuance of these proposals, on occasion of the marriage of Thomas Bowes, Earl of Strathmore, and Louisa Rodney Carpenter, a ward of Court.

George Bowes the elder, grandfather of Thomas, being entitled absolutely to considerable freehold estates in the counties of York, Durham and Middlesex, made his will, dated 14th February 1749, by which he devised his estates in trust for his daughter and only child, Mary Eleanor Bowes, for life, with remainder to her first and other sons in tail male, remainders over.

Mr. Bowes died in 1760, and in 1767 his daughter intermarried with John, Earl of Strathmore, and by him had three sons, John, George and Thomas. The Earl died in 1776, leaving the three sons surviving.

Mary Bowes, widow of George, and mother of Mary Eleanor Bowes, made her will, dated 6th April 1777, by which she devised her freehold estates in trust for her grandson, George Bowes, for life, remainder to his first and other sons in tail male, remainder to Thomas for life, remainder to his first and other sons in tail male, and after several intermediate remainders, remainder to the heirs of the body of George, remainder to the heirs of the body of Thomas. Mary Bowes died in 1781, and George became possessed of the life estate under her will.

By an order of the Court of Chancery, dated the 24th December 1799, made in a suit *Finch* v. *Delaval*, instituted apparently to make Miss Louisa Rodney Carpenter, a young lady of large fortune, a ward of Court, it was referred to Master Simeon to consider and certify whether a marriage stated to have been proposed between Thomas Bowes and Miss Carpenter would be a proper marriage, and that if he should be of opinion that it would, it was ordered that the parties [471] should be at liberty to lay proposals before him for a proper settlement.

At this time Thomas Bowes was possessed of a sum of £3000, which was all that remained of his share of £50,000 provided, under his father and mother's marriage settlement, for younger children, and entitled as tenant in tail in remainder, next after the deaths of his brothers, John, Earl of Strathmore, and George Bowes, without issue, to an estate of £10,000 a year, under the will of George Bowes, his grandfather, and to an estate for life of £5000 a year, under the will of his grandmother, Mary Bowes, upon the death of his brother George without issue, or George's becom-

ing entitled to the estate tail under the will of his grandfather. Neither John nor George, at this time, had issue.

The proposals by Thomas Bowes contained, among other things, the following passage:

"Mr. Bowes will further covenant, that in case either of the limitations in his favour, contained in the wills of his said grandfather and grandmother, shall take effect, he will, in twelve months next after coming into possession of the estates thereby devised, convey so much thereof as shall be of the clear annual value of £1500 to trustees, in trust, to pay to Miss Carpenter during her life, in case she shall survive him, so much and such part of the rents, as with the rents, dividends, etc. of her own fortune, will make up to her a clear jointure or rent-charge of £2000 per annum, and to charge the estate so to be conveyed with the payment of £8000 in addition to the fortune provided for younger children, and upon the same ultimate trusts as the £2000 now to be assigned by Mr. Bowes, and subject thereto, to [472] limit the estate to the first and other sons of the marriage in tail male, with remainder to daughters in tail, as tenants in common, with cross remainders amongst them, with remainder to Mr. Bowes and his heirs."

The Master reported his approbation of the marriage and proposals; and by an order, dated 5th February 1800, the report was confirmed, and reference made to the Master to settle a proper settlement. A deed of settlement was accordingly prepared, dated 28th Feb. 1800, and by that deed Thomas Bowes covenanted: "That in case the said intended marriage shall take effect, and he the said Thomas Bowes at any time or times during his life shall under or by virtue of the devises or limitations contained in the before-mentioned wills of his late grandfather George Bowes, and his said late grandmother Mary Bowes, or either of them, or otherwise, become seised or entitled to all or any of the manors, hereditaments and estates devised by such wills, or by either of them, or of any other messuages, lands, tenements or hereditaments, *for any estate of inheritance in possession or otherwise, capable of being settled or bound in law or in equity*, then he the said Thomas Bowes, and all and every other person or persons whose consent or concurrence to that end shall be deemed requisite or necessary, shall and will, at the proper costs and charges of him the said Thomas Bowes, within the space of twelve calendar months next after the said Thomas Bowes shall become seised or entitled as aforesaid, by such act or acts, deed or deeds, recovery or recoveries, fine or fines, and other conveyances and assurances in the law as by the said George Bowes, Thomas Wilkinson, and Ralph Johnson Wall, or the survivor or survivors of them, or the [473] heirs or assigns of such survivor, or by their or any of their counsel, shall be reasonably devised or advised and required, well and sufficiently *grant, convey, settle and assign*, or cause or procure to be granted, conveyed, settled and assured, *so much and so many, and such part and parts, of the several manors, messuages, lands, tenements and hereditaments whereof or whereto he the said Thomas Bowes shall become so seised or entitled as aforesaid*, as at the time of making such assurances and settlement as aforesaid shall be of the net yearly value of £1500 over and above all taxes, reprizes and deductions whatsoever, or as near the value of the manors, messuages, lands or hereditaments whereof he the said Thomas Bowes shall so become seised or entitled as aforesaid, will extend or be sufficient, so and in such manner as that the same hereditaments and premises to be so of the said yearly value of £1500 as aforesaid, with the rights, members and appurtenances, shall, from and immediately after the making and completing of such recovery or recoveries, acts, deeds, conveyances or assurances as aforesaid, go, remain and continue, and shall be held and enjoyed, *to the several uses, upon the several trusts, and to and for the several ends, intents and purposes, and subject to, with and under the several powers, provisoes, declarations and agreements to which the same ought to be limited and settled, in pursuance of and in compliance with the proposals, reports, orders and decrees hereinbefore mentioned.*"

The marriage took effect at the date of the settlement, and there was issue of it, first, George Thomas Lyon Bowes, commonly called Lord Glammis, and Lady Mary Isabelle Bowes, who afterwards became the wife of the appellant John Walpole Willis.

[474] In April 1800, John, Earl of Strathmore, suffered a recovery of the estate

tail which he took under the grandfather's will, and declared the uses to himself in fee. George Bowes died without issue in 1826, and Thomas became entitled in possession to the life estate under the will of the grandmother.

Various annuities were granted by Thomas Bowes out of his life estate, and in 1812 Lord Glammis and Mary Isabelle Bowes, then infants, filed their bill by their next friend against their father, in order to have the £8000, alleged to be an incumbrance on the estate, under the proposal and covenant in the settlement, in favour of M. I. Bowes, as younger child of the marriage, raised without delay; and suits were also instituted by the annuitants under the names of *Braham* v. *Bowes*, and *Robinson* v. *Bowes*, in order to have their claims liquidated. John Bowes died in 1821, and Thomas became Earl of Strathmore.

By a decretal order made on the 9th June 1825, in the case of Braham (for whom Robinson was afterwards substituted) and Bowes, it was referred to the Master to inquire whether Lady Mary Isabelle Willis, or her husband or trustees claiming in her right, had any charge or incumbrance on her father's estates on the ground of the proposal and covenant in the marriage articles, and the Master reported that the event on which Thomas, Lord Strathmore, covenanted to charge the estate with the £8000, viz. "in case he should become seised or entitled to the estates devised by such will of the said Mary Bowes, for *any estate of inheritance* in possession, or otherwise, capable of being settled or bound in law or equity," never took place, and that therefore it did not appear to him that M. I. Willis, or her husband or trustees, were [475] entitled to any incumbrance on any of the estates devised by Mary Bowes.

The report, as to this particular, being excepted to, the exception was, by order of the Vice-Chancellor, dated the 18th March 1829, over-ruled, and the report confirmed; and from that order the appellants appealed, for the following, among other reasons:

It will be observed that the language of the covenant contained in the settlement of the 28th day of February 1800, does not pursue the language of the proposal which it was the object of the settlement to carry into effect.

The order of the 5th of February 1800 did not authorize the Master to deviate from the proposal, except in one particular, not material to the present inquiry: and the appellants therefore submit that the case must first be considered as if it rested upon the proposal, and as if a Court of Equity were now for the *first* time called upon to execute such proposal by a proper settlement; though they contend, with confidence, that the order complained of is erroneous, when the question is considered upon the effect of the proposal and the settlement taken together.

I. Suppose the case to rest on the proposal alone, and that a Court of Equity was called upon for the first time to execute that proposal by a proper settlement: in this view of the case it is submitted, that the order of his honor the Vice-Chancellor, dated the 18th day of March 1829, which proceeds upon the ground that the covenant was to take effect only in case Thomas Bowes should become seised of *an estate of inheritance*, is clearly erroneous:

1st. Because, by the proposal, Thomas Bowes, now Earl of Strathmore, in express terms contracts that his life estate under Mary Bowes's will shall, *for some* [476] *purpose or other*, be subject to the trusts of his marriage settlement: and a Court is not at liberty to look out of the proposal in search of the intention of the parties, where the words they have used are capable of a sensible interpretation.

Now, if the limitation which relates to the £8000 be referred to the life estate to which Lord Strathmore was entitled under Mary Bowes's will; and if the other limitations contained in the proposal be referred to the estate of inheritance to which Lord Strathmore was entitled under George Bowes's will; *the words of the proposal* will receive a clear and sensible construction, giving effect to every branch of the proposal, and consistent with the declared intention of its author.

2dly. Because, although by the proposal, Thomas Bowes, now Earl of Strathmore, in express terms contracts that his life estate under Mary Bowes's will shall, *for some purpose or other*, be subject to the trusts of his marriage settlement, and although the *words of the proposal* admit of a clear and sensible construction, the effect of the order of the 18th day of March 1829 has been to determine that Thomas Bowes, now Earl of Strathmore, did not contract that his life estate under Mary

Bowes's will should, *for any purpose whatever*, be subject to the trusts of his marriage settlement, and in effect, to strike out of the proposal and settlement every word which relates to Lord Strathmore's life estate under Mary Bowes's will.

3dly. Because, if a Court were at liberty to look out of the proposal in search of the intention of the parties, the construction of the proposal would still be the same: for Lord Strathmore did not, in fact, under any limitation "*in his favour*" contained in the will of his "*grandmother*," take any estate except his life estate, over which, "*in twelve months next after coming into* [477] *possession*" thereof, he would have powers commensurate with any construction of the language of the covenant he proposed to enter into. The words of the instrument are therefore the safest, as in truth they are the only legitimate guide by which the intention of the parties can be determined.

4thly. Because the construction which the *words of the proposal* require is confirmed by reference to the limitations to which the estates comprised in Mary Bowes's will stood subject at the time of Lord Strathmore's marriage, and the state of his family at that time: with reference to these circumstances, it is not possible to suppose that those estates were proposed to be brought into settlement for any purpose other than that which the words of the proposal express, namely, that of charging Lord Strathmore's life estate with a provision for the younger children of the intended marriage.

5thly. Because the construction which the *words of the proposal* require is also confirmed by the fact, that the life estate to which Lord Strathmore was entitled under Mary Bowes's will was, in truth, the interest of the greatest value, if not the only valuable interest which he had power to bring into settlement; and it is reasonable to suppose that the friends of Miss Carpenter would stipulate, and that Lord Strathmore would consent, that until a moderate provision was secured for the children of the intended marriage, Lord Strathmore's immediate personal interests should be postponed.

II. Consider the case as it stands upon the effect of the proposal and the settlement together. In this view of the case also it is submitted, that the order of the 18th day of March 1829 is erroneous:

1st. Because the language of the covenant contained [478] in the settlement is *capable* of that construction which the proposal requires, and there is nothing in the language of the covenant by which that construction is *excluded*.

2dly. Because, if the rights of the parties under the proposal are such as the appellants contend for, and if the language of the covenant does not confirm and secure those rights, then the appellants humbly submit, that inasmuch as the mistake by which their just rights will be defeated is the mistake of the Court of Chancery and not of the parties to the settlement, the judgment of that Court upon the exceptions to the Master's report, dated the 18th day of March 1829, ought to have been suspended until an opportunity had been afforded of rectifying the mistake.

For the respondents it was contended, that the judgment ought to be affirmed, because the construction put by the appellants upon the proposals contained in the Master's report of the 31st of January 1800, and upon the covenant contained in the articles of settlement, bearing date the 28th of February 1800 (being the construction against which the Court below, confirming the Master's judgment, has decided), is forced and inconvenient, and is contrary to the intention of the proposals and settlement.

Lord Chancellor (26th March 1830): It is a strange circumstance that, although the words of inheritance are not in the proposal, the very Master to whom the proposal was submitted allowed them to be put in the settlement. The same Master received the proposal and approved of the settlement: and I consider the latter as throwing light on the former. The case is not without its difficulties, but there is strong evidence from the subsequent proceedings that the proposal was not understood to [479] apply to the life estate. The covenant in the settlement is inconsistent with the supposition of its applying to the life estate. Something has been said about the intention, but I consider that it was not the intention to charge the life estate. The same Master to whom the proposal was submitted confined the covenant in the settlement to the inheritance, and that was confirmed by the Court.

Judgment affirmed.

[480]

APPEAL

FROM THE COURT OF EXCHEQUER.

DENCHFIELD and Others, *Appellants*; STRONG, Clerk,—*Respondent*.

[S.C. 4 Bli. N.S. 136.]

Bill by a Vicar for vicarial tithes; answer, a modus in lieu of vicarial tithes, without specifying more particularly the tithes in respect of which the alleged modus is payable. No sufficient evidence given of the Vicar's title to all or any of the tithes which he claimed. The Lord Chief Baron, notwithstanding, directs an issue, in terms of the answer, to try the question of modus in lieu of tithes. Affirmed by the Lords, as being the proper issue. (*Vid.* 2 Youn. and Jer. 594.)

On the 23d January 1826 the respondent exhibited his bill of complaint in the Court of Exchequer, stating that in the year 1823 he was lawfully presented, instituted and inducted into the vicarage of the parish and parish church of Aston Abbots, in the county of Bucks, and as vicar was entitled, by some ancient endowment, usage or otherwise, to all tithes (except only the tithes of corn and other grain) growing, etc. within the said parish and titheable places thereof; that the hamlet of Burston was situate within the parish, and that the appellants were occupiers of land within the limits of the hamlet, and that they had growing and increasing thereon divers quantities of hay, grass, clover, etc.; that the appellants had never set out to the respondent his tithes, nor made any recompense or satisfaction for [481] the same: and the bill prayed that the appellants might be decreed to set forth an account of the titheable matters, and come to a fair and just account for the single value.

The appellants, by their answer, admitting the presentation, induction, etc., said they were unable to set forth whether the respondent was entitled as he had stated; and then, after admitting their occupation of the lands, and the titheable matters growing thereon, they said that there was payable and paid by the occupiers of the lands in question, by equal half yearly payments at Lady-day and Michaelmas in each year, the yearly sum of £37, as a modus or immemorial customary payment in lieu of vicarial tithes,—without specifying more particularly the tithe in respect of which the modus was payable; and they said that they believed that the modus covered the whole of their land.

Some evidence was given, but not sufficient to establish the vicar's title to all or any of the tithes which he claimed.

The cause was heard on the 17th May 1828, and on the 18th November 1828 the Lord Chief Baron decreed that it should be referred to a trial at law, on the following issue, in terms of the answer, viz.: Whether from time whereof the memory of man runneth not to the contrary there hath been payable and paid, and of right ought to have been paid in each and every year, by the occupiers of the farms and lands of the appellants for the time being, etc., a yearly sum of £37 as a modus or immemorial customary payment, in lieu of the vicarial tithes, etc.

The appellants were dissatisfied with this decree, contending that the bill ought to have been dismissed, or that if an issue should be directed, it ought to be in a different form from that directed by the decree, and [482] that the decree ought to be varied accordingly; and they appealed, for the following reasons:

First. Because no evidence was adduced on behalf of the respondent to show that as vicar of the said parish of Aston Abbots he was entitled, either by endowment, usage or otherwise, to, or had received, all the tithes (except only the tithes of corn and other grain) or any particular tithes, either generally throughout the said parish of Aston Abbots, or in particular in and upon the farms and lands constituting the manor and hamlet of Burston; and therefore the said respondent's bill ought to have been dismissed with costs.

Second. Because, if any issue is proper to be tried in this cause, the same ought to be an issue to try "Whether the respondent, as vicar of the said parish of Aston

Abbots, is entitled to all the tithes (except only the tithes of corn and other grain) yearly arising within the said manor or hamlet of Burston, in kind."

The respondent maintained that the judgment ought to be affirmed, for these reasons:

First. Because, where a suit is instituted by a vicar, claiming certain specific tithes, it is incumbent on a defendant, who rests his defence on the existence of an alleged modus, to point out distinctly in respect of what particular tithe such alleged modus is payable; nor can he, in any case, be permitted to derive an advantage from the inaccuracy or insufficiency of his own pleading. If, therefore, the decree pronounced at the hearing of the suit, direct an issue for the purpose of trying at law the validity of the modus set up by the defendant's answer, according to the terms in which it is there stated, it is not open to the defendant to object to that decree on the ground that it is impracticable to try the validity of the said modus by reason of the [483] uncertainty of the terms which he has himself used to describe it, even though such objection actually exist. And on the same principle, if the said modus is stated to be payable in lieu of the tithes due to the vicar, it is an admission, in the absence of any other defence, that but for the existence of the modus in question, the vicar would be entitled to the tithes claimed by him.

Secondly. Because, independently of the evidence of his title afforded by the admission of the appellants themselves, the respondent has in the present case a strong *primâ facie* title to the tithes of Burston hamlet, founded on his receipt either of tithes in kind, or of some satisfaction in lieu of them, out of the other lands in the parish of Aston Abbots; and because the appellants have neither ventured to assert that their lands in Burston are altogether exempt from the payment of tithes to the respondent, nor have they attempted to show that any satisfaction is in any way whatever made in respect of such tithes.

Thirdly. Because, if the decree were to be varied in the mode proposed by the appellants, and the bill dismissed, it would amount to a declaration by the Supreme Court of Judicature, that the appellants were entitled to hold their lands discharged from the payment of any vicarial tithes, in the face of an express admission to the contrary in their own answer; and the same objection applies with equal force to the proposed variation of the decree, by directing an issue to try whether the respondent, as vicar, is entitled to any, and what, tithe.

For the appellants it was argued, that the respondent, the plaintiff below, ought to have shown his title to the tithes which he claimed, and not having done so, the bill ought to have been dismissed, or the issue ought to have been to try the vicar's title, or two issues ought to have been directed; one to try the title, the other the [484] modus. And the case of *Ekin* v. *Dormer*, 3 At. 534 (not cited below), and that of *Carte* v. *Ball*, 3 At. 499, 1 Ves. 3, were relied on as of great importance to the question.

For the respondent it was contended, that all had been done which justice required to be done. When a defendant pleaded a modus he admitted the title, and relied on the modus, and the modus was the proper question for the issue. And the cases of *Lewis* v. *Young*, 13 Pri. 394; 1 M'Clell. and Youn. 11; *Stokes* v. *Edmonds*, 1 Youn. and Jer. 436; and *Blake* v. *Veysie*, 3 Dow, 189, were cited.

Lord Chancellor: The Lords are of opinion that, as the case stands, this is the proper issue. What may be to be done afterwards remains to be seen. If the issue should be decided the one way, there is an end of the question; if the other way, there may or may not be occasion for a further issue.

Judgment affirmed.

[485]

APPEAL

FROM THE IRISH CHANCERY.

RICHARD FRANKLIN GOUGH and JOHN FRANKLIN,—*Appellants*:
LATOUCHE and Others,—*Respondents*.

[Mews' Dig. vi. 1774; S.C. in Irish Court of Chancery, 2 Moll. 406.]

T. G. institutes a suit, and pending the proceedings, dies, leaving two wills, of

which the second is established; but before the second is discovered, the suit is revived by the parties entitled under the first, and a private agreement is entered into by the parties entitled under the first, and R. F. G. entitled under the second, that the suit should proceed in the names of the parties entitled under the first will, and that the benefit should accrue to whichever should be found ultimately entitled. Decree for the plaintiffs in the suit so proceeded with, and an order made under it, from which the person beneficially entitled under the first will, and R. F. G. beneficially entitled under the second, appeal, but the Lords refuse to hear the appeal, for want of proper parties, and order it to stand over, with liberty to the parties to take such steps below as they should be advised.

Bill then filed by R. F. G. adding other parties, and praying to have the benefit of the revived suit, which is decreed him, but the Lords still refuse to hear the appeal, for want of proper parties, "more especially considering that the appeal was from an order made on a decree obtained by persons who had no right, and in consequence of an agreement which did not appear to have been disclosed to the Court or the defendants, and might be deemed a fraud on the Court and the other parties;" and the appeal ordered to stand over, but with liberty as before.

[486] R. F. G. then files another bill to have the benefit of the revived suit, and adding other parties, and stating a new case, viz. that the other parties were aware of the agreement from the first, and had acquiesced in it. The allegation denied by the answer and not proved, and the bill dismissed. Appeal from the decree of dismissal, but the decree affirmed by the Lords.

Thomas Gough filed an original bill in November 1803, impeaching a deed of sale and conveyance dated August 1786, and a mortgage dated October 1783, made to the Latouches, bankers in Dublin, of certain lands in the county of Limerick, held by Gough on a lease for lives, with covenant for perpetual renewal; and after answer, issue, and examination of witnesses, but before publication, Gough died, in November 1804.

Gough left two wills: one dated the 19th August 1804, by which he devised his real estates to John Hamilton and William Crawford, in trust for his infant daughter, Maria Gough, in tail; and appointed the trustees, and his wife, Henrietta, and John Lloyd, executors, and guardians of his daughter; another will dated September 1804, by which he devised his real estates to his nephew, Richard Franklin Gough, the appellant (subject to a charge for the daughter); and apponted the said Richard and the other appellant John Franklin, his executors.

The second will not having been immediately discovered, the devisees and executors under the first will revived the suit instituted by Thomas Gough, and made Richard Franklin Gough, and a John Bourke, who was stated to be assignee of T. G., who had taken the benefit of an insolvent debtors' Act, defendants, and prayed to have the will established, and to have the benefit of [487] the suit instituted by T. G. The Court, by decree dated June 1806, set aside the conveyance, and declared the plaintiffs entitled to a redemption of the mortgage; and after further proceedings and a report by the Master, to which the defendants took some exceptions, which by order of the 23d March 1808 were allowed, and after accounts taken, a balance of £4755 was found due to the defendants, which was afterwards paid to them, with interest, by Richard F. Gough, to whom they delivered up the deeds and papers relating to the estate.

But in August 1805 a private agreement was entered into between the plaintiffs in the revived suit, and R. F. G., by which it was settled between them that the suit should be prosecuted in the names of the plaintiffs entitled under the first will, and that the benefit should belong to the parties beneficially interested, whichever of the wills should be established, and then the name of R. F. G. as a party was struck out. The second will was proved by the executors, and established as the true one.

In 1814, R. F. G. and Maria Rylands (the daughter of T. G., who had married Rylands, and become a widow) appealed to the Lords against the order of 23d March 1808; and on the cause coming on for hearing, the Lords declared that R. F. G. ought to have been a party in the suit below, and adjourned the hearing *sine die*:

and on the 10th June 1818, their Lordships ordered that the parties in the appeal should be at liberty to take such proceedings as they should be advised in the Court below, to make proper parties to the suit, and to bring proper parties before the House.

In November 1818, R. F. G. filed his bill against the Latouches, John Franklin, Maria Rylands, and John Massey, assignee of R. F. G., who had taken the [488] benefit of the insolvent debtors' Act, praying to have the benefit of the original and revived suit, and that he and John Franklin might be declared entitled to appeal; and the Court below, by decree of the 10th May 1819, declared R. F. G. entitled *as executor* of T. G. to the benefit of the proceedings in the pleadings mentioned, and dismissed his bill *as devisee* of T. G., and wholly dismissed the bill as against Massey, making no declaration as to the right of John Franklin, the co-executor.

The original appeal, amended by leave, so as to make John Franklin a party, came on again to be heard before the Lords, who, on the 24th July 1820, made an order reciting the proceedings before mentioned, and then going on thus: "It appearing to their Lordships that, under the circumstances of the case, the House could not proceed to pronounce any decision on the said appeal, inasmuch as although by the said decree of the 10th of May 1819, which has not been appealed from by any of the parties, it was declared that as between the defendants, the respondents, and John Latouche, deceased, the said Richard Franklin Gough as executor of the said Thomas Gough was entitled to the benefit of the proceedings in the said suit instituted by him, as prayed by his bill, but such decree had declared no right of the said John Franklin as co-executor, and by such decree the said bill of the said Richard Franklin Gough had been dismissed as between the said Richard Franklin Gough claiming as devisee of the said Thomas Gough, and the said respondents, and the said John Latouche, deceased, and the said bill had also by the said decree been dismissed against the said John Massey, so that there is no person before the House in whom the property of the said Richard Franklin Gough is vested in conse-[489]-quence of his discharge under the said Act for relief of insolvent debtors; and inasmuch as the said decree of the 28th day of June 1806 was and could only have been obtained by the said Maria Rylands, John Hamilton and William Crawford, as devisees as well as executors of the said Thomas Gough, and the same and the subsequent order of the 23d of March 1808, and the subsequent decree of the 27th of June 1808, were founded on the supposed rights of the said Maria Rylands, John Hamilton and William Crawford, as devisees as well as executors of the said Thomas Gough, the House cannot proceed to determine the merits of the appeal against the said order of the 23d day of March 1808 and the said decree of the 27th June 1808, without having before them the said Richard Franklin Gough in the character of devisee in the will of the said Thomas Gough, and also without having before them such person as may be entitled to be assignee of the estate of the said Richard Franklin Gough under the said Act for relief of insolvent debtors, especially as it appears on the face of the proceedings before the House, that the said decree of the 28th of June 1806, on which the said order and decree appealed from were founded, was obtained by persons who had no right to the estate in question, and in consequence of a private agreement between them and the said Richard Franklin Gough, to which the defendants in the said cause do not appear to have been parties or privies, and which agreement does not appear to have been disclosed to the Court at the time of such decree or during the subsequent proceedings, and may therefore be deemed to have been a fraud on the said Court and on the other parties to the said suit; and it therefore may be [490] objected at the hearing of the said appeal that the said decree of the 28th June 1806, and the subsequent proceedings thereon, were absolutely void, so far as the same respected the said leasehold estate: it is therefore ordered, by the Lords Spiritual and Temporal in Parliament assembled, that the hearing of the said appeal [illegible] over, with liberty for the several parties interested to take such proceedings RICHARD be advised in the said Court of Chancery respecting the said suit insti- Thomas Gough, and the suit instituted by the said Maria Rylands, and William Crawford, and the said suit instituted by the said John Gough, and to bring before the House parties competent to litigate they arise between the appellants and respondents, and the right to prosecute the said appeal."

T.

R. F. G. having taken the benefit of another insolvent Act, John Franklin was appointed his assignee, and in November 1824 they filed their bill, setting up a new case, viz. that the defendants, the Latouches, were aware of the agreement of August 1805, at the time it was entered into or very soon after, and had acquiesced in it; and they prayed for the benefit of the revived suit, and that the several proceedings in it might be rectified so as to entitle them to appeal. The defendants by their answer denied that they either knew of the agreement till after the final decree in the revived suit, or ever acquiesced in it, or in the proceedings under it; and insisted that the concealment was a fraud on them and on the Court, and that the proceedings under the decree were void. No sufficient evidence was given of the knowledge or acquiescence, and by decree of the 25th June 1825, the Court below dis-[491]-missed the bill, whereupon the plaintiffs appealed, and prayed that the decree might be reversed for several reasons, among which the following were the most material:

The suit in which the decree of the 10th of May 1819 was pronounced, was, owing to the absence of material parties, and especially of those principally interested, and owing to the frame of the bill, not a suit in which a decree could be made in favour of the devisees or those claiming under them; the dismissal of the suit so far as respected such matter was not a dismissal on the merits, and it could not operate as a bar to a subsequent suit for the same purpose properly framed and between proper parties; that suit, so far as it related to the personal representatives of Thomas Gough, was manifestly defective in form, and the decree pronounced in favour of one of two executors was inoperative and useless; if the decree had been appealed against it must have been reversed without prejudice to the right of the parties claiming under the second will to file a new bill for enforcing their rights.

The decree in that suit could not prevent John Franklin, as executor of Thomas Gough, from filing his own bill in order to have effective relief in that character; it could not prevent John Franklin, as assignee of Richard Franklin Gough, from filing his bill in respect of the devise of the leasehold estate, because in that character he was no party to the former suit. To a bill filed by John Franklin alone, Richard Franklin Gough must have been made a party complainant or defendant, and expense was saved and no injury done to any party by joining him as complainant.

If the respondents were entitled as against any party to avail themselves of the former decree as a bar to the new suit, it should have been done by plea, and [492] was not available to them by answer in which they went into their own case at large and occasioned to the appellants the expense of going into proof of their case.

The respondents having had the benefit of the revived suit, and accepted the money thereby decreed to be paid to them, and the costs thereby awarded, should not be permitted to prevent the parties interested from having also the benefit of the same proceedings, which benefit could only be obtained by a suit of the nature of that in which the decree of dismissal has been pronounced.

The irregularity of the proceedings in the revived suit is chargeable on the defendants, who must have been cognizant thereof and acquiesced therein, as well as on the other parties. Substantial justice can only be done by a decree giving to the parties really interested the benefit of those proceedings, and a court of equity ought not in such a case to be prevented from doing substantial justice when the opportunity is afforded it, by a suit which brings before it all parties in any manner liable to be affected by those irregular proceedings, and when the doing of such substantial justice is opposed only by persons privy to the irregularity of those proceedings, and who are themselves in the enjoyment of the fruits of those irregular proceedings.

The respondents submitted that the decree ought to be confirmed, for the following, among other reasons:

1. Because the orders and decrees made and proceedings had in the suit instituted after the death of the said Thomas Gough, by the devisees and executors under his said *first* will *were void*, such *first* will having been entirely revoked and superseded by the said *second* or subsequent will.

2. Because the appellants were not, and are not, under the general circumstances of the case, entitled to [493] have any benefit or use of the said decrees of the 28th of June 1806, and 20th April 1807, the report of the 23d December 1807, the exceptions

thereto, and rules made thereon ; the second report of the 23d of May 1808, the exceptions thereto, and the rules made thereon ; and the decree of the 27th June 1808, or any or either of them. This was established by the order of the House of Lords, on the 24th of July 1820 ; and the new case attempted to be made by the bill filed on the 2d November 1824, was denied by the answer and not proved by evidence. This point therefore is concluded by the decision on the 24th of July 1820.

3. Because of the great length of time which has elapsed since the death of the said Thomas Gough ; the protracted and expensive litigation which these respondents, or those under whom they claim, have been involved in for so many years already, in great measure owing to the conduct of the said appellant R. F. Gough, and of the informality and irregularity of his pleadings and proceedings in this cause, and generally in the matter of the said original appeal.

Mr. Horne, for the appellants, in the argument above, insisted that the Court below had done what, under the order of the Lords of the 24th June 1820, it had no right to do ; for although the object of the Lords was to have proper parties before them in the original appeal, the last mentioned decree, now appealed from, extinguished the original appeal altogether, and the rights of all parties.

It was not thought necessary to hear Counsel for the respondents.

Lord Chancellor : The Lords reserved the right to decide whether they should hear the original appeal or [494] not. The bill was to have the benefit of the former proceedings, and the Court said No. The appeal must be dismissed. What effect that may have on any subsequent proceedings is another thing.

(12th March, 1830.) The last mentioned decree, dismissing the bill, was accordingly affirmed.

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[495]

APPEAL

FROM THE COURT OF SESSION.

ALLARDICE and BOSWELL,—*Appellants;* ROBERTSON,—*Respondent.*

[S.C. 6 Shaw and Dun. 242 ; 7 Shaw and Dun. 601 ; 4 Wils. and Sh. 102. Explained and distinguished in *Seaman* v. *Netherclift*, 1876, 1 C.P.D. 540 ; 2 C.P.D. 53.]

The agent for R., a person convicted of poaching, applies to the convicting magistrates for a mitigation of the penalty, on the ground that the poacher supported his father and mother by his labour or industry. A., one of the magistrates, said, " I do not think the defender deserves any mercy, as I am informed that besides being a poacher he is a thief, and has been known to steal bee hives and leather ; " and he appealed to B. another magistrate, who said, " I cannot say as to the bee-hives, but I was informed by a respectable farmer, now dead, that he stole a quantity of leather." R. brings his action of damages against the magistrates for defamation, and the action held by the Court below to be relevant, and sent to a jury, and verdict for the pursuer for £125 damages against each of the magistrates, and the verdict confirmed by the Court. The interlocutor of relevancy affirmed by the House of Lords, but the interlocutor confirming the verdict *reversed*, and the case remitted for a new trial.

The summons on which this was founded was as follows : " Whereas it is humbly meant and shown to us by our lovite John Robertson, shoemaker at Baldcraigs, parish of Fetteresso, near Stonehaven, that the pursuer, who is a man of unimpeachable moral character, lately had the misfortune to incur the displeasure of certain of the landholders of the county of Kincardine, by the unpardonable offence of shooting *at* a hare, upon the property of one of them, and has been made the victim of a persecution [496] almost unequalled for its rigour, and particularly aggravated in its circumstances : That he was not only dragged before the justices of the peace, at the instance of the proprietor, under one statute, for the trespass upon his property, and subjected in the whole expenses attending the trial, but, an information having been lodged with Francis Wilson, esq. solicitor of taxes for Scotland, a prosecution was

raised against him, under another, at the instance of that officer, for shooting without a license; and on the 3d March current, a court of commissioners of supply was held at Stonehaven, for the purpose of trying the offence. The gentlemen who presided as judges on that occasion were Colonel Duff of Fetteresso, Robert Barclay Allardice, esq. of Ury, John Boswell, esq. younger, of Kincaussie, and George Silver, esq. of Netherley. Instead of entrusting the conduct of the prosecution, according to invariable practice in all previous prosecutions under the game laws, to the charge of Mr. Robert Brown, general surveyor of taxes, and Mr. Thomas Kinnear, writer in Stonehaven, the local officer, or surveyor of taxes, for the district within which the offence was committed, and who were both present as representing the officer for the Crown, the duty of these gentlemen was superseded by the appointment of Mr. Charles Monro, writer in Stonehaven, by whom the prosecution was conducted with an ardour rather unusual in such cases. The deposition of the first witness went to prove, not that the pursuer had *killed* the hare in question, or indeed any other species of game, for he swore that, to the best of his belief, it had been mortally wounded by himself before the pursuer had discharged his piece, but only that he, the pursuer, had *fired at* the hare: That although, [497] strictly speaking, this might be considered as a breach of the game laws, yet the pursuer, unconscious of any thing very heinous in the crime, considered it proper to avow his fault, and throw himself upon the clemency of the court. Accordingly, after the first witness had been examined, his agent stated that enough had already been proved to convict his client, and as he wished to save the court farther trouble, he admitted the complaint, only expressing his confidence that, in awarding judgment, the court would deal as leniently with the defender as was consistent with their duty, and that they would be pleased to take into their consideration that he was the only support of two aged parents: That in place of giving effect to this appeal, the said Charles Monro answered, and falsely stated, in aggravation of the offence, that the present pursuer was a notorious poacher: That upon this, the said Robert Barclay Allardice spoke and delivered himself as follows, or in words to the following purport and effect: 'I do not think the defender deserves any mercy, as I am informed that, besides being a poacher, *he is a thief; that he has been known to steal bee-hives and leather;* and that Mr. Boswell (his brother judge) knows this to be true.' Upon which the said John Boswell stated as follows, or in words to the following purport and effect: 'I cannot say as to the bee-hives, but I was informed by a respectable farmer, now dead, that *he stole a quantity of leather.*'"

The case was argued before the Judges of the Second Division, on the question of relevancy; and by interlocutor of the 13th December 1827, the Judges found the action relevant and remitted the cause to the Jury Court, and the jury found for the pursuer, with [498] £125 damages against each of the defenders. The proceedings and evidence are succinctly stated in the following bill of exceptions tendered to and signed by the Lord Chief Commissioner: "Whereas, by an interlocutor of the honourable Joshua Henry Mackenzie, one of the Lords Ordinary of the Second Division of the Court of Session, bearing date the 21st day of May 1824, this cause was transmitted from the Court of Session to the Jury Court, in terms of the Acts of Parliament applicable to such cases; and after certain proceedings were had therein, the said Court, upon a motion by the counsel for the defender Robert Barclay Allardice, did, upon the 26th day of November 1825, transmit the said cause back to the Court of Session, for the determination of their Lordships, whether the said action, as libelled, was relevant or competent; and the said honourable Joshua Henry Mackenzie, as Ordinary thereto, having ordered cases to the Second Division of the Court, their Lordships, by an interlocutor dated the 13th day of December 1827, unanimously found the action to be relevant, and again remitted it to the Jury Court: And whereas afterwards the following issues were adjusted, and ordered to be tried by the said Court:—It being admitted that the defenders are justices of peace and commissioners of supply for the county of Kincardine, and, in that character, attended a meeting at Stonehaven, in the said county, on the 3d day of March 1823; and that the pursuer was then brought before the said court upon a complaint preferred against him for unlawfully shooting at game, and being thereof convicted, he did then and there, make application to the court to mitigate the punishment,—whether, at the time and place, and pending the proceeding aforesaid, and in presence [499] and hearing of the persons then and there assembled, the defender

Robert Barclay Allardice did falsely, maliciously and calumniously, say that the pursuer, besides being a poacher, was a thief; that he had been known to steal bee-hives and leather, and that the defender John Boswell knew this to be true; or did falsely maliciously, and calumniously use or utter words to that effect, to the loss, injury and damage of the pursuer?—Whether, at the time and place, and pending the proceeding aforesaid, and in presence and hearing of the persons aforesaid, the defender John Boswell did falsely, maliciously and calumniously, say that he was informed by a respectable farmer, now dead, that the pursuer stole a quantity of leather; or did falsely, maliciously and calumniously, use or utter words to that effect, to the injury and damage of the pursuer? Damages laid at £800. And whereas, at a sitting of the Jury Court in civil causes, holden on the 24th day of March 1828, before the right honourable William Adam, Lord Chief Commissioner of the Jury Court, and the honourable James Wolfe Murray, one of the Lords Commissioners of the said Jury Court, the foresaid issues came on to be tried by a common jury of the county of Edinburgh, county of Haddington or East Lothian, and the county of Linlithgow or West Lothian; at which day came there, as well the said pursuer as the said defenders, by their respective counsel and agents and the jurors of the said jury aforesaid empannelled to try the said issues being called, also came, and were then in due manner chosen and sworn to try the said issues; and upon the trial of the said issues, the counsel learned in the law for the said pursuer to maintain his case under the said issues, did give in certain evidence; and no **[500]** evidence having been given on the part of the defenders, the jury aforesaid did then and there deliver their verdict for the pursuer, upon both issues, and found the said Robert Barclay Allardice and John Boswell, defenders, conjunctly and severally, liable to the pursuer in £200 of damages;—which verdict was afterwards, upon the 24th day of June 1828, set aside, and a new trial granted, upon the ground of the damages being awarded *conjunctly and severally* against both defenders, in respect that their defences were distinct, that the acts done, and the words spoken, were different in charge and proof, and that they were not *in pari delicto*. And whereas afterwards, at a sitting of the said Jury Court, holden on the 21st day of July 1828, before the right honourable William Adam, Lord Chief Commissioner of the said Court, and the honourable Joshua Henry Mackenzie, one of the Lords Commissioners thereof, the foresaid issues came on to be tried by a common jury of the counties aforesaid; on which day came there the counsel and agents for the parties as aforesaid; and the jurors of the said last jury being empannelled and chosen, and sworn to try the said issues as aforesaid, the counsel for the pursuer did give in the following evidence:—It was given in evidence by Peter Christian, writer in Stonehaven, that he was employed in February 1823, by the pursuer Robertson, to conduct his defence in a prosecution raised against him under the stamp act, for killing game without a license. The first meeting was on the 3d day of February, when six or seven witnesses were examined. The next meeting was on the 17th, and then adjourned to the 3d March, when one witness was examined by the solicitor of stamps. It appeared to witness that **[501]** the charge was brought home to Robertson, and he thought it improper to give more trouble. He admitted that the charge was brought home. He thinks he did not consult with his client. He thought he had full authority. Immediately after this, witness said, as it was Robertson's first offence, and as witness understood he had a father and mother to support by his industry, that he hoped the court would be lenient in the punishment. On which Mr. Barclay said, that he did not consider that Robertson was an object of lenity, as he was a thief as well as a poacher. On Mr. Barclay saying this, witness said, that he had not made any statement as to Robertson's character, as he was unacquainted with it, and it appeared to him not a matter for the consideration of that court; that if he had been guilty of theft, he was otherwise liable to punishment, and this ought not then to be taken into consideration. Mr. Barclay said he differed with witness entirely; that the court was entitled to take it into consideration; and that he was informed by Mr. Boswell that Robertson had been guilty of stealing bee-hives and leather, or in the practice of stealing them. Mr. Boswell was then in the room, and said he could not swear as to the bee-hives, but he was sure of the leather, as he was informed by a respectable farmer, now dead. Witness thinks nothing more was observed by the gentlemen of the court; but Monro, who acted as agent for the prosecution, said it would be better to leave that, or reserve the discussion for their private meeting. Nothing farther

was said. A conviction took place for the full penalty of £20, and three guineas license duty. Robertson was imprisoned till payment. The surveyor of assessed taxes prosecuted in the name of [502] the solicitor of taxes. The surveyor of the district is named Kinnear. It is not common to take assistance. Does not know another instance. Kinnear is an agent. If he were not professional he would take assistance. Monro was the defender Boswell's private agent at that time. The observations of the defenders excited a great deal of conversation among the legal people in the town. Messrs. Duff, Silver and Barclay were present. Mr. Boswell was not in the sederunt. He was present at part of the examination, but don't know if he was present at the whole. Witness went immediately to the hall of the Fiars' Court, and was followed by the pursuer. His feelings seemed to be considerably hurt by the observations. On his cross-examination this witness said, that the meeting of the justices was in a committee-room off the hall. Barclay said he understood Robertson was both a poacher and a thief, or a poacher as well as a thief. Did not see Barclay make any motion towards Boswell. Barclay lives within two miles of Stonehaven, and was present on the 3d of February. Cannot recollect how long the pursuer was imprisoned; thinks several days. He was not put in prison immediately after the conviction. It was months afterwards. They don't in practice commit immediately. Imprisonment is the act of the officer whose duty is to levy the fine. Boswell was not present on the 3d of February. Did not observe any communication made by Boswell to Barclay before the observations. The pursuer made no observations, nor did he ask for time to inquire into the matter. The witness knows Alcock, who came to Stonehaven afterwards. Knows Monro still acts in the county for Boswell.—It was farther given in evidence for the pursuer, by Thomas Kinnear, [503] writer in Stonehaven, that witness is surveyor of taxes, not of stamps. Part of witness's business is to prosecute offenders against the game laws. Remembers prosecuting Robertson. Monro assisted him. Never was assisted before. Got his information from Monro, and thinking him better acquainted with the facts, wished him to do the business. Monro gave him the list of witnesses, gave him the information, and examined the witnesses in court. Monro was at one time Boswell's private agent. Did not know if he was so still. Witness was in court on the 3d March as pursuer. Only one witness was then examined. He brought home the case against Robertson completely; so much so, that he would not detain the court longer. Christian requested the court to be lenient, as it was his (Robertson's) first offence. Christian said that he was a poor man, and the support of his father and mother. Barclay said that the case was clearly proved; that he did not consider him as entitled to the leniency of the court; that besides, he understood he was a person of very bad character, and had been guilty of stealing leather and bee-hives, and made some reference to Boswell. Witness did not think Christian said any thing then. Barclay referred to Boswell for the truth of what he had stated. On which Boswell said he could not say as to the bee-hives, but he could swear to the leather, as a very respectable farmer, now dead, had told him. Christian said the man was a stranger to him, and that he had said nothing about his character. Monro said it was as well to leave that alone, and decide the case on a proof. Robertson was convicted in £20 penalty, and certificate duty. He was put in prison a considerable time afterwards, and liberated [504] on payment. There were about half-a-dozen people in the court-room at the time when the observations were made by the defenders. In his cross-examination, this witness said that the conversation took place without the justices retiring. Barclay said something to Christian, importing that he was entitled to take Robertson's character into consideration.—It was farther given in evidence for the pursuer, by James Tindal, clerk of the commissioners, that he was present on the 3d of March 1823. Witness concerts with the solicitor of stamps. Witness gets the warrants. The prosecutions are generally conducted by Kinnear. Christian said it was unnecessary to deny the charge any longer, and appealed to the leniency of the court to mitigate the punishment. Barclay said that Robertson was a poacher, and that he was informed he had stolen bee-hives and leather, and appealed to Boswell as having informed him. Boswell said that he could not depone as to the bee-hives, but was certain as to the leather, because a respectable farmer, now dead, had told him so. Monro said it would be better to leave that or reserve the discussion for their private meeting. Robertson was imprisoned for the

penalty at some distance of time from the conviction.—The following documents were also put in as evidence by the pursuer, viz. the summons, the defences, and condescendence and answers, a receipt for the penalty, dated Stonehaven, 10th June 1824, and signed J. Brand. No evidence was given on the part of the defenders, and the counsel for the said pursuer did then and there insist before the said Lord Chief Commissioner and Lord Commissioner, that the said evidence adduced on the part of the pursuer did entitle the said pursuer to a verdict. But the coun-[505]-sel for the defenders did then and there insist that the pursuer was not entitled to a verdict on the evidence aforesaid, but that on the said evidence the defenders were entitled to a verdict. *Whereupon the Lord Chief Commissioner did then and there observe to the said jury, that an action for damages was not competent at all against Judges of the Supreme Courts in Scotland for words spoken by them in a judicial capacity, but that such an action lay against justices of the peace, provided the words were spoken maliciously. With reference to the malice, that in all cases where the party using the words complained of was entitled to speak of the complainer, the jury must be satisfied that the malice was proved; and the Lord Chief Commissioner did then and there direct the jury to take into consideration the words and the whole circumstances of the case, and to consider whether Mr. Barclay was honestly discharging his duty, and only erred in judgment as to his duty; or whether he acted not from a fair desire of doing his duty, but was induced by malice to use the words proved. The Lord Chief Commissioner farther stated to the jury, as his direction on the law, that malice consisted in speaking from bad motives, and that it may be either preconceived or instantaneous. His Lordship farther stated to the jury that in cases like the present, where no evidence was adduced by the defenders to prove that the words spoken were true, they must be understood or presumed to be false, although no evidence of the falsehood was adduced by the pursuer.* And the jury aforesaid did then and there deliver their verdict for the pursuer, upon both issues, and found the defender Robert Barclay Allardice liable in £125 of damages, and also found the defender John Boswell liable in £125 of damages to the pursuer.—That the [506] counsel for the defenders did afterwards obtain a rule to show cause in the Jury Court to have the said verdict set aside, and a new trial granted, founding their application, among other grounds, upon the aforesaid direction, as a misdirection in point of law, by the Lord Chief Commissioner at the trial. But the said Court did, on the 15th day of January 1829, dismiss the said rule;—whereupon the counsel for the defenders did, in terms of the act of parliament of the 59th George 3d, cap. 35, sect. 17, tender a bill of exceptions to the said order of the Jury Court, in as far as the said Court, by discharging the said rule, did confirm the said direction of the said Lord Chief Commissioner at the trial; and the said counsel for the defenders did contend that the said Court should have set aside the said verdict and granted a new trial, as the verdict should have been given in favour of the defenders. *That the Lord Chief Commissioner, instead of the direction on the law given by him as aforesaid, should have directed the said jury to have found a verdict for the defenders, by directing them,* first, *that for words spoken by the defenders when sitting in judgment as justices of peace, and deliberating upon or delivering the grounds and reasons of a judicial determination, the defenders are entitled in law to complete protection and immunity, even where the words are alleged to be maliciously spoken;* secondly *and* separatim, *That the evidence of malice in the present case ought to be direct and express by proof of malice, wholly independent of the alleged intemperance, or even falsehood of the words spoken, and that from the mere absence of evidence of the truth of the words spoken, these words could not be held to be false, to the effect of affording legal or competent evidence of malice against the defenders, acting as aforesaid,*" etc.

[507] In the case of *Doctor Hamilton* v. *Doctor Hope*, which was an action brought by one professor in the University of Edinburgh, against another, for defamatory words spoken at a meeting of the Senatus Academicus (Free. Coll. 337, 10th March 1827), the law on this subject was stated by the Lord Justice Clerk as follows:

"*First*, I take it to be quite fixed, that in ordinary cases where an action is brought, concluding for damages for slanderous words, where no case of privilege whatever can be alleged in favour of the defender, it is sufficient for the pursuer to prove the use of words of a slanderous, defamatory and injurious nature, and

that in such case the malicious purpose of using them will be inferred without any further proof whatever. *Secondly*, it is equally clear, on the other hand, that whilst there are *two classes of cases* which are sheltered by an absolute privilege or protection against all actions for alleged slander viz. those of a member of parliament in parliamentary debate, and of a *supreme* Judge acting *in judicio* (with neither of which we have at present any concern), still that *in all other cases* which are held by law to be of a privileged nature, the presumption of law is against malice; and it is therefore incumbent on the pursuer of an action for the use of slanderous words, in such circumstances, to bring evidence that will satisfy a jury, that notwithstanding the privilege founded on, the expressions were used maliciously by the defender. This is the doctrine laid down by Mr. Starkie in his work on the 'Law of Slander,' p. 231. In regard to the question, What sort of evidence is required to establish malice in privileged cases, or in what mode the presumption of law is to be rebutted? it appears to me, from the best consi-[508]-deration of the authorities, that it cannot be held that nothing but direct and positive proof of malice, altogether apart from, and independent of, the case itself, can avail; on the contrary, I think, that while it is competent to prove by separate, distinct, and (as it is sometimes termed) extrinsic evidence, independent of the case itself, that the defender was influenced by malice, it is also competent to require the jury to take into their consideration the whole circumstances of the case itself, with the conduct of the party in relation to time, place, and, in particular, the pertinency of his words to the subject matter of the privilege, and to decide if there is sufficient evidence of malice resulting from a general view of these circumstances. The opinion seems to be confirmed by the case mentioned by Mr. Starkie, 'Law of Slander,' at page 242, and by another passage, at page 260 of the same work. For looking at the English doctrine and practice on this subject, we have the highest authority in the law of Scotland, that of my Lord Stair, who, in treating of this subject of reparation for verbal slander, in B. i. tit. 9, sect. 4, of his Institutes, expressly refers us to them." Again, after remarking that the pursuer of the case referred to, indeniably stood in a privileged situation, "with the presumption of law in favour of the innocence of his intentions in the use of words of a slanderous nature," his Lordship proceeds thus—"But if not keeping closely to the subject of discussion, if travelling into impertinent matter, or using the occasion as a cloak or cover for malice, as indicated by the whole of his conduct and the circumstances of the case, it will undoubtedly be for the jury to decide the question, whether the malice which the law requires to warrant a verdict against [509] him for slanderous words, is not sufficiently proved, even though no extrinsic proof of malice has been led?" At page 354 of the same report, Lord Alloway states, "I am also clear, and I think my opinion is confirmed by every authority to be found, either in Scotland or England, that it is not necessary, in cases of protection, to prove malice by what is called extrinsic evidence, but that the jury, in every such case, must judge from the expressions made use of, whether they could be justified by the place where they were made use of; and that it is enough for them to find that they were falsely spoken, and also that, in the circumstances of the case, they were maliciously spoken." Again, at page 361, the same Judge observes, "If I am right in what I formerly stated, and what has been uniformly stated in every jury trial in this country, in so far as I know, as well as in England, that extrinsic or express proof of direct malice was not necessary, but that intrinsic or internal evidence might arise out of the facts and circumstances of the case, and out of the character and nature of the words used, then, if the words used were impertinent, unnecessary, and not intended to forward the argument, but to produce an insult, and to harass the feelings of the person of whom they were spoken, the jury were certainly entitled to consider *quo animo* they were uttered, and whether they were to infer malice from them or not." The same doctrine is laid down as beyond dispute by Lord Pitmilly, who, after alluding to the nature and limits of privileged cases, expresses himself thus: "It is not necessary to say any thing of the very few cases in which no action at law whatever lies for slander, as it is not alleged that this case belongs to that class. Of other cases, the distinction is, that in common [510] slander (as distinguished from privileged cases), the law presumes malice from the use of the words, and the pursuer having proved injury and falsehood, is not put to prove malicious intention, but the law infers it. In other cases which are called privileged, there is no room for this

presumption; and therefore the pursuer must prove malice in the user of the words. There are certain persons who are called upon by duty, others are permitted in the exercise of their legal rights, to speak of the character and conduct of their neighbours; and when they do so from a sense of duty, or in the exercise of their rights, and believing what they state, they are free from a claim of damages, although the expressions of which they make use may be injurious, and would in other circumstances be actionable. The presumption of law in their favour is, that they spoke from such motives; and the pursuer is therefore put to prove their malicious intention. *Their situation must not be made a cloak for malice;* and the pursuer is therefore in such cases allowed to rebut the legal presumption in their favour, by contrary proof. It is a different question what kind of proof it is necessary for him to lead, and whether he is confined to extrinsic evidence, such as previous threats, or other facts of that description. It must lie with the jury to say whether malice is made out; and in considering this matter they are entitled to take into view the whole facts and circumstances, or the intrinsic evidence, as well as the extrinsic proofs of malice. The intensity of the expressions, the situation of the parties, and the whole circumstances of the case, are legitimate matter for the consideration of a jury, to enable them to judge whether the malicious intention be made out. This is, I think, made out by the cases **[511]** referred to by the pursuer, mentioned by Mr. Starkie at page 241 of his work on the Law of Slander, and in the second volume of his work on Evidence, p. 867, 912, and 914, and, indeed, by the reason of the case. Real evidence of malice is often afforded in this way; and there is no inconsistency that the law should presume against malice, and yet allow the whole circumstances to be taken into account in considering the proof of it." Again, the same Judge, in reference to the question, who are entitled to privilege? remarks, p. 348, "there is a long list of privileged situations in the books, and when a new one like the present arises, which has not hitherto been adjudged, we must attend to the principles on which the admitted cases rest. Now, this principle appears to be what I have already mentioned, viz. that the privilege protects all persons who are called upon by duty to speak, or who do so in the exercise of a legal right. The privilege always depends on the duty or right of the party. Hence Lord Mansfield, in a case of a master giving a character of a servant, says that, if he has not been asked to do so, there is no privilege, for this reason, that till he is asked for a character, the duty of giving one does not emerge. It is a branch of the same rule that a person thus called upon, or thus entitled to speak of his neighbour, must confine himself to what is pertinent."

In giving judgment on the bill of exceptions, the Lord Justice Clerk used these words: "The case is very different from that of a Judge speaking in language, however strong, of the case before him, which I conceive every Judge is protected in doing; but here he goes entirely out of his way, and takes the liberty of calling the pursuer a *thief*—accusing **[512]** him of a crime of the deepest die, inferring infamy, and for which, under some of the old Scotch statutes, he might have been tried capitally. I do not care whether this was done in a large audience or a small one: it was alike unjustifiable. From the first moment I never entertained a doubt that, according to the established principles of the law of Scotland, this was actionable matter, and inferred a relevant and competent claim of damages. I know nothing, and am not bound to be informed, as to the law of England in such a case. But by the law of this country, the defenders, in uttering the words complained of, clearly went out of the case before them, and thereby rendered themselves liable in damages. Justices of the peace, after finding a person guilty of poaching, have no protection by the law of Scotland (which must be the rule of decision here) in stating, as a reason for refusing to mitigate the punishment, that the offender is entitled to no favour from the court, because he is a thief. And as to the other exception, when there was no issue in justification, we cannot doubt that the learned Judge is right in saying that the accusation must be assumed to be false, and therefore I am quite clear that the bill must be disallowed."

The other Judges concurred; and by interlocutor of the 14th May 1829, disallowed the exceptions, and found the verdict final and conclusive. From this interlocutor, and the interlocutor of relevancy, the magistrates appealed.

The cause came on for hearing in the House of Lords (Lord Wynford presiding),

on the 30th March and 1st April 1830, and on the 6th April their Lordships proceeded to judgment.

[513] Lord Wynford (after stating the nature and circumstances of the case and the result of the proceedings below:)—In giving my opinion on this case, I have endeavoured as much as possible to forget that I am an English Judge, and to consider myself as sitting in a Scottish Court to administer the law of which the people of Scotland have been so jealous, and for which they so zealously contended, and the possession of which has been so solemnly secured to them by the Act of Union. The summons which forms the foundation of this action raises two questions: first, whether the interlocutor of relevancy was correct; and, secondly, whether the verdict of the jury was right. The summons commences thus: "Whereas it is meant and humbly shown to us, by our lovite John Robertson, shoemaker, at Balderaigs, parish of Fetteresso, near Stonehaven, that the pursuer, who is a man of unimpeachable moral character, lately had the misfortune to incur the displeasure of certain of the landholders of the county of Kincardine, by the unpardonable offence of shooting *at* a hare upon the property of one of them, and has been made the victim of a persecution almost unequalled for its rigour, and particularly aggravated by its circumstances." I hope these flights of imagination will soon be banished from Scotch pleading. They are highly improper, and in this country would be set aside for impertinence at a heavy expence to the party giving way to them. The summons then states that the pursuer was brought before the magistrates for this shooting at a hare, and that the gentlemen who presided were, Colonel Duff, of Fetteresso, Robert Barclay Allardice, of Ury, John Boswell, etc.; and then it proceeds: "The deposition of the first witness went **[514]** to prove, not that the pursuer had killed the hare in question, or indeed any other species of game, but only that the pursuer had fired at the hare. Although, strictly speaking, this might be considered as an offence against the Game Laws, yet the pursuer, unconscious of anything very heinous in the crime, considered it proper to avow his fault, and throw himself upon the clemency of the court." To that clemency the pursuer's agent appealed; and after stating this, the summons proceeds: "But instead of giving effect to this appeal, the said Charles Monro (agent for the prosecution) answered, and falsely stated, in aggravation of the offence, that the pursuer was a notorious poacher: that upon this the said Robert Barclay Allardice spoke and delivered himself as follows: 'I do not think the defender deserves any mercy, as I am informed that, besides being a poacher, he is a thief, and has been known to steal bee-hives and leather; and that Mr. Boswell (his brother judge) knows this to be true.' Upon which the said John Boswell stated as follows: 'I cannot say as to the bee-hives; but I was *informed* (your Lordships see that they do not speak of their own knowledge, but only from information) by a respectable farmer, now dead, that he stole a quantity of leather.' That after some discussion, in the course of which the said Robert B. Allardice maintained his right to comment on the private character of the pursuer, he (the pursuer) was subjected in the sum of £20," etc. Now your Lordships will observe, that the respondent's agent appealed to the clemency of the justices on the ground of character; and this is a very material circumstance in considering the question of malice, for the question of character was called to the attention of the magistrates **[515]** by the respondent's own agent. I have thought it my duty to consider well the foundation of the opinion which I am now to state to your Lordships. You will consider in what situation a magistrate is placed. It is absolutely necessary that he should be protected in the discharge of his duty, and that he ought not to be responsible in this manner for an error in judgment. For malice he may, but then it must be malice established by evidence. If it were otherwise, who would be a magistrate? It is equally important that he should be protected in the discharge of his duty, as that the subject should be protected against oppression. [His Lordship then reviewed the authorities and cases, and stated that the only cases which ran on all fours with the present were *Gibb* v. *Scott*, reported by Lord Elchiss, and *Leitch* v. *Fairy*, 7th July 1711; and from the whole he came to the conclusion, that even the inferior Judges could not be made responsible in a civil action, except for malice proved.] In the case of *Haggart* and the Lord President *Hope*, it was found that a Judge was not responsible in a civil action for words spoken on the bench; and it has been argued that there is no distinction between a supreme and a subordinate Judge; but

I conceive, my Lords, that in the case of a supreme Judge the Courts below cannot inquire into the question of malice. The only remedy is by application to this House, in which the Constitution has vested the power of compelling the Judges below to do their duty. Although the supreme Judges should be disposed to reject this protection for themselves, yet the law will cast it upon them, and this House is the only proper tribunal to deal with them. This, however, is the case of a subordinate Judge, and I think he is liable to an action if malice be clearly made out; and, therefore, I think that the judgment of **[516]** the Court of Session, as far as the interlocutor of relevancy is concerned, ought to be affirmed. Then comes the second question: Has the alleged malice been proved? If it has not, the verdict of the jury cannot be supported. In the case of *Oliphant* v. *Macneil* (5 Brown, Suppl. 573; Borth. on Libel, 201), the justice had called the pursuer, a preacher of the Gospel, when under examination, a d—d perjured villain, and yet he was held not liable because he had some reason to suspect that the witness was perjured; and so the defenders in this case had some reason to believe that the poacher was a thief, though that could not be proved. If the magistrates are not protected by law in the administration of their duties, no man of property or character will undertake the office. Then, has the malice been proved? There is a material distinction as to exceptions between the old English statute of Westminster the second, and the late Scotch statute on the same subject. By the former you are confined to the terms of the exception; but the latter is large enough to enable you to look at the whole of the record and the circumstances. The Court of Session remitted the case to the Jury Court, and the trial proceeded and damages were given. The case came back again to the Court of Session, and was argued on the exceptions, which the Court disallowed, and that interlocutor also was appealed from. But I think that they ought to have been allowed, for I do not see that there was any thing like sufficient evidence of the malice, and justice cannot be done without sending this to a new trial. The question is—whether the conclusion which the jury came to was warranted by the facts; and I have carefully examined the whole evidence from the beginning to the end, and could not find any thing to warrant the conclusion; and I am satisfied that the case must be sent to another jury. **[517]** No one more values the assistance which we derive from juries in the investigation of facts than I do. But the facts must be such as to warrant the conclusion; for juries must not be allowed to act in an arbitrary manner. [His Lordship here recapitulated the facts, and marked particularly the circumstance that the respondent's character was brought under the magistrates' consideration by his own agent.] In all this I cannot find a *scintilla* of proof that can warrant the conclusion of malice. The words were pertinent to the matter under the magistrate's consideration. If the words were not pertinent, malice may perhaps be inferred from the words themselves, but the inference may be repelled by the circumstances under which the parties uttering them were placed, and then malice must be proved by other circumstances; but no proof of the malice was here given. The Lord Chief Commissioner seems manifestly to have been of opinion that that there was no evidence of malice, and I am glad to see that my old and excellent friend the Lord Chief Commissioner Adam still preserves his faculties in full vigour. If malice had been proved we could not have relieved these gentlemen; but here there is no evidence of malice. I am glad to see that the trial by jury is to be still further extended in Scotland. But it is an institution that must be regulated, and prevented from becoming arbitrary, otherwise trial by jury, instead of being a blessing, would become one of the most intolerable of nuisances; for our persons and property would not be under the protection of law, but left at the discretion and mercy of an arbitrary and capricious tribunal. The tribunal is the best assistant under Heaven in the investigation of facts, when under proper regulation, but without such regulation it would be a curse, and not a blessing. The magistrates have **[518]** duties to perform which often render them unpopular with a certain class, and they cannot perform those duties unless they are protected; and if a jury were to find one hundred verdicts against them without evidence, these verdicts must be set aside. I have considered the case much at different times, and meditated upon it, to see if I could find any thing to support the finding of the jury in this instance, but I have been able to discover nothing. The principle of such a verdict as this, founded on no evidence, would, if allowed to pass unquestioned, deeply affect the administration of justice—especially by the unpaid gentry of the country,

who, although some attempt to run them down, form one of the most valuable class of magistrates that ever existed in any country. I propose, therefore, that the interlocutor of 1827 be affirmed, and that of 1829 reversed; and that the cause be sent back again to be remitted to another jury.

Adjudged accordingly.

[*Qy.*:—Whether, as the Court below proceeded on the assumption that the words spoken were *not* pertinent to the subject under discussion, and Lord Wynford on the assumption that they *were* pertinent, the difference may not be referrible, in some degree, to matter of fact, rather than matter of law.—REP.]

[519]

APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

MARQUIS OF WESTMEATH,—*Appellant;* MARCHIONESS OF WESTMEATH and Others,—*Respondents.*

[Mews' Dig. iv. 150; vii. 986; S.C. (*Westmeath* v. *Salisbury*) 5 Bli. N.S. 339; and cf. *H.* v. *W.*, 1857, 3 Kay and J. 386. Among the numerous cases in which this case has been dealt with it may suffice to refer to *Wilson* v. *Wilson*, 1848, 1 H. L. C. 538; 5 H. L. C. 40 (and see the note to that case in 1 Wh. and T. L. C. 7th ed. pp. 577, 597, 611): *Cartwright* v. *Cartwright*, 1853, 3 De G. M. and G. 982. And see *Rowell* v. *Rowell* (1900), 1 Q. B. 9; *Marlborough* (*Dowager Duchess of*) v. *Marlborough* (*Duke of*), 1900, 17 T. L. R. 137.]

Deeds of separation, in 1817 and 1818, between Lord and Lady W. By the deed of 1817 it is provided that the parties shall continue to reside together and cohabit as husband and wife, but that on the renewal of dissentions the separation should immediately take effect. Disputes continue, and the deed of 1818 is executed, which provides for an immediate separation; but Lady W. is prevailed upon to allow her husband to occupy apartments in the same house with her till he can procure an appointment abroad. They accordingly live, dine and visit together for about a year after the execution of the deed, but without cohabitation as husband and wife. Bill by Lord W. to set aside the deeds, chiefly on the ground of their being contrary to public policy, and the deed of 1817 is declared to be null and void, reserving the rights of a child of the marriage, and no appeal by Lady W. against the decree. As to the deed of 1818 the bill is retained for twelve months in the usual way, to give the parties an opportunity to try the question of its validity at law. Neither of the parties avail themselves of this opportunity, but Lord W. appeals against the decree to the House of Lords. The judgment of the Court below affirmed, enlarging the time of retaining the bill, so as to enable the parties still to try the question at law:

The Lord Chancellor and Lord Eldon being clearly of opinion that the deed of 1817, providing for a future separation, could not be supported; and the Lord Chancellor being decidedly of opinion that, under the circumstances [520] of the parties living together, although without cohabitation as husband and wife, the deed of 1818 could not be sustained; and Lord Eldon being of the same opinion, but more cautiously, and with an anxiety that the question should still be tried at law, with the record put into such a shape that it might be again brought by writ of error before the House for final adjudication. (*Vide Hindley* v. *Westmeath*, 6 Barn. and Cres. 200.)

On the 29th May 1812, the respondent, a daughter of the Marquis of Salisbury, intermarried with the appellant, the Marquis of Westmeath, then Lord Delvin. The appellant's father being then alive, and his family estate considerably encumbered, it was not thought advisable to make a formal settlement, but articles were executed

by which the appellant engaged to secure to the respondent a jointure of £3000 a year, and to settle his estates after his father's death on the issue of the marriage in strict settlement.

Soon after the marriage disputes arose between the parties, and the respondent complained of various acts of cruelty and ill usage on the part of the Marquis from 1812 till 1817, in the course of which year she caused it to be intimated to the appellant, through Mr. Sheldon, a bencher of Gray's-Inn, and a friend of the Salisbury family, that she was determined to apply to the Ecclesiastical Court for a divorce and separation *a mensa et thoro*. The appellant was extremely anxious to prevent this step being taken, and the respondent, at the earnest entreaty of him and her most intimate relations and friends, was induced to consent to continue to live with the appellant, on his engaging not to repeat his ill usage of her, and to execute a deed for a future separation, and for separate maintenance for the respondent in case of a renewal of cruelty and [521] ill usage, and also securing the jointure, and the settlement of the estates on the issue of the marriage, with a proper provision for younger children. There was at that time existing issue of the marriage only a daughter, Lady Rosa Nugent.

Accordingly the deed, bearing date the 17th December 1817, was executed on that day. It was made between the appellant of the first part, the respondent of the second part, and Mr. Sheldon of the third part. After reciting the settlement made on the marriage, and that no provision had yet been made for the issue of the marriage, it proceeds to recite that disputes and differences had, for some time past, existed between the appellant and respondent, and had risen to such a height that they were on the point of separation; but, by the intervention of mutual friends, the respondent had agreed to live and cohabit with the appellant, after he should have executed this deed: it recites also, that there was then issue of the said marriage one daughter only. The appellant covenants to convey certain estates to the use of the said William Sheldon, his executors, etc., for ninety-nine years, with remainder to the use of the Earl of Talbot and Baron Nugent, as trustees for two hundred years, with remainder to the use of the appellant for life, with remainder to the use and intent that the respondent might, in case of surviving the appellant, receive a jointure of £3000 per annum, with remainder to the use of the honourable and reverend Gerald Valerian Wellesley, D.D. and the honourable and reverend John Talbot, clerk, as trustees for one thousand years, remainder for the benefit of the issue of the marriage, with the ultimate remainder to the plaintiff in fee.

The trusts of the term of ninety-nine years are, and it is declared, that the respondent had agreed to live [522] with the appellant, upon the express condition that, in case it should unfortunately happen that, by a renewal of such disputes as had nearly caused such separation as aforesaid, the respondent should find herself compelled to cease to cohabit with the appellant, or live apart from him, the said William Sheldon should, out of the rents and profits, or by sale or mortgage, raise such annual sum as should then, by the advice of their mutual friends, be agreed upon as a proper and sufficient sum for her separate maintenance, which was to be paid to her as she should appoint, and, in default of appointment, into her own hands, for her separate use. The appellant agrees, in that event, to execute such articles of separation as are usual in such cases, and necessary for the security and comfort of the respondent; and he covenants to permit their daughter, and such other child or children as they might have between them, to be and reside with their mother, the respondent, and to be educated under her care and superintendence. It is thereby declared, that the term and provision thereby agreed to be made are not to become void by means of any subsequent reconciliation; but the payment is only to be suspended, and to be revived if, at any future time, any other separation should unfortunately take place: but such separation only to take place in case of ill usage or gross abuse to the respondent. The trusts of the term of one thousand years are to raise portions for younger children.

After the execution of this deed the parties continued to life together as man and wife; and the disputes still continuing, the respondent at Easter 1818 ceased to cohabit with the appellant as his wife, and requested Mr. Sheldon to take the proper steps for a divorce. This led to the execution of another deed, [523] of the 20th May 1818, under circumstances which will be best described in Mr. Sheldon's deposition:

" That in or about the latter end of the month of March or the beginning of April, 1818, he received a letter from the respondent, complaining to the deponent that the appellant had recommenced his ill-treatment of her, and that she was therefore absolutely determined never more to live or cohabit with him as his wife, or to that effect. Deponent, shortly after his having received the respondent's said letter, came up to London, and had repeated communications with the appellant, upon the subject of such the respondent's determination; upon which occasions deponent unreservedly informed the appellant, that the respondent was so provoked and indignant at the renewal of his former cruel and outrageous conduct toward her, that she was determined to commence a suit, in the proper Court in Doctors' Commons, for a divorce. The appellant repeatedly and unremittingly importuned deponent to dissuade the respondent from such a course, in which the appellant was seconded by the Marchioness of Salisbury (the mother of the respondent), who also entreated deponent to the same effect; but deponent refused to comply with such their desire, the deponent well knowing (of which he informed Lady Salisbury and the appellant) that the respondent's determination was taken never again to put herself in the power of the appellant, who had so cruelly treated her after she had, at the solicitation of deponent, then acting on the earnest solicitation and entreaties of Lady Salisbury and the appellant, in the preceding month of December, become reconciled to and continued to cohabit with him. That deponent at length yielded to the importunities of **[524]** the appellant and Lady Salisbury; and from himself and without any direction from the respondent so to do (for she was utterly averse to it), suggested to the appellant, that the only possible way in which the exposure and publicity that would attend the suit in the Spiritual Court for a divorce could be avoided, would be, that of the appellant's executing a regular deed of total and absolute separation between him and the respondent, and thereby securing a suitable provision, by way of separate maintenance, to the respondent, and covenanting to permit her to live separate and apart from him, with all such clauses as are usually inserted in deeds of that nature; to which suggestion of the deponent the appellant having acceded (he having no other alternative), and the respondent having been prevailed upon to consent, and the appellant giving deponent directions to prepare the necessary deed of separation, deponent, in like manner as he had done upon the preparation of the former deed, in the preceding month of December, entreated the appellant to call in and consult with his own solicitors and counsel; deponent observing, that it was very irksome to deponent and repugnant to his feelings, to be concerned for both parties, particularly as deponent considered himself altogether as the counsel and friend of the respondent upon the occasion. That the appellant thereupon implored this deponent to undertake the whole arrangement, giving for reasons his anxiety to save appearances, and to prevent *éclat*, as repeatedly urged to him by the appellant and Lady Salisbury. That having yielded to the entreaties of Lady Salisbury and the appellant, deponent accordingly prepared the deed of separation, and the same was executed on the 20th day of May 1818."

[525] After the execution of this deed of the 20th May 1818, the appellant desired to have a copy of it, and it was sent to a stationers for that purpose, and there the appellant got hold of the original and half-finished copy, and destroyed them both. Mr. Sheldon, who was then out of town, was informed of this by his clerk, and he thus describes what followed:

" That on the receipt of his clerk's letter he wrote to the appellant, observing on the impropriety of his conduct; and the deponent received a letter from the appellant in reply thereto, in which the appellant expressed his concern and sorrow for what he had done, and his wishes to execute another deed to the same effect. That the deponent, in the month of July following returned to London, and having written to Henry Widman Wood, the intimate friend and adviser of the appellant, and Mr. Wood having thereupon come up to London to meet the deponent, he (Mr. Wood), in some short time after, informed the deponent to the effect that he had received a letter from the appellant, addressed to him from Beaumaris, to the best of the deponent's recollection, informing him that the appellant would remain at Beaumaris until the deed to be executed by him, in place of the deed which he had destroyed, should be prepared for his signature. That the appellant, on or about the 2d day of August following, came up to London, and a meeting having, in a day or two afterwards,

taken place between the deponent, the appellant, and Mr. Wood, at the appellant's residence in Stratford-place, London, the appellant (by whom the conversation upon the subject of the loss or destruction of the said deed was then opened) expressed great concern at having destroyed it as he had done, and declared that it was his wish to [526] restore the provisions of that deed by the execution of another deed of complete, final and positive separation, with a separate maintenance for the respondent, and all the usual clauses in such deeds; upon which, this deponent earnestly requested that he would employ a solicitor and counsel on his behalf, deponent at the same time particularly recommending to him to employ the said Messrs. Brooks, Williams and Powell, which the appellant most positively refused to do; professing, as he had done upon the two former occasions, his entire confidence in this deponent, and expressing, as he had also on former occasions done, his wish that what was going forward might be concealed from the public, to save appearances and prevent *éclat*, and at the same time earnestly entreating this deponent to prepare such deed, which, however, this deponent absolutely refused to do; but this deponent observed, that the draft of the deed should be prepared by Messrs. Barrett, Talbot and Turville, solicitors, whom this deponent would recommend the respondent to employ for that purpose. That the appellant then requested this deponent to give instructions to the said Barrett, Talbot and Turville, to prepare the draft of a regular deed, in lieu of the deed of covenants, of the 20th day of May 1818, which he, the appellant, had destroyed, and agreeable to the provisions and covenants of the said last-mentioned deed. That the deponent having, accordingly, given instructions to the said Messrs. Barrett, Talbot and Turville, and they having prepared the said draft, the deponent and Mr. Wood, accompanied by Mr. Talbot, who brought with him the draft which had been prepared of the said deed, met the appellant at his Lordship's house in Stratford-place. That Mr. [527] Talbot, or his clerk, having begun to read over the said draft, the appellant first objected to its being recited therein that he and the respondent had mutually agreed to separate, observing that the appellant did not wish it; to which this deponent replied, that the respondent not only requested, but insisted upon such separation; but this deponent at the same time consented that, instead thereof, it should recite that the same took place at the request of the respondent, or to that or the like effect. That when, in the reading of the said draft, they came to the clause whereby the respondent's brother, Lord Cranbourne, now the Marquis of Salisbury, covenanted to indemnify the appellant against any debts which the respondent might contract, the appellant objected to any such clause, and insisted upon its being erased, because, as he said, he was convinced of the prudence and economy of his wife, and that she would contract no debts, declaring that, therefore, he would not suffer any such clause to remain in the deed. That such alterations having been made in the draft of the said deed, and the parties having thereupon separated, the same was engrossed, and was shortly afterwards executed, upon the 10th day of August in the said year 1818. That the said deed of the 20th of May 1818 was, to the best of this deponent's knowledge, recollection and belief, of the tenor, import and effect already stated by the deponent, being a deed of total and immediate separation."

This deed, although it was executed under the circumstances which have been before stated, in August, was dated on the 30th of May preceding, in order as well to correspond with the deed which had been destroyed, as that it might the more nearly bear relation [528] to the period at which the actual separation had taken place between the appellant and the respondent, and the particular day of its date was fixed by the appellant for his own convenience, with reference to the period at which his rents were payable.

The last-mentioned deed is made between the appellant and the respondent of the one part, and Viscount Cranbourne, now Marquis of Salisbury, and Henry Widman Wood, esq. of the other part. After reciting that the appellant had, at the instance and sole desire of the respondent, agreed to live separate and apart from her, and to allow to her, during their joint lives, a separate maintenance for her and her child or children, the appellant devises the lands, etc. therein mentioned, to the trustees, their executors, etc. for ninety-nine years, if the appellant and respondent should so long live; upon trust out of the rents and profits, or by sale or mortgage, to raise £1300 per annum, and after six years an additional sum of £300 per annum, to be paid as the respondent should appoint, and in default of appointment into her own

hands, for her separate use, and subject thereto in trust for the appellant. The £300 per annum was to be raised for the maintenance of their daughter, and of the child of which the respondent was *enceinte;* if one of the children died, £250 only was to be raised, which was to cease in case of the death of both. The deed contained covenants, on the part of the appellant, for payment of the £1300 and £300 per annum to the trustees, and that he would not intermeddle with the monies to come to the hands of the respondent by virtue thereof. That she should have power, by deed or will, to dispose of the arrears and savings of the annual payments as well as of her jewels, and whatever other personal property she may acquire, or which may [529] devolve upon her. The appellant also covenants that the respondent may, notwithstanding her coverture, live separate and apart from the appellant as if she were sole and unmarried, and that she shall from thenceforth be freed and discharged from the power, command, restraint, control, authority and government of the appellant, and may live and reside in such place and places, and in such manner as to her shall from time to time seem meet; and that he will not molest or disturb her in her manner of living, or require by any manner or means whatever, either by ecclesiastical censures, or by taking out any process, or by commencing or instituting any suit whatever, compel the respondent to cohabit or live with him; and that he would not for that purpose or otherwise use any violence or restraint to her person, or sue or molest any person or persons for harbouring or entertaining her, but that she might in all things live as if she were sole and unmarried.

After the execution of this deed of the 30th May 1818, the appellant's house in Stratford-place was given up to the respondent, but she was prevailed upon to allow the appellant to occupy separate apartments in it till he could procure an appointment abroad, but no cohabitation took place between them as husband and wife, although they sometimes dined and visited together. As this permission was a fact most materially connected with the question as to the validity of the deed, the circumstances under which it was given are thus set forth, as stated in the evidence of Mr. Sheldon:

"That the appellant resided in Stratford-place, Oxford-street, London, at the respective times of the execution of the said deeds of the 20th and 30th days of May 1818; and that the said deed of the 20th of May aforesaid was executed in pursuance of an [530] agreement for an absolute separation from thenceforth to take place between the said appellant and respondent, and which did take place accordingly as to any connection or cohabitation as man and wife. And it was agreed the house should thenceforth be the property of the respondent, notwithstanding that no actual assignment took place. That the appellant and respondent had not, at the time of the execution of the said deeds, or of either of them, become reconciled, neither did they cohabit together as husband and wife, but resided in the same house, occupying different apartments therein; and it was at the earnest request and unremitting entreaties of Lady Salisbury and the appellant, that this deponent and the said Henry Widman Wood united with them in their entreaties to the respondent to consent thereto. That on the 10th of August, being the day on which the deed dated the 30th of May was executed, the same agreement existed; and it was then more fully settled and understood that the said house in Stratford-place, and every thing belonging to the respondent, should be the property of the respondent (the appellant's own private property, in any furniture, books, etc. therein excepted), notwithstanding that, in order to save appearances and prevent *éclat*, no assignment by deed was made thereof. And in pursuance of such agreement, the respondent actually let the house to Colonel Strutt, at an advanced rent, and took a house in Bolton-street in her own name; and in that house, as theretofore in Stratford-place, the appellant was, at the said earnest entreaties of both Lady Salisbury and appellant, and of deponent and Mr. Wood, allowed for a limited time, and until he could accommodate himself by obtaining a government abroad, or getting on full pay [531] in some regiment abroad, to have a separate sitting-room, a separate bed-room, and a chamber for his servant; but under the express condition, that such permission should not, in any shape, impeach the deed of separation of the 30th of May 1818, or be deemed or construed to imply that any reconciliation had taken or did take place between the appellant and the respondent. And that the appellant and respondent were not at that time, and have never been reconciled since the execution

of the said deed of the 20th day of May 1818; and on the 14th November 1818, the respondent gave birth to a son. In January 1819, she under-let the house in Stratford-place, and removed to a house in Bolton-street, where also the appellant occupied separate apartments till the 14th June 1819, when the respondent, owing to renewed acts of violence on the part of the appellant, abandoned the house, and went to reside at the house of Mr. Wood in Clarges-street, and committed the care of her chidren to her mother."

On the 15th of June 1819, the appellant filed a bill in the Court of Chancery in England, alleging that the execution of the deeds before stated was obtained by means of false representations, and by an undue advantage having been taken of his feelings; and he thereby prayed that the deeds might be delivered up to him, to be cancelled, or that so much of them as provided for the separate maintenance of the respondent and her children might be declared to be void; and that in the mean time the trustees might be restrained from proceeding to raise the separate allowance of the respondent, under the powers given to them by the deeds for that purpose. The injunction was obtained until the answers were filed; and upon their being put in, and a motion being made to dissolve [532] the injunction, the whole merits of the cause were discussed. Lord Eldon, the then Lord Chancellor, after hearing Counsel on all sides at great length, and examining the nature of the deeds, and the circumstances under which they were executed, said "The bill is by Lord Westmeath, to have the deeds delivered up; and the question is, whether they ought to be set aside upon grounds of public policy. On looking into the cases on this subject, which are extremely well collected by Mr. Roper, I perceive that it seems to have struck every one as extraordinary that such deeds should ever have been supported. The law has imposed upon husband and wife duties of the most sacred nature, which one would have supposed that no Court would allow them to engage not to observe. But there are many cases, particularly since that in the first volume of Burrows (*R.* v. *Mead*, p. 542), breaking in upon the principle. The Court of Exchequer Chamber, in the year 1819, held that a deed could not be made providing for a future separation (*Titley* v. *Durant*, 7 Price, 577; *Hobbs* v. *Hull*, 1 Cox, 445). There are other cases to be found, which seem to intimate that if the conduct of the husband has been such that the wife, applying to the Ecclesiastical Court for a divorce and alimony, would have succeeded, a deed of separation might be supported on that ground. In a case in 8 James's Reports (*Yunn* v. *Wilsmore*, p. 527), Lord Kenyon seems to hold that opinion, intimating that if, in such a case, an estate was vested in trustees for the wife, to enable her to live separate, that would be supported, and a Court of Equity would administer the trust. There have also been many cases (*Stephens* v. *Olive* and others) where it has been held that, where there was a co-[533]-venant to indemnify the husband, that consideration would support the deed.

"In this case, if either of the instruments in question be void on grounds of policy, it seems to me that they must be void at law as well as in equity, and there is no reason why it should not be tried at law. That might be done by a case; but, on the part of Lady Westmeath, it is argued that an injunction ought not to be granted, but that she should be left at liberty to distrain; and my opinion is, that if any action can be maintained upon these deeds, I cannot prevent it, unless I could at the hearing order the deeds to be delivered up on the other grounds. The conclusion I come to is, that though I might have decided differently if I had been one of the common-law Judges formerly, yet that it is impossible for me now, to take upon myself to say that those deeds are not good at law. The parties may therefore try the question in such manner as they may be advised, with liberty to apply. I cannot direct a case; for looking at all the decisions it seems to me that no case can bring the question properly before the Court, without its containing admissions, with reference to conduct, which it would be most improper to expect."

No further proceedings were taken in that suit, and the bill was dismissed for want of prosecution.

In March 1821 the appellant had the child Lady Rosa Nugent delivered up to him by order of the Court of Common Pleas. The other child had died before.

In April 1821 the appellant instituted a suit in the Consistorial Court of the Bishop of London, for a restitution of conjugal rights, to which the respondent pleaded, and prayed for a sentence of divorce by [534] reason of cruelty and of adul-

tery committed by the appellant. As the appellant refused to pay the allowance of the respondent for separate maintenance, the trustees distrained some cattle and crops, and the appellant issued writs of replevin, but did not proceed to trial of the actions.

On or about the 3d September 1822, the appellant filed the bill in the Court of Chancery in Ireland, out of which this appeal rose; and after a statement of circumstances, charged that he executed the deeds of 1817 and 1818 under improper influence and ignorance of their legal effect; and he also charged that subsequent to the execution of the latter deed, he and the respondent had lived and cohabited together as husband and wife; and the bill prayed that the deeds might be set aside, and delivered up to the appellant to be cancelled; or, if the Court should be of opinion that they ought not to be wholly set aside, then that so much thereof as tends to make a provision for the separation and separate maintenance of the respondent, and to provide for the maintenance and education of the appellant's children, independently of his control, may be declared to be void; the appellant offering to live with and maintain his wife, and to maintain and educate his children in a suitable manner. Or, if the Court should think an issue necessary to try the validity of the said deeds, an issue might be directed by one action only, and that the same might be tried forthwith; and, in the mean time, that the trustees might be restrained from selling the cattle and crops distrained by them, and that the other defendants might be restrained from suing the appellant at law upon any of the covenants or agreements contained in the said deed.

Pending the proceedings in this cause, the suit in the [535] Consistorial Court was brought to a hearing, and Sir Christopher Robinson [2 Hagg. E.R. Suppt. 1] was of opinion that the charge of adultery pleaded by the respondent was not fully proved, and that although the charge of cruelty had been proved, the effect was taken away by a subsequent condonation, after which there was no sufficient proof of cruelty; and that as the respondent was not entitled to a sentence of separation, the law knew no other course than a return to cohabitation. From this sentence the respondent lodged an appeal to the Court of Arches; and on the 29th January 1827, Sir John Nicholl, after pronouncing an elaborate judgment, reversed the sentence, and declared that Lady Westmeath had sufficiently proved the charge of cruelty, and that there was no such condonation as to destroy the effect of it, and that she was therefore entitled to a sentence of separation from bed and board as prayed. [2 Hagg. E.R. Suppt. 61.] From this sentence, which, as an act of Court, was dated the 7th February 1827, Lord Westmeath entered an appeal to the Court of Delegates. [2 Hagg. E.R. Suppt. 133.]

In the Irish Chancery suit, after answers by Lady Westmeath denying the cohabitation, and by the other parties to the deeds, and witnesses examined at great length as to the charges of cruelty, and all the circumstances under which the deeds were made—the cause came on to be heard before the late Lord Chancellor of Ireland (Lord Manners), on the 7th of March 1827, and was further heard on the 12th, 13th, 14th, and 15th of March; and was argued by the Counsel on both sides at great length, the respondents counsel insisting that there was no evidence nor any equitable grounds for impeaching the validity of the deed of the 30th of May 1818; and the appellant's Counsel insisting that it had become void by reason of a reconciliation between the parties subse-[536]-quent to its execution. They therefore urged that they wanted the assistance of the Court to try that question at law, and requested the Lord Chancellor to direct an issue. His Lordship (Lord Manners) said, he should certainly not do so. He was of opinion that the material questions between the parties were in the proper train of being decided in the Ecclesiastical Court, the proper tribunal for that purpose, and he did not see the advantage of any other proceeding pending that suit. If the Ecclesiastical Court should determine in favour of Lady Westmeath, the Court would decree alimony, and his Lordship took it that the Court would decree the sum in the deed. He therefore could see no useful purpose for which the appellant filed his bill; and that in such a case the Court did not feel bound to assist him. The Lord Chancellor, on being requested by the appellant's Counsel to direct the respondent to bring an action, said further, that the appellant might have proceeded in the replevins, or brought an action of trespass. And on the appellant's Counsel asking what they were to do, his Lordship replied "Nothing. You should never have come here; you had your opportunity in England, and I am certainly of

opinion that I should not assist you. I will retain the bill the usual time, and let the parties bring such actions as they may be advised to do." The appellant's Counsel thereupon objecting that they could bring no action if the trustees did not distrain, and that the question could not be raised at law, his Lordship replied, "Then you should not complain; for if the Ecclesiastical Court shall decide the question of condonation, I do not see any other question then to be decided." And thereupon his Lordship decreed, that the deed of the 17th of December 1817, in the pleadings and herein mentioned, so [537] far as the respondent or her trustees sought any redress under the same, should be declared to be null and void, but without prejudice to the rights or claims of the defendant, Lady Rosa Nugent, thereunder. And further ordered, that as to the remainder of the said suit, the appellant's bill in the said cause should be retained for twelve months; and further ordered, that all the said parties should be at liberty to proceed at law, as they might be advised; and that all parties should be at liberty to apply to the Court for further order or direction.

From this decree the appellant appealed to the House of Lords, for the following reasons:

1st. Because the deed of the 17th December 1817 was extorted from the appellant by means and by the exercise of influence against the policy of the law; wherefore it ought to have been set aside altogether as fraudulent and void.

2d. Because the said deed of the 30th of May 1818, so far as the respondent, the Marchioness of Westmeath, or her trustees, the said Marquis of Salisbury and the said Henry W. Wood, for her sought any benefit under it, should have been declared to be null and void; the said deed having been consequential to and connected with the said deed of the 17th of December 1817, and executed under the impression that appellant was bound by the covenants of the said deed of the 17th December 1817.

3d. Because the said deed of the 30th of May 1818, so far as same provided a separate maintenance for the said Marchioness of Westmeath, and that the said Marchioness might live separate and apart from the appellant, ought to have been declared void, as being against public policy and good morals.

4th. Because the appellant and the said Marchio-[538]-ness of Westmeath having cohabited together from the 30th May 1818 to the said 18th day of June 1819, the said deed of the 30th of May 1818 was thereby avoided, and therefore ought to have been decreed to be null and void as against the Marchioness, so far as she or her said trustees claimed any benefit under it.

5th. Because as the said deed of the 30th of May 1818 was not intended to be, and was not followed by any immediate separation, the same was void *ab initio*, and therefore ought to have been decreed to be delivered up to the appellant to be cancelled.

6th. Because the agreement that the appellant and the respondent the Marchioness should live together in the same house preceded the execution of the said deed, and continued to the time of the execution thereof, which agreement appellant contends was in itself sufficient to vitiate and avoid said deed.

7th. Because the said deed of the 30th of May 1818 was obtained from the appellant by undue influence, and should by said decree have been decreed to be delivered up to be cancelled.

8th. That by the evidence in the cause, it was plainly established that the real agreement of the parties was in fact different from that expressed in the said deed, and was in substance and effect an agreement for an eventual and future separation, wherefore said deed should have been declared fraudulent and void.

9th. Because said decree does not determine whether said deed of the 30th of May be invalid or not, and does not direct an issue or an action to try its validity; but leaves the main question in the cause undecided, and therefore is improper, and ought to be reversed.

For the respondent it was contended that the decree [539] ought to be affirmed, as far as it related to the deed of 1818, for these reasons.

1st. Because the said deed of the 30th day of May 1818 is not contrary to sound policy or good morals, for the reasons in the bill alleged, or for any other reasons; nor invalid, but on the contrary is valid and binding, similar deeds having been upheld by repeated legal decisions of the highest authority.

2d. Because there is no pretence for alleging that the appellant was deprived by the deeds in question of the society of his wife, or of that control over her to which he was, as her husband, entitled; for, on the contrary, the said appellant, prior to the

execution of this or any other deed, had, by the cruelty and violence with which he had treated the respondent, forfeited all claim to live and cohabit with the respondent and to exercise marital authority over her; and such cruelty, and the subsequent necessity of a separation, has been established by a Court of competent jurisdiction, and a sentence of divorce and separation pronounced, on the ground of the same cruelty and violence which occasioned the execution of the deeds.

3d. Because the said deeds were executed by the said appellant for good and sufficient considerations; amongst others, in consideration of the respondent's forbearing to sue publicly for that redress to which his cruelty and violence had entitled her.

4th. Because the deed of the 30th May 1818 was not executed in contemplation of a separation thereafter to take place; but in confirmation and ratification of a separation which had then actually taken place, and which has ever since continued, without any suspension or any reconciliation of the parties.

5th. Because there is not the slightest truth or foundation for the appellant's allegation that there ever was **[540]** a reconciliation, or a suspension of such separation, between the respondent and himself; and the contrary is proved by the decision of the Arches Court of Canterbury, and by every witness, competent to speak to the fact, who has been examined in this and every other Court in which the matters in dispute between the parties have been discussed, and is confirmed by the circumstance of the appellant not having introduced any such allegation in the bill filed by him in the Court of Chancery in England, to set aside the said deeds.

6th. Because the only attempt which the appellant has made towards establishing the aforesaid allegation, has been by the evidence of persons wholly unacquainted with the facts relating to the said separation: and even such attempt could not have been made but by the appellant's violation of his engagement, that her consent to allow him an apartment in her house should never be made use of to avoid the separation.

This cause was heard in the House of Lords in 1828, but it was ordered that judgment should be postponed till the result of the appeal to the Delegates in the suit in the Ecclesiastical Courts should be known. Afterwards the judgment of the Arches Court in favour of the divorce was confirmed by the Delegates, and on the 3d April 1830 the cause came on for judgment in the House of Lords.

Lord Chancellor (3d April, 1830): This appeal was fully argued at your Lordships' bar in the course of a former session, and it stood over for judgment merely because there was a suit between the Marquis and Marchioness of Westmeath depending in the Ecclesiastical Courts, which had some relation to this appeal, and in which Sir Christopher Robinson had pronounced a judgment which was reversed by Sir John Nicholl. When this **[541]** appeal was heard, the suit in the Ecclesiastical Courts was depending before the Delegates, and it was thought possible that their judgment might affect that which was to be given on the appeal by your Lordships, and on that ground the case stood over.

The merits of the case were argued at great length at the bar, but it is unnecessary, in my view of the case, to enter into details, and therefore I shall state it with reference to one or two points, as to which there can be little doubt or difficulty. The parties intermarried in 1812, and disputes and differences arose which led to the deed of 1817. It is unnecessary to state its provisions at length, and I mention it merely to the effect of supporting an observation which I am about to make. The animosities were such that they parted, but the Marchioness consented to live again with the Marquis, on condition that, in case the disputes should again revive, a deed of separation should be executed on the terms and the conditions mentioned. This was the deed of 1817, and on the face of that deed it is contrary to the policy of the law and cannot be supported; and so it was decided in the cases of *Durant* v. *Titley*, 7 Price, 577, and *Hindley* v. *Westmeath*, 6 Barn. and Cres. 200, and in other cases. About that part of the decree, therefore, which declares that deed to be null and void, there can, I think, be no question.

Then came the other deed, dated the 30th May 1818, but which was executed in August of that year. The differences had still continued, and then this deed of separation was executed, and on the face of it the same objection as that to the deed in 1817 does not apply. The Marchioness having threatened to apply to the Ecclesiastical Courts for a divorce *a mensa et thoro*, this deed of separation was agreed upon to pre-**[542]**-vent *éclat* and scandal, as it was said; and by that deed the Marchioness

had a separate establishment, but by a verbal agreement the Marquis and Marchioness continued, from the 30th May 1818 to the 14th June 1819, to reside together in the same house. They dined together at the same table, they visited together, and travelled together; and although they might possibly not cohabit as husband and wife, they appeared to the world as living together as husband and wife. I am of opinion, that where there is a deed of separation of this kind, but with a verbal stipulation that they shall continue to live in the same house together, although they should not cohabit as husband and wife, the deed cannot in law be sustained. The question on this very deed came under the consideration of the Court of King's Bench, in an action entitled *Hindley* v. *Westmeath*, 6 Barn. and Cres. 200.

The question there was, whether Lord Westmeath was liable for debts contracted by his wife after this deed of separation. The action came on for trial in 1823, and a verdict was taken for the plaintiff, subject to the arbitration of Mr. Alderson, who examined into all the facts of the case, and came to the conclusion, that as the parties had agreed to live together after the execution of that deed, and did live together, the deed could not in law be supported, and he vacated the verdict. The evidence was in substance the same as that which appeared in this case; and I draw the same conclusion, that as the parties had agreed to live together notwithstanding the execution of the deed, that deed cannot in law be supported.

Mr. Alderson made his award, setting forth the facts so as to raise the question of law for the opinion of the Court. It came under the consideration of the Court of King's Bench, first upon motion to set aside the [543] award, but the Court thought it of so much importance, that they ordered it to be put in the shape of a special case, that more time might be afforded for the consideration of the question; and in the result the Court was unanimously of opinion, that the circumstance of the parties living together after the execution of the deed was sufficient to impugn it, and set it aside as invalid: and this decision was satisfactory to the whole profession. So I am of opinion that this deed cannot be sustained.

The only remaining question then is, what course the House is to pursue. The Judge below was of opinion that it was a question proper to be tried at law, and therefore, while he declared the first deed to be null and void with the exception therein mentioned, he retained the bill for twelve months, in order to give the parties an opportunity of trying the validity of the second at law. Of this opportunity neither of the parties availed themselves, and therefore it may be best to affirm the judgment, and order the time for retaining the bill to be enlarged, so as to allow the parties still to agitate the question at law if they should think fit. But I think that neither of the parties will be much disposed to agitate the question again, when it has been so solemnly settled at law, in the Court of King's Bench.

The Earl of Eldon: It has been my fate to have had a long experience in Westminster-hall, and I know that about thirty years ago a doctrine prevailed there that a husband and wife had the power to separate themselves by deeds of this kind, almost to all intents and purposes. That doctrine was founded on an opinion of one of the greatest Judges that ever sat in Westminster-hall, Lord Mansfield; and it pre-[544]-vailed there on his authority for twenty years; for owing to the practice which began generally to be adopted in cases of difficulty, of turning them into special cases instead of taking special verdicts, no opportunity had occurred of having the doctrine reviewed in a Court of Error. But at length an opportunity did occur; a special verdict was taken, and the cause was brought by writ of error before the Exchequer Chamber, and there it was found that this doctrine could not be supported in law.

According to the law of this country, marriage, as far as concerns the *vinculum matrimonii*, is indissoluble, and can only be dissolved by Act of Parliament. The contract between husband and wife is of the most solemn and sacred nature, not merely as regards themselves, but with reference to their children; and it is by so much the more strange that the doctrine should have prevailed, that the parties might by agreement between themselves destroy all the duties and obligations of that important and sacred contract, not only as respected themselves but their offspring also. The opinions on which the doctrine was founded were never to me satisfactory; but considering that it had been upheld by some whom I was bound to respect and even to revere, it was not for me to say with confidence that I was not wrong in that dissatisfaction, but I was always most anxious that the question should be brought under the review of this House.

This certainly is a question both of law and equity, for the question of public policy both at law and in equity rests on the same grounds; but I think that the opinion of a Court of Law ought to be taken in the first instance, and that the case should be put into such a shape and form that it may be brought before this House by a writ of error; and as the decree has left [545] the question open and undecided, I should be disposed to send the case back again that the opinion of a Court of Law may be taken upon it in such a shape that it may be brought by writ of error into this House.

As to the deed of 1817, it is impossible that it can be supposed for a moment to be sustainable. But it is unnecessary to say anything as to that, since by the decree of the Court below it is declared to be null and void, and Lady Westmeath has not appealed against it, so that in that respect the decree must be taken to be right. But there is one observation to be made upon it, which is that the decree reserves the claims of Lady Rosa Nugent. But that reservation was not sufficiently ample, as the provision in the deed was that the estates therein mentioned should be settled on the sons first and then on the daughters, in strict settlement, as the law contemplated that the parties might come together again.

As to the deed of separation of 1818, that raised a question of very great importance. In the Ecclesiastical Court, Sir Christopher Robinson was of opinion that it was at an end by the parties living together after its execution, which he considered as amounting to a condonation. Sir John Nicholl was of opinion that it was not such a condonation as prevented Lady Westmeath from being entitled to a divorce on the ground of cruelty. But here the question is not as to the cruelty, but as to the circumstances under which the parties lived together after the execution of the deed, and whether the policy of the law, having regard to the rights of third parties, does not destroy an agreement for a separation under such circumstances. I have considered the case anxiously, and if it has been supposed that I said that it was not a case for the Ecclesiastical Court, that supposition is founded on [546] mistake; for on looking back at my judicial life, I believe it will be found that I have always struggled to leave these cases of separation as much as possible to the Ecclesiastical Courts. What I meant to say was, that we were not to be concluded by them as to the effect of a voluntary deed of this nature.

I was not aware that the Court of King's Bench had given an opinion on the subject. The question may come under our consideration again, but my present opinion is that the circumstances under which the parties lived together after the execution of the deed of 1818 puts an end to that deed. I think it right, however, that the parties should be left to try the question at law, taking care to put the record in such a state that it may be brought here by writ of error, and that at present we ought not finally to relieve either party.

But seeing a learned civilian (Doctor Lushington) at the bar, I would wish to ask him a question: The proceeding in the Ecclesiastical Court was commenced by Lord Westmeath, for restitution of conjugal rights, and she pleaded cruelty, and prayed for a divorce on that ground, and also for alimony. Now I do not find that the judgment of Sir John Nicholl says anything about alimony. I wish therefore to know, whether, when there is a suit for a restitution of conjugal rights, and the answer is cruelty, and a prayer for a divorce and alimony, whether in that case it is competent to Lady Westmeath to apply with effect to the Ecclesiastical Court for alimony?

Doctor Lushington: No doubt but that in the case supposed alimony would be decreed; and the only reason why it was not decreed in this case was a reliance on the provision made by the deed of 1818, and apprehension of the effect which a decree of alimony would have on that provision.

[547] Earl of Eldon: Is it competent to her to apply now?

Doctor Lushington: Undoubtedly it is competent.

Earl of Eldon: Why then we have nothing to do with it, for Lady Westmeath may go to the Ecclesiastical Court instead of resting on the deed of 1818, and the consequence is that our judgment ought to leave her to go to the Ecclesiastical Court; and if she gets as much there as she claims under this deed, she has no occasion to rely upon it, and it will be of no use to Lord Westmeath to contest it: but if she cannot get alimony to the full extent of the provision, I do not know what other remedy there is than to try the question at law. I shall prepare the minutes of the judgment, and hope to be able to submit them to the House soon after the holidays.

REPORTS OF CASES heard in the House of Lords on Appeals and Writs of Error, and decided during the Session 1830. By P. Dow and C. Clark, Barristers-at-Law. Vol. II.

APPEAL

FROM THE COURT OF CHANCERY, ENGLAND.

AMICABLE SOCIETY FOR A PERPETUAL ASSURANCE OFFICE,—*Appellants*; BOLLAND and OTHERS, Assignees of Fauntleroy,—*Respondents*.

[Mews' Dig. viii. 75. S.C. 4 Bli. N.S. 194: and, in Court of Chancery, 3 Russ. 351. (*Bolland* v. *Disney: Fauntleroy's* case.) Considered in *Cleaver* v. *Mutual Reserve Fund Life Association* [1892], 1 Q.B. 149. See also *Borradaile* v. *Hunter*, 1843, 5 M. and G. 639; *Clift* v. *Schwabe*, 1846, 3 C.B. 437; *Dufaur* v. *Professional Life Co.*, 1858, 25 Beav. 602; *Horn* v. *Anglo-Australian Co.*, 1861, 7 Jur. N.S. 673.]

H. F. assures his life in January 1815, and pays premiums regularly till 1824. In June 1815, H. F. commits a felony, of which he is convicted in October, and for which he is executed in November, 1824. Bill filed in 1825 by the representatives of H. F., claiming under him and in his right, for payment of the sum alleged to be due on the insurance, and decree by M. R. in favour of the representatives; but the judgment reversed by the Lords, on the ground that by the general policy of the law the insurance became void, as to those claiming under and in right of H. F., in consequence of the death's being occasioned by his own criminal act.

In Hilary term 1825 the Respondents filed their bill of complaint in the high Court of Chancery against [2] James Cathrow Disney and Ann Nelson his wife, Sir Everard Home, bart., Joseph Birch, Jedediah Kerie, and the Appellants, stating (amongst other things) that in and for many years previous to September 1819, Henry Fauntleroy, late of Berner-street, in the county of Middlesex, esquire, deceased, carried on the trade and business of a banker in Berner-street aforesaid, in partnership with William Marsh, Josias Henry Stracey and George Edward Graham, under the style and firm of Marsh, Stracey, Fauntleroy and Graham.

That in the month of January 1815 the said Henry Fauntleroy effected an insurance upon his life with the Appellants, the incorporated Society for the insurance of lives, called "The Amicable Society for a Perpetual Assurance Office," which policy bears date the 11th of January 1815, whereby, after reciting that the said Henry Fauntleroy had paid to the said society the sum of £25, by way of premium on his admission, and the further sum of £128 15s. as the first yearly payment of the said annual sum of £128 15s., which the said Henry Fauntleroy had agreed to pay yearly to the said Society, according to the provisions of the bye-laws of the said Society, it was witnessed, that in consideration of the premises the said Henry Fauntleroy was thereby admitted a member of the said Society on Nos. 6,025, 6,026, 6,027, 6,028, 6,029, 6,030, 6,031, 6,032, 6,033, 6,034, 6,035, 6,036, 6,037, 6,038, 6,039, 6,040, 6,041, 6,042, 6,043, 6,044, 6,045, 6,046, 6,047, 6,048, 6,049; and the said Society did thereby oblige themselves and their successors to pay to the executors,

administrators or assigns of the said Henry Fauntleroy, such a proportion or share of the joint stock and fund of the said Society as should become due upon the death of the [3] said Henry Fauntleroy, according to the charters and bye-laws of the said Society.

That such policy of assurance was duly signed by the directors, and was sealed with the seal of the said Society; and the said Henry Fauntleroy, from the time of the making of such policy of assurance until the time of his death, regularly paid the premiums as they became due upon the said policy of assurance, and that such policy of assurance was, at the time of his death, a valid and subsisting policy of assurance; and that there was then due and payable thereon or in respect thereof, according to the charters and bye-laws of the said Amicable Society, a large sum of money, amounting to £6000 and upwards.

That the said Henry Fauntleroy, being so possessed of and entitled to the said policy of assurance, some time in the month of January 1820 executed an indenture, which was made to bear date the 10th day of September 1819, and which was made and executed by and between the said Henry Fauntleroy, of the one part, and Sir Everard Home, bart. and Joseph Birch, esq. of the other part, whereby, after reciting the said policy of assurance, and that the said Henry Fauntleroy had agreed with the said Sir Everard Home and Joseph Birch to assign all the right, title and interest of him the said Henry Fauntleroy, of, in and to the said policy, and of the money secured thereby and to become due thereon upon the death of the said Henry Fauntleroy, it was witnessed, that in pursuance of the said agreement, and in consideration of 5s. to the said Henry Fauntleroy paid by each of them the said Sir Everard Home and Joseph Birch, he, the said Henry Fauntleroy, bargained, sold, assigned, transferred and set over all that the said policy of assurance, and all sum and sums of money secured thereby or to [4] become due thereon, and all the estate and interest of him the said Henry Fauntleroy, his executors, administrators or assigns, to have, receive, take, keep, possess and enjoy the said policy, sum and sums of money and premises, unto the said Sir Everard Home and Joseph Birch, their executors, administrators and assigns, thenceforth as to and for their own proper estate, goods, chattels, monies and effects.

That the said Sir Everard Home and Joseph Birch, at or about the same time, executed a declaration of trust, which was made to bear date the 19th of September 1819, and they thereby declared that the before written assignment was made to them in trust for the benefit of Ann Nelson Macnamara, otherwise Cathrow, commonly called Cathrow, whose maiden name was Ann Nelson Peele, and that they would stand possessed of the said policy, and all benefit and advantage to arise therefrom, in trust, for the sole and separate use and benefit of the said Ann Nelson Macnamara, otherwise Cathrow, for her own sole and separate use and benefit, notwithstanding her coverture with her present or any future husband, and free from his and their debts, control and engagements; and that the receipt and receipts of the said Ann Nelson Macnamara, otherwise Cathrow, should be a good and sufficient discharge for any money arising therefrom, and that the said policy, and all benefit and advantage to arise therefrom, should be at the absolute disposal of the said Ann Nelson Macnamara, otherwise Cathrow, by deed, will, or in any other manner she should think fit; and the said Henry Fauntleroy thereby covenanted with the said Sir Everard Home and Joseph Birch that he would pay the said annual sum of £128 15s., according to the terms of the said policy.

That the said Henry Fauntleroy, at or about the [5] same time, signed a memorandum, which was in the words and figures following: "Memdum. This assignment was given to Sir Everard Home and Joseph Birch, in trust, to pay Ann Nelson Cathrow the proceeds upon my decease. Signed, H. Fauntleroy, Berner-street, September 10th, 1819."

That the person in the said instrument described as Ann Nelson Macnamara, otherwise Cathrow, commonly called Cathrow, whose maiden name was Ann Nelson Peele, was, at the time of the execution of such instrument, the wife of the defendant James Cathrow Disney.

That the said Henry Fauntleroy never received, or agreed or intended to receive, any valuable consideration for such assignment of the said policy of assurance, but such assignment was purely voluntary on his part, and it was intended by him, either that the said policy of assurance so assigned should be held in trust for himself

and as he should direct, or that the same should be held for the benefit of the said Ann Nelson Cathrow, as a present and voluntary assignment from him the said Henry Fauntleroy.

That on the 16th of September 1824 a commission of bankrupt, under the great seal of Great Britain, was awarded and issued against the said William Marsh, Josias Henry Stracey and George Edward Graham, under which they were duly found and declared to be bankrupts, and the Respondents were duly chosen assignees of their estate and effects, and the usual bargain, sale and assignment thereof, were duly made to them accordingly; and on the 29th of October 1824 a commission of bankrupt, under the great seal of Great Britain, was duly awarded and issued against the said Henry Fauntleroy, under which he was duly found and declared to be bankrupt, and [6] all the estate and effects of the said Henry Fauntleroy had become duly vested in the Respondents, as his assignees under such commission.

That the said Henry Fauntleroy departed this life on the 30th day of November 1824, and that the monies secured by the said policy of assurance thereby became payable.

Therefore the Respondents by their bill (amongst other things) prayed, that the aforesaid assignment of the said policy of assurance might be declared to have been void, or might be set aside, and that the Respondents might be declared to be entitled to the said policy of assurance and the money then payable thereon, and that it might be ascertained what was then payable upon the said policy of assurance, and that the Appellants might be decreed to pay what was so due to the Respondents, and that the said James Cathrow Disney and Ann Nelson his wife, and the said Sir Everard Home and Joseph Birch, might be decreed, if necessary, to assign the said policy to the Respondents, and to deliver up the same to them, and to do all necessary acts to enable the said Respondents to receive what was then due thereon.

That on the 13th of May 1825 the Appellants put in their answer to the said bill of the Respondents, and thereby (amongst other things) admitted that the said Henry Fauntleroy effected the insurance on his life at the time and in the manner set forth in the Respondents' bill, and the payment of the premiums due thereon up to and until the 11th day of January 1824, and that the said policy was a valid and subsisting policy up to the 30th day of October 1824, or up to the 23d day of the said month of October, being the first day of the session at which the said Henry Fauntleroy was tried and convicted as thereinafter mentioned.

[7] That in case the said policy of assurance was a valid and subsisting pol'cy at the time of the death of the said Henry Fauntleroy, there was then due thereon, according to the charters and bye-laws of the said Amicable Society, a large sum of money; but for the reasons therein stated they could not set forth what sum, if any, was or would be due upon or in respect of the said policy of assurance, until after the 5th day of July then next, save and except that they believed that the same would amount to £6000 or thereabouts.

That the Appellants by their said answer also admitted that they had heard and believed that the said Henry Fauntleroy executed the indenture of the date of the 10th of September 1819, as stated in the Respondents' bill, and that the same was to the purport and effect in the said bill stated; and that the said Sir Everard Home and Joseph Birch executed the declaration of trust of the 19th of September 1819, at the time and to the purport or effect as in the said bill stated; and that the said Henry Fauntleroy at or about the same time signed a memorandum of the purport or effect in the said bill mentioned. That on the 15th of September 1824 a commission of bankrupt was awarded and issued against the said William Marsh, Josias Henry Stracey and George Edward Graham, under which they were duly found and declared bankrupts; and that the Respondents were duly chosen assignees of their estate and effects, and the usual bargain, sale and assignment thereof were duly made to them accordingly. That on the 29th of October 1824 a commission of bankrupt was awarded and issued against the said Henry Fauntleroy, and that he was found and declared to be a bankrupt, and that all the estate and effects of the said Henry Fauntleroy had become or were intended to be vested in the Respondents as his [8] assignees under such commission; but whether the said commission against the said Henry Fauntleroy was or was not duly awarded and issued against him, or whether he was or was not duly found and declared to be a bankrupt, or whether or not all the estate and effects of the said Henry Fauntleroy had or had not become duly

vested in the Respondents as his assignees under the said commission, the Appellants said they were unable to set forth as to their knowledge, information or belief, and left the Respondents to such proofs thereof as they could produce. The Appellants also by their said answer said they believed that the said Henry Fauntleroy departed this life at or about the time in the Respondents' bill mentioned; but they said they were advised, for the reasons thereinafter mentioned, that the money secured by the said policy of assurance did not thereby become payable, and that the Respondents were not, as assignees of the said Henry Fauntleroy, entitled to the said policy of assurance, and to the money then or which might become payable thereon.

The Appellants also by their said answer said that the said Society was first incorporated by letters patent under the great seal of England, bearing date at Westminster the 25th day of July in the fifth year of the reign of queen Anne, and in the year of our Lord 1707, whereby the Queen granted that William, then Lord Bishop of Oxford, and the other persons therein named, and all and every other person and persons who should be admitted to be a subscriber and subscribers according to the directions thereinafter contained, not exceeding 2000 persons in the whole, should be and be called one body corporate and politic in deed and in name, by the name of "The Amicable Society for a Perpetual Assurance Office;" and the Queen also [9] granted, amongst other things, that all and every other person or persons who thereafter should be admitted members of the said Amicable Society according to the powers and authorities thereby granted, should be and be esteemed members of the same corporation thereby constituted; and that after the fifth year, to be computed from the 25th of March 1707, £10,000 of lawful English money, and so much more as should be agreed on by a majority of the members of the said Amicable Society for the time being, assembled in a general court, should be annually paid and equally divided to and amongst such nominee or nominees of the member and members of the said Amicable Society, their respective executors, administrators or assigns, who should die in every year then next ensuing, and that the remainder of the monies which should be contributed and paid as therein mentioned, together with such interest, increase or improvements as should arise, accrue or be made thereof or thereby, or should arise or be received for annuities to be granted by the said Amicable Society to their own members only, should be reserved and improved by the said Amicable Society for a perpetual Assurance Office, for the sole use and benefit of all and every the members of the same corporation, according to their respective interests therein.

That by other letters patent under the great seal of Great Britain, bearing date at Westminster the 30th day of October, in the forty-eighth year of the reign of king George the third, and in the year of our Lord 1807, after partly reciting or taking notice of the said first-mentioned letters patent and two subsequent charters granted to the said Society, it was, amongst other things, granted and ordained, that if any other person who thereafter should be admitted a member of the said Society, or should be a contributor thereto, should [10] make or sign, or cause or willingly or wittingly permit to be made and signed, any false or fraudulent representation or declaration, in order to become a member thereof or contributor thereto, or should refuse or neglect to pay his or her contribution according to the bye-laws, rules and orders made or to be made in the general courts of the said Society, or should break any of the conditions which in his or her policy should be specified, every such person, and his or her executors, administrators or assigns, should be absolutely excluded from the said Society, and from all benefit under such policy; and it was also granted, directed and appointed that seven-eighth parts of the annual contributions as should become due in every year, and should be actually paid by or on account of all and every person and persons who should thereafter become a member or members of the said Society, should be equally divided amongst and duly paid to all and every the nominee and nominees of all and every member and members of the said Society who should die in every year, their respective executors, administrators or assigns, together with such part of the annual contributions of all and every member and members of the said Society, admitted under and by virtue of the said several therein in part recited charters, or any or either of them, and so much more as should be agreed upon by the members of the said Society for the time being, or the major part of them, as should be present in general courts to be from

time to time assembled, and as was directed by the same charters, according to the original plan of the said Society; and that the remaining eighth part of the monies which should be so contributed and paid, together with such interest, increase and improvements, as should accrue or be made thereof, or be received or retained for annuities to be granted by the [11] said Society, and all other monies which should be received by or on account of the said Society, should be reserved and improved by the said Society, for the sole use and benefit of all and every the members of the same corporation, according to their several interests therein.

That by certain other letters patent under the great seal of Great Britain, bearing date at Westminster the 12th day of February, in the fourth year of the reign of his present Majesty king George the fourth, and in the year of our Lord 1823, after reciting in part or taking notice of the former charters granted to the said Society, it was amongst other things granted, declared, ordained and appointed, that for the purpose of the calculation thereinafter mentioned, the seven-eighth parts by the said letters patent of the 30th day of October, in the forty-eighth year of the last reign, directed to be taken of and from the annual contributions of the persons thereafter becoming members of the said Society, and also the sum of £5 sterling for or in respect of every share granted by the said Society, previous to the date of the said last-mentioned letters patent, which then was and should from time to time be subsisting, should from thenceforth continue to be taken as theretofore had been used, and the parts and sums so to be respectively taken, and the parts and sums which yearly had been so respectively taken since the 5th day of April 1818, should be called the dividend fund; and that at the expiration of the year ending on the 5th day of April then next, and at the expiration of every subsequent year ending on the 5th day of April, the sum of the dividend fund to be constituted as aforesaid, for the year so ended and the four years then last preceding, should be divided by the sum of the number of shares in the said Society, [12] in respect of which claims should have arisen by the death of members in the year so last ended as aforesaid and the four years then last preceding, and the quotient should be the amount to be paid as and for the dividend, upon and in respect of every share for which a claim shall have arisen by the death of a member of the said Society, dying in the year so last ended as aforesaid, and the same should be paid by the directors of the said Society for the time being, out of the general funds of the said Society, without reference to the amount of the dividend fund, to the nominee and nominees of every such member so dying as last aforesaid, at such time or times and under such regulations as had been and should from time to time be directed in that behalf, by the bye-laws and rules of the said Society.

The Appellants by their said answer further said, that the said Henry Fauntleroy, at the general sessions of the peace, held in and for the city of London, which commenced on the 23d day of October 1824, was indicted for felony, and was on the 30th day of that month tried for and convicted of felony, and afterwards received judgment of death and was executed for the same; and that the Appellants were advised and humbly submitted to the judgment of the said Court of Chancery, that upon the before-mentioned attainder of the said Henry Fauntleroy for felony, he ceased to be a member of the said corporate body called the Amicable Society for a Perpetual Assurance Office; by reason whereof, and also by reason that the death of the said Henry Fauntleroy was the direct consequence of, or was occasioned by his own felony, the Appellants submitted that no claim could be made upon the said Society, upon or by virtue of the said policy of assurance so as aforesaid effected on his life; and the [13] Appellants said, that although they were ready and willing to pay what might be due on the said policy to any person or persons legally entitled to receive the same, yet they were advised that, as a corporate body, they were bound to raise and submit the question to the judgment of the said Court of Chancery, inasmuch as the legal representatives of the other members of the said Society who died in the same year as the said Henry Fauntleroy might be interested therein; and the Appellants submitted to the judgment of the said Court of Chancery, whether, under the circumstances thereinbefore mentioned, his Majesty's Attorney-general ought not to have been a party to the said suit: and the Appellants insisted upon such their said objections, and such other objections as might or could be urged against the said demand of the Respondents, in the same manner as if they had pleaded the same in bar to the demand of the Respondents.

That the said cause being at issue, and the usual rules having been given to produce witnesses and pass publication, it was agreed between the Respondents and the Appellants that a copy of the said policy of insurance should be read and given in evidence on the part of the Respondents on the hearing of the said cause. That the Respondents were the assignees of the estate and effects of Henry Fauntleroy in the said policy named, under and by virtue of a commission of bankrupt awarded and issued against the said Henry Fauntleroy, under which he was duly found and declared bankrupt, and his estate and effects were duly assigned to the Respondents on the 29th day of October 1824; and that the said Henry Fauntleroy, from the time of making the said policy up to and until the 11th day of January 1824, or some person on his behalf, regularly paid the premiums as they became due on the **[14]** said policy. That the printed copies of the several charters, letters-patent and bye-laws of the Appellants, the Amicable Society for a Perpetual Assurance Office, should be read and given in evidence on the hearing of this cause without further proof. That the said Henry Fauntleroy was convicted of felony on the 30th day of October 1824, and was executed on the 30th day of November 1824, in pursuance of such conviction and the judgment of death thereupon pronounced upon him. That a copy of the record of the said indictment and conviction of the said Henry Fauntleroy should be read and given in evidence on the hearing of the said cause, without further proof, and that Henry Fauntleroy named in the said indictment and conviction was the Henry Fauntleroy named in the pleadings of the said cause, upon whose life the insurance mentioned in the pleadings of the said cause was effected.

That the Respondents having settled with the claimants under the said indenture of the 10th day of September 1819, and obtained an assignment to them the Respondents of the said policy of assurance, the said cause came on to be heard on the 21st day of May 1827, before the right honourable the Master of the Rolls; whereupon, and upon debate of the matter and hearing of the said policy of insurance, the commission of bankrupt issued against the said Henry Fauntleroy and the assignment dated the 29th day of October 1824, a book marked with the letter A, containing printed copies of the several charters, letters-patent and bye-laws of the Appellants, the Amicable Society for a Perpetual Assurance Office, a copy of the record of the indictment and conviction of the said Henry Fauntleroy, marked with the letter B; and it being admitted by the Respondents and the Appellants **[15]** that the said Henry Fauntleroy, from the time of making the said policy up to and until the 11th day of January 1824, or some person on his behalf, regularly paid the premiums as they became due on the said policy; and that the said Henry Fauntleroy was convicted of felony on the 30th day of October 1824, and was executed on the 30th day of November 1824 in pursuance of such conviction; and that the said Henry Fauntleroy named in the said indictment and conviction was the Henry Fauntleroy named in the pleadings of the said cause; and the Respondents by their Counsel undertaking to pay the costs of the defendants, James Cathrow Disney and Ann Nelson his wife, Sir Everard Home and Joseph Birch, of the said suit; his Honor made his decree in the said cause, and thereby ordered that the Respondents' bill should stand dismissed out of the said court as against the said last-mentioned defendants, with costs, to be taxed by the Master in rotation, the costs of the said defendants Sir Everard Home and Joseph Birch, the trustees, to be taxed as between solicitor and client; and his Honor declared that the Respondents, as assignees of Henry Fauntleroy the bankrupt, in the pleadings named, since deceased, were entitled to the policy of assurance bearing date the 11th day of January 1815, in the pleadings mentioned, upon the life of the said Henry Fauntleroy, and the money then payable thereon. And the Appellants by their Counsel admitting that the sum then payable upon the said policy amounted to the sum of £6084 7s. 6d., his Honor ordered and decreed that the Appellants should pay to the Respondents, as such assignees as aforesaid, the said sum of £6084 7s. 6d. so payable upon the said policy of assurance as aforesaid.

From this decree, the Amicable Society appealed to **[16]** the Lords, and the cause was heard on the 23d and 25th June 1830.

Argued for the Appellants: Look at the case, first with reference to public policy, and then as a contract between man and man. As to the ground of policy, suppose it had been expressly stipulated in terms that, in case the man should be

executed for felony, the money should be payable; would the policy of the law allow this to be effectual? If not, if the man does commit a capital felony, and is executed for it, the same policy stands in the way. But it is said that when the man committed the felony he had no intention to be hanged for it. It would be difficult to prove that he had, but something like it had happened in the case of one who insured and committed suicide. So on the same ground, wagering policies were void, and *a multo fortiori* policies under circumstances of this kind. And so as, in the Duchess of Kingston's case, a fraudulent divorce was void on the ground of public policy, and so argued by Thurlow, although a sentence of a competent Court had been given in its favour. Then look at it with reference to contracts between man and man, and four cases of void policies might be mentioned similar in principle to the present: 1st. Detention of a ship by a foreign state for an attempt to violate the law of nations. The person attempting has no intention to be detained, but the detention follows, and the policy is void. 2dly, Smuggling: the first act is the smuggling, and the second is the condemnation. 3dly, Commerce with the King's enemies: the first act is the being found out, and the second is the seizure. 4thly, Deviation: which, although not so directly in point as the other three cases, has some bearing on the question. And to [17] this may be added a fifth case, where there is an insurance against fire, and the person insuring causes the fire.

Argued for the Respondents: That if the policy was valid till the 30th October 1824, which was admitted, it could not have been destroyed by the felonious act, which had been committed long before. [Lord Ch. :—Their argument was, that the policy had been avoided, not by the felonious act, but by the probable consequences.] Then, if the felonious act did not destroy the policy, why should the conviction? Fauntleroy meant to do wrong, but he did not mean to be hanged, and never contemplated death either by his own hands or that of others.

Since this transaction, the Society had introduced a clause avoiding the policy in case the assured should die by his own hand or the hands of justice; which showed that, before the introduction of this clause, they were liable in a case of this kind. Was it the criminal nature of the act that avoided the policy? If not, where were they to stop? The instance of deviation had nothing to do with this, for where a loss happened in a deviation, it did not happen on the voyage insured, and to such a loss the obligation in the contract had no application; and the same observation applied to the other supposed analogous cases. The case of suicide had no application; for here F. had no intention to kill or to be killed by others. It was said, the Society was cheated and robbed, but F. meant no such thing. Persons insured might engage in occupations extremely injurious to health, and calculated to shorten life; they might shorten their lives by hard drinking, by hard labour, and in other ways, but then it was the object of insurance to guard against [18] such risks. Suppose that F. instead of being hanged had been transported, and that the ship had been lost, would that have avoided the policy? The only question was, whether the risk had been incurred by the Society, and it was clear that it had. It was admitted, that the felonious act did not of itself avoid the policy, and if not, public policy had nothing to do with the matter.

The following were the reasons given in the cases.

For the Appellants: First. Because the insurance was effected by the said Henry Fauntleroy upon his own life, which life ceased in consequence of his wilful violation of the law; and it is against the general policy of the law, as well as established principles, that either the insured, or those claiming in his right, should recover for a loss caused solely by the criminal act of the insured himself.

Secondly. Because insurance is legally defined to be a contract, in which the insurer, in consideration of a premium equivalent to the risk run, undertakes either against probable perils and losses, or against a certain event, as in the case of death, but uncertain as to the period of its taking place. If the insured, therefore, can at any time by his own act determine the event, it is against the essence of the contract; and much more is it so, if that act (as in the present instance) be felonious, which the law always considers wilful.

Thirdly. Because the said Henry Fauntleroy ceased to be a member of the Amicable Society, which is a corporation established by royal charter, upon his attainder by the judgment which preceded his execution; and therefore at the time of his death he had no interest in the funds of the said Society.

[19] For the Respondents: That by the assignment to the said Respondents, of the 29th day of October, 1824, the said policy of insurance, and all interest therein, and the right to receive the money payable thereon, upon the death of the said Henry Fauntleroy, became and was vested in the Respondents, as such assignees as aforesaid, and that the same policy of insurance was a valid and subsisting policy at the time of the death of the said Henry Fauntleroy.

Lord Chancellor: I find it difficult to say that an insurance, under such circumstances as the present, can be legally enforced, and we will take some time to consider.

Lord Chancellor (9th July, 1830): The proceedings in this case were instituted by the assignees of the estate and effects of the deceased Henry Fauntleroy, a bankrupt, to recover a sum of money on an insurance on his own life, effected by the bankrupt with the incorporated Society for the insurance of lives, called "The Amicable Society for a Perpetual Assurance Office;" and the case is of this description: Fauntleroy effected the policy in January 1815, and paid the premiums on it up to 1824. On the 29th of October 1824, a commission of bankruptcy was issued against Fauntleroy, who was duly declared bankrupt, and his estate and effects vested in the Respondents, as his assignees under the commission. On the 28th October 1824, Fauntleroy was indicted for felony, and on the 30th of that month he was tried and convicted, and received sentence of death, and was afterwards executed; and the question is whether, under these circumstances, the assignees can recover from the insurance Society the amount of the [20] sum insured on Fauntleroy's life; that is, whether—the party effecting the insurance having committed felony, and having been tried, convicted, and executed for felony—the parties representing him, and claiming under him and in his right, can maintain the suit. I listened with the utmost attention to the arguments at the bar, as did the noble Lord (Radnor) who is now present, and was present at the hearing of the cause; and we have come to the conclusion that the assignees are not entitled to maintain the suit, and simply on this consideration: Suppose that in the policy this risk had been insured in terms—that in the event of the party effecting the insurance being executed for a capital felony, the money should become payable—is it possible that a claim in right of a party effecting such an insurance could be maintained, or that the insurance should not be held void as affording encouragement to crime, and being contrary to public policy? If such a policy could not be sustained where a risk of that kind was mentioned in direct terms and language, how can you give effect to a policy if it in reality involves that condition?

On this short and plain ground, we are of opinion that the claim cannot be sustained, and that the judgment of the Court below must be reversed.

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[21]

IN ERROR:

FROM THE COURT OF KING'S BENCH.

The KING, on the relation of CHARLES WELLS LOVELL,—*Plaintiff;*

THOMAS WESTWOOD,—*Defendant.*

[Mews' Dig. iv. 628, 644; vi. 158. S.C. *Sub nom. R.* v. *Westwood*, 4 Bli. N.S. 213, and K.B., 4 B. and C. 781; 7 Dowl. and Ry. 267. Cited (i) on point as to acceptance of charter in *Lyme Regis* (*Mayor of*) v. *Henley*, 1844, 2 Cl. and F. 342; (ii) on point as to making bye laws, *per* Parke B., in *Chilton* v. *London and Croydon Railway Co.* 1847, 16 M. and W. 228; and see now municipal Corporations Act 1882, ss. 23, 24; (iii), on point as to delegation, in *R.* v. *Attwood* 1833, 4 B. and Ad. 503.]

A charter granted by the Crown cannot be partially accepted, unless it should appear to be the intention of the Crown that the grantee should have the option to accept in part and reject in part.

A charter vests the right to elect burgesses in the general body of an ancient corporation, and gives a power to make bye-laws to a select body. The general body makes a bye-law delegating the power to elect burgesses to the select body. Held, that this is a good bye-law; for the power given by the charter to the select body to make bye-laws, does not devest the general body of the right to make such laws, which is incident to it at common law.

The general body of a corporation may lawfully delegate the power to elect burgesses to a select body of the corporation.

This was an information, in nature of a *quo warranto*, exhibited against the Defendant, in Easter term 1819, for usurping the office of burgess of the borough of Chepping Wycombe, in the county of Buckingham. To which the Defendant pleaded:

First: That the said borough of Chepping Wycombe, in the said county of Buckingham, from time whereof the memory of man is not to the contrary, hath been and still is an ancient borough, incorporated and called and known by the name of the mayor, bailiffs and burgesses, of the borough of Chepping [22] Wycombe, otherwise Wicombe, in the county of Buckingham; and that within the said borough, from time whereof the memory of man is not to the contrary, there hath been, and of right ought to have been, and still of right ought to be, a mayor, two bailiffs, and an indefinite number of burgesses of the said borough; of which said burgesses, during all the time aforesaid, there have been, and of right ought to have been, and still of right ought to be twelve, sometimes called principal burgesses, sometimes capital burgesses, and for divers, to wit 150 years past, and now, called aldermen of the said borough; who, together with the bailiffs of the said borough for the time being, for all the time aforesaid, have been and been called, and of right ought to have been and been called, and still are and ought to be and be called, the common council of the said borough; and to be aiding and assisting to the mayor of the said borough for the time being, in all matters and causes touching and concerning the said borough: And that, from time whereof the memory of man is not to the contrary, there hath been, and still is an ancient and laudable custom within the said borough, used and approved of; that is to say, that the mayor and common council of the said borough for the time being, or the major part of them, duly assembled together for that purpose within the said borough, have from time to time by themselves, and without the concurrence or assistance of the rest of the burgesses of the said borough, nominated and elected, and have been used and accustomed to nominate and elect, and still ought to nominate and elect, such person or persons to be a burgess or burgesses of the said borough, as to them the said mayor and common council of the said borough for the time being, or the major part of them, so assembled as aforesaid, hath [23] seemed meet or shall seem meet; and that every such person so nominated and elected, having been in due manner sworn in that behalf, hath been, and hath been used and accustomed to be, and still ought to be, admitted into the place and office of a burgess of the said borough, and to use and enjoy the said place and office, and all the liberties and franchises thereto belonging. And the Defendant then alleged, that he was duly elected a burgess according to that custom.

Secondly: The Defendant pleaded a similar custom; stating, by way of inducement, that the said borough of Chepping Wycombe, in the said county of Buckingham, is, and from time whereof the memory of man is not to the contrary, hath been, an ancient borough; and that the said burgesses of the said borough, from time whereof the memory of man is not to the contrary, have been, and now are, a body corporate and politic; and for a long space of time, to wit for 150 years now last past, have been, and now are called and known by the name of the mayor, bailiffs and burgesses, of the borough of Chepping Wycombe, otherwise Wicombe, in the county of Buckingham.

Thirdly: The Defendant pleaded, that the said borough of Chepping Wycombe, in the said county of Buckingham, is, and from time whereof the memory of man is not to the contrary, hath been, an ancient borough; and that the burgesses of the said borough, long before, and until, and at the time of the granting of the letters patent of Charles the Second, late King of England, thereinafter mentioned, were one body politic and corporate, in deed, fact and name, and called and known by the name of the mayor, bailiffs and burgesses, of the borough of Chepping Wycombe, otherwise Wicombe, in the county of Buckingham; and that within the said borough, from time whereof [24] the memory of man is not to the contrary, there hath been, or of right ought to have been, and still of right ought to be, an indefinite number of burgesses of the said borough: And that long before any of the days and times in the said information mentioned, to wit, on the 16th day of November, in the fifteenth

year of the reign of his said late Majesty king Charles the Second, the said king Charles the Second by his letters patent, under the great seal of England, bearing date at Westminster, the day and year last aforesaid, for himself and his successors, did, amongst other things, grant, ordain, constitute and confirm to the said mayor, bailiffs and burgesses of the borough aforesaid, that from thenceforth for ever there might and should be, within the borough aforesaid, one of the most honest and discreet burgesses of the borough aforesaid, to be elected in manner thereunder in the said letters patent mentioned, who should be, and be named, mayor of the borough aforesaid; and that in like manner there might be and should be, within the same borough, two honest and discreet burgesses of the borough aforesaid, who should be and be named bailiffs of the borough aforesaid; and the said late King willed, and thereby for himself, his heirs and successors, did grant, ordain and confirm, that from thenceforth for ever there might and should be, within the borough aforesaid, from time to time, twelve honest and discreet men, continually inhabiting and residing within the said borough, who should be, and should be called, aldermen of the said borough: And that the mayor, bailiffs and burgesses of the same borough, and their successors, or the major part of them, from time to time, for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the borough aforesaid, as and which to them [25] should seem most expedient, to be burgesses of the said borough. And the said late King further willed, and thereby, for himself, his heirs and successors, did grant and confirm to the aforesaid mayor, bailiffs and burgesses of the borough aforesaid, and their successors, that the aforesaid aldermen and bailiffs of the borough aforesaid, and their successors, should be, and be called, the common council of the said borough; and should be, from time to time, assisting and aiding to the mayor of the said borough of Chepping Wycombe, otherwise Wicombe, aforesaid, for the time being, in all matters and causes touching and concerning the borough aforesaid. And the said late King further willed, and did thereby, for himself, his heirs and successors, grant and confirm to the aforesaid mayor, bailiffs and burgesses of the borough aforesaid, and their successors, that the mayor, aldermen and bailiffs of the borough aforesaid, and their successors, for the time being, or the major part of them, (of whom the mayor for the time being, the said late King willed to be one,) might and should have full power and authority to frame, constitute, ordain and make, from time to time, such reasonable laws, statutes and ordinances whatsoever, as to them should seem to be good, wholesome, useful, honest and necessary, according to their sound discretions, for the good rule and government of the burgesses, artificers and inhabitants of the borough aforesaid, for the time being; and for declaring in what manner and order the aforesaid mayor, aldermen, bailiffs and burgesses, and the artificers, inhabitants and residents of the borough aforesaid, should behave, conduct and carry themselves in their offices, mysteries and business, within the same borough, and the limits thereof, for the time being; and otherwise for the further good, and public advantage and rule of the same borough, [26] and the victualling of the same borough; and also for the better preservation, government, disposition, letting, demising of lands, tenements, possessions, revenues, and hereditaments, to the aforesaid mayor, bailiffs and burgesses, and their successors, by the said letters patent or otherwise given, granted, assigned or confirmed, or thereafter to be given, granted or assigned; and other matters and causes whatsoever, touching or in anywise concerning the aforesaid borough, or the state, right and interest of the same borough. And the said late King did thereby constitute and appoint one person therein named, to be the first and present mayor of the said borough; two other persons therein named, to be the first and present bailiffs of the said borough; and twelve other persons therein named, to be the twelve first and present aldermen of the said borough: and his said late Majesty king Charles the Second, by his said letters patent, for himself, his heirs and successors, further granted and confirmed, that the aforesaid mayor, aldermen, bailiffs and burgesses, of the borough aforesaid, for the time being, or the major part of them, from time to time for ever thereafter, might and should have power and authority yearly and every year, on the Thursday next before the feast of Saint Michael the Archangel, to assemble themselves, or the major part of them, in the guildhall of the borough aforesaid, or in any other convenient place within the borough, to be limited and assigned according to their discretions, and there to continue until they, or the major part of them there then assembled, should then elect and nominate one of the alder-

men of the borough aforesaid, to be mayor of the borough aforesaid, for one whole year then next ensuing; and that then and there, they should and might be able to elect and nominate, before they should [27] from thence depart, one of the aldermen of the borough aforesaid, for the time being, who should be mayor of the borough aforesaid, for one whole year then next ensuing; and that he, after he should be so (as aforesaid) elected and nominated to be mayor of the borough aforesaid, before he should be admitted to execute the same office, should take a corporal oath, upon the holy gospel of God, yearly, on the day of election, if he should be then present, and if he should be absent, then within one month next ensuing after the said day of election, before the mayor, his last predecessor, or in his absence, before such aldermen of the borough aforesaid, for the time being, and the rest of the burgesses of the borough aforesaid, who should be then present in the guildhall of the borough aforesaid, or in any other convenient place within the borough aforesaid, to be limited and assigned according to their discretions, rightly, well and faithfully, to execute the same office, in all things touching the same office. And his said late Majesty king Charles the Second, by his said letters patent, for himself, his heirs and successors, granted and confirmed to the aforesaid mayor, bailiffs and burgesses, of the borough aforesaid, and their successors, that the mayor, aldermen and bailiffs of the borough aforesaid, for the time being, or the major part of them, from time to time for ever thereafter, might and should have power and authority yearly and every year, on Thursday next before the feast of the Annunciation of the blessed Virgin Mary, to assemble themselves, or the major part of them, in the guildhall of the borough aforesaid, or in any other convenient place within the borough aforesaid, to be limited and assigned according to their discretion, and there to continue until they, or the major part of them there then assembled, [28] should elect and nominate two burgesses of the borough aforesaid, to be bailiffs of the borough aforesaid, for one year then next ensuing, to be elected and nominated in form following; that they should and might be able there to elect and nominate, before they should from thence depart, two of the aforesaid burgesses, who from thenceforth should be bailiffs of the borough aforesaid, for one whole year then next ensuing; and that they, after they should be so as aforesaid elected and nominated to be bailiffs of the borough aforesaid, before they should be admitted to execute the same office, and each of them, should take a corporal oath upon the holy gospel of God, yearly, on the same day of election, if they should be present, and if they should be absent, then within one month then next ensuing the day of election aforesaid, before the mayor of the borough aforesaid, or, in the absence of the said mayor, before the bailiffs, their last predecessors, or either of them, in the presence of such of the aforesaid aldermen of the borough aforesaid for the time being, and the rest of the burgesses of the borough aforesaid, who should be then present in the guildhall of the borough aforesaid, or in any other convenient place within the borough aforesaid, to be limited and assigned according to their discretion, rightly, well and faithfully, to execute the same office of bailiffs of the same borough, in all things touching the same office. And his said late Majesty king Charles, by his said letters patent, for himself, his heirs and successors, further granted to the said mayor, bailiffs and burgesses, of the borough aforesaid, that if any or either of the aldermen of the borough aforesaid should die, or be removed from his office, (which said aldermen, and every or any of them, not well behaving themselves in the same office, his said late [29] Majesty willed to be removable, at the pleasure of the mayor of the borough aforesaid, and the major part of the aforesaid aldermen of the same borough, for the time being,) that then the mayor, and such of the residue of the aldermen of the borough aforesaid, who should be assembled in the guildhall of the borough aforesaid, or in any other convenient place within the borough aforesaid, to be limited and assigned according to their discretions, or the major part of them so assembled, at the pleasure of the mayor and the residue of the aldermen of the same borough, should and might be able to elect and prefer one or more of the best and most honest burgesses of the borough aforesaid, in the place or places of the same alderman or aldermen of the borough aforesaid, so dead, or removed from his or their office or offices, to supply the aforesaid number of twelve aldermen of the same borough. Which said letters patent afterwards, to wit, on the 17th day of November, in the 15th year of the reign of king Charles the Second, were duly accepted by the then mayor, bailiffs and burgesses of the said borough; and that afterwards, and after the granting and acceptance

of the said letters patent, and long before the days and times in the said information mentioned, to wit, on the 1st day of December, in the year of our Lord 1675, the then mayor, bailiffs and burgesses of the said borough, being in due manner met and assembled for that purpose, within the said borough, did then and there duly make, constitute, ordain and establish a certain ordinance, or bye-law, (not now extant in writing,) for the better rule and government of the said borough, touching and concerning the election of the burgesses of the said borough, for the time then to come, in order to avoid popular confusion and disorder in such elections; by which said ordinance, or bye-law, it was [30] ordained and established in manner following, (that is to say,) that, from thenceforth, the mayor and common council of the said borough, or the major part of them, duly assembled together for that purpose, within the said borough, should and might from time to time, and at all times thereafter, by themselves, and without the concurrence or assistance of the rest of the burgesses of the said borough, elect and choose such person or persons, to be a burgess or burgesses of the same borough, as to them the said mayor and common council of the said borough, for the time being, or the major part of them, so assembled as aforesaid, should seem meet; and which said ordinance or bye-law hath, ever since the making thereof, hitherto been constantly kept and observed by the said mayor, bailiffs and burgesses of the said borough, and is still in full force and virtue, and in no wise annulled, abrogated, abolished, revoked or repealed.—The plea then states, that the defendant was duly elected a burgess, according to the said ordinance or bye-law.

To the first and second pleas, there were several general replications, putting in issue the fact stated therein; and then a special replication to those pleas, setting out the charter of Charles the Second, as in the third plea, whereby it was granted, ordained and confirmed, that the mayor, bailiffs and burgesses of the said borough, and their successors, or the major part of them, from time to time, for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the borough aforesaid, as and which to them should seem most expedient to be burgesses of the said borough; and also setting out a clause in the charter, respecting the appointment of a recorder of the said borough: Which said letters patent afterwards, to wit, on the said 17th day of November, in the 15th year of the reign of king Charles [31] the Second, were duly accepted by the then mayor, bailiffs and burgesses of the said borough; and that, under and by virtue of the said letters patent, the burgesses of the said borough, continually from and after the granting thereof, hitherto have been eligible, and of right ought to have been elected, and still of right ought to be elected, from time to time, by the mayor, bailiffs and burgesses at large of the said borough, or the major part of them, and not otherwise.

To the third plea there is a general demurrer, and joinder in demurrer.

To the special replication to the first and second pleas, the Defendant, after praying that the charter might be enrolled, in which there appeared to be a general confirmation of all the liberties, franchises, immunities, privileges, etc. before vested in the corporation, rejoined, that the said letters patent were not duly accepted by the then mayor, bailiffs and burgesses, of the said borough, as to that part thereof whereby his said late Majesty king Charles 2d did will and ordain that the mayor, bailiffs and burgesses, of the same borough, and their successors, or the major part of them, from time to time, for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the said borough, as and which to them should seem most expedient, to be burgesses of the said borough, as by the said replication is supposed.

To this rejoinder there is a demurrer, for the following causes: That the Defendant hath not, in or by his said last-mentioned rejoinder, stated or set forth any charter or letters patent, or other matter of record, dispensing with the total acceptance of the said letters patent, in the said last-mentioned replication mentioned and set [32] forth, by the mayor, bailiffs and burgesses, of the said borough; and authorizing or enabling them not to accept the said last-mentioned letters patent, as to that part thereof whereby his said late Majesty king Charles 2d did will and ordain that the mayor, bailiffs and burgesses, of the same borough, and their successors, or the major part of them, from time to time, for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the said borough, as and which to them should seem most expedient, to be burgesses of the said borough;

and also, for that the defendant hath not, in or by his said last-mentioned rejoinder, denied, or confessed and avoided, the allegation in the said last-mentioned replication, that the said letters patent therein mentioned were duly accepted by the then mayor, bailiffs and burgesses, of the said borough; and also, for that the Defendant hath, in and by his last-mentioned rejoinder, stated and alleged the supposed partial acceptance of the said last-mentioned letters patent, as a matter of fact, triable by the country, instead of stating and setting out therein, as he ought to have done, the charter, letters patent, or other matter of record, if any, authorizing such supposed partial acceptance, with a *prout patet per recordum*, and concluding his said last-mentioned rejoinder with a verification by the record.

The Defendant having joined in demurrer, the Court of King's Bench, after two solemn arguments, in Michaelmas term 1823, and Michaelmas term 1824, gave judgment for the Crown, in Michaelmas term 1825, on the first and second pleas; being unanimously of opinion, that a charter granted by the Crown to a corporation cannot be partially accepted, whether it be a charter of creation, or granted to a pre-existing corporation. On the demurrer to the third plea, the **[33]** Chief Justice intimated that he had very considerable doubt whether the corporation at large had power to make the bye-law stated in that plea; and Mr. Justice Bayley was decidedly of opinion that the bye-law was invalid: But the other Judges being of a different opinion on that point, judgment was given for the Defendant, on the third plea. See this case very fully reported, with the arguments of counsel, and opinions of the Judges, *seriatim*, in 4 Barn. and Cres. 781, and 7 Dowl. and Ryl. 267.

On this judgment a Writ of Error has been brought in this Honourable House; and it is submitted, that the bye-law, stated in the third plea, is invalid, and the judgment ought to be reversed, as to this plea, for the following, amongst other reasons:

1. That the power of making bye-laws being vested by the charter exclusively in the select body of mayor, aldermen and bailiffs, of the borough, the corporation at large, consisting of the mayor, aldermen, bailiffs and burgesses, were not authorized to make the bye-law stated in the third plea, nor any bye-law whatever, "touching or in anywise concerning the borough, or the state, right and interest of the same."

2. That the corporation at large, if it had such power, yet, having accepted the charter, by which it was declared that the mayor, bailiffs and burgesses of the borough, and their successors, or the major part of them, should have the election of burgesses of the said borough, could have no right to make the above bye-law, by which the election of burgesses was transferred to the mayor and common council, without the concurrence or assistance of the rest of the burgesses of the said borough, in direct contravention of one of the most important constitutions of the borough, expressed by the charter.

[34] 3. That the above bye-law is unreasonable, and alters the mode of election prescribed by the charter, and excludes the burgesses at large (being an integral part of the corporation,) from voting at the election of burgesses.

4. That this bye-law not only varies the constitution of the borough, but has a direct tendency to keep the number of common burgesses below the number of the common council.

5. That, for anything which appears to the contrary, the bye-law in question might originally have been made by the concurrence of an actual minority of the common burgesses with the common council, and may ever since have been continued, against the votes of the majority of the same body.

6. That none of the cases, cited in support of the bye-law, (except that of *Rex* v. *Bird*, 13 East, 367, which is distinguishable from the present,) go farther than to limit the number of electors upon the election of officers of the corporation; whereas this bye-law has a direct tendency to limit the number which are to constitute the corporation itself.

For the Defendant, Westwood, it was contended, that the judgment in his favour, on the third plea, ought to be affirmed; and the judgment against him, on the first and second pleas, ought to be reversed, for the following, among other reasons:

Because there is a general power inherent in the corporation at large to make bye-laws, which is not taken away by the grant of that power in particular cases to a select body: nothing is taken away by the charter from the body at large except

that which is given to the select body; and the power of making bye-laws or regulations for the election of burgesses is not so given, and consequently remains in the whole corporation. (Dutton's Hospital, 10 Coke 31; 1 Roll Abridg. 513; Corporation, v. pl. 5.)

[35] Because the bye-law in question was valid and legal, inasmuch as it was only a delegation of the power of election made by the corporation at large; that is, by the mayor, bailiffs and burgesses, to a part of themselves, viz. the mayor, bailiffs and aldermen; the aldermen, who, together with the bailiffs, constitute the common council, being still burgesses, consequently this bye-law, which limits the number of electors, is not liable to the objection, that it is made by a select body, or that it strikes off an integral part of the corporation. (Case of Corporations, 4 Co. 776; Corporation of Colchester, 3 Bulst. 74.)

Because no distinction, it is conceived, exists in principle, or is to be found in the decided cases between bye-laws, the object of which is to regulate the election of corporate officers, and those which regulate the election of burgesses. If the number of electors is legally restrained the object of the election is immaterial. (Vide 4 B. and Cres. 833.)

The Defendant also humbly submits, that he is entitled to judgment on the Demurrer to the Rejoinder to the Replication to the first and second pleas.

Because the charter of King Charles the Second might be partially accepted, and consequently the body corporate might legally act under its authority, with the exception of that part which gives the mayor, bailiffs and burgesses the power of election. (*Rex* v. *Vice Chancellor of Cambridge*, 3 Burr. 1647.)

Because the charter of Charles the Second gave to the mayor, bailiffs and burgesses, the power to elect burgesses, and the usage exercised, both before and since the charter, in the election of burgesses by the mayor, aldermen and bailiffs, or the mayor and common council, as set forth in the first and second pleas, is consistent with the express language of the charter, the mayor, aldermen and bailiffs, being, in fact, mayor, bailiffs and burgesses, and the language, mayor, bailiffs **[36]** and burgesses being only used as descriptive of the corporate name.

Because this being a charter of confirmation, the ancient usage of the borough, for the mayor and common council only to elect, which is a mode of exercising that right by the corporation at large, is not superseded.

The case was argued on the 16th February 1830, on the same grounds as in the Court below; and on the 28th May the eight Judges who were present at the argument gave their opinions *seriatim*, all of them concurring in the opinion, that a charter could not be partially accepted, unless it appeared that the Crown wished to give the option so to accept, and five out of the eight being for the Defendant in the third plea, and three for the Crown.

On the 21st July 1830 the House proceeded to give judgment.

Lord Tenterden [after stating the case]: Two questions arose upon this: 1st, Whether it was competent to a corporate body to accept a charter in part only, or whether they must not take or reject altogether. On that point there was no difference of opinion among the learned Judges. In former times there was some difference of opinion among Judges as to whether or not a charter could be accepted in part, and in part rejected; but now there was no difference of opinion on that head; and all were agreed that a charter must be accepted or rejected *in toto*, unless there should appear an intention on the part of the Crown that the body to whom the charter was given should have the liberty and power to accept in part, and reject in part. On that head there is now no difference of opinion, and as to that, judgment was given below for the Crown.

[37] The other question was, whether the bye-law by which the corporation at large delegated the power of electing burgesses to a select body was a good bye-law? and whether the election of the Defendant by the select body so authorized, was a good and valid election? On that point there was a difference of opinion among the Judges below, and also among the learned Judges who gave their opinions in this House; but a considerable majority was of opinion that the bye-law was a good one, and consequently that the Defendant was duly elected. Such also was the opinion of a majority of the Court of King's Bench, two being of that opinion, and a third of a different opinion; and I entertaining so much doubt that I gave no opinion at all; and so judgment was entered up on that point for the Defendant.

That question arises in this way: It was admitted that the corporation existed from time immemorial, and that the power to make bye-laws was by common law incident to a corporation; but inasmuch as the charter of Car. 2. gave the power of making bye-laws to a select body, the question was, whether the power of the whole corporation to make bye-laws was not by implication taken away? The majority of the Judges were of opinion that the granting a power to make bye-laws to the select body did not prevent the body at large from making bye-laws; and that no valid objection could be made to this election by the select body to whom the power was by the corporation at large delegated, except by the body at large itself. I doubted; but the majority thought that the power given to the select body by the charter was not inconsistent with the power of the corporation at large to make bye-laws; and that that power was not taken away by the charter. I have had some communication with the Lord Chan-[38]-cellor on the subject, and he agrees with the majority of the Judges; and I also am now of that opinion.

I should mention that some were of opinion that this bye-law could not be considered as good under any circumstances, on the principle that the body at large had no right to transfer the power to elect burgesses from themselves to a select body. But so many bye-laws of this description have been held to be good, that now it may be considered as settled that such bye-laws may be made by the body at large. I agree, therefore, with the majority of the Judges that this is a good and valid bye-law, and I recommend that in all respects the judgment of the Court below be affirmed.

Affirmed accordingly.

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[39]

APPEAL

FROM THE IRISH COURT OF EXCHEQUER.

MYLES JOHN O'REILLY,—*Appellant;* SARAH FEATHERSTON, and others,—*Respondents.*

[S.C. 4 Bli. N.S. 161. See *Hussey* v. *Domville* (1900), I.R. 1 Ch. 417.]

Where a tenant, having mortgaged his lease, has neglected to pay rent, and costs, or file his bill, according to the provisions of the Tenantry Acts, within six months from the time of execution executed on an ejectment brought by the landlord, the mortgagee has a further period of three months within which he may, by payment of rent and costs, or filing his bill and lodging the money in Court, save the lease from forfeiture.

In the year 1789 Robert Johnson held a lease for sixty-one years of certain lands in the county of Roscommon, at a rent of £200, payable to a Mr. Knox, the head landlord, and these lands he sub-let to some under-tenants at a profit-rent. Johnson was also entitled in fee to certain other lands in the counties of Roscommon and Leitrim, and mortgaged both these and the leasehold lands to a Mr. Preston, who assigned the mortgage to a Mr. Walsh. In 1807 Johnson died, having devised the whole of the lands mentioned to Francis Featherston and J. and G. Devenish, against whom, in the same year, Walsh filed a bill of foreclosure in the Court of Exchequer. In 1808 the Appellant, Myles John O'Reilly, became entitled to the interest in the leasehold lands which had been held by Knox as head landlord; and in Easter term 1811, a year's rent being then due to him, he brought an ejectment in the Court of Common Pleas under the Tenantry Acts; [40] and on the 18th of October 1811 he was put in possession by the sheriff under a writ of *habere*.

On the 20th of July 1811, a decree was pronounced in the foreclosure suit in favour of the representatives of Walsh the mortgagee, who had previously died. The tenants of the leasehold premises had permitted the six months allowed by the Acts to expire without having paid or tendered to the landlord the amount of the rent in arrear, and the costs of the ejectment, so that the landlord claimed the lease as forfeited; but the mortgagees, before the expiration of nine months from the time of execution executed in the ejectment, tendered the full amount of the rent and

costs, which, as they contended, was sufficient under the Acts to save the forfeiture; but the landlord refused to accept the amount so tendered; and then on the 29th June 1812 the mortgagees and under-tenants filed their bill in the Exchequer for redemption of the lease, and paid the money into Court; and on the 9th May 1817 the Court decreed that the mortgagees were entitled to redeem, and directed the necessary accounts to be taken between all the parties interested; but the Appellant then entered into an arrangement with the mortgagees, by which he paid them the money due to them on the mortgage, and thereupon obtained from them an assignment of the mortgage to a trustee on his account; and then, considering the leasehold premises as vested in himself, discharged of the lease, or that he became entitled to the equity of redemption, he proceeded to sell the other mortgaged lands under the decree of the 10th July 1811 in the foreclosure suit.

In January 1821, Sarah Featherston, representative of Francis Featherston, filed a bill in the Exchequer against the Appellant and others, and prayed, amongst **[41]** other things, that all parties might be restrained from proceedings under the foreclosure decree of the 10th July 1811, until they should have proceeded with effect under the decree for redemption of the 9th May 1817; and that the accounts directed by that decree might be taken, etc. The Court immediately ordered the injunction to issue; and on the 16th July 1824 decreed that the Respondent, Sarah Featherston, was entitled to have the accounts taken as directed by the decree of the 9th May 1817 in the redemption cause; and from this decree the Appellant appealed.

The cause was heard in the House of Lords in the course of the session 1829, and it was contended for the Appellant, that the equity of redemption of the said lease which was subsisting at the time execution was executed under the judgment in ejectment hereinbefore stated, became in effect from that time vested absolutely in the Appellant, by virtue of the statutes before mentioned; and was not restored to or re-vested in the evicted lessees by any subsequent act of the mortgagees, or of the Appellant, or otherwise howsoever.

For the Respondents it was contended, that according to the true construction of the statutes for non-payment of rent in Ireland, if a mortgagee redeem within nine months after the execution of a writ of *habere*, founded on a judgment in ejectment for non-payment of rent, the effect of such redemption is to set up the lease to all intents and purposes for the benefit of the mortgagor, as well as of the mortgagee so redeeming, and therefore the said decree of the 9th of May 1817 was in all respects well founded.

The main question was, whether the tender of the amount of the rent and costs by the mortgagees to the landlord, before the expiration of nine months from **[42]** the time of execution executed in the ejectment, saved the forfeiture of the lease for all parties. The clauses in the Tenantry Acts which bear upon this question are as follow:

Extracts from Irish Tenantry Acts, Stat. 11 Ann. c. 2. (Irish Act).

Section 2d. And whereas great inconveniences do frequently happen to lessors and landlords in cases of re-entry for non-payment of rent, by reason of the many niceties that attend re-entries at common law; and forasmuch as when a legal re-entry is made the landlord or lessor must be at the expense, charge and delay of recovering in ejectment before he can obtain the actual possession of the demised premises; and it often happens that after such a re-entry made, the lessee, or his assignee, upon one or more bills filed in a Court of Equity, not only holds out the lessor or landlord by an injunction from recovering the possession, but likewise pending the said suit do run much more in arrear, without giving any security for the rents due when the said re-entry was made, or which shall or do afterwards incur; for remedy whereof, be it enacted by the authority aforesaid, that in all cases between landlord and tenant, from and after the 25th day of March, in the year of our Lord 1712, as often as it shall happen that more than one half year's rent shall be in arrear, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a summons in ejectment for the recovery of the demised premises, which summons in ejectment shall stand in the place and stead of a demand and re-entry: **[43]** and in case of judgment against the casual

ejector, or nonsuit for not confessing lease, entry and ouster, it shall be made appear to the Court where the said suit is depending, by affidavit, or to be proved upon the trial, in case the Defendant appears, that more than half a year's rent was due before the said summons was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter, then and in every such case the lessor or lessors in ejectment shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or lessees, his or their assignee or assignees, or other person or persons claiming or deriving under the said leases, shall permit and suffer judgment to be had and recovered on such ejectment and execution to be executed thereon, without paying the rent in arrear, together with full costs, and without filing any bill or bills for relief in equity, within six calendar months after such execution executed, then and in such case the said lessee and lessees, his or their assignee or assignees, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by writ of error for reversal of such judgment, in case the same shall be erroneous; and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; and if on such ejectment verdict shall pass for the Defendant or Defendants, or the Plaintiff or Plaintiffs shall be non-suited therein, except for the Defendant or Defendants not confessing lease, entry and ouster, then in **[44]** every such case such Defendant or Defendants shall have and recover his and their full costs.

(Same Statute.)

Section 3d. Provided always, that nothing herein contained shall extend to bar the right of any mortgagee or mortgagees of such lease, or any part thereof, who shall not be in possession.

4th Geo. 1, c. 5. (Irish Statute.)

Section 3d. And whereas it hath been a frequent practice for sub-sheriffs, and seneschals of manors, to take insufficient security on replevins, by which means landlords have been often put to great trouble, charges and vexation, in recovering their rents, after judgment obtained in avowry: and whereas it hath been found difficult for landlords or lessors to prove the want of sufficient distress, by reason of niceties that attend such proof, whereby the said former Act hath proved in a great measure ineffectual; be it therefore enacted by the authority aforesaid, that from and after the 25th day of December 1717, as often as it shall happen that more than one year's rent shall be due and in an arrear to any landlord or lessor, though there be distress sufficient on the land to answer the said rent in arrear, such landlord or lessor may serve a summons in ejectment for recovery of the demised premises; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry and ouster, if it shall be made appear to the Court where the said suit is depending, by the affidavit of such landlord or lessor, his agent or receiver, or that it shall be made appear on the trial, in case the Defendant appears, that more than one year's rent was due before the said summons was served, then and in every such case such landlord or lessor, his lessee in ejectment, shall recover **[45]** judgment, and have execution thereon: and the jury that shall try such cause, in case it shall be before a jury, and if not, the Judge before whom the judgment shall be given, shall ascertain the sum that shall be so due and in arrear; and in case the lessee or lessees, his or their assigns, or other person or persons claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such ejectment and execution to be executed thereon, without paying on demand the rent so ascertained as aforesaid to be in arrear, together with full costs, which the officer is hereby empowered to tax, or depositing the same in a Court of Equity, on filing a bill within six months after execution executed, then and in such case the said lessee or lessees, his or their assignee or assignees, and all other persons claiming or deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by writ of error for reversal of such judgment, in case the same shall be erroneous; and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease.

(Same Statute.)

Section 5th. Provided always, that nothing therein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession.

8th Geo. 1, c. 2. (Irish Statute.)

Section 4th. And be it enacted, by the authority aforesaid, that where any lease, for avoiding of which such ejectment is brought, shall, before the bringing such ejectment, have been mortgaged for a valuable consideration, and the lessee and mortgagee, and their respective assignees, shall be duly served with sum-[46]-mons in the said ejectment, and a proper affidavit or affidavits of the said summons shall be made and duly filed, and the Plaintiff shall obtain judgment and execution in the said ejectment, then if the said mortgagee, or his assignee, shall not within nine months after such execution executed pay or tender unto such landlord or lessor the said rent in arrear and costs, to be ascertained in such manner as in and by the said Acts is directed and appointed, then such mortgagee, or his assignee, shall be barred and foreclosed of all relief or remedy in law or equity, on account of the said mortgage; and the said landlord or lessor shall from thenceforth hold and enjoy the demised premises, discharged and freed from the said mortgage, and the equity of redemption, any thing in the said Acts, or any law to the contrary, notwithstanding.

Section 5th. And be it further enacted, by the authority aforesaid, that all and every mortgage of any lease, and every assignment thereof already made, shall be registered before the 24th day of June which shall be in the year of our Lord 1722, in such manner as is required by the statute for public registering of deeds, conveyances and wills; and all such mortgages and assignments hereafter to be made shall be registered in like manner within six calendar months after perfection thereof; and in default of registering such mortgage or assignment in manner aforesaid, the landlord or lessor may proceed in ejectment, and obtain judgment and execution thereon, although such mortgagee or assignee be not served with summons in ejectment, in such manner as if such mortgagee or assignee had been duly served.

[47] On the 5th July 1830, Judgment was given.

Lord Chancellor: The question in this case depends on the construction of the Irish statutes of the 11th Anne, and the 4th and 8th Geo. 1, called the Tenantry Acts. The effect of these Acts is, that if the rent be in arrear for a year, the landlord may have judgment and execution in ejectment; and if the tenant does not pay his rent and the costs of the ejectment within six months from the time of the execution executed, or file a bill, and pay the money into Court, his right is barred, and the landlord shall have the land free from the lease. Such was the enactment in the Act of the 4th Geo. 1, which, like the statute of Anne, contained a general saving clause in favour of mortgagees. Then came the Act of the 8th Geo. 1, saving the rights of mortgagees more precisely. As the tenant was allowed six months time to pay, the mortgagee was allowed nine months time to pay before his right became forfeited, and the landlord had the land free of the lease.

The question arising in this case is of this description: Whether when the tenant having mortgaged the lease neglects to pay his rent in proper time, the mortgagee can save the forfeiture by paying the rent and costs after the expiration of the six months, but before the expiration of the nine months? This is a question of great importance and general interest. It is clear that the lease is in the mortgagee. It is the legal estate, and the security for his debt; and it is difficult to perceive, if the payment of the rent and costs has effect and operation for one purpose, why it should not have effect and operation for all purposes.

In the course of the argument at the Bar, a question was asked, which still remains unanswered. Suppose **[48]** the mortgagee assigns the mortgage with covenants, what would be the situation of the landlord? Would he be bound by the covenants? It would be extraordinary if he were to be bound by the covenants, and yet that the tenant should lose his estate.

But it is stated in the Act, that, in case the tenant neglects to pay, the landlord shall hold the land free from the lease; and it is contended, that such being the case, the right of the tenant could not be set up again by the payment of the rent and costs by the mortgagee. But all the Acts must be taken together, and when so taken it is clear that these words of the 8th Geo. 1, cannot be construed literally, for one object

of the Act was to save the right of the mortgagee: and if on the neglect of the tenant to pay the rent, the landlord were to hold the land completely discharged of the lease, the right of the mortgagee would be defeated, for the lease is his interest in the premises. The words therefore cannot be taken literally, and if the tenant does not pay within the six months the forfeiture may be prevented, by the tenant and mortgagee paying before the expiration of the nine months.

It was said in the course of the argument that the effect of the Acts was not to set up the lease in the tenant, but to transfer the equity of redemption to the landlord. If that was so, the Legislature should have said so. But so far from it, that the language employed has a contrary tendency, stating, that the lease would be forfeited in case of nonpayment by the mortgagee before the expiration of nine months, implying, that in case the payment should be made within the time limited, the lease would be still in force, so that there was no transfer of the equity of redemption. The force of this was felt at the Bar, and reference was made to different parts of the act to show that it was [49] drawn loosely, and it was contended that the words ought to receive an interpretation different from their ordinary meaning. But the equity of redemption are words so familiar, that this could hardly be the intention of the Legislature, and the words of the Act must be understood according to their ordinary and legal import and meaning.

It was asked why six months had been made the period for the tenant to save his interest, and nine months for the mortgagee. It does not seem difficult to discover the reason for that. It was the duty of the tenant to pay in the first instance; but if the tenant neglected, then it was but reasonable that the mortgagee should have time and notice, after the failure of the tenant, to save the lease, which was his interest. This appears to me to be the reasonable construction of the Acts, and it is one which is free from the anomalies which were referred to in the argument. If it is reasonable that the tenant should have six months to pay the rent and costs, it is reasonable that the mortgagee should have a further term to save his interest; and if the payment is not made in nine months the landlord then has his forfeiture, and then all is right. There is no inconvenience in this, for it is merely extending the time for the payment which is necessary to save the forfeiture. It was said that Lord Redesdale intimated a different opinion in a case, called Nesbitt and Trevitt,* but then that was not the ground of the judgment. The question there was decided on another ground, and it was not necessary to decide this point. We have lost the benefit of the assistance of that eminent man by death, but he read the papers in this cause, and was far from entertaining the opinion which he is said to have intimated in Nesbitt and Trevitt. So the late Lord Chancellor of Ireland, [50] I mean Lord Manners, was present at the argument, and read the papers. I have conversed with him on the subject, and he does not agree in the opinion said to have been intimated by Lord Redesdale, but entirely concurs with me in my construction of the Acts. If this construction should be adopted there will be little difficulty in deciding this case. The representatives of the mortgagee have filed their bill, and paid the money into Court before the expiration of the nine months, and under these circumstances I am satisfied that the Court below was right in holding that the right of the mortgagee was not sunk, nor the lease forfeited, otherwise it would be a great object with the landlord to make an arrangement with the tenant to defeat the claims of a mortgagee or sub-lessee. The Bill in this case was filed in 1821, and the Plaintiff, Sarah Featherston, prayed that she might be declared entitled to proceed with the account taken under the decree of 1817. The question then resolves itself into a question of form, and it appears to me that the Court below did what was correct as between the landlord and the other persons lawfully interested. It is clear that the relative rights of the parties could never be adjusted till these accounts are taken, and the Court did right in declaring Sarah Featherston entitled to adopt and proceed in these accounts, so that the rights might be adjusted on the one side and the other, reserving to itself to dispose of the future questions that might arise in the case, and I propose, therefore, that the decree be affirmed.

Affirmed accordingly.

* [*Nesbitt* v. *Tredenwick*, 1 Ball and Beatty, 29. See 4 Bli. N.S. 191, *n.*]

[51]

APPEAL

FROM THE IRISH COURT OF CHANCERY.

WILLSON,—*Appellant*: CARMICHAEL, and Others,—*Respondents*.

[Mews' Dig. vi. 1291, 1373, 1687: vii. 1430, 1439: xiv. 1029: S.C. 4 Bli. N.S. 145: and in Chancery, 3 Moll. 79. As to charging interest against executors, see *In re Barclay* (1899), 1 Ch. 674. *Carmichael* v. *Willson* was approved on point as to accumulation of balances (3 Moll. 79) in *Edwards* v. *Grove*, 1860, 2 De G. F. and J. 221; and see *In re Wise* (1896), 1 Ch. 281.]

An Executor, conducting suits as solicitor for the Legatees under the will of his testator, not allowed his costs in the first instance, where it appeared that he had conducted the suits in a negligent and tardy manner.

Andrew Carmichael, of the city of Dublin, solicitor, by will, dated the 24th April 1794, devised and bequeathed his property to be divided in equal shares between and among his wife and children; and made Willson, also a solicitor, who was married to one of his daughters, sole executor. Carmichael, who died in the same year, had been a practising attorney, and clerk of the Crown and Peace for several counties in Ireland, and almost the whole of his personal property consisted of bonds, mortgages and judgment-debts; and the Appellant had to institute and defend various suits at law and in equity relative to the assets of his testator.

In 1812 the widow, and all the children of the testator, except Appellant's wife, filed their bill in Chancery against the Appellant, (executor) praying for the usual accounts, and also for an inquiry as to the suits, whether necessarily and properly instituted, conducted and defended for the benefit of the estate. The Appellant answered, and rendered an account; and after the usual further proceedings the cause was heard on the 14th April 1818, when a decree was pronounced, [52] by which it was referred to Thomas Ellis, Esq. one of the Masters of the Court of Chancery, to take certain accounts of the personal estate and effects of the testator, Andrew Carmichael, with various special directions; and amongst other things, the said Master was directed to inquire whether any, and what, sums of money due to the estate of said testator, had been lost by the default or negligence of the said Appellant: and whether any, and which, of the suits in the pleadings mentioned were necessarily and properly instituted, carried on, or defended, and for the benefit of the estate: and whether the same, or any of them, were so instituted or defended with the knowledge and approbation of Respondents, or any, and which of them, or not; and that the Master was, in taking the said last-mentioned account, to tax and compute the amount of said executor's several bills of costs, for business done by him as attorney in the said several causes, without prejudice, nevertheless, to the question, whether said Appellant, Thomas Willson, being an executor, was, as an attorney, to be allowed such costs, or any of them, except so far as he had paid and disbursed money on account of such costs.

The Master afterwards made his Report, part of which was as follows:

"I find that the several suits instituted by the said defendant, as executor, against Laurence Geoghegan, Deborah and Thomas Lowndes, Arthur Nicholls, and others, and Martin Armstrong, and others, were properly instituted and commenced by said executor; but whether with the knowledge of such of the legatees of said Carmichael as were then adults, has not appeared in evidence before me: I find, however, that said causes were not conducted with due diligence, or due regard to the interest, or to the [53] peculiar circumstances of the properties on which the debts due in such cases were secured; and find, that by such delay and default in prosecuting said causes, the recovery of the debts due in all of them has been unnecessarily delayed, and in some of them, probably endangered; and have therefore disallowed the defendant credit for the costs of same; and humbly submit, whether the claim of said defendant for the costs of said suits, should not for the present be postponed till the debts due in said causes shall be respectively recovered, and the defendant be enabled to recover said costs, as between party and party, out of said estates, with liberty to

claim against the assets for such bills of costs, as between solicitor and client, when duly taxed, as may then eventually and fairly be due to him."

The Appellant excepted to this part of the report; but by order of the Lord Chancellor of the 13th July and 6th December 1825, the exceptions were overruled, and the report was in other respects confirmed; and on the 31st May 1826, the Lord Chancellor made this further decretal order in the cause:

"Refer it back to the Master; and in the taking of the accounts let the Master charge simple interest on the sums found by said Report to be in the executor's hands in each year to the date of said Report of 24th February 1826, as the shares of said legatees, and credit the executor with the payments in each year, with interest from the time of such payments to the date of said Report (except as to the said infants during the period of their infancy); and declare that during the said period the said executor is not to be credited with payments beyond the interest on the shares of said infants; and let the Master strike a balance on the said several accounts [54] between the executor and said several parties respectively, and as to the other points, let same and all further directions be reserved until return of the Master's further report."

From this decree the legatees appealed, on the ground that the executor had not been charged with interest as he ought to have been, but the decree was affirmed with a variation.

The executor (the Appellant) lodged this cross-appeal against the decretal orders which over-ruled his exceptions, and submitted that they ought to be reversed for the following among other reasons:

First. Because the object of the inquiry directed by the decree was to ascertain whether any suit had been wantonly and unnecessarily instituted or carried on, and for the mere purpose of profit to the Appellant, and not to measure the degree of diligence with which he proceeded, which was quite immaterial, if no ultimate loss accrued, and this was made the subject of a distinct inquiry, viz. whether any debts were lost by his neglect or default, and no such loss has been reported.

Secondly. If it was intended to make Appellant responsible for negligence as a solicitor, it ought to have been the subject of an action, and not of an inquiry before the Master.

Thirdly. The decree did not give the Master any authority to adjudicate what should be the consequences of such neglect, even if properly found, much less to award such a penalty as the total loss of Appellant's costs, when at most he could only be made liable in an action for the actual damage sustained by reason of such neglect, and even in an action for his costs, such neglect, though of the grossest kind, could not be made a defence to the action.

[55] Fourthly. But even supposing the decree to have authorized such a report, and to be unobjectionable, in doing so the Master had no sufficient evidence to warrant his report, nor had the court to warrant it, in over-ruling said exceptions.

Fifthly. The Plaintiff's submitting to and attending a re-taxation of the costs, amounted to a complete admission of the right to the sum ascertained by such re-taxation to have been properly incurred; and the result of such proceeding ought to have been binding on the Master who ordered it, as well as the parties who concurred therein.

Sixthly. The notion, that because an executor happened to be a solicitor he was not entitled to costs incurred by him as such, was a total misapplication of the rule that a trustee should not make profit of his trust; the costs here were in a great measure actual disbursements for the benefit of the assets, and the rest were a remuneration for the labour and skill of the Appellant as solicitor, and for that which he neither did, nor could do, merely in his character of executor or trustee.

Seventhly. The result of the account as now taken, is, that an executor has been refused credit for monies expended out of his pocket for the benefit of the estate, although more than the amount of such expenditure has thereby been brought into the assets, and credit given for it, and the original debt still in a state of solvency and security not less than ever it was.

The Respondents, the legatees, on the other hand, contended, that the orders over-ruling the exceptions ought to be affirmed, and the cross-appeal dismissed for the following among other reasons:

[56] First. Because it clearly appears that the said Appellant did not conduct

the suits, the subject of the said first, second, third, and eighth exceptions, with due diligence, or a due regard to the interests of the testator's estate, or to the peculiar circumstances of the properties on which the debts sought to be recovered in the said suits were secured; but, on the contrary, conducted the same with great negligence, and in such a manner as to impair the said securities, and let them waste away, and greatly to increase the costs of the suits; and so that the recovery of the said debts has been not only unnecessarily and improperly delayed, but has been also not merely endangered, but for the most part frustrated, and rendered hopeless.

Secondly. Because it clearly appears, that the Master has given credit to the said Appellant for all such costs as he was entitled to, within the spirit and meaning, and directions of the decree of the 14th of April 1818.

Thirdly. Because the said Master was authorized by the said decree to disallow the costs of suits which he should find to have been conducted without due diligence, or due regard to the interests of the testator's estate, or to the circumstances of the property on which the debts in the said causes were secured.

The cause was heard in the course of the session 1829, and on 5th April 1830 judgment was given.

Lord Chancellor (5th April 1830): This case may, to appearance, seem somewhat complicated; but, by detaching the unnecessary matter, the real points for consideration may be briefly stated.

The questions arose on the will of a Mr. Andrew Carmichael, a solicitor, dated so far back as April 1794, by which he bequeathed the bulk of his pro-[57]-perty to his widow and children, and appointed Willson, also a solicitor, who had married one of his daughters, sole executor. In the administration of the assets it became necessary to institute and defend a great many suits, which of course caused a considerable sum to be expended in costs, so that costs formed a material object in the present suit. These suits went on for nearly seventeen years, and at last, in October 1812, the legatees filed their bill in Chancery against the executor, praying that the usual accounts might be taken of the testator's assets, and that an inquiry might be directed as to whether the suits had been properly instituted, conducted and defended. The executor answered in May 1813, but no decree was made till April 1818, when the Master was directed to take the account of the assets, and to make the inquiry prayed for, and to report. The Master made his report, in which he stated, as to three of the suits, that they had been properly instituted, but not properly conducted, since in the proceedings there had been great negligence and delay on the part of the executor, and that therefore he had made no allowance in the first instance to the executor for the costs of those suits. To this part of the report exceptions were taken; and the Lord Chancellor of Ireland, after hearing them argued, was satisfied that the Master was right, and confirmed that part of the report.

I have heard the case argued at length, and I have examined the evidence with great care, and I am of opinion that there was much delay and negligence on the part of the executor, who was himself the solicitor for the legatees. The question then is, whether the Master judged wrong in not allowing the executor his costs of these suits in the first instance. I concur with [58] the Lord Chancellor of Ireland in thinking that he was right, and I propose that that part of the decree of 1825 be affirmed.

But the decree of 1826 directed interest to be charged for the money in the hands of the executor at the end of each year; and, on the other hand, that interest should be charged in his favour on the payments made by him to the legatees, with interest on such payments to the time of making the report. That is not the proper mode to calculate the interest. The proper course will be, as is done in this country, to make rests at the end of each year, and to strike a balance, and charge interest on the balances. So far I think that the decree of 1826 ought to be varied and amended, and that it should be declared that rests should be made, and interest computed in the way which I have stated.

I shall draw up minutes for that purpose, and submit them after the holidays.

14o Junii 1830.—Ordered and adjudged, That the decretal order, complained of in the original appeal, be varied, by declaring that the Master should be directed, in taking the accounts, to make a rest, and state the balance at the end of each year; and to charge the executor with interest on such balance; and to apply such interest, as may be so found due from him in each year, in the first place, towards his

future payments, before any application is made of the principal money; and that it be referred back to the Master to take and carry on the subsequent accounts in like manner from the 5th December 1824: And it is further ordered, That with this declaration the cause be referred back to the Court of Chancery in Ireland, [59] to do therein as shall be just and consistent with the said declaration: And it is further ordered and adjudged, That the cross-appeal be and is hereby dismissed this House, and that the orders and decrees therein complained of be and the same are hereby affirmed.

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[60]

APPEAL

From the Court of Session in Scotland.

MACKENZIE and Others,—*Appellants;* ANDERSON and Others,—*Respondents.*

[S.C. 4 Wils. and Sh. 328; 6 Shaw, 1034; 5 Scots R.R. (H.L.) 395 (*Mead* v. *Anderson*).]

Where the price, or any part of it, of an inheritable (real) estate remains unpaid, and is made, by the conveyance, a burden on the estate till paid, the price, or that part of it which remains unpaid, and is so made a burden on the estate, does not go to the executor or administrator, but remains heritable, and descends to the heir at law.

This appeal arose out of an action of multiple poinding raised by James Pedie, writer to the signet, for the purpose of ascertaining those shares of the price of an heritable property at Broughton, in the neighbourhood of Edinburgh, for which the Appellant and Respondent were competitors.

This property originally belonged to Mrs. Steven, widow of Henry Anderson, farmer at Broughton, who died in 1791, leaving a deed of settlement, conveying it to her children, equally among them. She was survived by seven children, viz.

1. William (the Respondent's father) born 26 July 1741.
2. Margaret (Mrs. Bogue) 14 July 1745.
3. Henry (unmarried) 21 March 1751.
4. Rachael (unmarried) 3 June 1753.
5. Agnes (the Appellant's mother) 17 June 1755.
6. Mary (unmarried) 6 March 1759.
7. Jean (Mrs. Sommers) 11 Sept. 1762.

The property thus came to be divided in seven [61] equal shares among those children, in all of whom, with the exception of the eldest son and heir, the succession was '*conquest.*' The property was held by them, *pro indiviso*, until the 2d of November 1822, when it was sold to Mr. Pedie, the Pursuer of the process of multiple poinding, with the exception of the share which belonged to Mrs. Sommers, the youngest child.

In the interval, between the year 1791, when the succession opened to those parties, and 1822, when the property was sold, five of these children had died, viz. William (the eldest son), Margaret (Mrs. Bogue), Rachael, Agnes, and Mary; and, on the 2d of November 1822, the shares of the property stood vested as follows:

1st. The Respondent was entitled to the share which belonged to his father, William, the eldest son, and also to the share of Mrs. Bogue, to which his father was entitled, as heir of conquest.

2dly. Henry Anderson was entitled to his own share, and to the shares of his two youngest sisters, Rachael and Mary, as their heir of conquest. The Appellant, Mrs. Mead, was entitled to one share, in right of her mother; and the remaining share belonged to Mrs. Sommers.

The Respondent, who thus held two of those shares, resided in the West Indies. His uncle, Henry, who held three shares, resided in England. The Appellant, who held one share in right of her mother, also resided in England. Those parties came to the resolution of disposing of their shares of this property; and, with that view, gave the necessary authority to Mr. Thomas Baillie, writer in Edinburgh, who accordingly sold this property to Mr. Pedie, in terms of the following missives:—"Edinburgh, 2d November 1822 Sir, I [62] hereby offer you, for the three fourth

parts of the property at Broughton, belonging to your clients, Messrs. Anderson and Miss Mackenzie, the sum of two thousand seven hundred pounds sterling (£2700), payable as follows: viz. two thirds thereof two years after Whitsunday next, which is to be my term of entry to the premises; and to bear interest from said term of Whitsunday 1823, at four per cent, *and to remain a burden over the property till paid*, and the remaining third part to be payable at Whitsunday next. I shall further be at the expense of the division of the property with Mrs. Sommers; and I am to have right to the rents from and after Whitsunday next. Your acceptance of this offer, for behoof of your constituents, will oblige and bind, Sir, your most obedient servant, (signed) JA. PEDIE." Address, "Thos. Baillie, Esq. Writer, Edinburgh."—"Edinburgh, 2d November 1822. I accept your offer before written, on the part of my constituents; and I am, Sir, your most obedient servant, (signed) THOMAS BAILLIE."

These missives were written under the idea that the powers of Mr. Baillie to effect a sale were limited to three fourths of the property; but when it was understood that he had power to sell six shares, the following addition was made: "As it has appeared since the date of the above missives that the shares of the Broughton property belonging to Mr. Baillie's constituents extend to six sevenths, in place of three fourths, and as it was our intention that their whole rights should be comprehended in the sale to Mr. Pedie, it is declared that the difference between the three fourths and six seventh shares shall be held to be sold to Mr. Pedie, he paying the ad-[63]-ditional price in proportion to the three fourths. (signed) THOMAS BAILLIE, JAMES PEDIE."

Mr. Henry Anderson, who had right to three of these *pro indiviso* shares, died in October 1823, without any regular conveyance having been executed in favour of Mr. Pedie, the purchaser, and while the bargain rested on the footing of these missives. He left a will in the English form, dated 7th April 1819, whereby he "gave, devised and bequeathed all and every my freehold estates in England, or elsewhere; and also, all and every my copyhold and customary estates, lands, tenements, hereditaments whatsoever and wheresoever situate, with all and every of their rights, members and appurtenances, to his niece, Jane Mackenzie, now Mrs. Mead, the Appellant."

These are the facts of the case; and the following are the pleas in law lodged for the parties:

Note of pleas in law for William Anderson and his attornies.

The defendant rests his claim upon the law of heritable succession; and pleads:

1st. In regard to two sixth shares of the fund *in medio*, corresponding to two seventh shares of the whole property of Broughton, which two shares of the property at the time of the Defender's father's death stood vested in his person, that one of these shares belonged to his father in his own right, and the other as heir to his sister Margaret, in whose person this *pro indiviso* share of the property was conquest, and that the Claimant's father, William Anderson, as her immediate elder brother, was her heir of conquest. The right to these two shares being thus vested in the Claimant's father at the time of his death, he pleads, that, as son and heir to his father, he has right to these [64] two seventh shares of the property; and, consequently, to two sixth parts of the fund *in medio*.

2d. In regard to the three remaining shares claimed by the Defender as in right of Henry Anderson, his uncle, he pleads, that as the bargain with Mr. Pedie was not completed by disposition with procuratory and precept, nor even by regular minute of sale, before the death of Henry Anderson, to whom three sevenths of the property belonged, as explained in the Claimant's condescendence, the price of this heritable subject, in so far as regards these three shares, must be held as a *surrogatum* for the heritable subject itself, and must be distributed according to the law regulating the succession of heritable property in Scotland, in the same way as if the heritable subject itself had been to be divided among those who had right to it. Therefore, that as the only settlement executed by Henry Anderson was a testamentary deed in favour of his niece Mrs. Mead (who is also a claimant in this process of multiple poinding), not effectual to carry heritage by the law of Scotland, the Claimant is entitled, as the heir of his uncle Henry, to three shares of the property which stood vested in his person at the time of his death; and consequently to three sixth shares

of the fund *in medio:* at all events, the Claimant pleads, that even giving effect to the missives of sale of this property, as it was a condition of the bargain that two thirds of the price should remain as an heritable burden over the property, two thirds of the price were heritably secured at the time of Henry Anderson's death: therefore, that this part of the price must be held as heritable, and, as such, regulated by the law of succession applicable to heritable property. See the case of *M'Nicol* v. *M'Nicol*, 31st January 1816, and the observations from the Bench in the case of *Wilson* v. *Wilson*, 29th [65] November 1808. In regard to the law regulating heritable succession, reference is made to the institutional writers on that subject.

Note of pleas in law for Mrs. Mead, Mr. Mead, and James Fenn, for their interest, and their mandatory, in the multiple poinding, Pedie against Anderson.

1. The different shares of the Broughton property were conquest in the persons of the several disponees, and Henry Anderson, as heir of conquest to his sisters Rachael and Mary, had a right to their shares of the property.

2. The property being transferred to Mr. Pedie, the purchaser, by the contract of sale in November 1822, he became thenceforward debtor for the price to the parties having right thereto.

3. Mr. Henry Anderson's shares of the property became, by the minute of sale, shares of the *price*, and were effectually conveyed to the claimant Mrs. Mead, by his will, mentioned in the condescendence.

4. The stipulation in the missive, that two thirds of the price should remain a burden on the property till paid, did not, in law, make that proportion of the price heritable, and no steps were ever taken for constituting it a real burden.

After the record was closed, the Lord Ordinary heard the counsel for the parties, on the merits of this question of competition; and thereafter, of this date, (June 19, 1827), pronounced the following interlocutor: "The Lord Ordinary having advised this process, and resumed consideration of the debate, finds, that by a missive letter, dated and accepted 2d November 1822, Mr. Pedie, the raiser of the multiple poinding, purchased an heritable property in this country, with [66] entry at Whitsunday thereafter, one third of the price to be then payable, and 'two thirds thereof two years after Whitsunday next, to bear interest from said term of Whitsunday 1823, and to remain a burden over the property until paid.' Finds, that Henry Anderson, one of the *pro indiviso* proprietors of the subject so purchased, died in October 1823, leaving an English will, dated 7th April 1819, in favour of the Claimant Mrs. Mead, which is admitted not to be effectual to carry heritable property situated within Scotland. Finds, that *quoad* the two thirds of the price which were to remain a real burden over the property till paid, there was no change from heritable to moveable, in consequence of the sale of the property, and that the same cannot be carried by the said will, just as little as Henry's share in the property would have been if he had died before the sale; but finds, that it belongs to the heir of the said Henry Anderson; and appoints the cause to be called, to apply these findings, and to proceed in the adjustment of the other claims made in this process."

(27 June 1828.) The second division of the Court of Session to which this interlocutor was submitted for revision, adhered to the judgment of the Lord Ordinary, and from these interlocutors the Appellants appealed for the following, among other reasons:

I. By the missives or minutes of sale in this case, the right of property in the subjects in question was effectually transferred from the several parties for whom Mr. Baillie was acting, to Mr. Pedie the purchaser; and the effect of that transfer was to render the price a moveable or personal fund in his hands, descendible to the [67] executors of the respective proprietors, and not to their heir or heirs. Erskine's Instit. B. II. Tit. 3. s. 17. Mor. Dict. *Chiesly* v. *his Sisters*, Dec. 22, 1704, p. 5531. Bell, vol. 2, p. 9. Ib. vol. 2, p. 10. *Wilson* v. *Wilsons*, Fac. Coll. Nov. 29, 1808. *Waugh* v. *Jamieson*, Mor. Dict. 5524. *Steuart* v. *Home*, Fac. Coll. 18th May 1792. *Winram* v. *Johnstone*, 4 Bro. Sup. 153. *Stewart* v. *Mowatt*, Mor. Dict. 5488. *Watson* v. *Ayton*, Mor Dict. 5489. *Macnicoll* v. *Macnicoll*, Fac. Coll. June 16, 1814. 21 Jan. 1816.

II. The whole share of the price of the Broughton property belonging to Henry Anderson, was effectually conveyed to the Appellant, Mrs. Mead, by

his deed of settlement and latter will. *Lamont* v. *Lamont*, Fac. Coll. 4 Dec. 1789. 1 Bell, B. L. 590.

III. According to the terms of the judgments under review, the whole two thirds of the price are found to belong to the heir of Henry Anderson, whereas this consequence would not follow, even if it were true, that the above proportion of the price is to be held as real estate.

By the interlocutor of the Lord Ordinary, to which the Court adhered, it is expressly found, that the two thirds of the price of the property in question belongs to the heir of the said Henry Anderson. But, with deference, this appears to be an erroneous application of the principle adopted by the Lord Ordinary. For, supposing it were correct to hold, that, in consequence of the stipulation in the missives of sale, two thirds of the price should remain heritable, this quality must attach *rateably* upon the shares of the different proprietors for whom Mr. Baillie was acting, and as Henry Anderson was only a proprietor to the extent of three [68] sevenths, so it can only be that proportion of the two thirds of the price, which, according to any view of the matter, can be held descendible to his heir.

For the Respondents, on the other hand, it was contended, that the judgment of the Court below ought to be affirmed, for the following reason, among others,

Because it being agreed by the terms of the sale to Mr. Pedie, that "two thirds of the price should remain a burden over the property, for two years after Whitsunday 1823," and Henry Anderson having died within that period, two thirds of the three shares of the price to which he was entitled was heritably secured at the time of his death; and not having been disposed of by him in terms sufficient for the conveyance of heritable property in Scotland, devolved upon the Respondent, William Anderson, as his heir at law. Erskine, b. 3, t. 8, sect. 20. Stair, b. 3, t. 2, sect. 3. Erskine, b. 2, t. 2, sect. 5. Bell on Completing Titles, pp. 93, 94. Erskine, b. 2, t. 2, sect. 20. Ibid b. 2, t. 2. sect. 17. *Wilson* v. *Wilsons*, Fac. Coll. vol. 12. *M'Millan* v. *M'Millan's* Executors, Shaw and Dunlop's Reports, vol. 3, p. 308. Erskine's Institutes, b. 3, t. 9, sect. 48.

Lord Wynford (16 Nov. 1830): Your Lordships heard a case the other day, in which Mrs. Jane Mackenzie, or Mead, and others, were Appellants, and William Anderson and others were Respondents; and although it was not one of great difficulty in itself, yet it might be of considerable importance with reference to the practice in Scotland in matters of this description, which it was desirable not to disturb; and it was fitting, herefore that we should deliberate before giving judgment, in [69] order to consider what has been the practice and the understanding of the Profession.

The action was what is called an action of multiple poinding, corresponding in a great measure to our bill of interpleader; and the most accurate notion I can convey of it to your Lordships is this: a person is indebted to one of two persons, A. and B. both of whom claim the money, and he is ready to pay, but he knows not which of them is entitled; and he raises an action, (files a bill) calling both of them into Court, in order that they may settle between them the question as to which is entitled. The case is of this description. Mrs. Anderson being entitled to some heritable property at Broughton, in the vicinity of Edinburgh, conveyed it, in equal shares, to her seven children; two sons and five daughters. By the death of two of the younger daughters, three parts out of the seven became vested in Henry Anderson, the second son, and the question is as to these three parts. Henry Anderson had real and personal property in England, where he resided and was domiciled: and he, by his will, dated 7th April 1819, left the whole of his property of every description wheresoever situate, in his niece Mrs. Mackenzie, the Appellant. If the price which a purchaser was to pay for the three shares was moveable, that is personal property; it passed to the Appellant as such under the will. If it was heritable, that is real property; it did not pass, but went to the principal Respondent, as heir at law of Henry; and the question here is, whether it was moveable or heritable?

Before I state the law, as applicable to the subject, I may observe that heritable property passes in Scotland without the solemnities required to pass real estate in England. In this case the conveyance was by instru-[70]-ments called missives. The offer by the purchaser was in these terms:

"Sir, I hereby offer you, for the three fourth parts of the property at Broughton,

belonging to your clients, Messrs. Anderson and Miss Mackenzie, the sum of two thousand seven hundred pounds sterling (£2700), payable as follows: viz. two thirds thereof two years after Whitsunday next, which is to be my term of entry to the premises, and to bear interest from said term of Whitsunday 1823, at four per cent., and to remain a burden over the property until paid, and the remaining third part to be payable at Whitsunday next. I shall further be at the expense of the division of the property with Mr. Sommers, and I am to have right to the rents from and after Whitsunday next. Your acceptance of this offer, for behoof of your constituents, will oblige and bind, Sir, your most obedient servant."

The acceptance was as follows: "I accept your offer before written on the part of my constituents."

That was the conveyance. There is no dispute as to the part of the price which was paid. The dispute is as to the two thirds, including the three parts in question, which were not paid, but remained for some time in the purchaser's hands, a burden on the property. On the part of the Respondent it was contended, that the price of the three parts descended to him as heir at law; on the part of the Appellants it was answered no: since when the property was sold, the price was moveable, according to the intention and disposition of the vendor. On the other hand they said no; for it continued heritable by virtue of these words, "*and to remain a burden over the property till paid.*"

[71] The principal Appellant also insists that to create or constitute heritable property or security certain instruments and solemnities are necessary, and he refers to an eminent writer, Mr. Bell. But Mr. Bell decides against him. I know that Mr. Bell is a writer in whom a great deal of confidence is generally reposed. That must be admitted by both; and the Appellant cannot reject his authority, since he himself relies upon it. No doubt, in order to constitute real property, the necessary solemnities and sufficient legal forms must be employed, and that disposes of that point. Now they for the Respondent admit this; but then they say that this is not a newly created interest, but that the old interest still remained; that the interest still retained its heritable character till the price was paid: and this is the whole of the question.

It was argued very ingeniously at the bar, that the whole heritable interest was gone by the sale, and that the price was moveable although secured on land. But then, on the principle above mentioned, the whole of the heritable interest was not gone, but the lien still continued, and the vendor remained in possession of the estate until the price was paid. This corresponds with the words of Mr. Bell, who says, "The price may be allowed to remain unpaid, secured over the land. This security may be constituted, either by an heritable bond, or by *rendering the price a burden in the conveyance.* In the latter case, where the price is declared to be a real burden on the estate by reservation, not only is the purchaser's right burdened, but the seller's original right is reserved to the extent of the debt, so that the debt stands secured on the seller's own infeftment." And he afterwards observes, that "in the constitution of a lien by reservation there are two feudal estates. There is one **[72]** feudal estate conveyed to the purchaser, standing on his infeftment, but burdened with the price. The real right in the lands, for security of the price reserved in the person of the seller, forms another feudal estate standing on the seller's original infeftment."

I have looked at all the cases which have been mentioned, and in all there is this distinction, that when land is conveyed away without this heritable reservation, the heritable interest is gone, and the price becomes moveable. The law of Scotland differs in this respect from the law of England. In England the price remains a lien on the property; in Scotland it does not, except by this reservation. None of the cases has any bearing on this except one which deserves some notice. The case is that of *Waugh* v. *Jamieson* [Mor. Dict. 5524], which is relied on, to show that properly, a sum of money may be moveable although heritably secured. It is stated by the reporter, "In this case, the Lords came to the following resolutions; viz. 1. That it was consistent, that *a sum should be moveable, and yet that it should be heritably secured*, as in the case of bygone annual rents, due upon infeftment of annual rents; by bygone feu-duties, for which real action is competent, even to executors wadsets; loosed by requisition; etc. 2. That as to these qualities of moveable or heritable,

in relation to succession, the *animus* of the creditor has principally to be considered; so that if an heritable security were afterwards taken for a debt moveable *ab initio*, it is presumed, the creditor intended that the sum should belong to his heirs; *secus*, if his intention appeared to be otherwise, e.g. if a debtor should dispone his estate in favour of a confident person, with the burden of his debts."

[73] Now although this case had applied more immediately to the present than it does, it might still be said, that this is a mere *obiter dictum* of the Judges, and not entitled to the same degree of weight and consideration as if it had been a decision on the point in issue. But it really does not touch on this case at all. The instance given is that of bygone annual rents. An infeftment of annual rent, like a rent-charge here, is heritable, and the rents not become due descend to the heir; but to be sure when the rent has become due, when the fruit has fallen—it goes to the executor. So that this does not touch the price in this case, which is like an annual rent not due, and the resolution therefore might be cited in support of the present decision.

The interest in question is not large, but much confusion would be introduced if we were to decide that that should go to the executors which has hitherto gone to the heirs. It appears to have been the law and practice in Scotland that such interests as this should go to the heirs, and we ought not to disturb the settled rule. I propose, therefore, that the judgment be affirmed. It seems however to have been the intention of the seller that the price should go to the lady; although I do not mean to appeal to your Lordships gallantry, yet there is some hardship in the case, and I propose that the affirmance should be without costs.

Affirmed accordingly.

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[74]

APPEAL

From the Court of Session.

EWEN and others,—*Appellants;* BANNERMAN and others,—*Respondents.*

[Mews' Dig. iii. 298.; S.C. *sub nom. Ewen* v. *Ewen's Trustees*, 5 Scots R. R. (H. L.) 406, and see 4 Wils. and Sh. 346; 6 Shaw, 479.]

John Ewen by his marriage contract covenants that his whole property at the time of his death shall belong to the issue of the marriage. His wife dies in his life-time, leaving a daughter, an only child, who, when about twenty-one years of age marries a young man of about the same age, and in a year after a son is born of the marriage. The husband then proposes to go abroad to improve his fortune, and Ewen, who was then a prosperous trader, persuades him and his wife to execute a deed, in the nature of a post-nuptial contract, by which, in consideration of a sum of £315, they discharge him from all claims whatever on his property. They were at this time ignorant of the daughter's claims under her father and mother's marriage contract, and Ewen, attended by his man of business, brought them the deed to sign on the night of the husband's departure, and it was then executed. It was stated in the deed that Ewen had paid a moiety of the £315 at the time of the execution of the contract, and that the other moiety was to be paid after his death. But in point of fact he paid down nothing at the time of the execution, but only renounced a debt of £61 due to him from the husband for goods, and gave a promissory note for the other £96. Ewen lived for a considerable time after; and two days before his death, by a trust-deed of settlement, conveyed the bulk of his property, amounting to £14,000, to trustees to build an hospital.

The daughter's post-nuptial contract reduced on the ground of fraud and circumvention.

The trust-settlement provided that the fund should accumulate till it should amount to ——— sterling, when it was **[75]** to be applied to the building of the hospital, and to the maintenance of ——— boys, leaving blanks as to the amount of the accumulation, and as to the number of boys. This deed reduced on the ground of the uncertainty, as well as the fraud.

The deed directed that the hospital should be governed according to such rules and regulations as Ewen should, by a separate deed appoint (no such appointment made), or failing any such appointment, by the rules and regulations of another well-known hospital referred to. This would have been sufficiently certain, if the deed had been good in other respects.

Soon after the marriage of John Ewen and Janet Middleton in 1766, a post-nuptial contract was executed between them, which contained the following provision respecting the issue: "And in like manner if he the said John Ewen shall survive the said Janet Middleton, his spouse, and there be a child or children of the marriage in life at the dissolution thereof, he binds and obliges himself to aliment, maintain and educate the said child or children suitable to their station, until they are put in a way of doing for themselves, and that his subjects, whether heritable or moveable, shall belong to them equally at his death."

A few years afterwards the wife died, leaving issue a daughter and only child, Elizabeth Ewen, the principal Appellant.

In 1787 Miss Ewen married Mr. James Graham, and of this marriage a son was born in 1788. Mr. Graham, who was in straitened circumstances, proposed to go to India, where an opportunity presented itself of mending his fortune, leaving his wife and child at home in Aberdeen; and it was agreed that a small patrimony which belonged to him, and part of what his [76] wife was entitled to under her mother's marriage settlement should be formed into a joint fund, to make some provision for the wife and child during his absence. Ewen, the father, estimated his daughter's claims at £315, one half of which he agreed to advance immediately. With this view a deed, in the form of a post-nuptial contract was prepared, to which Ewen, on behalf of his daughter, and for his own interest, was a party. At this time the Appellant and her husband were both under twenty-one years of age, and it did not appear that either of them were aware of her claims under her mother's marriage contract. The material part of the deed was in these terms:

The parties considering that "the said James Grahame and Elizabeth Grahame, alias Ewen, his spouse, were lawfully married to each other upon the day of November 1787, and have lived together since that time as married persons, and that now a son is born, lawfully procreated of the said marriage, called John; and also considering that there was no contract of marriage entered into betwixt them, prior to the celebration of the marriage, and the said James Grahame intending soon to go abroad, where he may remain for some time in the prosecution of his affairs, he is desirous to make some suitable provision for his said spouse and family, according to his ability; and in like manner the said John Ewen, out of his own free will, and from the regard he bears to his said son and daughter, the parties have, with mutual advice and consent, concerted and settled upon the post-nuptial contract under written. Therefore in pursuance thereof the said John Ewen hath instantly, at the making thereof, satisfied and paid to the said James Grahame the sum of £157 10s., as one moiety of £315 sterling, [77] which he has agreed to give in name of tocher or dowry with his said daughter, of which moiety the said James Grahame and his said spouse hereby grant their receipt, and discharge the said John Ewen, his heirs, executors and successors thereof renouncing the except of not numerated money, and all other exceptions and objections on the contrary. And sicklike, the said John Ewen binds and obliges him and his foresaids to satisfy and pay to the said James Grahame, his heirs, executors, or assignees, the remaining moiety or half of the said tocher, being the like sum of £157 10s. sterling, and that at the first term of Whitsunday or Martinmas next, and immediately following, year and day after the decease of the said John Ewen, with a fifth part more of liquidate penalty in case of failure, and the annual rent of the said moiety, during the not payment after the term of payment thereof above written; and which whole sum of £315 sterling is hereby declared to be in full satisfaction to the said Mrs. Elizabeth Grahame alias Ewen, and her said husband, and they do hereby accept of the same, in full contentation to them of all goods, gear, debts, sums of money, and other moveables whatsoever which they might anywise ask, claim, or crave by and through the decease of the said Janet Middleton, her mother, by virtue of her contract of marriage with the said John Ewen, her father, or of any clause, article or condition therein contained, which

is hereby discharged, to all intents and purposes, as fully and effectually as if the same was particularly ingrossed, or by any other manner of way; or by and through the decease of the said John Ewen, her father, whenever the same shall happen at the pleasure of God, either as part of bairns gear, dead's third, portion-[78]-natural, or on any other cause or account whatsoever, good-will only excepted. And, on the other part, the said James Grahame gives, grants, assigns and dispones to and in favour of himself and the said Elizabeth Grahame, alias Ewen, his spouse, in conjunct fee and liferent, but for her liferent use allenarly, during all the days of her lifetime after his decease, in case she shall survive him, and to the said John Grahame their son, and any other child or children to be born of the said marriage, equally amongst them in fee; whom failing, to the said Elizabeth Grahame alias Ewen, her heirs, executors or assignees, all and whole the sum of £500 sterling, belonging, due and payable to the said James Grahame out of the first end of the sum and subjects left and bequeathed to him by the said deceased William Grahame of Morphie, his father; and obliges himself to make the said principal sum forthcoming to his said spouse and children, according to their several interests above specified; and, in the mean time, during his absence forth of this kingdom, to satisfy and pay to the said Elizabeth Grahame alias Ewen, his spouse, the legal annual-rent of the said principal sum, yearly and termly, at two terms in the year, Whitsunday and Martinmas, by equal portions, as a subsistence to her and her family, beginning the first term's payment thereof at the term of Whitsunday next to come, for the half year previous, and so forth yearly and termly during his absence forth of this kingdom as aforesaid."

Ewen the father, attended by his man of business, brought this deed to Graham and his wife on the 16th December 1788, being the night on which Mr. Graham left Aberdeen for India, and it was then executed.

Ewen the father survived till 1821; and two days [79] before his death, and while on death-bed he executed a settlement, by which he conveyed all his property, heritable and moveable, to the Respondents, as his trustees, for the purpose, first, of completing their titles to his property; secondly, of paying his debts; thirdly, of paying an annuity of £40 to the Appellant, Mrs. Grahame; fourthly, of paying an annuity of £10 to a servant; a legacy of £250 to Mr. Alexander Ewen, in America; a legacy of £525 to the Appellant's only son, Baron Grahame, and £110 to each of six charities in Aberdeen; and then the bulk of his fortune, amounting to about £14,000, was disposed of in the following way: "Fifthly, For payment to the magistrates and town-council of Montrose, the place of my nativity, and the ministers or clergymen of that town, of whatever sect or denomination of christians they may be, or to any one or more of their number who may be appointed by them (the said magistrates and council and clergymen) to receive the same, the sum of £6000 sterling for the foundation and establishment of an hospital in Montrose, similar to Robert Gordon's hospital in Aberdeen, for the maintenance, clothing, and education of the lawful sons and grandsons of decayed and indigent burgesses of guild and craftsmen, burgesses of the said town of Montrose; and which sum and interest, and profits arising therefrom, shall remain vested in the said magistrates and town-council and clergymen, and laid out or managed by them for the purposes aforesaid, under such rules, regulations and directions, as I shall establish and appoint by any separate deed or writing under my hand; and failing such deed or writing, under rules and regulations similar to those now existing for the government and management of Robert Gordon's Hospital in Aberdeen aforesaid, [80] with such additions to, or alterations thereon, as may be made by my said trustees, which they are hereby empowered to do; and which rules, regulations and directions, the said magistrates and town-council and clergymen shall be bound strictly to abide by and observe. And with respect to the rest, remainder and residue of my means, property and estate, including as a part thereof the foresaid legacy to the said Baron Grahame, my grandson, in the event of his death before his receiving the same, and also the sums to be secured and set apart by my said trustees, for answering and paying the foresaid annuities to my said daughter and the said Elizabeth Wallace, after the said annuities shall cease and determine, and be no longer payable, I hereby will, direct and appoint such residue and remainder to be paid or conveyed and made over by my said trustees to the said magistrates and town-council and clergymen of Montrose, or to any one or more of their number, authorized by them to receive the same, as an addition to, and to

be employed for the same ends and purposes with the foresaid legacy of £6000; declaring that the sum and residue shall be payable by said trustees at the first term of Whitsunday or Martinmas that shall happen twelve months after my decease, or as soon thereafter as the funds under trust can be realized: Also declaring, as it is hereby specially provided and declared, that neither the said sum and residue, nor any part thereof, shall be diverted at any time from the uses and purposes to which the same is hereby destined, or applied to any other use or purpose whatever; and the said magistrates and town-council and clergymen shall lend out the free balance of the interest and profits arising from the said sum and residue every year, on such heritable [81] or personal security as they may deem sufficient at the time, so as the same may accumulate, with the additional interest arising thereon, until the principal sums and accumulated interest shall amount to the sum of sterling, when the same shall be stocked, secured and employed upon land, bonds, obligations, or other sufficient security, from time to time, for erecting and maintaining the foresaid hospital, and for the maintenance, clothing and education of boys, of the description above mentioned, it being always in the power of the managers of the said funds, if they shall continue to increase, to augment the size of the hospital, and number of the boys to be maintained therein, as above mentioned: And they are also hereby empowered to pay such sums of apprentice fees for the said boys, and for fitting them out after their apprenticeships are expired, as shall from time to time be payable for these purposes, to boys educated in Robert Gordon's Hospital aforesaid."

The Appellants, as soon as they heard of this deed, determined to bring their action to reduce it: but anticipating that the trustees would rely in their defence on the discharge contained in their post-nuptial contract of the 16th December 1788, they included both deeds in their summons of reduction, which concluded, as to the marriage-contract of 1788, that it should be reduced, as having been obtained by gross fraud and circumvention on the part of the father; and as to the trust-deed, that it should be reduced for the following reasons, after the usual reason of style: "*Secundo*, The said disposition and deed of settlement was granted by the said deceased John Ewen, without any just, necessary or onerous cause, on the day of while he was on death-bed, and labouring under the disease [82] of which he died, to the prejudice of the Pursuer, as nearest and lawful heiress apparent to her said father as aforesaid. *Tertio*, The said deed is blank in the sums destined for the foundation of the foresaid hospital, and of the number of boys to be maintained, clothed, and educated thereat, whereby the will of the said John Ewen has not been declared, and therefore the said sums are intestate succession, and fall to the Pursuer as the nearest in kin to the said John Ewen, her father. *Quarto*, The foresaid disposition and deed of settlement was made and granted by the said John Ewen in prejudice of the foresaid contract of marriage entered into between him and the said Janet Middleton, his spouse, and was *ultra vires* of the said John Ewen when the same was granted." The Court, by its first judgment (January 1823), reduced both deeds; but afterwards on advising a reclaiming petition, they pronounced an interlocutor (Dec. 1823), in which "they adhere to the interlocutor reclaimed against, and refuse the desire of said petitions, in so far as relates to the reduction of the trust-deed executed by the said John Ewen, as having been granted *in fraudem* of his marriage-contract with Janet Middleton; but alter the interlocutor reclaimed against, in so far as it may be construed to the reduction of the marriage-contract entered into betwixt the Respondent and James Grahame, her husband, and find it unnecessary to reduce the said contract, in respect that the same does not import any discharge of the rights competent to the Pursuer on the death of her father, as heir of provision under her father and mother's contract of marriage, and decern and declare accordingly."

This last interlocutor was brought by appeal before the House of Lords by the Respondents; and their [83] Lordships adjudged, that the marriage-contract of 1788 did import a discharge of all the rights competent to the Pursuer, Mrs. Grahame, as heir of provision under her father and mother's contract of marriage, and with that finding remitted the cause.

The cause having again come before the Court of Session, the Lord Ordinary was of opinion, that the discharge in the contract of 1788 did not preclude the Appellants

from challenging the trust-deed, on the ground of death-bed, so far as the heritable property was concerned, and pronounced an interlocutor, reducing the trust-deed to that extent; and this interlocutor was acquiesced in by the parties, and allowed to become final. (Dec. 1825.)

The following are the notes of pleas in law put on the record for both parties:

Note of Pleas in Law for the Pursuers.

The discharge obtained by the late John Ewen, in the post-nuptial contract of marriage between the Pursuers, to which the said John Ewen was a party, and in which he stipulated for a discharge of all claims, at the instance of his daughter against him, were fraudulently obtained by deception practised upon the Pursuers by the said John Ewen, shortly after their majority, while they were in ignorance of their rights, and entirely under the influence of, and in dependence upon, the said John Ewen, the father of the Pursuer, Mrs. Grahame, and is reducible on the ground of the deception so practised upon them, and the utter inadequacy of the consideration.

French v. *Watson*, 18th February 1669.—Morrison's Dictionary, 4958. Stair, 1. 9. 79. Ersk. p. 694. *Ferguson* v. *Maitland*, July 26, 1729. *Gordon* v. *Crawford*, January 14, 1730.—See Craigie and Stew-[84]-art's Appeal Reports, vol. I. p. 1. Lochiel's Trustees, July 8th, 1795. *M'Neil* v. *M'Neil*, January,1816. *Murray* v. *Murray's Trustees*, January 21, 1826.—Shaw's Reports, vol. IV. p. 374.

II. The discharge in the foresaid post-nuptial contract of marriage does not exclude the right of the Pursuer, Mrs. Grahame, to reduce her father's trust-settlement as executed on death-bed. Stair, 422. 622.—Erskine, B. 4. t. i. sect. 27.—Irvine, December 15, 1744.—Elchies, No. 18. Death-bed.—Mor. Dict. 3332.

III. The law of death-bed applies to every deed, whether an alienation of heritable or moveable subjects.—Ersk. p. 651, s. 16. *Maxwell* v. *Nelson*, Feb. 1722.—Rem. Dec. 1, No. 32.—Kilkerran, Death-bed, No. 4.

IV. The trust-deed is reducible and ineffectual, because it is an incomplete and imperfect deed, being blank *in essentialibus*.

Note of Pleas in Law for the Defenders.

I. The facts and circumstances averred by the Pursuers are not relevant to establish fraud or deception, or circumvention of any kind, on the part of the late Mr. Ewen, in reference to the tripartite contract, or to warrant the reduction of that contract on any such grounds. The facts already admitted or proved instruct the said contract to have been a fair, just and onerous deed, as between the parties, and an advantageous arrangement for the Pursuers.

II. Mere inequality or inadequacy of consideration or lesion does not of itself justify any presumption of fraud.

III. The tripartite deed of 16th December 1788 was expressly homologated by the Pursuer by the [85] second factory executed by him, after his return to this country from America in 1793; and he is now barred from challenging the said deed on any ground whatever.

IV. The terms and declarations of the said second factory totally disprove the allegations of fraud now brought forward against Mr. Ewen.

V. All right and interest competent to the pursuer in the late Mr. Ewen's heritable or moveable estate was extinguished and taken away by the discharge contained in the tripartite deed; and she has no title to insist in any conclusion affecting the said estate, further than as the defenders have admitted her title, that is, *quoad* the heritage.

VI. The pursuers are now barred by the final interlocutor of 7th December 1825, and subsequent procedure, from insisting that the reduction of the deed of settlement on the head of death-bed shall be carried farther than as regards the heritage, as decerned for in the said interlocutor.

VII. Supposing this were open to the pursuers, the objection of death-bed does not affect the moveable estate.

The record being closed, the Lord Ordinary, after hearing counsel for the parties, pronounced the following interlocutor:

"The Lord Ordinary, having considered the closed record, and whole process, and having heard parties procurators fully thereon, finds that there is no evidence produced in process sufficient to establish that the subscription of the Pursuer, or of her husband, to their post-nuptial contract of marriage, was obtained by the fraud of her father, the late Mr. John Ewen, or that the consideration given by that deed, in return

for the Pursuer's discharge of her [86] rights under her mother's contract of marriage, was, considering the probable amount of Mr. Ewen's fortune at the time, unfair or inadequate; finds that there is nothing condescended on by the Pursuer which is relevant to infer such fraud, in opposition to the evidence to the contrary already in process; therefore sustains the defences against the reduction, in so far as regards the said deed, and assoilzies the defenders; finds that the discharge contained in the said deed bars the Pursuer from making any claim in the character of heir of provision under her mother's contract of marriage, and that it is only in the character of her father's heir at law that it can be competent to her to challenge his trust-settlement on the head of death-bed, in which character her right of challenge is limited to the heritage; therefore sustains the defences, and assoilzies the defenders from the reduction of the said trust-settlement, in so far as respects the moveable succession and decerns; repels the claim made by the Pursuer against the trustees, founded on Mr. Ewen's alleged intromissions with the £500, settled by Mr. Grahame on his wife and children by their marriage-contract, in respect the same is incompetent under the conclusions of the present action; but in the special circumstances of the case finds no expenses due."

The Appellants having reclaimed to the Inner House against the foregoing interlocutor, it was held that the Lord Ordinary ought to have pronounced a deliverance, in regard to the legal effect of the blanks contained in Mr. Ewen's trust-settlement; and accordingly, an interlocutor was pronounced of this date (12 Dec. 1827), "remitting to the Lord Ordinary to hear parties on the legal effect of the blanks in the trust-deed under reduction, upon the validity of the same, [87] and to proceed, in regard to the discussion of the point now remitted, as to his Lordship shall seem proper."

In consequence of this remit the Lord Ordinary heard the counsel for the parties at considerable length, and afterwards pronounced the following interlocutor and note (22 Dec. 1827): "The Lord Ordinary having, in terms of the remit by the Lords of the First Division of the Court, heard parties upon the legal effect of the blanks in the trust-deed under reduction, on the validity thereof: finds, that as these blanks do not occur in that part of the deed which gives directions to the trustees, pointing out the uses to which they are to apply the trust-funds, they cannot have the effect of annulling the trust-conveyance, whatever they may have in vacating the bequest to the magistrates and clergy of Montrose, for the purpose of erecting and maintaining an hospital; but further finds, that the omission to fill up the said blanks is not sufficient to vacate the said bequest, and that the same is notwithstanding effectual." "Note.—It appears from that part of the trust-deed, which is intended to mark out the powers and duties of the managers of the hospital, that the testator had been aware that the funds destined for this purpose might not be sufficient for carrying his object into immediate execution, and that he intended to allow them to accumulate for a certain time. It appears further, that he intended to limit this accumulation, by fixing the sum at which it was to stop; but that, not having made up his mind when the deed was executed, the sum was left blank, and that he died without having had it filled up. The question, and it is one of considerable difficulty, comes therefore to be, whether or not is the uncertainty thereby created, [88] as to the period of accumulation, and of course, as to the size and extent of the hospital at its commencement, or the consideration, that the testator's intention of fixing these himself has not been carried into effect, sufficient to render void his declared purpose and object of founding an hospital?

"The Lord Ordinary thinks it can scarcely be maintained, that the testator's failure to complete any direction, however minute and trifling, as to the management of the hospital, which it may appear he had intended to give, can have such an effect. Thus, suppose (to take the cases put by the Defendant,) that in pointing out the dress to be worn by the boys, he had declared that they were to wear cloth of a colour, or that they were to have a flesh-dinner on days of the week, and that he had died before filling up these blanks, it will not surely be held that such an omission would have totally defeated his main purpose, and carried the funds to his heirs-at-law. But if this cannot be maintained, then some other criterion must be resorted to, and the Lord Ordinary cannot see any line of distinction but one founded on the importance of the omission. He conceives such blanks will only be fatal which render un-

certain either the object and purpose of the bequest, the person in whose favour it is made, or the amount of the sum bequeathed, or, at least, that the direction which was intended to be given must be of that nature and importance, that it is reasonable to presume the testator would not have inclined to leave the legacy, unless accompanied by the direction.

" In the present case it does not appear to the Lord Ordinary that the blanks in the deed are of that importance. The amount of the legacy to be [89] paid by the trustees is clear and certain. The persons who are to reap the benefit are distinctly specified; and the nature and the quality of the maintenance, clothing, education, and apprentice fees which they are to receive are fixed by reference to another hospital, to which the new one is in all these respects to be similar. Even had the clause as to the extent of the accumulation been altogether omitted, there seems to be direction sufficient to regulate this matter in a previous part of the deed, where the testator directs that the sum bequeathed, with the interest and profits arising from it, shall remain vested in the managers, ' and be laid out and managed by them for the purposes foresaid,' under such rules and regulations as he should afterwards make; or, failing such, under rules similar to those existing for the management of Gordon's hospital, ' with such additions to, or alterations thereon, as may be made by my said trustees, and which they are hereby empowered to do.' So that there does not appear to be much necessity for the interference of a Court of Equity to supply the defect. It may be further observed, that the uncertainty of the period of accumulation is reduced within comparatively narrow limits by the operation of the Act of the 39th (and 40th) Geo. 3, c. 98, by which such accumulation is restricted to the period of twenty-one years from the time of the testator's death. The blank as to the number of boys seems of little moment, as this fell to be regulated by the ultimate amount of the fund, and the number is allowed by the testator to be afterwards augmented, as the funds may permit."

To this judgment of the Lord Ordinary the Court adhered, and the Pursuers appealed; and the cause [90] having been heard in November 1830, Lord Wynford moved the judgment of the House.

Lord Wynford (16 Nov. 1830): This, my Lords, is undoubtedly a case of very great importance, and it has received from every one of your Lordships now present the consideration which such a case deserves. The case arises out of a family transaction connected with the situation of the family of a person of the name of Ewen, now dead. Upon his marriage with his wife he made a settlement, which contained the following provision in favour of the wife and the issue: " And the residue of his whole subjects, whether heritable or moveable, shall belong to the said children equally; declaring hereby, that in the case the said child or children shall afterwards die in minority, without lawful issue of their bodies, and during the life-time of the said Janet Middleton, their mother, then the general disposition before written, conceived in her favour, shall revive and return to its full force and effect, and she shall have the entire and free disposal of the whole effects and subjects, whether heritable or moveable, thereby conveyed, alike as if there had not been a child of the marriage in life at the dissolution thereof. And in like manner, in case the said John Ewen shall survive the said Janet Middleton, his spouse, and there be a child or children of the marriage in life at the dissolution thereof, he binds and obliges himself to aliment, maintain and educate the said child or children, suitable to their station, until they are put in a way of doing for themselves; and that his subjects, whether heritable or moveable, shall belong to them equally at his death."

Under this instrument I consider that there was [91] a complete vested interest in this property at his death (for this instrument was made to take effect at his death) in the person of the present Appellant. In about a year, or a little more, after the marriage, the deed, which is the first deed challenged, was entered into between these parties. It is no where ascertained for why this deed was presented to the young man and young woman at ten o'clock of the night on which one or both of them were leaving their native country, perhaps for ever, and when they were therefore probably in a state of considerable agitation; why it was then presented to them for the first time, instead of being presented to them at the intermediate period that had elapsed between their marriage and that time.

But let us look at the deed itself.

"At Aberdeen, the 16th day of December, in the year 1788, it is contracted and finally ended and agreed upon betwixt the parties following, viz. James Grahame, presently residing in Aberdeen, youngest lawful son of the deceased William Grahame of Murphy, esq. on the one part, and Mrs. Elizabeth Grahame *alias* Ewen, his spouse, lawful daughter and only child of John Ewen, merchant in Aberdeen, procreate betwixt him and the deceased Janet Middleton, his spouse, with the special advice and consent of her said father, and the said John Ewen, for himself, his own right and interest, on the other part, in manner and to the effect following; that is to say, the said parties considering that the said James Grahame and Elizabeth Grahame *alias* Ewen, his spouse, were lawfully married to each other, upon the day of November 1787 years, and have lived together since that time as married persons; and that now a son is born, lawfully procreated of the said marriage, called [92] John; and also considering that there was no contract of marriage entered into betwixt them prior to the celebration of the marriage, and the said James Grahame intending soon to go abroad, where he may remain for some time in the prosecution of his affairs, he is desirous to make some suitable provision for his said spouse and family, according to his ability: and in like manner the said John Ewen, out of his own free will, and from the regard he bears to his said son and daughter, the said parties have, with mutual advice and consent, concerted and settled upon the post-nuptial contract under written: Therefore, in pursuance thereof, the said John Ewen hath instantly, at the making hereof, satisfied and paid to the said James Grahame the sum of £157 10s. sterling, as one moiety of £315 sterling, which he has agreed to give, in name of tocher or dowry, with his said daughter, of which moiety the said James Grahame and his said spouse hereby grant the receipt, and discharge the said John Ewen, his heirs, executors and successors thereof, renouncing the exception of not numerated money, and all other exceptions and objections in the contrary: and siclike, the said John Ewen binds and obliges himself, and his foresaids, to satisfy and pay to the said James Grahame, his heirs, executors or assignees, the remaining moiety or half of the said tocher, being the like sum of £157 10s. sterling, and that at the first term of Whitsunday or Martinmas next and immediately following year and day after the decease of the said John Ewen, with a fifth part more of liquidate penalty in case of failzie, and the annual rent of the said moiety during the not-payment after the term of payment thereof above written; and which whole sum of £315 sterling is hereby declared [93] to be in full satisfaction to the said Mrs. Elizabeth Grahame *alias* Ewen and her said husband; and they do hereby accept of the same, in full contentation to them of all goods, gear, debts, sums of money, and other moveables whatsoever, which they might anyways ask, claim, or crave by and through the decease of the said Janet Middleton, her mother, by virtue of her contract of marriage with the said John Ewen, her father, or of any clause, article or condition therein contained, which is hereby discharged, to all intents and purposes, as fully and effectually as if the same was particularly ingrossed, or by any other manner of way, or by and through the decease of the said John Ewen, her father, whenever the same shall happen, at the pleasure of God, either as bairns part of gear, dead's third, portion-natural, or on any other cause or account whatsoever, good will only excepted; and, on the other part, the said James Grahame gives, grants, assigns and dispones to and in favours of himself and the said Elizabeth Grahame *alias* Ewen, his spouse, in conjunct fee and life-rent, but for her life-rent use allenarly, during all the days of her life-time after his decease, in case she survive him, and to the said John Grahame, their son, and any other child or children to be born of the said marriage, equally amongst them in fee; whom failing, to the said Elizabeth Grahame *alias* Ewen, her heirs, executors or assignees, all and whole the sum of £500 sterling, belonging, due and payable to the said James Grahame out of the first end of the sums and subjects left and bequeathed to him by the said deceased William Grahame of Murphy, his father, and obliges himself to make the said principal sum forthcoming to his said spouse and chil-[94]-dren, according to their several interests above specified."

The deed sets out with a most important recital, because it shows that the father took care of the interests of his daughter as far as the husband was concerned, but the sequel shows also how he took care of both daughter and husband, as far as his own interest was concerned. One of the considerations for the deed was the husband's

settling £500 on the wife, which he did, and it was under these circumstances that Ewen says, "Therefore the said John Ewen hath instantly, and at the making hereof, satisfied and paid to the said James Grahame the sum of £157 10s." Now that was positively false. He had not then satisfied and paid a single farthing. What he did was merely to renounce a debt of £61, due to him from Grahame, for goods, and to give a promissory note for the other £96. The deed therefore recites a positive falsehood, which, beyond all doubt is one of the strangest *indiciae* of fraud.

The deed is made to declare that they accept of the £315, in full satisfaction of the daughter's claims under the marriage contract of her mother and father. And then, what is it they really accept in full satisfaction? a promissory note for £96, and goods to the amount of £61; for as to the other £157, they had no real security for it—nothing to prevent his wasting it or disposing of it, as he might any other part of his property. All that they have got, therefore, is £157 in this manner, not in money, but partly in goods of some sort or other, of which the true value is never ascertained, and partly by a promissory note. And with respect to the other £157, they do not stand in the least in a better situation than under the father and mother's original [95] settlement, for they have only his personal security. Now take it that they were entitled only to £315, is not this a fraud on this young woman, then only twenty-one years of age, to obtain from her a discharge of that £315 for the sum of £157, and that paid in the manner which I have stated. It seems to me that any one who looks at this deed, having regard to the circumstances under which it was made, must be satisfied that it is, on the face of it, fraudulent. It begins with the recital of a falsehood, and what is worse, if any thing can be worse, it evidently shows that a gross and abominable advantage was taken of these young persons, for it does not put them in the least in a better situation than they were in before. If it had given them any heritable charge, or any good security that this property should be forthcoming afterwards, it might be said that this was a gainful bargain. But nothing of that kind was done; and I say therefore, that this deed is, on the face of it, fraudulent. If that be so, then the interlocutor that has been pronounced by the Lord Ordinary, and adhered to by the Court below, ought to be reversed.

I have felt some difficulty in this case, as I always do in reversing decisions of the Court below; but I have here the satisfaction to state that the Lord Ordinary and the rest of the Court, in the first instance, pronounced a different judgment. Now I am not one of those who think that second thoughts are always best; I am of opinion that first impressions are often best. We reason upon them afterwards, and sometimes we refine and refine until we get rid of those strong, plain, and intelligible principles by which we ought to be governed; and I wish that in this instance the Court below had adhered to their original determination, and then the parties would have been saved the [96] trouble of preferring these different appeals which have been attended with such enormous expense.

If I had thought that any thing could have been gained by an issue, I would unquestionably have sent this case to a jury. But this question comes before us to be inquired into, after all those who could give the best account of the matter have fallen into the grave; and I am afraid that it would now be useless to direct an issue. I do not abstain from sending the question to a jury, because I have not the highest respect for the Jury Court of Scotland, and particularly for the learned, and intelligent, and excellent person who presides in that Court. But neither he nor the jury can get at the facts by a trial, unless there are witnesses to state them, and witnesses cannot be had in this case, for the reasons which I have stated.

But besides this, there is another point on which the case might be decided. By this instrument, one of the most extraordinary I have ever seen, and one executed under circumstances the most calculated to excite suspicion that I have ever known, the lady released every right of every description which she had, and which it was possible for her to release—a circumstance which, in my mind, goes very far to show that an undue advantage has been taken of her. If the deed, with the discharge, be valid, it put her into this situation that it gave to her father, Mr. Ewen, a power to dispose of this property, which otherwise he had not by law, because by law a portion of it was secured to her, independently of the first deed. If he has legally disposed of it, it is gone, and the daughter cannot now be heard to dispute the transaction. And that brings us to the question—has he legally disposed of the property? I am of

opinion that he has not legally disposed of it; and that the deed by which he attempted [97] to rob his family, in order to procure for himself an empty name, is a void instrument. I wish we could find some mode of getting rid of all deeds of this description, by which people cheat their families of the property which belongs to them, in order to make it a sacrifice to their own vanity.

I am of opinion that the deed is void on the ground that it is too uncertain to be carried into execution. It is impossible—I defy any Judge to give directions on which it can be carried into execution. I agree with the learned Lord in the Court below, who says that a little confusion or ambiguity is not to vacate a deed. God forbid that it should; for if it did, few would be the deeds that would stand. I say, and I state this as my principle, that in order to vacate a deed on the ground of obscurity, the obscurity must be such as to render it impossible to put such a construction upon it as that it can be carried into execution; and I will even go this length, that if any part of it can be well executed, that part ought to stand, if it be not controlled by something else. But I put the case on this ground, that the deed cannot be executed at all; and I undertake to demonstrate this to your Lordships.

This deed, dated October 1821, was made two days before the death of the maker; but I do not put the objection at all on the ground of death-bed, because, as has been properly observed, that objection does not properly apply to personal property. But it appears that two days before his death, and while on his death-bed, he executed a deed of settlement, which, after making some small provisions for some members of his family, and some small bequests to certain charitable institutions, proceeds as follows: "For payment to the magistrates and town-council of the town of [98] Montrose, the place of my nativity, and the ministers or clergymen of that town, of whatever sect or denomination of Christians they may be, or to any one or more of their number who may be appointed by them to receive the same, of the sum of £6000."

Now here, to apply my own principle, I say, that if we could see how to apply the £6000, but could not see how to apply the residue, and the accumulations on the residue of the property, I should have said that the deed might be good as to the £6000, although bad as to the rest. But I will show your Lordships that the £6000, and the residuary property must all go together by the words which create so much confusion. "For the foundation and establishment of an hospital in Montrose, similar to Robert Gordon's hospital in Aberdeen, for maintenance, clothing, and education of the lawful sons and grandsons of decayed burgesses, etc. of the said town of Montrose; and which sum, and interest and profits arising therefrom, shall remain vested in the said magistrates, etc. to be laid out for the purposes aforesaid, under such rules, etc. as I shall appoint by my separate deed or writing under my hand, (he did no such thing,) and failing any such deed or writing, under rules and regulations similar to those now existing for the government and management of Robert Gordon's hospital in Aberdeen aforesaid."

As to the rules for the government and management of the charity, which the maker of this deed wished to establish, I think the deed sufficiently clear on that subject, if we only know when the trustees are to begin to have any thing to manage, since they are directed to regulate themselves according to the rules and regulations of Gordon's hospital, and with such additions to or alterations thereon as might be made by [99] the trustees, and which they were empowered to make. This, on the authority of a case which I shall mention by and by, is quite sufficient; and most persons who make dispositions of this kind give to those who have to execute the trust authority to make such regulations. Then he goes on to say, "and with respect to the rest, remainder and residue of my means, property and estate, etc. I hereby will, direct and appoint such residue and remainder to be paid, or conveyed and made over by my said trustees to the said magistrates and town-council, and clergymen of Montrose, or to any one or more of their number authorized by them to receive the same, as an addition to and to be employed for the same ends and purposes with the foresaid legacy of £6000: declaring, that the said sum and residue shall be payable by my said trustees at the first term of Whitsunday or Martinmas that shall happen twelve months after my decease, or as soon thereafter as the funds under trust can be realised: Also declaring, as it is hereby specially provided and declared, that neither the said sum and residue, nor any part thereof, shall be diverted at any time from the

uses and purposes for which the same is hereby destined, or applied to any other use or purpose whatever; and the said magistrates and town-council, and clergymen, shall lend out the free balance of the interest and profits arising from the said sum and residue, every year, on such heritable or personal security as they may deem sufficient at the time, so as the same may accumulate, with the additional interest arising thereon, until the principal sums, and accumulated interests, shall amount to the sum of £ sterling, when the same shall be stocked, secured and employed upon lands, bonds, obligations, or other sufficient security, from time to **[100]** time, for erecting and maintaining the foresaid hospital, and for the maintenance, clothing and education of boys of the description above mentioned."

Your Lordships will therefore observe that the £6000 and the residue were to be put out in the manner directed, at interest, and that the interest was to go on accumulating till it amounted to sterling; and till it has accumulated to the sum of sterling the trustees can build no hospital, and can do no act whatever in the execution of this trust. Now when does the fund amount to this sum of blank pounds? Is it after the national debt shall have been paid, or before? No human being can possibly tell. I say then, that unless you can give some meaning to the blanks it is a trust that cannot by possibility be executed. A noble Lord once said, on the very seat in which I am now sitting, that it was not for wise people to put fools nonsense into sense; but it is impossible for any person, wise or otherwise, to put any construction upon this. Then the deed says also, for the clothing, maintenance, etc. of boys. How many boys? One? One hundred? or One thousand? The sums constituting the provisions, and the objects to be provided for, are equally uncertain. If the sums and objects had been certain, the rules and regulations are sufficiently provided for; but they can never be called into existence till you get rid of the difficulties which I have mentioned. I think this deed is to be accounted for in this way: This man, when he executed this deed, was within two days of the period of his death, but did not think that he was to die so soon, for at the time he contemplated the execution of another deed by which certain directions were to be given to the trustees. What is the inference from that? That this **[101]** poor man, not thinking he was so near his end, left the instrument in this imperfect state, contemplating that it would please Providence to allow him time to complete it, but such was not the case.

My Lords, we have been referred to one case on this subject, and to one case only; and I think I have already given an answer to that case, by stating, that in this case if any part of the deed could be executed it ought to be executed, although the rest should be incapable of execution. The case I allude to was decided by your Lordships, when you were assisted by a learned Judge, whose decease we all lament, I mean that excellent man the late Lord Gifford, and I subscribe to every syllable that was said on that occasion by his Lordship. Now what was that case? In that case, Hill and others were Appellants, and Burns and others were Respondents, and it was of this description: Alexander Hood, of the island of Montserrat, after bequeathing certain legacies, conveyed the residue of his estate, real and personal, amounting to £30,000 to his sister Mary Hood, of Glasgow, and her heirs, for ever. Thereafter she executed a trust settlement in favour of the Respondents as trustees, in which, after giving legacies to different individuals, she directed the residue of her estate—the residue as it existed at the time—which makes a great difference between that case and the present—to be applied to charitable purposes in these terms: "I appoint the residue of my said estate to be applied by my said trustees, and their foresaids, in aid of the institution for charitable and benevolent purposes established, or to be established, in the city of Glasgow, or neighbourhood thereof, and that in such way or manner, and in such proportions of the principal or capital, or of the interest or annual proceeds of the sums so to be appropriated **[102]** as to my said trustees and their foresaids shall seem proper;" declaring, "and I hereby expressly declare that they shall be the sole judges of the appropriation of the said residue for the purposes aforesaid." Now what was the question in that case? It was argued that it was necessary that the Lady should have distinctly stated who were the objects of her bounty, and Lord Gifford said, No, it is not necessary for the Lady distinctly to state who are the objects of her bounty. She says it is in aid of all the charitable institutions existing, or which are hereafter to exist in Glasgow; and in order that there may be no un-

certainty she leaves it to the trustees to decide who were to be the objects of her bounty. Now your Lordships perceive that there is not that uncertainty in that case which exists in the present. There the extent of the fund was ascertained, and the power over it was given to trustees, and the mode in which it was to be managed and applied was left to their discretion. In the judgment in that case Lord Gifford goes into a learned argument, and refers to a great many cases, with which I shall not trouble your Lordships, but every one of them stands on the same principle as that which Lord Gifford decided; and that was, that there were a certain fund; and the only ambiguity was as to the appropriation; and in all these cases that difficulty is got over by a large discretion vested in the trustees; but here no discretionary power is vested in the trustees. If it had been said in this deed, "the trustees shall begin to build as soon as they shall have accumulated such a fund as they think equal to the purpose," that, in my view, would have obviated the difficulty, because then the time when the hospital was to be built would be left to the discretion of the trustees; but there is no such discretionary power left with them, **[103]** or with any body else, and it was quite uncertain what Ewen's own intention was on the subject.

It is with regret that I feel it my duty to advise your Lordships to reverse the decision of the Court below, for which I have the greatest respect, but in doing so I, most conscientiously, exercise my own judgment. I have done so in this case, which I considered of so much importance, that during a large portion of the night which has intervened between the time when this case was under discussion yesterday and this morning, it has occupied my thoughts; and after having given it the most attentive and anxious consideration, I feel myself bound to recommend to your Lordships to reverse the judgment of the Court below, and to declare that the two deeds which I have mentioned ought to be reduced.

Judgment reversed accordingly.

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[104] APPEAL

FROM THE COURT OF SESSION.

STEVENSON,—*Appellant*; ROWAND,—*Respondent*.

[Mews' Dig. xi. 968; S.C. 5 Scots. R.R. (H.L.) 317; and see 4 Wils. and Sh. 177; 5 Shaw 903; 6 Shaw 272. Cp. 6 Cl. and F. 202; and *Clark* v. *Sim*, 1833, 6 Wils. and Sh. 452.]

A law agent employed to prepare an heritable bond states the manner of holding in this way; the grantor is taken bound "to infeft and seise the said Henry Wardrob and his foresaids, on our own expenses, in the lands and others above disponed, to be holden *from me, of and under my immediate lawful superiors thereof*, in the same manner as I hold the same myself, and for payment of the same feu-duties as I pay or am bound to pay therefor."

The agent neglects to procure confirmation from the superior, in consequence of which his employer, the grantee, loses his money.

Held by the House of Lords, affirming a judgment of the Court of Session, that this was a public holding, and invalid for want of confirmation; and that the agent, having chosen to depart from the usual practice of introducing the double manner of holding, and having neglected to procure confirmation, was bound to make good the loss.

Secus, if it had been a mistake in a nice and difficult point of law.

Rowand, a banker in Glasgow, being willing to advance £1000 in loan to Mr. Campbell, of Lochend, on heritable security, and not wishing that Mr. Campbell should know that the money came from him, employed Stevenson, a writer in Glasgow, to offer the loan to Mr. C. in the name of a Mr. Wardrob, a partner of Rowand. Mr. C. accepted it, and Rowand employed Stevenson to prepare the security. The **[105]** security was prepared and executed in December 1817, and handed over to Mr. Rowand, who thereupon advanced the money to Mr. C. There was some dispute afterwards whether it was handed over to Rowand by Stevenson as a complete and valid security over the lands. It appeared that Stevenson had said to Rowand at the time, that something remained to be done; but it turned out that

this referred merely to an assignation of the security to be made by Wardrob to Rowand, which was accordingly made.

In August 1820, Sir Colin Campbell, and a Captain Patrick Campbell, lent Mr. C. £5250 on security of the same lands of Lochend. Afterwards Mr. C. became embarrassed; the value of land was depressed; and it was found that the price that could be got for the estate of Lochend would not nearly pay the money secured on it; and the result was, that a sequestration was applied for and awarded.

Sir C. and Captain Campbell then looked narrowly into the prior securities, and discovered, that in the heritable bond in favour of Wardrob this was the only manner of holding introduced; viz. Mr. C. was taken bound "to infeft and seise the said Henry Wardrob and his foresaids, in the lands and others above disponed, to be holden *from me of and under my immediate lawful superiors thereof*, in the same manner as I hold the same myself, etc." There was no charter of confirmation. The precept of sasine which followed made no mention of any particular manner of holding, but simply granted warrant to infeft Wardrob, his heirs and assignees, in the lands mentioned in the previous part of the deed.

The state of the law, and the practice on the subject, was thus described in the case for the Respondent Rowand.

[106] "According to the feudal usages adopted in Scotland all heritable property is supposed to be held under some superior or over-lord. It sometimes, though rarely, occurs, that the immediate superior, when he conveys or feus his property, prohibits the disponee or vassal from sub-feuing the lands, or from granting any conveyance of them, to be held of himself, or of any other superior than the one by whom the original conveyance is granted. Even when such a clause, prohibiting sub-infeudation, occurs in a title, it is not held to apply to heritable securities, which are mere burdens upon the property, and which are in general expressly excepted in such prohibitory clauses. Accordingly, the uniform practice of preparing heritable securities is to grant an obligation engaging to infeft the disponee or lender of the money, by the double manner of holding, either of and under the grantor's superior, which is called a public holding, or of and under the grantor of the bond himself, which is called a base holding. This last creates a species of sub-feu, which, as soon as the infeftment is recorded, is effectual against all third parties. If a public holding be intended, the infeftment is not good till confirmed by the superior under whom the lands are to be held, because no one but himself can authorize, or grant warrant, for such an infeftment. Even where there is the most express prohibition against sub-infeudation, the uniform practice is to grant warrant for the double manner of holding; because the base holding, though not good against the original superior, is effectual against all the world beside. It is the uniform practice, therefore, in preparing heritable securities, to create a base holding, not merely because it is a very rare occurrence in any set of title-**[107]**-deeds to find this prohibited, but also because, where this occurs, the superior has generally no interest to challenge it, and no other person can do so. On the other hand, no cautious and intelligent practitioner ever thinks of framing an heritable security, with a public holding only, because till the infeftment shall be confirmed by the superior, it is utterly invalid. Accordingly, till recently, no example of this kind had occurred in practice; but some law agents in Glasgow, either from ignorance of the feudal usages, or from a desire to innovate upon established forms, or from mere inadvertence and carelessness, have prepared heritable securities, omitting the base holding, and giving infeftment to be held of the grantor's superior, while, at the same time, they have neglected to apply for or obtain the superior's confirmation to this proceeding. The consequence is, that the intervening bankruptcy of the grantor of the bond, before such confirmation was obtained, has rendered the security altogether void and useless. That such a blunder is a very gross one on the part of any legal practitioner cannot be doubted. Every style-book, as well as the invariable practice of all men of business, would be sufficient to show any person, of the most moderate acquirements, (even though he were totally ignorant of the principles which regulated the different clauses), how a proper heritable security should be framed."

Sir Colin and Captain Campbell therefore objected to Wardrob's security that it must be postponed to theirs, as it was a public holding unconfirmed, on which there could be no valid infeftment in the lands. But in answer to this it was urged, that

as the precept of sasine was general and indefinite, and made no [108] reference to the manner of holding, the infeftment upon it might be considered as applying to a base holding and constituting a base fee. On the other hand it was contended, that the precept of sasine must be construed in reference to the manner of holding specified in the previous part of the deed, and that the sasine was therefore null without confirmation by the superior. The point was brought before the Court by petition from Sir Colin and Captain Campbell, praying that Wardrob might be postponed in the rouping of the creditors; in other words that it might be found that his infeftment was not a base infeftment, but a public infeftment unconfirmed.

"When this point came first to be discussed before the first division of the Court of Session, a considerable difference of opinion prevailed upon the Bench. Two of the Judges were of opinion that, as the precept of sasine made no reference to any manner of holding, the infeftment might be construed base; but the majority were of a different opinion, and held, that where any manner of holding was specified in the deed, the precept of sasine, and the infeftment following upon it, must necessarily be construed in reference to this manner of holding; and, consequently, that Mr. Wardrob's infeftment was null till confirmed by the superior. All the Judges, however, concurred in opinion that the agent who in preparing such a security had deviated so far from the ordinary form as to raise such a question, was much to blame. When it was so easy to avoid any question, and to render the security undoubted, by merely inserting the usual clauses to be found in every style-book, an agent who deviated from the common course incurred much responsibility; and even though his new form might not have been [109] found to invalidate the security, he was unquestionably to blame for preparing it in such a strange manner as to raise a question regarding it, and to involve his employer in a litigation as to its validity.

"The question at issue appeared doubtful to some of the Judges, and there was a natural leaning to support, if possible, a security, of which the competing creditors had full knowledge, when they lent their money to Mr. Campbell. The Court, accordingly, upon advising a reclaiming petition for the present Respondent, with answers for Sir Colin and Captain Campbell, being desirous to sift the matter to the bottom, and to ascertain whether legal grounds might not be found for supporting the security in question, appointed a hearing in presence. But the result of this hearing was to satisfy all the Judges, with the exception of Lord Hermand, that the blunder which had been committed by the Appellant was fatal to the security, and that it was impossible consistently with feudal rules, to hold the infeftment in question as a base infeftment, or in any other light than as a public infeftment unconfirmed; or, in other words, as a mere nullity. The security, therefore, which the Respondent had employed the Appellant to prepare, was set aside."

Rowand then having obtained his assignation from Wardrob brought his action of relief, and had judgment (February 1828) in his favour, and from this judgment Stevenson appealed, and the material reasons assigned for him were these:

"A law-agent is bound to obey the instructions given to him by his employer, and if he exceed or fall short of these instructions, he may be justly made liable for the damages which result from his [110] disregard of them. But if he strictly adhere to these instructions, no responsibility can attach to him. Now, in the present case, the Appellant was instructed to prepare an heritable bond and disposition in security by Mr. Campbell to Mr. Wardrop, with a sasine on that bond, and an assignation by Mr. Wardrop to the Respondent. He was not instructed or empowered to do more; and all this he performed. The Respondent has not offered to prove that his instructions were more ample than they are now stated, and therefore he has no claim on the ground of disobedience to instructions."

"Even if the Appellant had delivered the security to the Respondent as complete, he could not have justly been made liable for the debt, because a law agent is not responsible for an error in cases admitting of reasonable doubt, but is liable only for gross neglect or ignorance. The security, as it actually stood when delivered to the Respondent, although not completed in the manner desired and proposed by the Appellant, was, in the opinion of the most eminent of the Profession, sufficiently valid. The professor of law, when consulted with regard to its validity, thus expressed himself: 'I cannot hold the obligation to infeft as expressed in this deed

to be conclusive in characterizing as a public infeftment only, a seisin which has been taken on an indefinite precept, granted as the bond bears, "to the end that the said H. Wardrob may be immediately infeft." I take this precept to be perfectly sufficient as a warrant for an immediate base infeftment, and that therefore *Mr. Wardrob's security is unexceptionable.*' Lord Balgray, when the cause was first advised, was of the same opinion with the **[111]** learned professor. 'The question then is,' said his Lordship, 'how are we to interpret this precept? Is it an indefinite precept, which is applicable either to a base or a public holding, or is it confined to the latter species of holding? I am of opinion that it is an indefinite precept, and, therefore, that *the sasine taken upon it confers a good and effectual right.*' At the same time advising the Lord President agreed with Lord Balgray: 'The infeftment,' said his Lordship, 'is given in order to vest the right of property; and the precept shows that the disponer unquestionably meant to grant two modes of holding. Now in the case of Graham, Lord Braxfield held, that, although there was a public holding, yet the precept of sasine made Mr. Graham and his ancestors to hold base. That judgment was acquiesced in. I am therefore of opinion that *there is here an effectual base holding, and consequently a good security in favour of Rowand.*' And at the last advising Lord Hermand, who had formerly expressed a different opinion, came at last to be convinced that the infeftment was to be considered as a base infeftment, and therefore valid. And admitting that this was a nice and difficult question, his Lordship concluded with stating: 'Perhaps if the word *allenarly* had been introduced here this might have limited the disposition to a public holding. There is an authority in Lord Stair to that effect. I am therefore *for altering the interlocutor;*' that is, for finding that the security was valid. Now, when so many eminent persons, distinguished by legal knowledge and abilities, were of opinion that this security, as it stood, was valid, it would be inconsistent with the principles of law and justice, to hold that a conveyancer who has only **[112]** erred along with them, should be visited for his error with the heavy penalty of making good the debt. The general rule is, that a professional man *spondet peritiam artis;* but he is not required to possess the highest degree of skill which any judge or lawyer can possess. If the matter be such, that judges and lawyers may hold different opinions concerning it without impeachment of that knowledge and talents, the mistake of a law-agent on such a point does not indicate that his skill is less than that which the law requires of him. This is the doctrine in both parts of the island. In the Scotch case of *M'Lean* v. *Grant*, 15th Nov. 1805 [No. 2, App. Reparation], the report bears that 'the general doctrine of the responsibility of a man of business by error, arising from *gross ignorance*, or *wilful negligence*, was recognized by all their Lordships. The difference of opinion in this case regarded entirely the degree of blame to be attached to the Defender, which a majority of the Court ultimately thought not to be of such an extent as to subject him in damages.' In the English case of *Pitt* v. *Yalden* (Burr 200), Lord Mansfield said, 'An attorney ought not to be liable *in cases of reasonable doubt.*' In *Baker* v. *Chandless* (3 Camp. 97), Lord Ellenborough laid it down, 'That an attorney is only liable for *crassa negligentia.*' But *crassa negligentia* cannot be urged against the Appellant; and the opinions above quoted show that there was room at least for reasonable doubt. Indeed, the diversity of opinions on the bench in the case of *Grant* v. *M'Leay*, 1st Jan. 1791 [Bell's Cases, 319], was held sufficient to excuse the agent. His defence was rested on the difficulty of the professional question, which he proved by the fact, that in the original question the judgments of the Court had varied, and this was **[113]** sustained a justification. The case of *Lang* v. *Struthers* [2 Wils. and Sh. 536; 4 Scots R.R. (H.L.) 965], decided on appeal during the last session, is not adverse to the Appellant; for it differed from the present case in many points, and particularly in this material respect, that Mr. Lang had the title-deeds before him when he prepared the security, and saw that they contained an express prohibition of the holding *de me.* Without a confirmation, therefore, he saw that an infeftment in the property was ineffectual; and yet he omitted to take this step, or to advise it to be taken. But in the present case, the titles contained no such prohibition; and, therefore, according to the opinions above given, infeftment in the indefinite precept was valid as a base infeftment. This too was the general opinion of law-agents or conveyancers, in which accordingly they modelled their practice. The Appellant tried

no new experiment in conveyancing; for the Respondent himself, in the competition with Campbells, expressly stated, that loans to the amount of half a million were held in Glasgow and its vicinity on securities similar to the one in question; and he therefore pleaded that the *communis error*, if there was an error, ought to protect his security. But an agent who follows the ordinary practice cannot be presumed to be deficient in ordinary skill; when that practice is sanctioned by the highest legal opinions, he cannot be charged with *crassa negligentia aut imperitia*; and these are the only grounds on which a law-agent can be held responsible for damages."

The reasons assigned for the Respondent were,

First, Because the Appellant, holding himself out as a regular conveyancer, is bound to repair to the Respondent the loss occasioned by the gross blunder **[114]** in the heritable security above mentioned. It was unnecessary and unusual to prepare an heritable security with only one manner of holding, but if the Appellant thought fit to deviate from the ordinary form, he ought to have completed the security, by obtaining confirmation from the superior. This was as essential as, in the ordinary case, it is to register the instrument of sasine, or to perform any other part of ordinary and well-known duty. It was improper for the Appellant to deviate from the ordinary form in preparing this security. Had he adhered to it, confirmation would not have been necessary, and the Respondent's security would have been as effectual, without confirmation, as were the securities prepared by the other conveyancers. It is impossible to conceive a grosser blunder than that committed by the Appellant; and it would be unjust were the consequences of this blunder not to fall upon himself. This point has been already adjudged by the Right Honourable House in the case already mentioned of *Lang* v. *Struthers*. Wil. Sh. 563 [2 Wils. and Sh. 563].—(May 28, 1827.)

Secondly. Because the Appellant does not allege, at least does not offer to prove, that he informed the Respondent that the security, as prepared by him, was invalid without confirmation. It is ridiculous to suppose that the Appellant would have done so, and it looks more like burlesque than serious pleading, for the Appellant now to make such an insinuation. It is totally untrue, and is destitute equally of proof and probability. Nobody but a fool, or a knave, would have acted in the manner now referred to. There was no use for any deed whatever being prepared, unless the Respondent was to get valid security; and it is alike incredible and untrue, that the Respondent would have received as valid securities a parcel of deeds which he was told were perfectly useless.

[115] And, besides the case of *Lang* and *Struthers*, the following were cited:

"The clerk of the bills found liable for that part of a sum, for which he had neglected to take caution; 1680, November 17, *Ogilvie* v. *Riddell*."

"The clerk of the bills found liable for a debt, for taking as cautioner in a suspension, a person who had been long dead; 1680, December 10, *Drummond* v. *Dunbar*."

"Where an inhibition had been marked as registered, but not in fact booked, the clerk and his representative held to be liable for damages and loss thence accruing; 1696, January 3d, *Scott* against *Grieve*."

"An inferior commissary clerk gave out a precept of poinding against one of many defenders, although there was no decerniture against him. This being suspended, and the suspender dying in the mean time, the debt was lost. The clerk was found liable; 1709, December 9th, *Johnstone* against *Pender*."

"A writer was employed to raise horning and caption. The messenger denounced before the elapse of six days. The debtor, incarcerated on this erroneous charge, recovered damages from the creditor, who was found entitled to relief from the writer; 1710, November 28th, *Wood* against *Fullerton*.

"A clerk of session found liable in damages for delay in giving out an extract: 1725, July 27th, *Robertson* against *Gibson and Hall*."

"A writer to the signet having received from the complainer 10s. sterling, in order to obtain a suspension for her, and accordingly presented the bill, which was passed, but neglected to be expede, for this reason, given by him in excuse, that the money **[116]** received was not sufficient for expeding the bill, but which he had not notified to the complainer, the Lords found him liable in damages and expenses, and

remitted to the ordinary on the bills to tax the same, and he not being in good circumstances, they fined him only in 10s. sterling to the poor; 1741, July 29th, *Susanna Rae, Complainer.*"

"The Lords found an agent liable in damages, who being employed to expede a confirmation, neglected it till his client died, by which means his widow sustained a loss of £212 sterling; 1757, January 4th, *Goldie* against *Macdonald.*"

"A person was intrusted with a bill of exchange, accepted in favour of another, for the purpose of doing such diligence as to put the drawer on an equal footing with the other creditors. He used inhibition on the ground of debt; but as he neglected to adjudge, no part of the money was recovered. The Lords found him liable in a sum equal to what the pursuer would have received had an adjudication been led; 1787, February 14th, *Mason* against *Thom.*"

In the late case of *Lilly* against *Macdonald*, 13th December 1816, "a bond and assignation having been granted to a party, it was found that his agent, being unable to prove that he had duly intimated the assignation, was liable for the amount, although the assignation was made twenty-five years before the action was raised against the agent, and although it appeared that the debt assigned was compensated at the date of the assignation." The judgment in this case was affirmed by the House of Lords.

In the case of *Dougan* against *Smith*, 3d July 1817, "In an action of damages against a writer and messenger for not having, according to instructions, [117] alimented a debtor in jail, who was afterwards liberated on the act of grace, the debt, for which the debtor was imprisoned, found the only measure of the damages."

In the case of *Currie* against *Colquhoun*, 17th June 1823 (2 Shaw and Dunlop 407). "Mrs. Currie having agreed to sell a piece of ground to Miller, employed Colquhoun, a writer, to frame missives of sale, which he did, but failed to test them in term of law. An action of implement was brought against Miller, who defended himself upon the ground that the missives were not probative. Without abiding the issue of this process, Mrs. Currie instituted an action of relief against Colquhoun: who pleaded in defence, first, that he had acted gratuitously as a friend, and not as an agent; and, secondly, that *rei interventus* had occurred, by which the bargain was completed independent of the missives. The Lord Ordinary found, that as he was entitled to make a charge for framing the missives, it was his duty to render them effectual, and therefore that he was liable in relief, and the Court adhered."

There is one late case, precisely in point, where the Court of Session had no difficulty in repelling defences similar to those now pleaded by the Appellant. The Respondent refers to the decision in the late case of *Struthers* v. *Lang* (Feb. 2, 1826. Fac. Col. p. 307; and Shaw and Dunlop, p. 418). In that case the blunder, in consequence of which the security was set aside, was the same with that which was committed by the Appellant. In both cases there was a precept of sasine in general terms, while, in the previous part of the deed, the holding was declared to be of and under the grantor's superior only. But the case of Mr. Lang was, in this respect, more favourable than that of the Appellant, that, by the title-deeds of the [118] party, sub-infeudation was prohibited, except in certain cases, which made it impossible to follow implicitly any common style of heritable bonds (May 28, 1827. Wilson and Shaw, p. 563).

The judgment of the Court of Session in this last case was affirmed by this Right Honourable House, with £100 costs; and, as was observed by some of the Judges in the court below, this is a still more unfavourable case for the Appellant than Mr. Lang's case was.

The cause was heard in February, and on the 13th July 1830, the Lord Chancellor moved:

Lord Chancellor: [After stating the general nature of the case.] It appears then, that by this security the property was to be held of the immediate superior lord under whom the grantor held, and that it was by that manner of holding that Mr. Wardrob was infeft in the lands. But in order to complete that security it was necessary that a charter of confirmation should have been obtained from the lord, and no application was made to the lord for that purpose.

The ordinary mode in these cases is, to infeft the disponee or lender of the money by a double manner of holding, *a me vel de me*, that is, of and under the grantor's

superior, which is called a public holding, or of and under the grantor himself, which is called a base holding, which is good as against third parties, whatever it may be with respect to the lord.

When the question came first under discussion in the court below it was contended on behalf of Mr. Rowand, that although the holding was public, yet as the precept of saisine was quite general, and made no reference to the manner of holding, that the infeftment upon it must of course be considered indefinite, and as constituting, at any rate, a base fee. At first there was a difference of opinion among the Judges below, but at **[119]** last they all, with one exception, came to the conclusion that the public holding was defective from the want of a charter of confirmation. They considered, that although the precept of saisine was in general terms, it must be construed according to the terms of the obligation, and as that was to grant a holding from the lord, the saisine and infeftment must be considered as applicable to the same manner of holding, and that the security was therefore defective for want of the confirmation.

But then it was argued that the point of law was a new and delicate one, and that some of the Judges below were at first of opinion that as the precept of saisine made no reference to any manner of holding, the infeftment might be construed as base, and that the Court arrived at a contrary conclusion after long discussion; and that it was hard on Mr. Stevenson that he should be held responsible for a mistake upon a nice and delicate point of law. But the distinction is this: A solicitor is not liable for mistake in a nice and difficult point of law, for to such mistakes all lawyers must be liable; and if the question had been merely one of that description, I would say that Mr. Stevenson was not responsible. But here he thought proper to depart from the ordinary mode of preparing heritable securities, which was to grant an obligation to infeft by the double manner of holding, and in so doing he must be considered as undertaking to do what was necessary to render the mode which he adopted effectual for its purpose; and if, whether from ignorance or inadvertence, he failed to do so, he must be held responsible for the consequences. On this ground I consider Mr. Stevenson bound to make good the loss arising in this case from the want of confirmation.

It may be proper to notice two points which were relied upon for the defence. First, it was said that **[120]** Stevenson, at the time he prepared the security, had not the title-deeds in his possession, and did not know whether they might not contain prohibitions and irritancies excluding every holding except under the grantor's superior. But without considering what might be the effect of the prohibition, if any such existed, it is sufficient here to say, that it appears in evidence that the title-deeds were offered to Stevenson for inspection, and that he had an opportunity to consider and examine them, so that he could not rest any defence on any such supposed clauses. When it was said, that at the time when Stevenson delivered the security to Rowand, he informed him that it was not perfect, and that something remained to be done, on looking at the whole of the case, that part of it does not seem to be attended with any doubt or difficulty. It is not pretended that he said to Rowand that confirmation was necessary; and it is evident that he only meant to intimate, that as the security was taken in the name of Mr. Wardrob, it was proper that it should be transferred from Wardrob to Rowand, in order to guard against any claim upon it by Wardrob's creditors, or the accident of his death, or incapacity; and that without this it was not therefore complete without something further being done. Nothing was said to call the attention of Rowand to the circumstance that confirmation by the superior was still wanting, and he was not solicitous about the assignation from Wardrob, who was his intimate and confidential friend and partner, of whose solvency he was assured.

On every principle of law and justice then, the Appellant is bound to make good the loss to the Respondents.

Judgment Affirmed.

[121]

APPEAL

FROM THE COURT OF SESSION IN SCOTLAND.

MACLELLAN,—*Appellant;* MACLEOD,—*Respondent.*

[S.C. 5 Scots R.R. (H.L.) 314; 4 Wils. and Sh. 157; 6 Sh. 790.]

An award, by the law of Scotland, although it does not decide on the whole matter referred, may be good as far as it goes, provided it be unobjectionable in other respects.

Maclellan took from Macleod a lease of the farm of Ensay, in the island of Harris, from Whitsunday 1813, for a term of twenty-one years, at a yearly rent of £250, with an option of quitting at Whitsunday 1818, on giving six months previous notice. The years subsequent to 1814 being what were called bad years, Maclellan in 1816 gave notice of his intention to avail himself of the break, unless he should be allowed a deduction of rent; and correspondence between the parties then took place, in which Macleod agreed to allow a deduction, and both parties agreed that the amount of deduction should be referred to Robert Brown of Hamilton, who had been factor for Macleod, and was well acquainted with the condition of his tenantry. Brown accepted the reference, but did not make his award till 1824. In the mean time Maclellan held on from 1818, without payment of any rent, its falling in arrear being held immaterial, as Macleod was indebted to Maclellan in £1000 on bond.

In July 1824, Brown made his award, finding that £74 was a proper deduction from the year 1818 to the expiration of the lease, making the yearly rent £176 during that period.

[122] There was no formal submission, and therefore the terms of it were to be collected from the correspondence, the material parts of which were printed, and afterwards produced in evidence. The parties differed about its import: Maclellan contending that the only thing referred was the amount of the deduction to be made for the years prior to 1818, or at all events, that these prior years were included: Macleod on the other hand, contending that the only thing referred was the amount of deduction to be made for the years subsequent to 1818.

In December 1824, Macleod brought his action for payment of the rents due, after allowing deduction of the amount of the bonds; and this was immediately followed by a counter-action, by Maclellan contending that the award should be set aside as being *ultra vires*, and relating entirely to a matter not referred, or as not having exhausted the whole subject by including the years prior to as well as the years subsequent to 1818; and also for corruption and partiality of the arbiter: and further concluding that it should be found that he had duly availed himself of the break in the lease, and held over only as tenant at will at such rent as the farm might be found to be worth.

In May 1826, the Lord Ordinary enjoined the processes, and proceeded so as to have the record made up in the action of reduction, and this having been made up accordingly, his Lordship, on the 27th December 1827, repelled the reasons of reduction, "but without prejudice to the Pursuer claiming either through the award of Mr. Brown or otherwise, all reasonable deduction from the rents of the farm of Ensey for the years prior to 1818." This interlocutor was affirmed by the Second Division, and Maclellan appealed from the judgment.

[123] An objection was made below, that the letters containing the submission were not stamped; to which it was answered, that after the parties had submitted and pleaded, and the award was pronounced, the objection could not be sustained; but that at all events, if the want of a stamp was a good objection, it might still be remedied. *Boyd* v. *M'Kenna*, 2 Shaw, 659. The letters were, in fact, stamped.

The appeal was heard in the House of Lords in the first session of parliament in 1830; and afterwards, in the same session, the following judgment, was pronounced:

Lord Chancellor (July 1830): The facts of the case, as far as the grounds of judgment are concerned, are these: The Appellant held a farm from the Respondent on lease, commencing at the Whitsuntide 1813, at a rent of £250, and occupied during

the years 1814-15-16-17. The years 1815-16-17, were, what in these places were called bad years; and the Appellant gave notice to his landlord that he must avail himself of a break in the lease in 1818, and give up the farm, unless he received a deduction of rent. The landlord was disposed to allow this, and a personal communication and correspondence took place, the result of which was that it referred to a Mr. Brown, who was named by the Appellant himself as a competent person to decide what the amount of the deduction should be; and in the mean time the Appellant continued his occupation till 1824, when Brown made his award, by which he named £74 as the amount of annual deduction for the years subsequent to 1818. The Appellant was dissatisfied with this, and instituted a proceeding in the Court of Session to set the award aside, on the grounds that the deduction should have been made for the years [124] previous to 1818, as well as the subsequent years, and that the award was bad in *toto*, as not having exhausted the subject of the submission. Whether the submission extended to the previous as well as the subsequent years was a question of fact to be decided on the evidence appearing in the correspondence; for there was no formal submission; and it appears to me, and also to the noble Lord (Radnor) who was present at the hearing, and read the papers, that Brown was correct in considering the deduction for the subsequent years as the only subject of submission, although there is certainly some confusion in the correspondence on that head.

But supposing it had been otherwise, and that the previous years also had been submitted, still, by the law of Scotland, the award is good as to the part decided, although the arbiter should not have decided on the whole matter; although if he had decided on evidence submitted by the one party, without notice to the other, it would have been bad. But here, where there was no objection of that kind, and where the claim was all on one side, the omission to decide on the previous years did not vitiate the award. We are of opinion therefore that the Court below was right in holding the award to be good as to the subsequent years; and then no injury was done to the Appellant, as the award and judgment as to the subsequent years were without prejudice to any claims which he might be enabled to make out as to the preceding years.

Then some objection was made, on the ground of misconduct on the part of the arbiter; but on a careful perusal of the evidence, I am of opinion that there was no such misconduct as affected the award.

Judgment affirmed.

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[129] APPEAL

From the Court of Session.

SEA ASSURANCE COMPANY OF SCOTLAND,—*Appellants;* GAVIN and Others,—*Respondents.*

[Mews' Dig. xiii. 1220. S.C. 4 Bli. N.S. 578; 5 Scots R.R. (H.L.) 244; 4 Wils. and Sh. 17; 5 Shaw, 525. See *Hunter* v. *Northern Marine Insurance Co. Lim.* 1888, 15 Rettie (H.L.) 72, 76: 13 A. C. 733.]

Insurance on a vessel "at and from Leith to Shetland, and from thence to Barcelona, and at and from thence, and two other *ports* in Spain, to a port in Great Britain." The vessel was lost while loading at Saloe, and the question was whether Saloe was a *port* within the meaning of the policy. The affirmative held by the courts below, and the Assured declared entitled to recover. Affirmed by the House of Lords.

The following are the facts of this case:

his co-owners, entered into a charter-party with Messrs. Strong and Company of Leith, whereby he let out the vessel, the *Sarah*, of the burden of 119 tons, belonging to the

Of this date (Aug. 4, 1821), the Respondent, Captain Duncan, with the consent of Respondents on freight to [130] Messrs. Strong and Company, to proceed on a voyage to Shetland, and there load such a quantity of fish or other goods, that the

agent of the charterers may put on board, and being so laden, proceed with the said ship and cargo, with all convenient speed, to Barcelona, or so near thereto as she may safely get, and there deliver the same, agreeable to bills of lading; and afterwards to take on board at Barcelona, or other ports on the Catalan of Valencian coasts (not exceeding two), such goods as the said freighter may choose to put on board, with which the said vessel shall proceed to a port in the United Kingdom, and deliver her cargo agreeable to bills of lading."

The other Respondent, Mr. Gavin, who acted as ship's husband, proceeded to make insurance on the vessel for the voyage. He laid the charter-party before Mr. Gibson, secretary of the Sea Insurance Company, the Appellants directing him to get insurance done on the vessel for said voyage, to the extent of £1200. After considering the charter-party, Mr. Gibson desired Mr. Gavin to make out a memorandum of the insurance, which Mr. Gavin immediately did, and handed it to Mr. Gibson, who on perusing it said it was correct. Mr. Gavin employed no other broker, but trusted entirely to the good faith of the manager of the Sea Insurance Company.

The policy of insurance insures the vessel "at and from Leith to Shetland, and from thence to Barcelona, and at and from thence, and two other ports in Spain, to a port in Great Britain." The policy contains the usual clause: "And it shall be lawful for the said ship," etc. "in this voyage, to proceed and sail to, and touch and stay at, any ports and places whatsoever, without prejudice to this insurance."

[131] The vessel proceeded from Leith about the 6th of August 1821, in a state perfectly sea-worthy for the voyage. She took on board her cargo of fish in Lerwick Bay, and in due time arrived off Barcelona. At that time there was a contagious fever raging at the place, so that the vessel could not enter the port. The master was therefore directed to proceed to Tarragona, and there discharge his cargo, and thereafter to proceed to Saloe (which is just round a head of land, about 10 miles distant from Tarragona), there to load her homeward cargo. The captain guided himself strictly by the orders he had received. He discharged his outward cargo at Tarragona, and, on the 12th of December 1821, cast anchor off Saloe, where he began to take on board his homeward cargo, which was to consist of nuts and brandy. He moored the vessel in the road-stead, the usual station there for vessels of the *Sarah's* burden. In so proceeding to Saloe it was never conceived, on the one hand, that there was any departure from the terms of the charter-party, by which the owners were bound, or on the other, that the vessel was in any degree placing herself beyond the protection of the policy.

While taking on board her cargo at Saloe, and about the 24th of December 1821, a storm arose, more tremendous than had ever been experienced by the oldest person in that quarter. So dreadful was it, that every vessel lying at Saloe, without any exception, was driven ashore and totally wrecked. Even at Tarragona, where there is a very extensive mole, out of about sixty vessels which were lying there, only one was saved. The *Sarah* shared the common fate.

The Sea Insurance Company refused to settle this loss, and the Assured brought their action in the Admiralty Court, to which the only substantial ground of **[132]** defence was, that the loading at Saloe was a deviation; for that the policy was confined to *ports*, and that Saloe was not a port within the meaning of the policy. A proof as to whether *port* or not was allowed, and many witnesses were examined both at Edinburgh and London, and under an interlocutor of the Judge Admiral (25th March 1824), the opinion of English counsel (Tindal, now Ch. J. C. P.) was taken; and on the 2d December 1824, the Judge Admiral pronounced the following judgment: "The Judge Admiral having resumed consideration of the memorials for the parties, proofs adduced by them, and writings produced, and having also advised the opinion of English counsel, taken on the cause, in pursuance of a former interlocutor of this Court, finds it proved that Saloe in Spain, where the *Sarah* was wrecked, was a port within the meaning of the policy in question, and that the vessel was within the same at the time the loss took place. Therefore, repels the defences, and decerns against the defenders, in terms of the libel."

The Assured having proceeded to execution on this judgment, the Insurance Company brought the question under review of the Court of Session by suspension; that Court by interlocutor, dated 3d March 1827, repelled the reasons of suspension, and found the letters orderly proceeded in.

From these interlocutors of the Judge Admiral and Court of Session the Insurance Company appealed, and contended that they ought to be reversed, because the insurance in this case was "to Barcelona, and at, and from thence, and two other ports in Spain, to a port in Great Britain." It was not the more comprehensive insurance of, "at and from ports and *places*." Saloe Bay is not a port, according to the just and legal construction of such a policy as the present. **[133]** The loss, therefore, at Saloe Bay was not covered by the policy; the loading there was a deviation, and by that deviation the Appellants liability is discharged.

The Assured contended that the judgments ought to be affirmed; and a summary of the facts established, and of the law as applicable to the case, will be found in their reasons.

First. The inquiry in this case is, not whether Saloe be a large or a petty port, —a good port or a bad one,—but whether it be a port at all, so that a merchant or ship-owner, having it in contemplation to repair thither, would be entitled, in good faith, to consider his adventure as covered by a charter-party, or policy of insurance, in the terms here in dispute. But, in point of fact, it is proved that the town of Saloe is frequented as a port, and is universally designated as a port;—that the Spanish nation recognize it to be a port, and have conferred upon it the dignity and privileges of a port; that it is also recognized as a port by the government of this country, who have extended to it, as such, a branch of their consular establishment. It is proved, that, in point of natural situation, it has many great advantages for the security of vessels, so as almost to supersede the necessity of any artificial means of protection. There exists at Saloe, on a very respectable scale, all the machinery and appendages that are pretended to be essential to a port. There are a custom-house and custom-house officers, who permit the cargo to be shipped, and receive the customs upon such shipping. There were, at the time of the wreck, conveniences erected on the shore for the purpose of loading goods, and of protecting smaller vessels from wind and weather. There was a port-captain, or harbour-master, who regulated the mooring of vessels, and by whom port-charges were levied; **[134]** and it is established by the evidence that Saloe is a port where, from time immemorial, considerable foreign trade has been carried on, particularly with Great Britain.

Secondly. The general doctrine of law is established beyond all controversy, that an underwriter is bound and presumed to know the course and practice of the trade in which the vessel he insures is to be engaged. In insuring to a port in Spain the Appellants were bound to know what a port in Spain is. They were bound to know the particular nature of most of the ports of the Mediterranean, few of which differ from the port of Saloe, being rather natural basins, protected by headlands, than artificial harbours, shut in with regular moles or piers. They were also bound to know, that, at such ports, it was the practice for vessels, of the burden of the *Sarah*, to load in the road-stead, and they must be held to have taken this risk into account accordingly in underwriting the policy founded on.

In order to show that Saloe did not come within the description of a *port*, the Insurance Company cited the following cases, which, as the Assured contended, either had no application, or tended rather to establish the contrary position: *Constable* v. *Noble*, 2 Taunt. 403; *Noble* v. *Kennoway*, Marshall, lib. 1, c. 6; *Cockey* v. *Atkinson*, 2 Barn. and Ald. 460; *Brown* v. *Tierney*, 1 Taunt. 517; *Keyser* v. *Scott*, 4 Taunt. 660; *Baring* v. *Vaux*, 2 Camp. 541.

The cause came on to be heard before the House of Lords in November 1830, when the judgments of the courts below were immediately *affirmed* with costs.

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[135]

APPEAL

FROM THE COURT OF CHANCERY.

MACDOUGALL,—*Appellant*: PURRIER,—*Respondent*.

[Mews' Dig. v. 1432; S.C. 4 Bli.; N.S. 433. Cited on point as to presumption of

enrolment, in *Hebbert* v. *Purchas*, 1870, L. R. 3 P. C. 643. See also as instances of other cases decided under the decree *London and Blackwell Ry. Co.* v. *Lews*, 1851, 3 H. L. C. 470; *Payne* v. *Esdaile*, 1888, 12 A. C. 613.]

The stat. 37 Hen. 8, c. 12, recited, that differences existed between the inhabitants and the clergy of London respecting the payment of tithes, and that the said inhabitants and clergy "had compromitted and put themselves to stand to such order and decree touching the premises as should be made by the Archbishop of Canterbury, and several other persons therein named, for a final end and conclusion of the said differences for ever." Therefore it was enacted, that such decree as should be made by the said Archbishop and others, before the 1st day of March then next ensuing, of or concerning the payment of tithes, oblations, or other duties within the said city or liberties of the same, and enrolled in the King's High Court of Chancery of Record, should stand and remain, and be as an Act of Parliament, and should bind as well all the said citizens as the said clergy, etc. for ever. The decree was made, but no enrolment of it in Chancery could be produced, though the decree appeared, by a statement in the registry-book of the See of London, to have been given by the Archbishop to Bonner the Bishop of London, to be kept in the registry of St. Paul's Cathedral.

The Appellant filed his bill against the Respondent for an account of the tithes due from the Respondent under this Act, and the decree therein mentioned. The Respondent's answer denied the enrolment of the decree, and its existence as a legal instrument. The Vice-Chancellor directed an issue to try whether the decree mentioned in and authorized to be made by the stat. 37 Hen. 8, c. 12, were duly enrolled according to the provision of that statute. Held that such issue was improper; and that after the courts had **[136]** repeatedly treated the decree as a binding instrument, and after the citizens had recognised it by the usage of paying tithes according to its order, the enrolment must be presumed.

The Appellant, on the 24th February 1824, filed his bill in the High Court of Chancery, thereby stating, that on or about the 25th day of March 1822, the Appellant was lawfully seised and in possession of the rectory impropriate of the parish of St. Helen's, Bishopsgate, in the city of London, with the rights and appurtenances thereto belonging, and was and is lawfully entitled to all the tithes, and rates for tithes, sums of money, and customary payments, and all other dues or duties due and payable to the rector for or in lieu of tithes, which had become due and payable from the inhabitants and citizens of the said parish for all and every their respective houses, shops, and other buildings and tenements within the said parish, according to the Act of Parliament and decree therein and hereinafter mentioned, and the laws and usages relating thereto; and that by a certain Act of Parliament made and passed in the 37th year of the reign of King Henry 8, after noticing and reciting an Act of the 27th of the same King, relating to the payment of tithes and dues in the city of London, and reciting, that since such Act divers variances, contentions and strifes had then newly risen and grown between the parsons, vicars and curates, and the said citizens and inhabitants, touching the payment of tithes, oblations and other duties, by reason of certain words and terms specified in the said order, which were not so plainly and fully set forth as was thought convenient and meet to be; for appeasing whereof, as well the said parsons, vicars and curates, as the citizens and inhabitants, had compromitted and put themselves to stand to such order **[137]** and decree touching the premises as should be made by the Archbishop of Canterbury, and the several other persons therein named, for a final end and conclusion to be had and made touching the premises for ever. Therefore it was enacted that such order and direction as should be made, decreed and concluded by the before-named archbishop, lords and knights, or any six of them, before the 1st day of March then next ensuing, of, for, or concerning the payment of the tithes, oblations, or other duties, within the said city or liberties of the same, and enrolled in the King's High Court of Chancery of Record, should stand and remain, and be as an Act of Parliament, and should bind as well all citizens and inhabitants of the city and liberties for the time being, as the said parsons, vicars,

curates and their successors for ever, according to the effect, purport and intent of the said order and decree so to be made and enrolled; and stating, that in pursuance of the said last-mentioned Act of Parliament, the Right Reverend Father in God, Thomas, then Archbishop of Canterbury, and certain other persons, being a sufficient number of the persons in the said Act named, did, on or about the 24th day of February, in the year of our Lord 1545, duly make their decree touching the matters aforesaid, whereby it was ordered and decreed that the citizens or inhabitants of the city of London, and the liberties of the same for the time being, should yearly, without fraud or covin, for ever pay their tithes to the parsons, vicars and curates of the said city, and their successors for the time being, after the rate therein and hereinafter mentioned (that is to say), of every 10s. rent by the year of all and every house and houses, shops, warehouses, cellars, stables, and every of them within the said city and liberty of the same, 16½d.; and of every 20s. rent by [138] the year of all and every such house and houses, shops, warehouses, cellars and stables, and every of them within the said city and liberties, 2s. 9d.; and so above the rent of 20s. by the year, ascending from 10s. to 10s. according to the rate aforesaid. And further, that where any lease was or should be made of any dwelling-house or houses, shops, warehouses, cellars or stables, or any of them, by fraud or covin reserving less rent than had been accustomed, or was, or that any such lease should be made without any rent reserved upon the same, by reason of any fine or income paid beforehand, or by any other fraud or covin, then and in every such case the tenant or farmer, tenants or farmers thereof, should pay for his or their tithes of the same after the rate aforesaid, according to the quantity of such rent or rents as the same house or houses, shops, warehouses, cellars or stables, or any of them were last letten for without fraud or covin, before the making of such lease. And further, that the said citizens and inhabitants should pay their tithes quarterly, that is to say, at the Feast of Easter, the Nativity of St. John the Baptist, the Feast of St. Michael the Archangel, and the Nativity of our Lord, by even portions. And further, that every householder paying 10s. rent and above, should for him or herself be discharged of their four offering-days; but his wife, children, servants, or others of their family, taking the rights of the Church at Easter, should pay 2d. for their four offering days yearly; and it was thereby provided and decreed, that if any house or houses that then had, or thereafter should be let for 10s. rent by the year, or more, be, or had within eight years then last past, or thereafter should be divided and leased into small parcels or members, yielding less yearly rent than 10s. by the year, that then the owner or owners [139] if he or they dwell in any part of such house, or else the principal lessee or lessees, if the owner or owners do not dwell in some part of the same, should thenceforth pay for his or their tithes after such rate of rent as the same house was accustomed to be let for before such division or dividing into parts or members, and the under-farmer or farmers, lessee or lessees, to be discharged of all tithes for such small parcels, parts or members rented at less yearly rent than 10s. by the year, without fraud or covin, paying 2d. yearly for four offering-days. And it was thereby provided that the decree should not extend to houses of great men, or noblemen or noblewomen kept in their own hands, and not letten for any rent which in times past had paid no tithes, so long as they should so continue unletten, nor to any halls of crafts or companies, so long as they should be kept unletten, so that the said halls in times past had not used to pay any tithes. And it was thereby decreed, that where less sum than after 16½d. in the 10s. rent, or less sum than 2s. 9d. in the 20s. rent, had been accustomed to be paid for tithes, that then in such cases the said citizens and inhabitants should pay but only after such rate as had been accustomed. And it was thereby also provided and decreed, that if any person or persons should take any tenement for a less rent than it was accustomed to be letten for, by reason of great ruin or decay, burning, or such like occasions or misfortunes, that then such person or persons, his executors or assigns, should pay tithes only after the rate of the rent reserved in his or their lease, and none otherwise, as long as the same lease should endure.

And the said bill further stated, that the said decree was, some time after the making thereof, or must be at this distance of time, and after the same had been since [140] the making thereof acted upon, presumed to have been duly enrolled in the Court of Chancery; for the bill stated that ever since the passing and making of the

said last-mentioned Act of Parliament and decree, the same, or the directions of the said decree had been observed and obeyed by the citizens and inhabitants of the said city of London, and in particular by the inhabitants and occupiers of houses and tenements within the said rectory and parish of St. Helen's, Bishopsgate, aforesaid, or the titheable places thereof; and that the said citizens and inhabitants of the city of London had, conformably thereto, or in pursuance thereof, paid their tithes at or after the rate in the said decree mentioned, unless in those cases in which such citizens, inhabitants or occupiers were thereby specially declared to be exempted, or liable only to a different sum or rate in respect of tithes, or in cases where by agreement, a less sum than 2s. 9d. in the pound has been accepted and paid. And the said bill stated, that by virtue of the said Act of Parliament of the 37 Henry 8, and the said decree, the rector for the time being of the said parish of St. Helen's became, and was, and that the Appellant as such present rector then was, entitled to receive and be paid all money due and payable for and in respect of the tithes, oblations and dues, arising and payable by the inhabitants and occupiers of houses, shops, warehouses, cellars, stables, edifices, buildings, wharfs and quays within the said parish of St. Helen's, Bishopsgate, at and after the rates expressed and directed to be paid in and by the said decree; (that is to say,) for every 10s. rent by the year of all houses, shops, warehouses, cellars and stables within the said parish, 16½d., and for every 20s. rent by the year of all houses, shops, warehouses, cellars and stables within the said parish, 2s. 9d., subject, however, to **[141]** certain particular abatements in the said decree mentioned and specified, and particularly to an abatement of every third penny respectively, on certain principal houses, with quay and wharf, having any crane or gibbet belonging to the same, situate within the said parish. And the bill proceeded to state that the said Respondent, John Vincent Purrier, had since the 25th of March 1822, up to and until the 25th day of March then last past, been in the possession or occupation of a messuage or dwelling-house, hereditaments and premises, situate at a place now called St. Helen's Place, within the said rectory and parish, and alleged that the premises which he occupied, or the other buildings formerly erected on the same ground, had been liable to tithes under the Act, and it charged the Respondent with not having paid the same.

The bill charged (amongst other things) that the tithes or dues were payable; and that the amount of the several sums to be paid by the Respondent ought to be calculated and computed after the rate and in manner directed by the said decree, according and in proportion to the present improved or last known rent or rents, or value of the said messuage or dwelling-house, hereditaments and premises, and not otherwise, or in any other manner; and the bill further charged that there was not, and were not, any customary or prescriptive sum or sums of money due and payable for the said messuage, dwelling-house, hereditaments and premises, other than and according to the rate in the said decree mentioned. And the bill further charged, that the Respondent did, previously to the 25th of March 1822, and that the former occupiers of the messuage or dwelling-house, hereditaments and premises then in the occupation of the said Respondent, always, or at many times since the passing the said Act of Par-**[142]**-liament and making the said decree, and in pursuance thereof, render and pay to the rector for the time being of the said parish of St. Helen's, Bishopsgate, tithes or tithe-dues, calculated at 2s. 9d. in the pound, on the then yearly rent of the said messuage or dwelling-house, hereditaments and premises, or make or pay a compensation for the same. And the said bill alleged that the Respondent pretended that the said decree never was enrolled, and was therefore not binding on him, or any of the citizens and inhabitants of the city of London; and that the said decree never had been confirmed or recognized as law in any court of justice, and had never been enforced, acted upon and complied with in any manner whatever; whereas the Appellant by his bill charged that the said decree was duly enrolled, and that by some accident, which could not then at this distance of nearly three hundred years be accounted for or ascertained, the said original decree, and the enrolment thereof, had been destroyed or lost, and the said original decree or the enrolment thereof could not then be found or produced. And the Appellant by his said bill further charged, that the said Act of Parliament and decree had at all times since the making thereof been accepted, recognized, enforced and acted upon as the established and existing law and custom relating to tithes, or dues relating

thereto, to be paid by the citizens of London, and by persons holding or occupying houses, messuages and premises within the said city and its liberties, and in particular in the said parish of St. Helen's, Bishopsgate, and that ever since the making and passing the said Act of Parliament and decree the same had, and then had, the force and effect of an Act of Parliament, and that the said Respondent ought to pay his tithes accordingly. And the bill further charged, that the said Act of Parliament and **[143]** decree was at some short time after the making of the said decree duly entered and copied in a register-book, kept by Bonner, then Bishop of London, wherein the rights and property, affairs and transactions of and relating to the see of London, and the deeds and papers relating thereto from the year 1539 to the year 1559 were registered, and which book was then deposited and preserved in the cathedral church of St. Paul in the city of London; and that it appeared by the copy of an indorsement on the decree copied and entered in the same book, and that the fact was that the decree, duly signed and sealed by the persons who made the same, was on the 25th day of the said month of February 1545 delivered to the said Bishop Bonner by the archbishop and the other persons who made the same, and that the bishop on the 25th day of February 1545 delivered the said decree to his registrar for safe custody, and that the same was accordingly so kept and preserved. And the bill further charged that the bishop, as the head and superintendent of the clergy of the city of London, was the proper person to have the custody of the decree; and that the decree had been constantly printed by the King's printers, along with the existing statutes of this realm, and as forming part of the said Act of Henry 8, and as having been duly made in pursuance of the said Act; and that said decree had been uniformly received and acted upon in the courts of justice in this kingdom, and considered by the King's judges in all times since the making thereof as a valid and existing decree, and as having been duly made and enrolled, and as having the force and effect of an Act of Parliament; and that many decrees and orders of the King's courts of justice had been made and acted on, pursuant to the said Act of Parliament and decree, and that the citizens and inhabitants of the city of **[144]** London had been ordered, decreed and adjudged to pay their tithes at and after the rate of 2s. 9d. in the pound, calculated on the yearly rate and value of the houses and premises in their occupation respectively, according to the decree and the true intent and meaning thereof; and that the citizens and inhabitants of the city of London had paid their tithes accordingly pursuant thereto, except in certain parishes within the liberty of the said city, which were exempted by Act of Parliament after the fire of London. And the Appellant, by his said bill, further charged, that except by force of the said Act of Henry 8, and decree, the clergy of London had not received, and were not entitled to receive, any tithes or any payment in respect of tithes. And the said bill further charged that a prior Act of the 27th year of King Henry 8, relating to the tithes in the city of London had been held to have been repealed by the said Act of the 37th of Henry 8; and that the said Act of the 27th of Henry 8 had never since the passing of the said Act of the 37th of Henry 8, and the making the said decree, been in any manner acted on or observed, and been deemed, taken, or considered to be a valid and subsisting Act, as it would have been in case the said decree had not been duly made and enrolled. And the Appellant, by his said bill, charged and insisted, that it was not necessary, at that distance of time, to produce or prove the actual enrolment of the said decree, but that such enrolment ought to be presumed; and if the same were not actually enrolled, yet the said decree having been so recognized, acted upon, adopted and received, and ought to be treated and considered of the same force and effect as if the actual enrolment were extant and produced. And the bill charged that the Respondent had in his **[145]** possession or power, books, accounts, and documents, by which the matters in the bill might appear, but which he refused to produce.

The said bill therefore prayed that an account might be taken, under the direction and decree of the Court, of all sums of money due and owing to the Appellant from the Respondent for or in respect of the said tithes or dues on account of the messuage or dwelling-house, hereditaments and premises, held or occupied by the Respondent within the said rectory or parish, or the titheable places thereof, from and since the 25th of March 1822, after the rate of 2s. 9d. in the pound of the present rent or value of the said dwelling-house and premises, or at such other rate as the Appellant should

be found to be justly entitled to; and that the said Respondent might be decreed to pay to the Appellant what on the taking of the said account should be found to be justly due to the Appellant for or in respect of such tithes, the Appellant waiving penalties in the usual manner.

To this bill the Respondent put in his answer (filed 17 March 1825), in which (amongst other things) he stated that the Appellant was not to his belief seised of or entitled to the rectory impropriate of the parish of St Helen's, nor entitled to any of the rights thereunto belonging, nor entitled to the tithes or other dues claimed in the bill, inasmuch, as the Respondent said, he was informed, and believed, that the said church was not at any time appropriated to any religious house or body, and, as evidence thereof, he said he was informed, and believed, that an ancient convention touching the said church had been entered into many centuries ago to the following effect, as translated from the Latin, (that is to say,) This is the convention between the chapter of St. Paul's and Ranulph and **[146]** Robert his son; that Ranulph and Robert grant to the canons of St. Paul the church of St. Helen's for their joint lives, to render yearly 12d., but upon their deaths any third person of their kindred whom they shall choose shall hold the aforesaid church, rendering 2s. per annum to the same brothers; but such third person being also deceased, the same church shall remain to the canons, discharged of all incumbrances, quietly and free. And the Respondent further said, he was informed, and believed, that in the year 1181, the canons of St. Paul's were rectors of the church of St. Helen, and that the said church paid 12d. for synodals and 12d. for diaconals; and that a great many years ago, when one Alured was dean of St. Paul's, another convention or agreement was made between the then dean and chapter of St. Paul's and William the son of William the goldsmith, patron of the church of St. Helen's, and the prioress and nuns of the late priory of St. Helen's, to the following effect: Know all men by these presents, that I, Alured, dean of St. Paul, and the chapter of the said church, have granted to William the son of William the goldsmith, the patron of the church of St. Helen's, London, that he may constitute in the same church nuns there for ever to serve God, and that he may confer the right and patronage of the said church, which was granted to him by our predecessors to the nunnery established there; but it should be confirmed to the nunnery in such manner, that whoever shall administer there under the appointment of the prioress, after her election shall have been made by the said collegiate body of nuns, he may be presented to the dean and chapter, as well for the aforesaid church itself, also for the payment of half a mark annually within eight days of Easter, and for the nonalienation of the right of patronage, **[147]** and for the nonsubjecting themselves to the jurisdiction of any other collegiate body; we grant also, as far as we have the power, that the nunnery there established may convert to their own use all the obventions of the above-mentioned church, except the aforesaid pension; also, that the said nunnery shall bear all episcopal burthens belonging to the said church, but if in the place aforesaid, by some unforeseen event, there could cease to be the present abode and establishment of nuns, we have granted, that the religious men shall be there established without any let or hindrance, according in the manner which has been above expressed concerning the establishment of the nuns, and that they may be held bound in a similar manner to the dean and chapter of St. Paul's.

And the Respondent, by his answer further stated, that he was informed and believed that the dean and chapter of the cathedral church of St. Paul's then had, and for many centuries had, the right of patronage and advowson of the said church, or if the same should have been legally appropriated to the vicarage thereof, and if it should be established that the said church had been duly appropriated, or that a vicarage had been fully endowed, the Respondent said, that inasmuch as he was advised that the rectors of all parishes in which vicarages were endowed, were of common right entitled to the advowson of such vicarages, he submitted to the judgment of the court, that the dean and chapter of St. Paul's were such rectors; and he alleged that the Rev. James Blencairne was, on the 22d of March 1822, and had ever since been, the minister or incumbent of the said parish, and had officiated in the cure of souls, and was then commonly called the vicar of the said parish of St. Helen's, **[148]** and that the said James Blencairne paid the sum of half a mark, or 6s. 8d. to the dean and chapter of St. Paul's.

And the said Respondent, by his said answer, further stated that, considering the said James Blencairne to be entitled to a suitable income as the incumbent, and understanding that he did not receive on an average for three years prior to July 1822 (exclusive of monies for sermons and voluntary gifts or offerings from the parishioners) more than from £15 or £20 a year; the Respondent was informed that the parishioners had proposed, in the years 1822 and 1823, to give the sum of £100 a year to be raised by a rate, and that he, the Respondent, did acquiesce in such arrangement, and did pay his share of the said sum of £100, and £100 for the two years ending Easter or July 1823; and the Respondent insisted that the said James Blencairne did receive such several sums in lieu of all dues to which he, as the ecclesiastical parson or vicar of the said parish was entitled; and that the Appellant being a layman, (even if he was rector of the said parish) was not on the 25th of March 1822, or at any time since, entitled to any Easter or other offerings, or ecclesiastical dues, payable *ratione altaris* of the said church of St. Helen's aforesaid; and the Respondent said, he was informed and believed that the Appellant had no seisin of the church or the chancel of the church, nor any glebe in the parish, and was not liable to the repairs of the chancel; for the Respondent said he was informed that other persons claimed to receive certain customary payments in lieu of tithes in the said parish, not as the Appellant's agent or collector, but in their own right.

And the Respondent denied that the Appellant was entitled to receive or enjoy the tithes, rates for tithes, **[149]** or customary payments alleged by the bill to be due and payable by the citizens and inhabitants of their respective houses and premises within the parish, according to the Act of Parliament in the said bill mentioned; but whether the Appellant was or not entitled to any of the customary payments payable in the said parish he did not know.

And the Respondent said he had been informed, and believed, that the Act of Parliament of the 37th year of the reign of Henry 8, had been made, but he did not know and could not set forth as to his belief or otherwise, whether such decree as in the said bill mentioned was made pursuant to the said Act of Parliament, save as he had heard statements made in relation to such a decree having been made, but how far such statements were accurate he was unable to set forth; however he said, that according to the best of the information he had been able to obtain on the subject, such decree, if ever made, was not duly or otherwise enrolled in this court of record, and that after diligent search had been made for the same, no decree to such purport or effect could be found enrolled in the King's Court of Chancery. And the Respondent submitted that enrolment of records in the High Court of Chancery of the decree or order contemplated by the said Act, was provided in order to prevent any surreptitious order or decree being imposed upon the citizens and inhabitants of London under and by virtue of the said Act, by reason that the laws of the land and usages of the said court required that before any such decree could be enrolled, the same being to be an instrument under the hand and seal of certain subjects of his then Majesty, the signature and seal of one at least of the parties signing and sealing the said contemplated decree would be by such laws and usages required to be acknowledged and **[150]** proved before the Master of the Rolls, or one of the Masters of the said Court, and that such decree being an instrument to be under the hand and seal of subjects, would, had it been enrolled pursuant to the said act then be enrolled on certain rolls or enrolments of the said Court called the Close Rolls of the Chancery, which from the time of their commencement to the present time, were kept in the Tower of London or in the Rolls Chapel; and which rolls were, as the Respondent was informed and believed, then extant, uncancelled, and undefaced in their regular order and series from the time of their commencement to this time, and an inventory and index to the said rolls, and coeval with the same, and containing the parties names and description of every instrument there enrolled, were also, as the Respondent was informed and believed, then extant, uncancelled, and undefaced, and in regular order and series; and he therefore submitted and insisted, that such alleged decree could not be presumed to have been enrolled, and the enrolment lost or destroyed; and he submitted, that inasmuch as such decree had not been enrolled, this Court would not presume entirely contrary to the fact that it had been enrolled.

And the Respondent further, by his answer, said he did not believe that since the

making of said alleged decree, or during any part of the time since, the said Act and the directions of the said alleged decree had been observed and obeyed by the citizens and inhabitants of the said city of London, although he said he had heard that in some few instances such a decree had been insisted on of late years as a binding decree; but he denied, to the best of his knowledge and belief, that the inhabitants of the parish of St. Helen's had, in conformity to and in pursuance of the said alleged [151] decree, paid their tithes at and after the rate therein mentioned, except as the said alleged decree, or any other payment in lieu of tithes, as thereinafter mentioned, and in the schedule thereto annexed, set forth.

And the Respondent stated, that in case the said decree had been duly enrolled and was binding, the same would not have been submitted to, and have been applicable to and binding on the said parish of St. Helen's; for he said it appeared, by the said act and alleged decree, that the same was meant to apply to parishes of which only one person, as parson, vicar or curate, had the cure of souls, and was entitled to all the tithes, oblations and other duties, and therefore to the parishes wherein all the tithes and oblations, obventions, offerings and altarages, were the property of the parson or vicar, or other person having the cure of souls, which was not the case, as the Respondent believed, in the said parish, if the said rectory had been appropriated.

And the Respondent denied that to his knowledge and belief, during the time the said messuage or dwelling-house and premises had been in his occupation, the tithes, or yearly payment in lieu of tithes, were payable to him the Appellant, as such impropriate rector of the parish of St. Helen, Bishopsgate, for or in respect of the said messuage or premises in the said alleged decree mentioned, or otherwise, or that the same were payable by the Respondent in proportion to the rent. And he denied that he had at any time, or that any former owner or occupier had, to the best of his knowledge and belief, always, or at any times or time (save as therein appeared) since the said alleged decree, and conformably to, and in pursuance and by virtue thereof, paid to the former rector, or pretended rector of the said parish, any tithes or payment [152] for the said messuage and premises, at the rate in the said alleged decree mentioned, or at any less rent or proportion; however, the Respondent said he had been informed, and believed that a Mr. Borradaile, who occupied the said premises in 1821, or some prior years or year, did pay some sums or sum of money to the Rev. Mr. Cooke, who called himself rector of the said parish, he having demanded the same, and as the Respondent had been informed and believed, threatened (if the same was not paid) to file a bill in Chancery to recover 2s. 9d. in the pound on the rack-rent of the said house. And the Respondent believed that the said Mr. Cooke did actually file a bill in equity against an inhabitant of the said parish, of the name of Cooper, for the tithe of his house, after the rate claimed by the said Appellant's bill; but the Respondent said he was informed, and believed that the said bill was dismissed with costs. And he believed that the said Mr. Cooke did by similar means induce some other parishioners of the said parish to pay sums of money for tithe of their houses not anciently or legally due for the same.

And the said Respondent admitted, that under the circumstances in his said answer stated, he had not made to the Appellant any payment for or on account of the messuage or premises in his the Respondent's occupation, and he believed there were not any payments due to the Appellant on account thereof.

The Respondent further said that a list or table of persons liable to pay tithes in the said parish, and the sums payable by them, appeared to have been by an order of vestry of the said parish, in the year 1814, made out and written on parchment, and hung up in the vestry with a view to perpetuate the evidence thereof, and which customary payments were a payment, in the aggregate amounting to the same sum as [153] at the passing of the Act 37 Hen. 8, and ever since had been payable to the person or persons then and now being rectors of the said parish, or the vicars thereof, or the person or persons lawfully entitled to the sums of money mentioned in the said table in lieu of tithes, and that the ecclesiastical person having the cure of souls was, in the 37 Hen. 8, and ever since had been, and that the Rev. James Blencairne then was as such so entitled; and further, that he did not believe any former occupier of the premises he held had, since the passing of the said Act and making of the decree, paid any tithes, etc. calculated at 2s. 9d. in the pound, and that the said Act and

decree had not (except in some recent instances) been enforced, and then only under the mistaken notion that the same was duly enrolled.

And the said Respondent, by his answer, further stated that he did not know, nor could he set forth, as to his belief or otherwise, whether the said Act of Parliament and alleged decree, or either of them, were or was, or not, duly entered or copied in a register, or any other book kept by Bonner, then bishop of London, or any other person for him; nor whether the affairs and transactions, and deeds and papers, or any of them, of and relating to the See of London, its rights and property, between the years 1539 and 1559, had been registered or preserved in such register or book; nor whether such book was or is deposited and preserved in the cathedral church of St. Paul, or any other place; nor whether it did or not appear by the copy of an enrolment on the said decree, copied and entered in the same alleged book; nor whether the fact was that the said decree duly signed and sealed by the persons who made the same, was at any time delivered by bishop Bonner to the archbishop in the bill men-[154]-tioned, nor any other persons; nor whether the said bishop did or not, on the 25th day of February 1545, or at any other time, deliver the said alleged decree to his registrar, or any other person, for safe custody; and he said he did not know whether the said alleged decree had or not been constantly, or at any times, printed by the king's printer along with the existing statutes of this realm.

And the said Respondent said he admitted that the said Act of the 37 Henry 8, would have been, and then was, useless and nugatory, unless taken and acted on or in connection with the said alleged decree, or some other decree, made by proper persons, and duly enrolled as the Act required; but the Respondent said he believed that some decree, touching tithes in London, has been acted on in some of the courts of justice in this kingdom, and considered by the king's Judges as a valid and subsisting decree, but under a mistaken notion, as the Respondent believed, that the same had been duly enrolled; and he insisted, that unless the Appellant produced the enrolment of the record in the Court of Chancery, or proved the same to have been casually lost or destroyed, and produced evidence of its contents to the effect in the said bill set forth, the Appellant could not be permitted to go into or give any secondary evidence of the contents of the decree alleged to have been made pursuant to the Act of the 37 Henry 8; however, the Respondent said he did not know, nor could he set forth, as to his belief or otherwise, whether many or any decrees or orders, in some and which of the King's courts of justice had been made, founded on or pursuant to the said Act of Parliament and alleged decree; nor whether the citizens and inhabitants of the city of London, or any of them, had been ordered and adjudged to pay their tithes at [155] and after the rate of 2s. 9d. in the pound, or any other rate on the rent or value, according or with reference to the said Act or alleged decree; nor whether the clergy of London had received or (save as aforesaid) were entitled to receive any tithes, or payments in respect of tithes, except by force and effect of the said Act and alleged decree; and he said he believed that a prior Act of the 27 Henry 8, did pass, relating to tithes in the city of London, but he submitted to the Court whether such Act was or had been held to have been repealed by the said Act of 37 Henry 8, and the said alleged decree; and he believed that the said Act of the 37 Henry 8, had been very lately insisted upon by some or one of the clergy of London as a valid and subsisting Act of Parliament, in the event of the said decree not having been duly enrolled; and the Respondent submitted to the judgment of the Court, whether the said Act of 37 Henry 8, ought not to have been deemed, taken to be, and considered, as a valid and subsisting Act, in case the said alleged decree had not in fact been duly made and enrolled; and the Respondent insisted it was then necessary, at that distance of time, to produce the actual enrolment of the said decree, which was the only evidence of the existence thereof that could be admitted, so as to bind the Respondent, and that such enrolment ought not to be presumed, inasmuch as such presumption, if made, would be, as the Respondent believed, entirely contrary to the fact; and he said, that under the circumstances therein appearing he submitted and insisted, that even if the said decree had been acted upon, recognized and adopted, as in the bill alleged, it ought not to be treated and considered as of the same force and effect as if the actual enrolment was extant and produced.

To this answer the Appellant replied, and witnesses [156] were examined on his behalf, but no witnesses were examined, nor any evidence given, on the part of the said Respondent; and the Appellant proved, by his witnesses, the several deeds and instruments showing his title to the said rectory: and further, that between Lady-day and Michaelmas 1822, and after he had become the purchaser of the said rectory, the Appellant's agent, accompanied the Reverend Edward Cooke, the former rector, in his collection of the tithes and payments in lieu thereof, at Lady-day 1822, and that the Appellant's agent was introduced by the said Reverend Edward Cooke to the several residents and occupiers as the person to whom they were in future to pay such tithes or payments; and the Appellant also proved the actual receipt by him, as such rector, (through his agent) of such tithes or dues, and that he had since continued to collect and receive such payments; and he proved, by the evidence of the said Mr. Borradaile, the former owner and occupier of the house and premises then in possession of the said Respondent, that he, the said Mr. Borradaile, had occupied the said premises about four or five years ago, and that he paid a certain sum of money during his occupation to the lay rector or impropriate of the said parish, or his agent, as tithes, or in lieu of tithes, amounting to about ten or twelve guineas; and the Appellant further proved by the Reverend H. B. Owen, who had been rector of the parish of St. Olave, Hart-street, in the city of London, for thirty years and upwards, and was then such rector, that he had always considered himself entitled to be paid at the rate of 2s. 9d. in the pound on the rack-rent of houses occupied in his parish, by or in the nature of tithes, under the said statute of 37 Henry 8; and the said witness proved that the East India Company had for many [157] years past paid, and were then paying to him (the witness) as such rector, 2s. 9d. in the pound on the estimated annual value of the premises occupied by them within the parish, and that the King's Excise Office also made a similar payment to him, and that the New Corn Exchange Company had agreed to make him a similar payment; and the same witness proved that he had at various times, since he became rector of the said parish, claimed and received from many other inhabitants living in the said parish, 2s. 9d. in the pound on the rack-rent of the respective houses and premises; and he mentioned two instances in which some of his parishioners resisted the payment, in consequence of which he caused a bill in equity to be filed against them, upon which they submitted, and paid him such rate accordingly on the rack-rent of their respective houses.

In further support of the Appellant's case, he produced the office-copy of the record of the Court of King's Bench, in an action at law, *Hallam* against *Adams*, Hil. ter. 23 Car. 1, roll 1834, brought for false imprisonment under a warrant for not obeying an order of a magistrate for the payment of the small tithes, or money in lieu thereof, within the said parish, and in which the question of enrolment of the said decree was in issue, and a verdict was found for the enrolment.

And in further proof, the Appellant produced various printed cases in support of the proceeding of suits and actions in the High Court of Chancery, and in the Court of King's Bench, and in the Court of Common Pleas, and in the Court of Exchequer, and in the House of Lords, at various times for upwards of two centuries, in which decrees, judgments and orders were made for payment of tithes in the city of London, founded on the fact or assumption that the said decree [158] had been duly enrolled and printed. Books of the statutes of this realm were also produced to show the fact of such decree having been duly made and enrolled; but notwithstanding such matters, his Honor the Vice Chancellor, before whom the said cause was heard, by his decree or order bearing date April 29, 1828 (which has been since enrolled), did order that the parties should proceed to a trial in his Majesty's Court of Common Pleas on the following issue: Whether the decree mentioned in, and authorized to be made by, the statute 37th of Henry 8, c. 12, was duly enrolled according to the provision in that statute, and his Honor did reserve the consideration of all further directions, and of the costs of the said suit, until after the trial of the same issue.

The Appellant is advised, and conceives that he is aggrieved by the said order or decree, and humbly appeals therefrom to your Lordships, and prays that the same may be reversed for the following (amongst other) Reasons:—First. Because there was sufficient evidence to show that the award of the Archbishop of Canterbury and

the other persons, or a competent number of them, mentioned in the Act 37th Hen. 8, had actually been made of the tenor and to the effect stated in the Appellant's bill, and although the actual enrolment of the award is not now to be found or accounted for, yet, after a lapse of nearly three hundred years, positive evidence of the formal act and ceremony of enrolment ought to have been and must be presumed.

Secondly. Because the presumption of enrolment is, under the circumstances, and after so great a lapse of time, a presumption of law, and not a mere presumption of fact to be found and formed by a jury.

Thirdly. Because a jury can have no better or other means of forming a judgment on the question sent to **[159]** them than the Court had; there can be no parol evidence in the case on which a jury could be required to decide with reference to the character or credit of conflicting witnesses.

Fourthly. Because the existence of the law, and the usage of the city of London founded on and derived from the statute 37 Hen. 8, and the award, and the judgments and decisions of the several courts of law and equity, recognizing the law on the subject, are matters of public notoriety.

The Respondent is advised, and humbly insists, that the said order or decree ought to be affirmed, for the following amongst other reasons: First, that the said Appellant not having proved that the said decree had been duly enrolled, and not having proved any facts or circumstances from which such enrolment could be judicially presumed, the only order he was entitled to was an order giving him an opportunity to try that fact.

Secondly, That it having been alleged upon the hearing of the said cause, that the Respondent was, as in fact he was, prepared with evidence to prove that the said decree had never been enrolled, the Appellant was not entitled, in contradiction to the evidence in the cause, to call upon the Court to assume that such decree had been enrolled.

The Cause was heard on the 13th December 1830, in the presence of the Judges who had been summoned to attend on the motion of Lord Wynford; and on the 14th the Judgment of the House was given.

The Earl of Eldon: My Lords, this is a cause in which the Appellant filed his bill in the Court of Chancery, stating that he was seised and possessed of the **[160]** impropriate rectory of St. Helen's, Bishopsgate, and in that character claimed the tithes of that rectory, and praying that an account might be taken of all sums of money due to him from the Respondent for tithes; and if the Appellant had a legal title to those tithes, there can be no doubt that he was entitled to have an account of what was due from the Respondent on the score of that legal title. The cause was originally heard before his Honor the present Master of the Rolls, who was pleased to order the trial of an issue, which order has brought the case before your Lordships, the Appellant insisting that no such order ought to have been pronounced. It is perfectly clear, that if a case depends on a mixed question of law and equity, the Judge in equity has himself a right to decide upon the circumstances which raise that question; but it must be admitted that in a great many cases it would be very wise to send an issue to a court of law, in order that the Judge in equity, who is to judge of the equity and the law, might have his conscience better informed, and be better able to apply the law to the facts and circumstances of the case. This is an appeal to your Lordships as a Court of Equity; for you are sitting here to decide upon the same principle as the Lord Chancellor ought to have decided upon in his court; it is clear therefore that your Lordships ought to send an issue to be tried, if you are satisfied that this is that species of case which upon the whole view of the circumstances requires such a proceeding. On the other hand, if you are perfectly satisfied that the Plaintiff has made out his title, and that you cannot act against that title without overturning a long series of decisions, your Lordships ought not to send the case to a court of law; but as Judges of the law you should decide the law, applying the **[161]** law to the facts and the evidence before you. Now it is admitted that the Appellant is lay-impropriator of the tithes of the parish. He shapes his title upon the 37 Hen. 8; and the question really to be decided by your Lordships is, whether, after all that appears to have been done upon a careful search, and after all that has been pronounced by the courts of law upon the subject, you feel yourselves satisfied that the Appellant,

founding his title on this statute, is entitled to your decree in the first instance, or whether he is first bound to try to produce better evidence before a jury, that your Lordships may afterwards decide whether the jury has come to a right conclusion. When the case first came before the House the nature of it was not immediately understood; and being a case of importance, it was thought proper by my noble and learned friend that the Judges should be called on to assist your Lordships with their advice. When however the nature of the case came to be seen, it was clear that there was no question which could properly be submitted to the Judges for their consideration, because it does not depend upon a question of common law, but upon the manner in which the Court of Chancery ought to exercise its jurisdiction in applying the law to the fact. When I have stated that this Appellant is the lay-impropriator, I have gone some length towards showing that, considering the decisions upon the Act of Parliament, and on the enrolment of the deed under it, the Appellant has a right to sue under the Act. The decisions of the Courts, that whether there be a producible deed or not, an impropriator under this Act has a right to sustain such a suit as the present, offer of themselves an indication, if there was no other, that the Act of 37 Hen. 8, is one under which an impropriator may recover. If that is so, it does not appear **[162]** that the objection now taken by the Respondent can be supported as against those who claim a title under the Act. That Act recites that differences had existed between the clergy of the city of London and their parishioners. It was those differences which the Act endeavoured to allay, and appease, but unfortunately it has not been successful in its attempt. From a statement made by Lord Hardwicke it appears that some friend of the church found a singular mean of augmenting the benefices in the city of London. The clergy of the city were to be paid by offerings to be made on a certain day in the week, and also upon every saint's day in the year. The Pope thought proper to introduce into the Calendar a large number of saints in addition to those that were there before, and by that mean the clergy received from the inhabitants a larger sum than was originally intended; and so matters continued till 37 Hen. 8, when it was referred to certain dignitaries and authorities to make a decree in the matter, which decree was for ever to settle the claim on one side, and the payment on the other. The persons thus appointed did make a decree, and at that time the Act passed upon which the present question arises, namely, whether that Act of Parliament made it necessary that in all future times, however distant, the impropriator should be able to prove to demonstration that there was an enrolment of that decree. The enrolment does appear to have been made necessary by the Act; but then comes the question, whether, at this distant day, if the enrolment is not to be found, your Lordships are to say that the Act is good for nothing, or whether you are not justified in presuming that there has been an enrolment, although it cannot now be produced. It has been stated at the bar, that with respect to the question of presumption, I once de-**[163]**-clared the man to be mad who should assert that Judges and Juries might presume an Act of Parliament: I desire to disclaim ever having made such an observation. In the case where it was said that Judges and Juries might make such a presumption, a presentation to a Crown-living had been made by a private individual; and Lord Mansfield seems to have entertained the opinion that the presentation was a ground to infer that the Crown had granted the right by patent, or by some particular species of conveyance, which he seems to have thought might be presumed, as well as an Act of Parliament. The observation referred to at the Bar was made on that case, but not by me. It was made in a case which I argued as counsel, in the Court of Exchequer, and in which Chief Baron Eyre said, that if that doctrine was true we might as well have no statutes; and another learned Judge remarked that he thought it infinitely too strong. But, my Lords, though perhaps a presumption of that kind ought not to be made, yet nobody will dispute that where there has been a species of enjoyment of property for a long series of years, which species of enjoyment never could have obtained without a legal origin, such legal origin may properly be presumed. Your Lordships are aware that no time is allowed to run against a demand for tithes. In many cases estates have been enjoyed, and no tithes have been rendered: but courts of equity have held that that circumstance alone was not sufficient to exempt them; but if there had been no payment of tithes for a very long period, though under circumstances which made it probable that there might have been originally a title to

those tithes, there a court of equity has said that the title has not been made out, but the claimant should be left to the law to establish his right. A vast length of time, however, [164] might have a different effect. There are cases in which courts of equity have held that possession for 250 years might be the ground for presuming that title-deeds had been lost, which title-deeds if produceable would have given effect to the rector's claim to the tithes. With respect to the evidence of enrolment in this case, it is to be observed, first, that from the time the Act of Parliament had passed to the present moment (now nearly 300 years), cases have repeatedly occurred, in every one of which the judgment has been founded upon the idea that enrolment was to be presumed; and when the question arises, whether an impropriator is within the Act, can I be called on to presume, after all these decisions, that there was no enrolment, especially when I find that the Act itself made that enrolment necessary. What, my Lords, would then become of that large class of cases where issues have been directed to try, not whether the impropriated rector under this Act was entitled to 2s. 9d. in the pound, but whether a less sum had been usually paid, so as to deprive him of the right to call for that payment? These issues would have been needless if this objection as to the want of enrolment was to be considered as valid. The same observation may be made with respect to those cases where the question has been, whether particular persons were or not specially exempt from the operations of this Act. In one case of that sort the question was, whether the Dean of St. Paul's was liable to be called on for payment under this Act, or whether he was "a great man," so as to come within its exemptions. The Judges held he was liable, which they surely would not have done had they not felt themselves bound to adhere to the Act. By its provisions no man is exempt who is not a nobleman, or a great man. They decided that the Dean of St. Paul's was not "a great man;" but whether he was [165] or not, is not in the smallest degree material if the non-production of the enrolment could put an end to the claim. In the same manner, my Lords, where was the necessity for deciding the cases in which the question was, whether the tithes were to be calculated, in leases granted upon payment of fines, upon the fine paid to the landlord, and upon the nominal rent reserved, or only on the rent stated in the lease, where the fine taken was considerable, and the rent reserved was small. Where, too, was the necessity for agitating questions of jurisdiction under this Act? The statute gives the right of decision to the Lord Mayor, and if he does not decide the question, then to the Chancellor; and on that provision questions have arisen, whether the Court of Chancery had jurisdiction in the matter; and these questions were decided in the affirmative, for the Court said, there was a matter of account; and the Chancellor in Chancery was entitled to compel a matter of account, although no enrolment was produced, and it forced the party to account according to the terms of the Act of Parliament. Where, I ask, was the necessity for agitating these questions if the claim could be at once defeated on the single ground of the non-production of the enrolment of the original decree. The variety of questions, my Lords, arising on this Act is so great, that if your Lordships hold the objection now made to be valid, you will in effect be taking it for granted that all the Judges in the land have been acting against the law for the last 300 years. But, besides what I have already observed, I would ask, my Lords, what are we to say to the fact, that in the memory of all living men the citizens of London have paid the tithes under this Act? Are the citizens of London so fond of paying tithes, and so liberal as not to take advantage of their non-liability? Do they [166] differ from all other persons in that respect? The fact of payment for two or three centuries is enough to justify your Lordships in presuming an enrolment, although it cannot now be produced. Many cases have occurred, and in some of them I have been professionally engaged, in which the rights of the clergy under this Act have been the subject of discussion, and yet this objection to the non-production of the enrolment has never before been taken, Judges and Counsel being equally satisfied, from the long train of decisions, and from long existing usage, that the Courts must at the end of two or three centuries act upon the presumption that all things, which the Act rendered necessary to be done, had been rightly done at the time. If your Lordships were not to act upon such a presumption, you would shake the foundation of every title to property in the kingdom. Upon these grounds, my Lords, it appears to me, that in this case an issue ought not to have been directed. I go farther, and I say, that even if it was right to give the parties an issue, this is not the issue that should

have been given. It should have been a more comprehensive issue. I shall therefore submit to your Lordships, that this judgment should be reversed; and I willingly take upon myself the task of putting into proper form the judgment to be given by your Lordships.

Lord Wynford: My Lords, I shall only trouble your Lordships with a very few words in this case. I entirely concur with my noble and learned friend, who has just addressed you, and probably it will be fit that I should point out to your Lordships why the Judges were brought here, and I am not sorry that I gave them the trouble, for although I agree with my noble and learned friend that it is not necessary **[167]** a question should be put to them, this being a matter depending upon a point of equity, and not a question of law, I yet obtained from them a material assistance in enabling me to form an opinion upon this very important question. This case came before me some time ago in the Court of Common Pleas, when I had the honour of being Chief Justice in that court. It was an action first upon a composition for tithes; secondly a claim upon the general law. Upon that occasion the plaintiffs obtained a verdict for the composition. There was then an express issue raised whether this deed was enrolled. My noble and learned friend is aware that I had no means of knowing before I came into court how the question would be raised; and when it was first started it occurred to me that as this question had been so often settled in courts of justice, though the issue was expressly raised, I ought to direct the jury to presume the deed enrolled. But I was told by one of my learned brothers in that Court that the thing had never been settled at all; that my recollection was quite imperfect; upon which I said I will leave the question of fact to the jury, reserving afterwards for the consideration of the Court, whether they ought not to have acted upon the presumption. A motion was afterwards made to enter a non-suit upon the point so reserved; the Court of Common Pleas granted a rule to show cause; that rule was afterwards generally discharged; and as the case is stated in a very good book upon the law of tithes, I see it is said, it was discharged because the Court thought it was properly left for the jury; that is undoubtedly a mistake. The fact is, that the plaintiff was content to take his verdict upon the count for the composition, which would not raise the point, and they suffered the rule to be discharged.

[168] Afterwards this bill was filed. I recollect that I had my doubts upon the law in the Court of Common Pleas as to directing the jury to act upon the presumption; therefore, I sought to trouble the learned Judges to attend, that the point might be settled. I am now of opinion, that if I could by any possibility be restored to a court of law, I should direct the jury to presume the enrolment, because, although the judges in a court of common law differ from the judge in equity, he being the judge of the law as well as the fact, I think the time has now arrived in a case of this sort, when a judge is justified in telling the jury they ought to presume an enrolment.

My Lords, there are many cases that bear a strict analogy to this. The custom of merchants and the custom of the realm are stated in pleading, and they used to be proved by witnesses, but they have been found so often, that now the Judges take judicial notice of them, and tell juries what those customs are. Now is not this a case of that sort; here are twenty-four printed decisions, all of which my noble and learned friend has stated must have been wrong if this deed is not to be considered enrolled.

At a very early period of the reign of Charles the Second the question of enrolment came before the Court upon an express issue, though not by an action for the recovery of tithes. An action for tithes could hardly be supported on the statute, because the statute has given a specific remedy, and gives the go-by to the ordinary proceeding; but the question was raised in the case I allude to, upon a false imprisonment, and that gave occasion for submitting to the jury the question, whether or not this deed had been enrolled, and the issue was found in favour of the enrolment of the deed. That case was decided nearly 200 years ago, **[169]** and from that time down to this I presume it has been taken for granted, for certainly in no case that I am aware of, except this, has the question, as a question of fact, ever occurred in any court of common law. Whenever it has occurred, it has seldom come before a court of law, for the reason stated, and whenever it has come before a court of equity, that court has taken it for granted. I think your Lordships would be doing great mischief if these presumptions were now to be disturbed. It is like doing away the effect of

statutes that have been truly said by great Judges to be statutes of peace. There is an end of all right, if when a question of this sort occurs it is to be left to a jury as a question of fact. If after twenty-four decisions, in one of which it is expressly found, and in all of which it is recognized as a fact, that this deed was properly registered, it is not at this distance of time to be taken as a presumption of law that it was registered, I do not know when presumptions can by possibility arise. It was argued that you cannot presume it in this case, because it must be registered on a given day, and you have only to search at that time, and if you do not find it, then it is conclusive that it never was registered: but undoubtedly that argument proceeds upon a mistake. The decree of the noble and learned persons which was to give effect to the statute was to be made before the 1st of March, but there is no time fixed for its being enrolled; there is no point of time we can fix upon and say, that not having been found there you are to presume it is not enrolled. That being the case, you must look for this at the Rolls for nearly 300 years before you can say with safety it is not enrolled. What a dangerous litigation this would lead to. I conceive, in a case of this sort, you must take it for granted it was enrolled, though at this time of day it was impossible to prove the fact.

[170] My noble and learned friend has said that he never stated presuming an act of parliament was presumption run mad. Talking about presuming acts of parliament I may say that I have heard a noble Judge once at Nisi Prius, and afterwards, with more advice, in the King's Bench, state that he would presume 200 Acts of Parliament; and Lord Kenyon stated that that was but a short mode of expressing what he meant, and only a strong mode of putting a fact that was beyond dispute. Some mistake has arisen upon an issue directed by my learned friend near me, (the Lord Chief Baron), as if he had directed an issue of this sort. My learned friend directed no such issue. My learned friend seems to me to have assumed there altogether that the deed was properly enrolled, for the issue directed by my learned friend was not whether there had been such a decree as this enrolled, but whether the parties were excused by a particular custom in that parish from paying according to the original decree. Now I take it, the issue directed by the Chief Baron would be quite idle if the decree had never been enrolled.

I ought, perhaps, after the excellent judgment and opinion pronounced by my noble and learned friend, to apologize for saying a single word; but as this is a question of very general importance in the city of London, and has much agitated the City, I thought I was bound to take upon myself my share of stating, as shortly as I could, without doubt and hesitation, what was my opinion; and I shall only add, that for the reasons my noble and learned friend has given better than I could do, I entirely concur in the judgment he proposes your Lordships should pronounce.

Judgment of the court below reversed.

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[171] APPEAL

FROM THE COURT OF SESSION.

DOUGLAS AND OTHERS, (Assignees of John Stein, Thomas Smith, Robert Stein, James Stein and Robert Smith,—*Appellants;* BROWN and GIBSON CRAIG, (Trustees for the Creditors of John Stein and Robert Stein and Co. Distillers at Canonmills and Kilbagie,—*Respondents.*

A trust-deed for the benefit of Scotch creditors, made by one of three partners in two Scotch firms, all of whom are also partners in English firms, is not such an act in the ordinary course of the partnership business as to be valid against the other two partners, or their representatives; and the assignees under a general commission of bankrupt against all cannot homologate it. The rules of English law are matters of evidence in Scotch courts; but the House of Lords, sitting as a court of appeal from the decision of a Scotch court, is equally an English as a Scotch court, and will act on its own knowledge of English law, and not be bound by the report of that law made by English lawyers to the Scotch courts.

The facts of this case, so far as they relate to the judgment in the House of Lords,

were these:—John, Robert, and James Stein carried on, in partnership, for many years prior to 1812, the business of distillers at Canonmills near Edinburgh, under the firm of John Stein, and at Kilbagie under the firm of Robert Stein and Co.; they were also partners in the banking concerns of Scott, Smith, Stein and Co. of Edinburgh, and of Stein, Smith and Co. of London. On the 22d July 1812, the London banking-house stopped payment, and [172] notice of that event having been despatched to Scotland, the Edinburgh banking-house stopped payment also. Four separate commissions were immediately taken out against Robert Stein, Thomas Smith, James Stein, and Robert Smith. A meeting of the distillery creditors was held at Edinburgh on the 3d of August 1812; and on the 6th of August John Stein, the principal partner in the distillery concerns, and the only partner on the spot, executed a deed of trust, by which, in the name of the companies, he conveyed the whole heritable and moveable estates of the companies to Messrs. Brown and Gibson, (afterwards Gibson Craig), for the benefit of the Scotch creditors. On the day after executing this deed John Stein set off for London. On the 11th of August a joint commission was sued out against him and the other four partners in the banking concerns. The four separate commissions were superseded at the same time. The trustees had undertaken and performed the trusts under the deed of the 6th of August, and communications between them and Messrs. Cuthbert, Smith and Duval, the then London assignees, had taken place. Among these was a letter, dated 1st September 1812, written by the London assignees, in which they desired Mr. Gibson, on their behalf, to take possession of what belonged to the bankrupts, and gave him certain directions about sending part of the effects (the produce of the distillery) to the English market. They also desired certain things to be done; and added, "We request of you therefore, as attorney for us, to regulate accordingly." The present Appellants were subsequently appointed assignees under the joint commission.

The questions raised were, first, whether the trust-deed of the 6th August was valid; secondly, whether the London assignees had homologated or confirmed it, [173] and thereby authorized the defenders to act under it as trustees for the Scotch creditors; or, thirdly, whether the deed was not utterly invalid as a fraudulent preference of particular creditors, and whether the defenders were not bound to account to the Appellants for all monies received by the Defenders as agents and attornies for the assignees.

The case having come before the Scotch courts, on an action to reduce the deed of trust, a letter of 26th September 1812, from the London assignees to the Defenders was relied on by the latter, to show that the assignees had recognized them in the capacity of trustees, and had therefore homologated the trust-deed, so as to make it binding as against themselves and the English creditors. That letter was as follows: "Gentlemen, being satisfied that the distillery concerns at Canonmills and Kilbagie were carried on by Messrs. John, Robert and James Stein, distinct from the concern in Fenchurch-street under the firm of Stein, Smith and Co., and that the creditors of the distillery companies have a preference on the effects belonging thereto we hereby authorize you to pay the distillery creditors the amount of their debts, taking care, in the first instance, to ascertain the exact amount of such debts." It was signed by Messrs. Cuthbert, Smith and Duval.

Lord Corehouse, the Ordinary in the cause, pronounced the following interlocutor: "16th May 1828. The Lord Ordinary having considered the revised cases, and whole process, appoints the parties to prepare and lodge a case for the opinion of English counsel upon the question, whether, on the supposition that the letter from Messrs. Cuthbert, Smith and Duval to the Defenders, dated 26th September, is held to import an authority to the Defenders to [174] settle with the distillery creditors in the capacity of trustees, and of consequence to be a homologation of the trust-deed to that effect, such authority is by the law of England binding on the creditors of Scott, Smith, Stein and Co.; and on the present assignees the pursuers of this action, reference being had to all the circumstances of the case, and in particular to the meeting of creditors held upon the 9th of that month." The only creditors who appeared to have met on that occasion, or who had signed the minutes of that meeting, were James Cuthbert and his partner; and by that minute they resolved to authorize and empower the assignees "to commence, prosecute or defend any suit or suits at law or in equity,

or any other proceedings in England or Scotland, for the recovery or defence of any part of the said bankrupts' estate and effects, or either of them, or to compound, submit to arbitration, or otherwise agree to any matter, cause or thing relating thereto."

Under this direction of the Lord Ordinary the following opinion was given:

"On the supposition that the letter from Messrs. Cuthbert, Smith and Duval, to the Defenders, dated the 26th September 1812, is held to import an authority to the Defenders to settle with the distillery creditors in the capacity of trustees, and of consequence to be a homologation of the trust-deed to that effect, I am of opinion that such authority is by the law of England binding on the creditors of Scott, Smith, Stein and Co., and on the present assignees, the pursuers in the action, reference being had to all the circumstances of the case, and in particular to the minutes of the meeting of creditors held upon the 9th of that month.

"With regard to the obligation of this transaction **[175]** upon the assignees in such their character as assignees, and individually as creditors, there could not be a question either in law or in equity.

"With regard to the creditors generally, the question involves in a conclusion rather of fact than of law.

"Assignees under a commission of bankrupt have the complete legal authority and title charged with a trust or duty to use them beneficially for the purposes of the commission. They are *prima facie* fully competent to bind the creditors at their (the assignees) own discretion, and without any previous or express sanction either of commissioners or of creditors, except in those particular instances in which such sanction is required by the statute 6th Geo IV, c. 16, s. 88, viz. compounding with a debtor, giving time, taking security, submitting to arbitration, and commencing suits in equity, or any other act relating to the property vested in or claimed by them. What absolute owners or claimants may do, they may do effectually and conclusively, provided it be for the benefit, or rather not to the detriment of the creditors; themselves at all events they bind; and if no creditor or creditors come forward to complain, the act done is good to all intents and purposes both in law and in equity. If the question were agitated in this country it would stand thus:—Creditors, one or more of them, would complain either in a court of equity, or to the equitable jurisdiction of the Chancellor in bankruptcy, that the assignees had abused their legal dominion to the prejudice of the interests of such creditor or creditors. The *prima facie* legal validity of the transaction would be recognized; the question would be, is it detrimental or not to those on whose behalf the assignees have thus been act-**[176]**-ing? Upon this question, as upon a matter of fact, the Court would direct a reference, either to the commissioners, or to a Master in Chancery; and upon their return, yea or nay, to such inquiry, would make its final adjudication. If this question were referred to me, or if in this case I am to be taken as exercising a similar function, I should, under all the circumstances of the case, without hesitation, affirm that the assignees and creditors were bound, holding first the assignees to be legally competent to homologate the trust-deed; and, secondly, that there was not in the mode of exercising, or in the circumstances attending such exercise, any incident upon which the creditors were entitled to disaffirm it."

On this opinion being returned to Scotland, the Lord Ordinary (Corehouse) pronounced an interlocutor, by which it was declared, "that by the law of England the pursuers, as assignees of Stein, Smith and Co., acting for themselves and for the creditors of the company, had power to homologate the trust-deed executed by John Stein in favour of the Defenders for behoof of the creditors of the distillery companies; that the pursuers did homologate that trust-deed, to the effect of authorizing the Defenders to realize and distribute the funds of the distillery companies, and for that purpose to ascertain the claims against the companies, and to settle with the creditors; that the Defenders are bound to account to the Pursuers for their actings and intromissions only in the character and with the privilege of trustees under the said trust-deed, and therefore assoilzies the Defenders from the reductive conclusions of the libel." This interlocutor had been adhered to by the first division of the Court of Session after appeal and argument thereon. The case now came on **[177]** to be heard at the bar of the House of Lords on an appeal against this interlocutor, and the same points which had been discussed in the Court below were argued before their Lordships.

The Lord Chancellor (Feb. 22, 1831): In this case I am released from considerable difficulty, for I can altogether put out of view the complicated accounts between the parties. I come at once, therefore, to that which has been the foundation of the judgment in the Court below. The Lord President admitted, that if the English counsel had stated the English law to be different, a different complexion might have been given to the business. The Lord Corehouse rested his interlocutor on the same ground; namely, on the opinion of the English counsel, as to what was the English law. Now the question here seems to me to be, whether we are to be bound by the opinion as to the English law? This Court, which is both an English and a Scotch Court, has the power to import into the case its knowledge of English law, and as a Court of Appeal to act upon that knowledge. We must not indeed govern cases of Scotch law by the decisions and rules of the English law, and he who should attempt to do so would act unwisely, improperly and illegally; but in the present instance we may act upon the English law, for the English law is here in question. In the Scotch Courts English law is a matter of evidence, and the evidence of what it is must be sent there from England. The opinions of English lawyers upon English law become therefore in Scotch Courts matters of fact, and are so received; but how stands the case here in the Court of Appeal, where the Judges are at once Judges of English and of Scotch law? Is it not somewhat of a subtlety to say, that though I am an English **[178]** lawyer, I sit here on Scotch appeals as a Scotch lawyer only, and that I have therefore only a right to look to the report of the English law, made by an English lawyer, as a matter of fact, in the same manner as if I were a Scotch Judge sitting in a Scotch Court, and bound so to receive it. I think that I am by no means called on to do so; and I take the analogy, which seems to me to be very strong, of a case under the civil law, which in the common-law courts of this country is considered as foreign law, and the rules of which are therefore made matter of evidence. When such a case arises in our common-law courts the Judges send to the Bishop for his certificate of the civil law. By that certificate, as Judges of the courts of common law, they are bound; but suppose the certificate to state the civil law wrongly, and that the same question should afterwards come before the Court of Appeal; that Court we know consists of common-law Judges, and of Judges of the Ecclesiastical Courts. Now I will suppose the certificate to have been manifestly wrong, would not Sir J. Nicholl, sitting in the Court of Delegates, correct the error, and set his brethren of the common-law right on the subject? Certainly he would. In the same manner the Judges of the Court of King's Bench would act if they were placed as a Court of Appeal under similar circumstances. What then, I ask, is the law of England with reference to this case? It is perfectly true that one partner can bind the other in all ordinary transactions, but that is not the case here. The creation of trusts by the trust-deed is not one of the ordinary transactions of a partnership. The original validity of the trust-deed therefore cannot be maintained; that must be admitted; and admitting that, then the question comes whether it has been since homologated. That proposition in fact amounts to **[179]** this, if it was not legal in its origin, could the assignees, who could not make it legal at first, do so afterwards? Ex parte Whitchurch, 1 Atkyns, is an authority on that point, and in that case the assignees were held not to have power to homologate an authority originally invalid. I therefore propose to your Lordships that this case should be sent back to the Court below, with instructions, that according to the English law the assignees had not power to homologate the trust-deed; and let the Court then proceed further as they shall be advised.

The interlocutor was accordingly ordered to be remitted to the Court below, with the instruction proposed by the Lord Chancellor.

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[180]

ERROR.

FROM THE IRISH EXCHEQUER CHAMBER.

PLUCK,—*Plaintiff in error;* DIGGES and Another,—*Defendants in error.*

[Mews' Dig. v. 1027; xii. 129; S.C. 5 Bli. N.S. 31. See now Conveyancing Act 1881

(44 and 45 Vict. c. 41), s. 44, as to assignment of interest with reservation of rent: and note on *Pluck* v. *Digges* in Bullen on *Distress*, 2d ed. pp. 296-302 (Appx. A.).]

A., entitled to a lease for lives renewable for ever, assigns the whole of his estate and interest in the lands to B., reserving a rent, and a power of distress and re-entry, but no reversion. The rent being in arrear, A. distrains, and B. replevies; A. avows under the Irish statute 25 Geo. 2, c. 13, corresponding to the English statute, 11 Geo. 2, c. 19, giving landlords the remedy by distress, and judgment in the Irish Common Pleas and Exchequer Chamber for A. But, on error by B. in Dom. Proc. the judgment reversed, for the statutes apply only to those leases where there is a reversion, or an interest vested in the lessor at the expiration of the lease; and here there is no reversion.

Richard Chapel Whaley, being, in 1756, seised in fee of the lands of Balinadoyle, in the county of Wicklow, demised the same at a yearly rent of £8 by indentures of lease and release, to Edmund Burroughs, his heirs and assigns, to hold the same for three lives, with covenant for perpetual renewal. In 1820, the interest of Burroughs was vested in William Hughes and Maria his wife, and in her sisters Isabella, Ann, and Harriet Hamilton, who then renewed the lives with Ann Richardson, in whom the interest of Whaley was vested.

Hughes and his wife, and her three sisters, by indentures of lease and release, dated the 18th and 19th of February 1821, assigned the whole of their estate and interest in the lands to Thomas Pluck, at the yearly **[181]** rent of £61 8s. 6d. The last-mentioned indenture purported in form to be a demise, and contained a covenant authorizing the releasors, their heirs and assigns, to enter and distrain on the lands in case of nonpayment of the rent within twenty-one days after the same should become due, and also for re-entry in case of further nonpayment, with covenant for perpetual renewal. Hughes and his wife, on the 4th September 1822, assigned their interest or share to the three sisters, Isabella, Ann, and Harriet Hamilton. In April 1824, the Defendant in error, Montgomery Digges intermarried with Isabella Hamilton, at which time the interest of Thomas Pluck was vested in the Plaintiff in error, Patrick Pluck, who was then in possession of the lands.

On the 25th November 1824, Digges and his bailiff, White, the other Defendant in error, entered on the lands, and distrained the cattle of the Plaintiff in error, then pasturing on the lands, as a distress for rent alleged to be due. The Plaintiff in error replevied, and in Hilary Term 1825 filed his declaration in the Court of Common Pleas against the Defendants in error for the distress.

To this declaration avowries and cognizances to the following effect were put in by the said Defendants as landlords of the said premises, under the statute of the 25 Geo. 2, c. 13, (corresponding English statute, 11 Geo. 2, c. 19).

First, the Defendant Montgomery Digges, in right of his wife Isabella avowed, and as bailiff of Ann and Harriet Hamilton, and the said Defendant Thomas White, as bailiff of said Montgomery Digges and Isabella his wife, Ann and Harriet Hamilton, acknowledged the taking as just, because they allege that Plaintiff, at the time of said taking, held and enjoyed said lands for one year and a half before elapsed, and **[182]** ending on the 29th September 1824, as tenant thereof to the said Montgomery Digges and Isabella Digges, otherwise Hamilton, his wife, and Ann and Harriet Hamilton, by virtue of a demise thereof to him the said Patrick Pluck theretofore made, at and under a certain yearly rent therein mentioned; and because the sum of £92 2s. 9d. of the said rent, for the space of one year and a half as aforesaid, on the 29th day of September 1824, was then in arrear from the said Plaintiff to the said Montgomery Digges and Isabella Digges, Ann, and Harriet Hamilton, the said Defendants, respectively, in right of said Isabella, Ann, and Harriet Hamilton, avowed and acknowledged the taking of the said cattle as for and in the name of distress for said rent so due and in arrear.

The second avowry and cognizance only varied from the first, by stating the tenancy to be by Thomas Pluck instead of Patrick Pluck.

The third avowry and cognizance varied from the first and second by claiming but one year's rent in arrear of said premises, up to and for the 25th March 1824,

and as being due to the said Ann Hamilton, Harriet Hamilton, and Isabella Digges, otherwise Hamilton, before her marriage with said Montgomery Digges, under a demise from them to said Patrick Pluck, and claimed in their right accordingly.

The fourth avowry and cognizance varied from the third only by stating the same tenancy to be by Thomas Pluck instead of Patrick Pluck.

The fifth avowry and cognizance varied from the former, by claiming one half year's rent of said premises only, ending the 29th September 1824, under the same demise and tenancy as in said first avowry and cognizance, and the tenancy is laid in said Patrick Pluck.

[183] The sixth avowry and cognizance is similar to the fifth, except that it lays the demise in Thomas Pluck.

To these several avowries and cognizances the Plaintiff pleaded in bar, first and second, that the said Defendants were not bailiffs, as they alleged.

Thirdly, riens in arrear, as to the said rents so claimed to be due to the said Montgomery Digges and Isabella his wife, and Ann and Harriet Hamilton.

Fourthly, that Plaintiff did not hold the premises under any of the alleged demises.

Fifthly, that Thomas Pluck did not hold the said premises under any of the said alleged demises.

Issues having been joined on these pleas, the cause was tried at the summer assizes for the county of Wicklow, when the above-mentioned indentures were produced and given in evidence. The Plaintiff's counsel insisted that upon that evidence the Judge ought to direct the jury to find for the Plaintiff. The learned Judge on the contrary gave it as his opinion that the evidence was not sufficient to entitle the Plaintiff to a verdict, or to bar the Defendants from maintaining their avowries and cognizances, and directed the jury accordingly; and a verdict was found for the Defendants, and the rent in arrear as reserved by the indentures of the 18th and 19th February 1821 was assessed at £87. To this opinion and direction a bill of exceptions was tendered and sealed, and came on for argument in the Court of Common Pleas in Easter Term 1826, when the exceptions were overruled by a majority of the Judges; and on error brought in the Exchequer Chamber the judgment was affirmed by a majority of that court, and thereupon the Plaintiff brought his writ of error in the House of Lords, and it was submitted on his behalf that the judgment ought to be reversed for the following reasons:

[184] First, Because the indenture of the 19th of February 1821, although in terms it purports to be a lease of the lands therein mentioned, yet, as it transferred the whole estate and term of the grantors in the premises, operated in law as an assignment of their estate therein, and not as an under-lease to the grantee; and consequently, at the time of making the distress in question, and while the said rent was accruing, the said lands were not held by the plaintiff or Thomas Pluck, as tenant under any of the several demises in the pleadings alleged:

Secondly, Because, since the statute of *Quia Emptores* a reversion in the lessor immediately expectant on the demised term is necessary, to constitute the relation of landlord and tenant between the parties:

Thirdly, Because though an interest had been shown to have passed under the said deed, no estoppel or conclusion was thereby created to preclude the Plaintiff from denying that he held as tenant under it, nor from showing by extrinsic evidence, that the term thereby conveyed, comprehended and passed the whole estate, term, and interest which the grantors then had in the lands:

Fourthly, Because the rent avowed for under the statute in this case, and payable under the said deed, was a rent-charge and not a rent-service, to which latter species of rent alone the Irish statute of 25 Geo. 2, c. 13, relieving landlords or lessors from the necessity of setting out their title, applies, and is confined:

Fifthly, Because the Defendants, and those in whose right they claimed the said rent, not having any reversionary estate in the premises at the time of making the distress in question, were not entitled to avow generally, but were bound to have shown and specially pleaded their title thereto:

[185] Sixthly, Because a party cannot stand at the same time in the situation of assignee of a lessee's estate and interest, and liable, as such, to the head landlord, under the covenants and contract under such head-lease; and also, as under-lessee to his immediate grantor, and liable under his contract with him as such:

Seventhly, Because, even supposing that the Plaintiff is to be considered as estopped from denying that Thomas Pluck and his assigns held the lands as tenants under the alleged demise of the 19th February 1821, yet he is at liberty to insist and show that he did not hold same at the time of making the distress in question, as tenant under any of the demises in the pleadings alleged, inasmuch as that indenture purports to be a demise by William Hughes and Maria his wife, Isabella, Harriet, and Ann Hamilton, to Thomas Pluck and his assigns: whereas the tenancy alleged in the pleadings was under a different contract and tenure, although the deed of the 4th September 1822, was inoperative to pass any estate or interest in the reversion of the said lands from the said William Hughes and Maria his wife, they not having any estate or interest in such reversion to transfer by the said deed.

When the cause came on for hearing in the House of Lords, no case was made, nor did any counsel appear for the Defendants in error; and Sir E. Sugden, counsel for the plaintiff, stated that notice had been given on the part of the Defendant in error, that no attempt would be made to support the judgment. He then briefly stated the case, and referred to the statutes by which it was governed, and cited the case of *Woolpitt* v. *Clark*, 1 Bos. and Pul. N. R. as the leading authority on the subject.

[186] Lord Tenterden: As the Defendant in error has given notice that he does not mean to defend the case, it is unnecessary for us to hear the case for the Plaintiff in error, any further than to satisfy us that there is good ground for reversing the judgment. Speaking with the greatest deference for the Judges below, I am clearly of opinion that this judgment ought to be reversed.

The case is of this description: the Defendants in error entitled to an estate for a term for lives, with covenant for perpetual renewal by deed of 1821, assigned their whole interest in the lands to a person represented by the Plaintiff in error, reserving a rent, and a power of distraining for the rent. The rent being in arrear, those who were entitled to it took a distress, which the Plaintiff in error replevied, and filed his declaration against the Defendants in error. Avowries and cognizances were put in by the Defendants under the Irish statute 25 Geo. 2, c. 13, as landlords of the premises, and all of these proceeded on the ground that the Plaintiff in error held as tenant.

By the common law both in England and Ireland, a person entering upon land and taking a distress was bound to show and set out his title to the land. The English statute 11 Geo. 2, c. 19, and the corresponding Irish statute 25 Geo. 2, c. 13, relieved landlords from this necessity, and enabled them to get payment of their rents by a shorter process. The Irish Act is the same as the English Act, but with this addition, that whereas by the English Act you cannot avow unless there is an actual demise, under the Irish Act the distress may be taken in this short mode, not only on a perfect demise, but also upon an imperfect one, such as a contract for a demise. But by neither of the acts is it permitted to avow for a rent-charge upon the [187] land payable to one who has no reversion. Now this cannot be considered as rent-service, or as rent reserved between landlord and tenant, as there can be no such rent without a reversion, or an interest vesting in the lessor at the expiration of the lease. Under this deed of 1821 there is no reversion, as the whole interest is assigned. The power of entry and distress is reserved, but there is nothing to constitute a reversion. There is consequently no rent of the description to which the provisions of the statute apply, and the only advice I can give your Lordships is, that the judgment be reversed.

Lord Wynford: I agree in that opinion; but I cannot help observing that this is one of that description of cases which ought to induce us to consider whether some alteration might not be made in law procedure, so as to prevent parties having rights from being deprived of their remedies through the blunders in point of form of attornies and counsel. It is a dreadful thing to be obliged for a defect in form to give judgment contrary to the real merits of the case. There is no doubt but that the Defendants in error in this case had a right to distrain, and that they lost the advantage of it solely by the erroneous mode of putting their case on the record.

Judgment reversed.

[188]

APPEAL

FROM THE COURT OF CHANCERY.

ROTHSCHILD,—*Appellant;* BROOKMAN,—*Respondent.*

[Mews' Dig. i. 68: vii. 258, 259: xi. 992. S.C. 5 Bli. N.S. 165; and in Chancery, 3 Sim. 153, 7 L.J. Ch. 163. Followed in *Tetley* v. *Shand*, 1872, 25 L.T. 661; *Hamilton* v. *Young*, 1881, 7 L.R. Ir. 299; *Guy* v. *Churchill*, 1889, 60 L.T. 743. Explained in *Ladywell Mining Co.* v. *Brookes*, 1887, 35 Ch.D. 408. Distinguished in *Waddell* v. *Blockey*, 1879, 4 Q.B.D. 680; and see *Robinson* v. *Mollett*, 1875, L.R. 7 H.L. 810.]

Where a person placed himself under the advice of a dealer in English and foreign funds, and the latter advised purchases and sales of stock, and it afterwards appeared that these purchases and sales were merely nominal transfers and re-transfers of the dealer's own stock, the difference being settled in account, it was held that the Court of Equity rightly interfered to compel an account between the parties, and to set aside the transactions that had taken place, on the ground that the dealer stood in a situation of advantage which Equity will not allow to an agent in dealing with his principal.

The substance of the bill in this case was, that the Appellant, in 1818, carried on the business of broker or agent for the sale of foreign stocks and securities, and it alleged that the Appellant having in that year become acquainted with the Respondent, expressed a great desire to serve him; had spoken highly of the means which the Appellant's connection in foreign countries afforded him of serving the Respondent; and stated that the Appellant should have considerable opportunities of assisting the Respondent, if he were employed by him as his agent in the purchase of foreign stock and that in consequence the Respondent did so employ him, and that the Appellant accepted the office of the Respondent's agent, and charged him a commission upon all the Appellant's transactions for him.

[189] The bill then stated the transactions that had taken place between the parties, and attributed the Respondent's having engaged in them entirely to advice, which the bill alleged the Appellant to have given upon each occasion, whether of sale or purchase: and it charged, that the Respondent would never have engaged in any of those transactions but for the confidence which the bill described the Respondent to have reposed in the Appellant, and the Respondent's alleged belief that the Appellant was throughout acting as his agent, and giving him honest advice; and the bill further charged, that the Appellant throughout gave false advice with a view to his own profit.

With respect to a transaction of the 25th of May 1818, the bill stated that the Respondent was, by the Appellant's letter of that day, induced to suppose that the Respondent's French rentes had been sold to some third person in the open market; but that he had lately discovered that they were purchased by the Appellant himself, and that the transaction was fraudulent and void.

With respect to three sums of £5000, £5000, and £40,000, Prussian bonds, it was insisted by the bill, that specific bonds to the amount of £50,000 ought to have been set apart for the Respondent, and kept by the Appellant distinct from his other bonds; that no bonds were set apart; and that for want of such appropriation the purchase of these bonds in June 1818, and the sale of them in December 1818, were wholly fictitious, and ought to be considered null and void.

With respect to a purchase by the Respondent of 115,000 French 5 per cent. rentes in December 1818, and January and February 1819; the sale of 110,000 of those rentes in May following; the purchase of 105,500 French 5 per cent. rentes on the [190] 11th of June 1819; and the sale of those rentes in September following; the bill alleged that no such sales or purchases ever actually took place, and that therefore those transactions were to be considered fraudulent as against the Respondent.

The bill further charged, that when the Respondent settled the account in December 1819, and paid a balance of £1614 19s. 2d., he was ignorant of the several circumstances in the said bill alleged.

The bill prayed that a purchase by the Appellant of 20,000 French 5 per cent. rentes might be declared fraudulent and void, and that the Appellant might be ordered to transfer into the name of the Respondent, in the books kept in France for that purpose, 20,000 French 5 per cent. rentes, or to pay to the Respondent their present value; and that the Appellant might also be ordered to pay to the Respondent the dividends which had accrued since the purchase of the said 20,000 French rentes by the Appellant, the Respondent offering to repay the purchase-money, namely £11,548 2s. 4d., with interest thereon, at 5 per cent. from the time of the said purchase.

It further prayed that the accounts between the Respondent and the Appellant might be opened, and that an account might be taken of all the said dealings and transactions between him and the Appellant, or between him and the Appellant and his brothers; and that in taking that account the Appellant might be charged with the difference between £41,639 16s. 6d., the price at which he sold the £50,000 Prussian bonds to the Respondent, and £37,500, the price at which he pretended to buy them back, with interest from the 31st of December 1818.

And that the Appellant might be charged with the value of £17,000 Prussian bonds, with interest at **[191]** £5 per cent. from the time when the Appellant sold the same, and also with the value to be then sold, of 110,000 French 5 per cent. rentes, with the dividend thereon from the time when the same were represented by the Appellant to have been purchased by the Respondent, the Respondent offering to be charged with the purchase-money thereof, with interest at £5 per cent., or at least that the Appellant might be charged with the sum of £1614 19s. 2d., paid to him by the Respondent, as a balance of account, on the 10th of December 1818, with interest from that day at £5 per cent. per annum: and that the sums charged to the Respondent for interest might be disallowed.

The Appellant answered the original and amended bill. By these answers he denied that he ever carried on the business of a broker; he said he carried on the business of a dealer in foreign securities; he denied all the allegations tending to charge him with having sought the confidence of the Respondent; and he denied having ever offered to act as agent for the Respondent; on the contrary, the Appellant said that the Respondent sought him, not he the Respondent; and he denied that he ever charged the Respondent brokerage or commission on any of the transactions mentioned in the bill.

With respect to the advice which the Appellant was alleged to have given, he said that he and his clerks were daily consulted by numbers of persons at his counting-house and upon 'Change as to the foreign funds, and it was therefore utterly impossible for him to recollect what advice he might have given so long ago, either to the Respondent or any other individual; he said, however, that whatever advice he gave it was always given *bonâ fide;* and that so far as he was **[192]** concerned, the transactions were perfectly regular and fair, and he had no doubt but they were the same, so far as Messrs. De Rothschild of Paris were concerned.

He believed that the Respondent, at the time he paid the balance of £1614 19s. 2d., knew all the facts he pretended to have since discovered, and the Appellant insisted upon the account settled in December 1819, as a settled account.

The cause, having been heard, stood for judgment on the 16th of July 1829, when by a decree of that date, his Honor the Vice-Chancellor ordered, that the Respondent was entitled to be paid by the Appellant the amount of the dividends which would have accrued on the 20,000 French 5 per cent. rentes, from the 25th day of May 1818, down to the time when those rentes should be re-transferred into his name, or the value thereof paid to him, and at his option to have the 20,000 French 5 per cent. rentes re-transferred into his name by the Appellant, or to be paid their present value, the Respondent allowing to the Appellant the sum of £11,548 2s. 4d., and interest thereon at £5 per cent. per annum, from the same 25th of May 1818; and the Respondent, by his counsel, electing to take the present value of such French 5 per cent. rentes, it was referred to the Master to take the necessary accounts for that purpose: it was also declared, that the sale and purchase of the £40,000, £5000, and £5000 Prussian bonds were not real, and that the Respondent was entitled to be placed in the same situation as if the same, and the loans connected therewith, had never taken place; and it was directed that the Master should take an account of the dealings between the Respondent and the Appellant in respect of such alleged sales

and purchases and loans; and that [193] whatever the Master should find to be the loss sustained by the Respondent in respect of such dealings should be paid to him by the Appellant; and it was declared that the Appellant was bound to pay to the Respondent the sum of £1614 19s. 2d., which was paid to the Appellant on the 10th of December 1819, with interest thereon at £5 per cent.; and it was referred to the Master to take an account of such interest down to the time of making his report; and, for the better taking these accounts, the usual directions were given, and the Master was ordered to tax the costs of the Respondent of the suit, and that those costs should be paid by the Appellant.

From the whole of this decree the Defendant, Nathan Mayer Rothschild, appealed to their Lordships.

Because the transactions in question were in their nature such as not to be fit subjects for the interposition of a Court of Equity. Because a settlement of account had taken place in December 1819, four years before the commencement of the suit, and such settlement not being made in ignorance of the facts, ought to be deemed final between the parties, and because there was no proof whatever of fraud.

For the Respondent it was argued, that the Appellant stood in the relation of agent to the Respondent, and while discharging the duties of an agent had employed the means which that character and his own dealings in stock transactions afforded, to pursue a course of dealing with his principal which amounted to legal fraud, and was therefore properly the subject of the jurisdiction of a court of equity.

The case was argued at the bar of the House by the Appellant's counsel, but without hearing counsel for the Respondent judgment was given.

[194] Lord Wynford: This is a case of considerable importance; but if the circumstances of it strike the minds of others as they strike mine, it will not be necessary for your Lordships to call on the Respondent's counsel, for I think that there is not the least pretence to set aside this judgment of the Court below. I wish to make one or two preliminary observations on the case, before I state to your Lordships the reason why I think that this decree ought to be affirmed. In the first place, I think it necessary to say, that there is no ground in the present case for accusing the Appellant of any actual fraud. With respect to one of these parties, it is clear that he is a most desperate gambler in the funds, and he now seems to have met with that fate which always does attend, sooner or later, most of such persons. To the man who, not being a member of the Stock Exchange, will gamble in the funds, ruin is certain, and the only question in his case must be, the question of the time at which that inevitable ruin will come upon him. It is clear that in most of these stock transactions the Respondent has acted under the advice of the Appellant, whom he trusted as his agent, and I think that that advice has not been given unfairly. I have no doubt that what has been stated at the bar upon this subject is perfectly true, that many others would have acted in the same manner as the Appellant has done. God forbid I should say that when men come to persons in the situation of this Appellant for advice on subjects with which they are most intimately acquainted, they will take advantage of that circumstance to give advice that can only tend to their own benefit, at the cost of those who apply to them for it; but the law your Lordships are called on to administer is a law of jealousy, and it will not allow any man to be trusted with power to [195] take advantage of the weakness or ignorance of others. In every one of these transactions the Appellant has had the opportunity to do this, and though I believe he is not capable of doing it, we must deal with him as we should do with others, and say that he shall not put himself in a situation where he could be able to exercise such a power. What are the facts of the case? A gentleman living in the country applies to the Appellant, to know whether the Appellant will give him advice in dealing in the French funds. The Appellant consents to do so, and advises him to sell some French Rentes, and purchase some Prussian Bonds. The Respondent resolves to act on this advice, and the Appellant transfers these French Rentes to himself. It has been said, that if a man in the country desires his bankers in London to sell stock for him, they will, if convenient, transfer it to themselves; but I say, that if they are likely to do this they ought not to be trusted in such transactions. If I live in the country, and write to my banker on such a subject, I fancy I shall have his assistance and advice, both of which are the more necessary to me, as he must be well acquainted with the state of the market, and the probabilities

of a rise or fall in the price of the funds, while the distance at which I live renders it impossible for me to know any thing of the matter. If the banker, then, instead of giving me the benefit of his advice and assistance, acts as he thinks best for himself, and takes the stock to himself, he deprives me of the security I ought to have enjoyed in the confidence I have in his knowledge and integrity, for if a loss arises upon the sale of that stock, I suffer the loss, and he takes advantage of it. For this reason I think that the transaction of the 40,000 rentes must be set aside. Then the Appellant advises the Respondent to buy Prussian [196] bonds, and the Respondent consents. If the Appellant had gone into the market and bought these bonds, that would have been another matter, but instead of that, he sells the Respondent his own Prussian bonds for these French rentes. It has been said that the Respondent must have known that these bonds were the Appellant's own, for that the Appellant was known as the contractor for the Prussian loan; but on the other hand it must be observed, that it is very well known the contractor does not always keep his own bonds in his own hands, but disposes of them as speedily as possible to others. It does not follow therefore that the Respondent knew the Appellant was the owner of these bonds; and besides, when the Appellant gave him that advice to sell the French rentes and purchase the Prussian bonds, he had a right to suppose that the Appellant would make a real purchase of these bonds. With respect to that transaction therefore I think the judgment of the Vice-Chancellor was right. The Appellant was then ordered to buy other Prussian bonds, which were to remain in his possession till the debt incurred on account of them had been settled. This, however, was not a case of lien as insisted on by the Appellant, for this property was not kept separate and distinct from the other property of the Appellant, so that if the Appellant had become bankrupt, these bonds would have passed to his assignees. The whole transaction was what we in Westminster Hall have been accustomed to call a simulated transaction. It is said on the part of the Appellant that this order did not require an actual delivery of the bonds at the time, but that it was sufficient if the Appellant was ready to deliver them over whenever they should be required. That however is not enough: for as [197] the transaction stood between these parties, I say, that if these bonds had risen in price, and the Appellant had failed, the Appellant's assignees would have been entitled to the bonds, and the Respondent would have lost all the advantage he expected to gain from them. With respect to the purchase of rentes in Paris, it appears that they were purchased by the sale of Prussian bonds, and that they remained in the hands of Messrs. Rothschild, as security for the purchase-money. Now the Appellant ought to have gone into the market at Paris, and have got these rentes fairly transferred to the name of the Respondent; but there was no real transfer of stock: no stock whatever actually passed, but only a broker's note was given for the rentes supposed to be purchased. I think that all these transactions ought to be set aside; and the next question therefore is, what is the mode of relief that ought to be afforded to this Respondent. It seems to me, that the mode of relief directed by the Vice-Chancellor is that which we ought to adopt. He says that these parties were not on an equality with respect to these transactions. That declaration proceeds on a principle which in my opinion ought to be universally known. The principle is this, that no man ought to be trusted in a situation that gives him the opportunity of taking advantage of the person who has reposed confidence in him. If such a man, in such a situation, performs any acts which are afterwards made the subject of legal inquiry, he must suffer the consequences. In this case, the Appellant is bound to show, by clear evidence, that the Respondent knew at the time the real nature of these transactions, and with full knowledge of their nature assented to them. It seems to me, that the Respon-[198]-dent was necessarily ignorant of their real nature. He applied to the Appellant for advice and assistance, on account of his own ignorance, and that advice and assistance ought to have been rendered in such a manner as not to raise the slightest suspicion of self-interest on the part of the Appellant. I will illustrate my meaning by a matter with which, no doubt, most of your Lordships are sufficiently familiar. Suppose I want to buy a horse, and being aware of my own ignorance on the subject, I apply to another person for advice and assistance in the purchase. If that person were to come to me and say, "I know of a horse which I can recommend you," and were to induce me, by the confidence I had in his integrity and skill, both of which I believed him fairly to employ before he gave me

the advice to purchase the horse, and if I were to purchase it, and it should turn out to be unsound, and finally it should be discovered that the horse was, at the time of the sale, his own property, do not your Lordships think I should have a strong equitable claim to be released from the purchase? In my opinion there can be no doubt on the subject; and I think it fit that your Lordships should say, in language which cannot be misunderstood, that in these transactions of trust and confidence there must be, on the part of the person trusted, that most marked integrity, that *uberrima fides*, which cannot leave a doubt as to the fairness of the transaction. I repeat, that I do not accuse the Appellant of having acted either out of the usual course, or with bad faith towards the Respondent; but that the rule which I have before mentioned, the rule which will not allow any man to be trusted with a power that he may possibly use to take advantage of another, has not been acted on here, and therefore [199] I think the judgment of the Vice-Chancellor has been properly given. For these reasons, I shall humbly move your Lordships that that judgment be affirmed.

Judgment affirmed accordingly.

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[200] THE EARL OF DEVON'S CASE.

[Mews' Dig. x. 306. S.C. (*Devon Peerage Claim*) 5 Bli. N.S. 220; The Devon Peerage (Sir Harry Nicholas); 2 St. Tri. N.S. 659. Discussed in *Herries Peerage Claim*, 1858. L.R. 2 Sc. and D. 262; *Wiltes Claim of Peerage*, 1862-69, L.R. 4 H.L. 126, and see *Cope* v. *De la Warr*, 1873, L.R. 8 Ch. 982, and *Buckhurst Peerage*, 1876, 2 A.C. 1.]

THE grant of honours is not regulated by the same law as the grant of lands, and therefore, where the Crown granted a peerage to a certain person *et heredibus suis masculis imperpetuum*, and the grantee died without issue, the title was held to descend to the male heir of a collateral branch of the family.

Viscount Courtenay in June last presented his petition to the King, claiming the Earldom of Devon, and His Majesty, having first referred the same to the Attorney-General, who made his report thereon, afterwards referred the petition and the report to the consideration of the House of Lords. In pursuance of the standing order of the House the Claimant submitted the following statement of his case:

In the first year of the reign of Queen Mary, Sir Edward Courtenay, knt. (son and heir of Henry Marquis of Exeter and Earl of Devon, who was attainted and executed in 31 Hen. 8.) was created Earl of Devon, to hold to him and his heirs male for ever, by a patent, containing the following words: *Habendum et tenendum nomen statum stilum titulum honorem et dignitatem Comitis Devonie predicta cum omnibus et singulis preeminenciis honoribus et ceteris quibuscunque hujusmodi statui Comitis Devonie pertinentibus sive spectantibus prefato Edwardo et heredibus suis masculis imperpetuum.* The patent further went on to say, that the Queen granted "to the aforesaid now Earl, that he and his heirs male may have, hold, enjoy and possess in all Parliaments and other places the same pre-eminence as any of the ancestors [201] of the said Earl, being heretofore Earls of Devon, had held or enjoyed." The grantee of this peerage died on the 18th of Sept. 1556, unmarried. His heir male was Sir William Courtenay, of Powderham, and from him the present Claimant was lineally descended. The Attorney-General (Sir J. Scarlett) reported that the Claimant "had proved himself to be the male descendant of Hugh second Earl of Devon, and therefore, according to the pedigree, proved the nearest heir male of Sir Edward Courtenay, who was created Earl of Devon by letters patent of the first of Mary, to hold *sibi et heredibus suis masculis imperpetuum.*" The Attorney-General then added, Whether under that patent the Claimant can establish a title to the dignity of Earl of Devon is a question of very grave consideration, and, as far as I am informed, has not received any precise determination, on which

account, I humbly submit to your Majesty that the claim ought to be referred to the consideration and report of the House of Peers."

When the case came on before a Committee of Privileges, it was argued on the part of the claimant, by Mr. Pepys and Mr. Nicholas, and for the Crown by Sir Thomas Denman, who had in the mean time been appointed his Majesty's Attorney-General.

The Lord Chancellor (March 14): This, my Lords, is a question of much curiosity and importance, whether considered in an antiquarian point of view, or as a matter of legal principal. There is, perhaps, no other case in which the claim to a peerage can be founded on a similar patent. The usual mode adopted in patents of nobility in this part of the kingdom is to make the grant to the first grantee and the heirs male of his body. That mode is sometimes called the creation of a barony in [202] fee, but more properly in fee-tail, for if it were in fee it would be descendible to the heirs-general of the grantee. There are other creations by writ of summons, and by the person thus summoned actually taking his seat in this house. The Crown has also the power of granting patents of nobility in such language as will make them descendible to the female as well as the male heirs of the body of the grantee, but the more ordinary course is to make them descendible only to the male heirs of the body of the grantee. In Scotland, however, a different rule frequently prevails, and the dignity is granted to a man and his "heirs whosoever." In the 21st Richard 2, nine peers were created, to all of whom the peerage was limited to "the heirs of their bodies," except only Earl Scrope, who being a particular favourite had the dignity granted to him and his heirs male *imperpetuum;* a circumstance which shows that, though such a grant was not at that time general, it was not unknown. The grant in the present instance is in similar terms, and a more satisfactory proof of pedigree never was given. The only question therefore is, whether by the laws which regulate the descent of honours, this grant carries with it the right of succession in favour of the collateral heirs. If the grant of lands had been made by the Crown in these terms, the grant would have been void, but the argument as to the rule of construction on a grant of lands by the Crown, is not to be imported into this case, which is one of a grant of honours. The difference between the two is manifest; for the rule of construction which would make such a grant of lands void is adopted for the protection of the property of the Crown; but it cannot be said that the same protection is needed in the case of honours, for the Crown does not part with the honours it confers as it does with the land it grants, since it is, as our law writers [203] term it, the fountain of honours, and a fountain that is inexhaustible. The Crown, therefore, is not injured in its interests by such a grant, for honours are the creation of the Crown rather than any existent thing transferred by it. The rule of construction applicable to grants of lands has therefore been truly said not to extend to grants of honours, or of armories or arms, which are but a species of honours. The power of the Crown to make such a grant as this, is not denied. That admission rests in the first place on the fact, that grants of a similar kind have been before made. In the next place, on the reason of the thing, such a grant is not objectionable, for it is hardly greater than a grant to the heirs-general of a man's body. If the Crown grant a barony by summons with a seat in parliament, the dignity will descend to the heirs in tail general, and will therefore vest in females as well as males. Now if such a dignity should descend to a daughter, she may marry a man of a different family, and the blood of the next taker will only be connected with the original family by a female. The same thing may happen again and again, till at last the dignity gets to such an immeasurable distance from the first family, that it becomes impossible to trace it to the free original stock. I can hardly conceive any thing more from control than this. In the present case, however, the words of the patent limit the descent to the heirs male, so that it can only be vested in the male blood of the family to the exclusion of all strangers to the grant. As to the power of the Crown to make such a grant, it appears from the authorities that the Crown may grant a peerage for life (see now 39 and 40 Vict. c. 59, s. 6), and not only for the life of the grantee, but *pur auter vie*. The most common way of doing this is by a grant to the son during the life of the father, by calling the son by another title to this [204] house; such a title will enure during the father's life, and on his death the

succession will operate by way of merger, so that the two will become but one dignity. But though this is the common and usual way, it is not the only way in which such a title may be granted. The *cestui que vie* may be the ancestor of the party, or not, and then observe, my Lords, what is the consequence of this singular reservation, a man does not know on one day, whether he will be noble or commoner the next. This is a known case, and yet it seems so contrary to all known legal principles, that on the first impression it appears quite absurd that a man should not know whether he was noble or not, unless he sent in the morning of each day to know whether the person on whose life his dignity depended was alive or dead. With reference to the uncertain nature of such a grant of nobility, I will now refer to the instance of a franchise, which is similar to the case I have just mentioned, and much more nearly resembles an honour or dignity than a real estate. It is indeed not a property, but an incident to a property. This may arise from a livery of land in my own possession, or it may exist on an estate for my life, or *pur auter vie*, and whoever may be the *cestui que vie*, I cannot go to the hustings and give my vote unless the person on whose life my freehold depends is alive at the time, for if he has expired, though but the moment before, I am divested of my estate. This, my Lords, is a strong analogy to show that there is nothing so absurd or incongruous in honours of this kind as might at first be supposed. The absurdity of a peerage depending on the life of a third person by no means however attaches to the present case. The rule that honours may be thus granted has been laid down by Mr. Justice Dodridge, who was a great authority on this subject, and **[205]** whose opinion, therefore, that the Crown possesses such a power, we have to strengthen the analogy and reason of the case. I now come to the question of the exercise of this power. In the 3d of Charles 1, a peerage that had been granted to a man *et heredibus suis tam de latere quam de corpore* was held good, though that was a limitation that would clearly include collaterals. Upon this subject there seems to be a mistake in the note to Co. Litt. 27 (*b*), where the case of Aubrey de Vere Earl of Oxford is cited. That case came on in 1 Car. 1, by petition to the Crown, and the resolution on the case was delivered by Croke and others. In the case in Jones's Reports, it is stated that the grant was "by the assent of Parliament" to Aubrey de Vere, in the time of Richard II. of the estate and honours of the Earl of Oxford, and that the King granted and restored the honours. In the note in Co. Litt. it is said that that case was out of the ordinary rules of law, for that the limitation subsisted by authority of Parliament. On examining the case itself it will be found, in the first place, that that was not the principal point; and in the next place, that though the judgment was in the result correct, the arguments on which it was founded were only those of the individual Judges, and not of the Court. But besides this, it appears that these peerages, the claim to one of which was then made by a collateral descendant of the grantee, had formerly existed, and had been put an end to by attainders most corruptly procured, many of the then members of this house having come to the house and there taken an oath to pass verdicts of guilty on all the accused. Having in this manner, as they thought, duly qualified themselves to pronounce judgment, they attainted several noble persons, alleging as a sufficient defence in morals and religion, for what they had done, that they were bound to perform the oath they had taken. The attainder occurred in the 16 R. 2, and the reversal **[206]** in the 21st of the same reign. The words in the reversal are *restitué donné et grantée per assent de Parliament*. The words *ex assensu Parliamenti*, to be found in this case, do not therefore mean that the grant took effect *ex assensu Parliamenti*, but that it was by this assent that the attainder was reversed. In that sense they are correct and intelligible, for the attainder having passed could only be reversed by the force of an Act of Parliament, and the words I have mentioned refer to the attainder therefore, and not to the grant, which certainly did not require an Act of Parliament to make it effectual. To the same point may be referred the word *restored*, which is to be found in the case. Croke therefore made a mistake when he referred the words *ex assensu Parliamenti* to the grant, in order to show that such a grant could not be made without authority of Parliament, for the Act was not necessary for such a purpose, but it was necessary to reverse the attainder, and that is the true reason of these words having been entered on the Roll. In the 21 of Rich. 2, came the reversal of these unjust attainders:

and it is remarkable, that John de Lancaster, against whom one of them had been directed, and who claimed no honours, had the attainder against him reversed, in the very same words as those employed in the case of persons who had peerages. On the grounds which I have thus enumerated, I am of opinion, that the claimant in the present case has made out his title, and I shall therefore humbly move your Lordships to that effect.

Lord Wynford: This case embraces three questions. The first relates to the descent of the present claimant, and on the evidence adduced before us, I am satisfied that the Attorney-general must admit the claimant to be the collateral heir of the grantee of this [207] patent. The next is a question of law, namely, whether the King has the power to grant such a peerage as this, to the immediate taker, and not the heirs of his body, but his heirs-general. We have been referred to a book which is a high authority on these matters, I mean Mr. Justice Doddridge's book on the Peerage. That learned person there states that the King can grant a peerage in tail for life, for years, and *pur auter vie;* but with respect to the two last he uses the expression "as it has been said." I think he was wise in using such caution when speaking of such a grant, for I think the King cannot grant a peerage for years or *pur auter vie*. Is the blood of a man to be ennobled only for a time? I say no; for being once ennobled, it must remain so till crime has worked a forfeiture of its nobility. The Lord Chancellor has stated the difficulty that would exist with respect to a peer *pur auter vie*, that he must send in the morning to inquire if the *cestui que vie* is alive, before he can venture into this House to give his vote: but the difficulty is still stronger, he must inquire whether the life is in existence at the instant before he gives his vote, for if it should have expired he will have no right to sit and vote in this House. That is a circumstance sufficient, in my mind, to show that such a peerage cannot exist. As far as the opinion of Mr. Justice Doddridge goes with respect to the present case it is conclusive. Is there, then, any thing to oppose that opinion? I believe not; but that opinion is not the only authority we have, for there have been a number of similar grants of peerages. Every grant of that kind is a strong authority to show that such a grant may be made, for these grants were formerly made on the advice of the Lord Privy Seal, who was a high judicial officer, and they are now made on that of the Lord High Chancellor, who has always been one of the [208] most eminent lawyers of the kingdom. On every proposed grant of a peerage, he exercises his opinion whether such a grant can or cannot by law be made, and if he thinks it cannot, he advises the Crown against it. I was at first as much struck as my noble and learned friend with the statement of the opinion in the case of Aubrey de Vere, Earl of Oxford, but I soon made up my mind that that opinion was not warranted by law. I perfectly agree with my noble and learned friend, that there is a mistake in that case about the Act of Parliament. That mistake arose, I dare say, in this manner: In ancient times the Judges and the House of Lords had strong contests upon the question of the entail of lands. Before the statute *de donis* there were estates of fees conditional. The Judges got rid of them easily, for they said, that the moment a man had issue born, these estates conditional were converted in absolute fees. The members of this House, actuated by the wish to preserve beyond the power of alienation the estates which they held with their titles, said "that will not do," and so they made another attempt, and passed the statute *de donis*, by which statute estates-tail were created and limited *per formam doni*. What was the consequence? Why the Judges, in order to bar these strict limitations, invented fines and recoveries, by which this House was again defeated. But that strictness of limitation which prevailed in consequence of the statute *de donis* was not at all applicable to titles of honour, so that when the learned Judge, in the case referred to, made that application of the statute, he got into a confusion. It is true that the King cannot make a grant of land to a man and his heir male, for that is a greater grant than the law will allow on the part of the Crown: but a private man making such a grant gives the grantee a fee. This takes place by the [209] operation of the statute *de donis;* but the Judges have held that titles are not within the provisions of that statute. My Lords, there is a great distinction taken by all the highest law authorities, between the descent of lands and the descent of honours, but there is none at all between the descent of two kinds of honours: and the same principle that governs one

must govern the other. There was no necessity for an Act of Parliament to grant these honours in this case any more than in that of Sir Aubrey de Vere. The King may make a man a peer by affixing his seal to the instrument creating the dignity, and all that this House has to do is to stand by and to see that this act of the King's prerogative is exercised in compliance with the forms prescribed by the law. I am not aware that there is any foundation for the argument, that we must construe this patent more strictly or more favourably than any other. All written instruments, whether between states or individuals, must be decided on the same principles, for the rules of construction are alike in almost every case, and after all are but the rules of common sense applied to the understanding of an instrument. The decision of Lord Eldon in the Annandale Case appears to me to be strongly in point upon the present, but the Case of the claim to the Earldom of Oxford is amply sufficient for us. In that Case the House decided that under a grant to the taker of the title and his heirs male, Sir Aubrey de Vere, though not descended from the original Earl, was entitled. I come then to the question, whether the King has the power to make such a grant? I assume that he has; and if he has the power, I ask, has he not exercised it? If the Crown meant that merely the descendants of the body of the last Earl should take, would not the same words have been used that are employed in an ordinary **[210]** patent? The circumstance of the difference in the words shows that a different intention was entertained, and the decisions that have taken place with respect to land show that these words have a different import from those which are required to create an estate-tail. It is clear, however, from another circumstance, that the Crown intended to give more than usual, for not only is the Earl to have the precedence that would belong to an Earl of Devon from the time of his creation, but he is to enjoy precedence as if he took under the creation of the first Earl of Devon; so that, without travelling out of the record, it appears to me that there is sufficient to justify us in saying that in point of law this claim is fully made out. Upon the question of the pedigree, I have already expressed my opinion, and as I believe, that both the fact of the descent from the first Earl of Devon, and the legal effect of the words in the patent, are in favour of the claimant, I can have no hesitation whatever in seconding the motion of my noble and learned friend.

The question was put by the Earl of Shaftesbury, and the claim allowed.

[211]

ERROR.

From the Irish Court of Exchequer Chamber.

LYSAGHT and another,—*Plaintiffs in Error:* WALKER and others,—*Defendants in Error.*

[Mews' Dig. x. 904; xi. 1175, 1315; S.C. 5 Bli. N.S. 1. The consideration need not now appear in writing or be a necessary inference from a written instrument (Mercantile Law Amendment Act, 1856, 19 and 20 Vict. c. 97, s. 3).]

Declaration that, in consideration of Plaintiffs appointing P. C. his agent, Defendant undertook that P. C. would faithfully and honestly discharge any duty assigned to or trust reposed in him. Plea; no Undertaking in writing. Replication; an Undertaking in writing. Demurrer to the replication, for that this was bringing matter of law to be tried by a Jury. But the replication held good, as putting in issue a matter of fact to be tried by a Jury.

Letter of guarantie to Plaintiff by Defendant, "that P. C. shall faithfully and honestly discharge any duty assigned to or trust reposed in him." Plaintiff, upon receiving this, employs P. C. as his agent. Sufficient consideration appears on the face of the guarantie to bind Defendant. Plaintiff, in an action against the surety for an Agent, shows, that he employed the Agent first at B. and afterwards at L.; and that the Agent when removed to L. was indebted to him in a considerable balance, and produces accounts which bear on the face of them, that various sums remitted by the Agent from L. were so remitted as the proceeds of sales made at L. Held that the Judge was not bound to direct the Jury as matter of law, that they must consider the remittances

from L. to be made in discharge of the balance due at B., so as to relieve the surety from his liability, but that he was right in leaving the question to the Jury on the whole matter in evidence.

This was a Writ of Error brought by the Plaintiffs in Error, on the affirmance by the Court of Exchequer Chamber in Ireland, of a judgment of the Court of **[212]** Exchequer there, in an action of *assumpsit*, brought against them by the Defendants in Error, for the nonperformance of an Undertaking or Guarantie, contained in a letter written by the Plaintiffs in Error to the Defendants in Error, of which the following is a copy:

"Lisconnor, 16th December 1816.

"Gentlemen: Entertaining the highest opinion of Mr. Patrick Considine's integrity of character, as well as propriety of conduct, we therefore hold ourselves responsible to you in the sum of Five Hundred Pounds sterling, for his discharging faithfully and honestly any duty assigned to or trust reposed in him; and we are ready to execute bonds to that effect, and for that or any larger amount that may be necessary, whenever you require it. We further strongly recommend Mr. Considine as a person likely to give satisfaction in every respect, as far as depends on individual exertions and qualifications. We are, gentlemen, your obedient servants,

"John Lysaght, James Davern.

"To Messrs. Walker, Perriott and Co. Brewers, Limerick."

Considine was appointed in 1817 agent for this brewing company, for the sale of ale and porter at Banagher, where he remained till February 1821, when he was removed to Loughrea, and sold ale and porter there for the company, till his death in May 1821. At the time of the removal there was a balance of £379 due from Considine to his employers. While at Loughrea he sent them weekly returns of his sales **[213]** there, and remitted to them various sums of money produced by such sales more than sufficient to cover the £379, if the money so received could be applied in liquidation of that balance; and it was one of the questions in the cause, whether it ought to be so applied or not. The company having lost the £379 by the agent, brought their action for that sum against Lysaght and Davern, on their guarantie.

The declaration (which was of Michaelmas term 1821) consisted of ten special and two common counts. In the first special count, the Undertaking of the Plaintiffs in Error was stated to be, that "the said Patrick Considine would faithfully and honestly discharge his duty as agent for the Defendants in Error, for the sale of ale and porter at Banagher, in the King's County." In the second count, that "he would faithfully and honestly discharge the trust reposed in him, as such agent, by the Defendants in Error." In the third count, that the Plaintiffs in Error "undertook and became responsible to the Defendants in Error, to the amount of £500, that said Patrick Considine would faithfully and honestly discharge the duty of such agent." And in the fourth count, that the Plaintiffs in Error "undertook and became responsible to the Defendants in Error, to the amount of £500, that the said Patrick Considine would faithfully and honestly discharge the trust reposed in him, as such agent, by the Defendants in Error." In these several counts the consideration for the Undertaking is stated to be, that the Defendants in Error would appoint said Patrick Considine their agent for the sale of ale and beer at Banagher; and the breach assigned, consists in his not paying or handing over to the Defendants in Error monies received by him for the sale of ale and porter at **[214]** Banagher. In the fifth count, the Undertaking is stated to be, that "Patrick Considine would faithfully and honestly discharge any duty assigned to or trust reposed in him by the Defendants in Error." And in the sixth count, that the Plaintiffs in Error "undertook and became responsible to the Defendants in Error, to the amount of £500, that said Patrick Considine would faithfully and honestly discharge any duty assigned to or trust reposed in him, by the Defendants in Error." In these counts, the consideration for the Undertaking is stated to be, that the Defendants in Error would, at the request of the Plaintiffs in Error, appoint Patrick Considine their agent generally; and the breach assigned consists in his not accounting with Defendants in Error for money received by him as such agent. In the seventh and eighth counts, the Undertaking and the breach of it are stated as in the fifth and sixth counts: but the con-

sideration for such Undertaking is stated to be, that the Defendants in Error "would, at the request of the said Plaintiffs in Error, repose in Patrick Considine the trust of agent for the Defendants in Error, to sell porter and ale for them at Banagher." In the ninth and tenth special counts the Undertaking and consideration for it are stated as in the fifth and sixth counts. But it is further stated therein, that the Defendants in Error did appoint Patrick Considine their agent, and did assign to him the duty of agent to sell ale and porter for them at Banagher, and to perform other duties of such agent; averring that they had an establishment for sale of ale and porter at Banagher, and had at such establishment divers large quantities of ale and porter, and also divers utensils of their trade of brewers, of great value; and that it was the duty of Patrick Considine to have taken care of the said [215] establishment, and of the said ale and porter and utensils; but that he neglected to do so; and for want of due care of such establishment, ale, porter, and utensils, permitted the said establishment to go to decay, and the said ale, porter, and utensils to be seized, taken away and destroyed; whereby the Defendants in Error were deprived of the use of such establishment, and lost a large quantity of ale and porter, and also divers utensils. There were two common counts for money lent, and an account stated.

To this declaration the plaintiff in error, John Lysaght (in Hilary term 1822), pleaded the general issue of *non-assumpsit;* and also, by leave of the court as to the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, and 10th counts, that the said several promises in those counts mentioned were special promises to answer for the default of the said Patrick Considine, and that no agreement in respect of or relating to the said several supposed causes of action in those counts mentioned, or any of them, or any memorandum or note thereof, wherein the consideration of the said several special promises, or any of them, was stated or shown, was in writing, or was signed by the said John Lysaght, or by any other person by him thereunto lawfully authorized. To the first of these pleas the Defendants in Error added a *similiter*, and to the last of them replied, that notes of each respective agreement, in respect of and relating to each respective cause of action, in each of those respective counts mentioned, wherein the consideration of the special promises in each of those counts mentioned, was stated, were respectively in writing, and signed by the said John Lysaght. To which latter replication the said John Lysaght demurred specially, assigning for causes of demurrer, because the said replication did not tender an issue [216] triable by the court, or by a jury, and attempted to take from the court, and submit to the jury, the construction of written instruments; and because the said replication was double, and also because the said Defendants in Error ought to have set forth in the said replication the written instruments mentioned in the said replication; and because, even supposing that a verdict should be had for the Defendants in Error, or an issue taken on the said replication, no judgment could be pronounced thereon; and because the said replication relied on a case different from that stated in the declaration, and was in other respects uncertain, informal, and insufficient; and the Defendant in Error joined in demurrer.

Davern suffered judgment to go by default. In Trinity term 1822, judgment was given by the Court of Exchequer against Lysaght on the demurrer, and in July following the issue of *non assumpsit* by Lysaght was tried before a special jury, who found for the Plaintiffs below, and assessed the damages at £338, deducting from the £379 a sum due to the agent for salary.

At the trial it was proved, that Considine sent weekly returns of his receipts and disbursements to his employers, and a paper-writing, being the state of the Banagher account, on the 3d February 1821, proved to be in Considine's hand-writing, was given in evidence, to show that the balance was £379. The defendant counsel for Lysaght objected to the admission of this paper in evidence, but the Judge thought it admissible; and this was the ground of the first exception.

The letter of guarantie being produced in evidence, the Defendant's counsel objected that it was not an agreement binding on the Defendant, Lysaght, since it stated no consideration for the promise, but the [217] Judge thought it a binding agreement, and so directed the jury; and this was the ground of the second exception.

The Defendant's counsel also insisted that, supposing the letter to be a sufficient agreement to charge him, it varied from every count in the declaration, and that, on this account, the Judge ought to direct the jury to find for the Defendant, but the

Judge was of opinion that it did not vary from all the counts in the declaration, and so directed the jury; and this was the ground of the third exception.

The Defendant's counsel also insisted that the averment in the declaration, that the Plaintiffs had appointed Considine their agent for the sale of ale and porter at Banagher had not been proved, since the evidence was, that he sold at Loughrea and other places besides Banagher, but the Judge was of opinion that the averment was sufficiently proved; and this was the ground of the fourth exception.

The Defendant's counsel further insisted, that the letter merely contained an offer to become bound for the good conduct of Considine, and that the Plaintiffs had never communicated to Lysaght that the offer was accepted, but the Judge was of opinion, that it was not merely an offer: and to this the Defendant's counsel excepted.

The Defendant's counsel also insisted, that as it appeared from the evidence that remittances had been sent from Loughrea more than sufficient to cover the Banagher balance, the remittances so made ought to be considered as applicable to the payment of that balance, and to the discharge of the Defendant from his liability, but the Judge held the contrary, and to this also the Defendant's counsel excepted.

[218] The Defendant's counsel next insisted that, as the Plaintiffs had given the Defendant no notice of the balance due from Considine at the time of his removal from Loughrea, or that he had ceased to be their agent at Banaghar, and had taken no proceedings against Considine, the surety was discharged from his liability; but the Judge was of a contrary opinion, and to this also the Defendants counsel excepted.

A bill of exceptions having been tendered and sealed, the same came on for argument before the Judges of the Court of Exchequer, who overruled the exceptions, and gave judgment for the Plaintiffs, and this judgment was affirmed in error in the Exchequer Chamber, and thereupon a writ of error was brought by the Defendants returnable in Parliament: and it was contended for the Plaintiffs in Error, that the judgments of the courts below ought to be reversed for the following among other reasons:

First, Because the said weekly return ought not to have been received as evidence against the said Plaintiffs in Error, in order to show that the said Patrick Considine had received the sums of money with which he had therein debited himself, without producing the persons from whom he thereby stated he had received the same, for the declarations of a principal are not evidence against a surety, *Bacon* v. *Chesny*, 1 Stark. 192; and although Patrick Considine was dead at the time the said weekly return was offered in evidence, yet this circumstance does not, it is submitted, render his declaration admissible for the purpose for which it was offered, inasmuch as entries by deceased persons have never been received in evidence, to prove the truth of the entries themselves in order to charge third [219] persons with the payment of money; and because they are peculiarly objectionable where the facts sought to be established by them are of recent occurrence, and if true, capable of proof by living witnesses.

Secondly, Because it is enacted by the statute of frauds, "that no action can be maintained whereby to charge the Defendants upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith;" and it has been established by a long series of cases, that the promise is not binding by the statute unless the consideration which forms part of the agreement is stated in writing; and it is humbly submitted that the consideration for the promise of the said Plaintiffs in Error does not appear upon the written document produced to prove the promise; in order to effectuate the object of the statute, it is clear, that if it is essential that the consideration must appear at all, it is equally so that it must appear by language unequivocally clear, and incapable of having its construction influenced by parol proof of extrinsic facts; but upon the face of the memorandum in question, it does not appear whether the agreement relates to a past or future transaction, it might relate to either, or even to the performance of an illegal trust. *Jenkins* v. *Reynolds*, 3 Brod. and Bing. 14. 23.

Thirdly, Because, supposing the consideration does appear upon the face of the said written memorandum, yet that consideration is not truly stated in any count in said declaration: the counts which state the consideration most largely are

those which allege the promise to have been made in consideration that the Defendants in Error would appoint the said Patrick [220] Considine their agent; yet it is plain, upon the construction of the instrument, that the Plaintiffs in Error would have been equally liable if a different trust had been reposed in him, and he had been appointed to any other situation instead of agent, for instance, clerk under one of the other agents.

Fourthly, Because the averment which is in each of the special counts, that the said Patrick Considine had been appointed agent for the sale of ale and porter at Banagher, was not supported by proof of agency there and elsewhere.

Fifthly, Because the said written document produced to prove the Undertaking of said Plaintiffs in Error, merely contained an offer on the part of said Plaintiffs in Error to become sureties for said Patrick Considine, and the said Defendants in Error ought to have shown that they had accepted and communicated their acceptance of said offer to the said Plaintiffs in Error. *M'Iver* v. *Richardson*, 1 M. and Selw. 557.

Sixthly, Because in this case the Plaintiffs in Error cannot in any event be liable for any sum of money save what the said Patrick Considine received as agent at Banagher, and did not remit or account for; and it appears by the evidence in this case that the said Patrick Considine had remitted to the said Defendants in Error all sums of money which he had received as such agent at Banagher, and consequently that the balance of £379 1s. 9½d., late Irish currency, returned as due by him when leaving Banagher, having been fully liquidated, the said Plaintiffs in Error are now freed from any liability to which they might have been subject on account of that balance; and that said balance has been discharged appears by an inspection of the said weekly returns which were read in evidence in this case. The last weekly return transmitted by [221] Considine from Banagher was for the week ending the 3d of February, and in that account the balance of £379 1s. 9½d. is struck against him; the said Patrick Considine was removed from Banagher to Loughrea in the middle of the ensuing week, namely, the 6th day of February; and the first account transmitted from Loughrea is for the week ending the 10th of February; the debit-side of this account is composed of three items only, namely, the balance of £379 1s. 9½d. carried forward from the last account, one sum of £20, and another of £15, both received subsequent to the 6th February, and consequently at Loughrea; no credits are claimed by this account, and the sum with which the said Considine debits himself is the gross amount of the former balance, and the two sums received at Loughrea, making together the sum of £414 1s. 9½d.; this sum forms the first item in the debit-side of the next succeeding account; in the succeeding accounts, the items in both sides are entered in chronological order; and, in the absence of any evidence to show a different intention, amount to an express allocation of the earliest credits to discharge the earliest debits, and such allocation has been assented to by the said Defendants in Error, who regularly received the said weekly accounts without objecting to such application of the payments made.—Clayton's Case, 1 Mer. 572. And it is submitted that the Court of Exchequer must have acted on this principle to a certain extent when they pronounced the order of the 12th day of February 1823, by which the verdict was reduced from £379 1s. 9½d. to £338 16s. 3d.; it appearing by the return for the week ending 31st of March 1821, that the sum due by the said Patrick Considine on that day amounted only to that sum, and inasmuch as said Considine remitted considerably [222] more than the said sum of £379 1s. 9½d. after his removal from Banagher, the said balance has been thereby, for the reasons aforesaid, altogether discharged. *Devaynes* v. *Noble*, 1 Mer. 568. *Brooke* v. *Enderby*, 2 Bro. and Bing. 70.

Seventhly, Because the said Defendants in Error had not informed the said Plaintiffs in Error of the balance due by the said Patrick Considine at the time of his removal from Banagher, and did not inform the said Plaintiffs in Error that the said Patrick Considine had ceased to act as agent for the said Defendants in Error at Banagher; and they had not taken any proceedings against the said Patrick Considine to recover the said balance due by him.

For the Defendants in Error it was contended that the Judgments ought to be affirmed, for the following among other Reasons:

First, That the Undertaking in writing, or Guarantie signed by the Plaintiffs

in Error, and bearing date the 16th December 1816, was sufficient to charge the Plaintiffs in Error for the debt or default of Patrick Considine; and that it would have been sufficient for that purpose, even though it had not contained the consideration for entering into the same. A different doctrine was indeed laid down in the case of *Wain* against *Warlters*, 5 East, 10. But the propriety of that decision was questioned by Lord Eldon, in a case of *ex parte Minet*, 14 Ves. 190, who said, that it had been contradicted by a variety of authorities; and it was expressly over-ruled by him in the case *ex parte Gordon*, 15 Ves. 286; and see Fell on Mercantile Guaranties, pp. 246, etc. 16 East, 370; Holt, *Ni. Pri.* 154, etc. in notes. It is also material to observe, that the fourth section of the Statute of Frauds does not [223] require the whole agreement, but it is sufficient if some memorandum or note thereof, be in writing, and signed by the parties.

Secondly, That if it were necessary, according to the case of *Wain* and *Warlters*, that the consideration for as well as the promise by which the party binds himself, should appear on the face of the agreement, there is a sufficient consideration in the present case, namely, the appointment of Patrick Considine as agent to the Defendants in Error, to support the Undertaking by the Plaintiffs in Error, for his discharging faithfully and honestly any duty assigned to or trust reposed in him; as to which, see the Cases of *Stadt* (or *Stupp*) against *Lile*, 9 East, 348; 1 Campb. 242, S. C.; *Morris* v. *Stacey*, Holt, *Ni. Pri.* 153; *Boehm* v. *Campbell*, 3 Moore, 15; *Russell* and another v. *Morsley*, 3 Brod. and Bing. 211; and *Pace* v. *Marsh*, 1 Bing. 216.

Thirdly, That the consideration appearing on the face of the Undertaking did not vary from, but was consistent with the consideration, as stated in the several counts of the declaration.

Fourthly, That the Undertaking contained a binding engagement on the part of the Plaintiffs in Error, that the said Patrick Considine would faithfully and honestly discharge any duty assigned to or trust reposed in him; and was not merely an offer on the part of the Plaintiffs in Error to become sureties for the said Patrick Considine; and that it was not necessary for the Defendants in Error, to show that they had communicated to the Plaintiffs in Error, that they had accepted them as such sureties.

Fifthly, That the replication of the Defendants in Error to the second plea of the Plaintiff in Error, John Lysaght, was good and sufficient in law; and was [224] warranted by the case of *Maggs* v. *Ames*, 1 Moore, and P. 294; which was determined on the authority of a similar case of *Saunders* v. *Wakefield*, 4 Barn. and Ald. 595. *Lilley* v. *Hewit*, 11 Price, 494.

Sixthly, That the paper-writing produced to the witness Morty Flanagan, being one of the weekly returns transmitted by the said Patrick Considine, as agent to the Defendants in Error, of the porter and ale received and sold by him, and of the monies paid to him as such agent, was admissible, and properly received in evidence against the said John Lysaght, in order to show that the said Patrick Considine had received, as such agent, the sums therein stated to have been received by him, and the balance stated by him to be due. See 1 Phil. Evid. 4 Ed. 285-6, and the cases there cited.

Seventhly, That upon the evidence stated in the bill of exceptions, the averments in the declaration, that the said Patrick Considine had been appointed by the Defendants in Error, and had acted as their agent for the sale of ale and porter at Banagher, were sufficiently proved.

Eighthly, That upon such evidence, the sum of money remitted by the said Patrick Considine to the Defendants in Error, after the 3d February 1821, ought not to be considered as applicable to the discharge of the balance of £379 1s. 9½d. due on that day, but might be applied by the Defendants in Error in discharge of the debits appearing against the said Patrick Considine in the interval between the said 3d February and the time of his death.

Ninthly, That the said John Lysaght was not discharged from his liability as surety for the said Patrick Considine by reason of the Defendants in Error not having informed the said John Lysaght of the balance [225] due by said Patrick Considine at the time of his removal to Loughrea, or that said Patrick Considine had ceased to be their agent at Banagher; or by their not having taken any proceedings against him for such balance.

Lord Tenterden (4th March): In this case there are several distinct points to be considered. In the first place, we have to attend to what appears on the face of the record, and to the question as to the demurrer to the replication to one of the pleas. There are several counts in the declaration, the substance of which is, that the Defendants, Lysaght and Davern, who are here the Plaintiffs in Error, undertook to guarantee the faithful discharge of his duty by one Patrick Considine; and it appearing on the face of the declaration, that the question arises on an agreement, and the statute of frauds requiring that it should be in writing, the defendant, Lysaght, pleaded the general issue to the whole of the declaration; and as to ten of the counts, he pleaded specially, "that the said several promises in these counts mentioned were special promises to answer for the default of the said Patrick Considine, and that no agreement in respect thereof, or relating to the said several supposed causes of action in these counts mentioned, or any of them, or any memorandum or note thereof, wherein the consideration of the said several special promises, or any of them, was stated or spoken, was in writing, or was signed by the said John Lysaght, or by any other person by him thereunto lawfully authorized." It is not necessary, in my view of the question, to consider whether this plea was good or bad, although I should be rather inclined to think that it is bad. But the replication was, "that notes of each respec-[226]-tive agreement in respect of and relating to each respective cause of action, in each of these respective counts mentioned, wherein the consideration of the special promises in each of these counts mentioned was stated, were respectively in writing, and signed by the said John Lysaght." To this replication the Defendant below demurred; and the question now is, whether it raised an issue of fact proper for the consideration of a jury, for if it transferred an issue on matter of law from the court to the jury, it was bad. The point seems to be this, whether this replication went to leave matter of law to be tried by the jury.

Now what is this case? The declaration states, "that in consideration that they, the said Plaintiffs, would, at the special instance and request of the said Defendants, appoint one Patrick Considine their agent, they the said Defendants undertook, and then and there became responsible to the said Plaintiffs to the amount of £500 that the said P. Considine would faithfully discharge any duty assigned to or trust reposed in him by the Plaintiffs." The Defendant pleads that no agreement, or note or memorandum thereof, wherein the consideration of the said several special promises, or any of them, was stated, was in writing, or signed by Lysaght.

The Plaintiff's reply, that notes of each respective agreement, wherein the consideration for the promises was stated, were in writing, and signed by Lysaght. The Defendant pleads, that no note of agreement setting forth the consideration for the special promises was in writing: the Plaintiff replies, that notes of the agreement, stating the consideration for the special promises, were in writing. Now the question is not [227] whether the plea was good in law or not, but whether the replication was sufficient, and put in issue a point on which a jury might give a verdict. It seems to me, that it is in that view good and sufficient; and that the court below did right in over-ruling the demurrer.

That being disposed of, we now come to the bill of exceptions, and we are to see whether there was any consideration for the engagement entered into by the Plaintiff in Error. The Undertaking is in these words:

"Lisconnor, 16th December 1816.

"Gentlemen: Entertaining the highest opinion of Mr. Patrick Considine's integrity of character, as well as propriety of conduct, we therefore hold ourselves responsible to you in the sum of £500 for his discharging faithfully and honestly any duty assigned to or trust reposed in him."

It appears that Considine had at that time no appointment under the Defendants in Error; but is it possible to say that there was no consideration, when the Plaintiffs in Error say to the Defendants in Error, "if you will employ P. C. in a situation of trust we guarantee that he shall faithfully perform his duty?" That is really the general effect of the Undertaking, and it seems to me evident that sufficient consideration appears on the face of it.

The next question is whether the consideration was such as was alleged in these

counts. I think it was such a consideration as that which is alleged in the sixth count, and if it is alleged properly in any of the counts, that is sufficient to support the action. The letter of guarantee is perfectly general. The early counts stated the guarantee to be for the faithful dis-[228]-charge of his duty by Considine, as agent for the sale of ale and porter at Banagher, but the sixth count is perfectly general, that the Plaintiff in Error undertook and became responsible to the Defendants in Error, to the amount of £500, that said P. C. would faithfully and honestly discharge *any* duty assigned to or trust reposed in him by the Defendants in Error, and the responsibility undertaken in the letter was, "for his discharging faithfully and honestly *any* duty assigned to or trust reposed in him." The count does not represent the Plaintiffs in Error as undertaking for Considine, as agent at any particular place, but states the undertaking for him generally as agent, without naming any particular place, and this seems to me sufficiently to follow the terms of the guarantee.

The next question on the bill of exceptions was, whether the learned Judge ought to have directed the jury, as matter of law, on the ground mentioned in the sixth exception, to find for the Defendants, or in other words, whether the question was one proper for the consideration of a jury, because, if it was, then the Judge was not bount to direct them absolutely to find either one way or the other. The exception was, that inasmuch as it appeared from the evidence so given on the part of the Plaintiffs, that P. C. had, after the 3d of February 1821, remitted to the said Plaintiffs sums of money amounting in the entire to more than the said balance of £379 due on that day; the learned Judge ought to tell the jury, that the sum so remitted should be considered as applicable to the discharge of the said balance, but that the Judge refused to give such direction to the jury. The Judge, it appears, did not think himself warranted to give the jury that kind of direction, and he accordingly left it for the jury to say, [229] upon consideration of all the circumstances, whether the subsequent remittances were a discharge of the first sum. There are several Cases where it has been held, that where running accounts are kept, as between partners and the interests of third parties are concerned, subsequent payments are to be held as a discharge of previous balances due, so as to discharge the third parties. That is the case in partnerships, and I am not prepared at this moment to say, whether sureties may or may not stand in the same situation as the third parties. But what was the situation of Considine in this case? He was agent for the Defendants in Error, for the sale of their ale and porter at Banagher, from 1817 till February 1821, when he was indebted to them in a balance of £379; he then goes to Loughrea, retaining his character of agent, and accounts to his employers for his weekly receipts, and makes remittances to them of monies so received for them at Loughrea; and then the question is, whether the monies so received and remitted are to be considered, as an absolute rule of law, as being paid in discharge of the balance remaining due on the Banagher account, or whether they may not be considered as remittances to the employers of the proceeds of their own goods sold at Loughrea, independently of the Banagher balance; suppose the agent had written a letter to his employers from Loughrea, stating, "I have this day received from such a person, for goods of yours, sold to him here, a sum of £20 and this I send to you;" it seems to me contrary to the plain sense of the case to say, that this was not a remittance for goods sold at Loughrea, but a payment in reduction or discharge of a previous balance. Suppose, then, that in the case of sureties, as well as third persons dealing with partners, it should be held [230] as an absolute rule of law, that, unless the contrary appeared, subsequent remittances should be considered as payments of a previous balance; can you not so frame your accounts as to take them out of the rule, as, for instance, might not the parties in this case so frame their accounts as to make it manifest on the face of them, that monies received on the sale of their goods at Loughrea were remitted to them as the produce of the sale of these goods and not as payments on account of a previous balance? If they might, then it seems to me, that the Judge was not bound to direct the jury to find in opposition to the frame of the accounts as they appeared on the evidence, and that he was not bound to tell the jury that they must consider the remittances from Loughrea as paid by the agent out of his own money, in reduction of a previous balance. I think then, that the learned Judge was right in leaving it to the jury

to say, on consideration of all the circumstances, on what account the remittances were made. The jury were of opinion that the remittances were made for goods sold at Loughrea, and they found for the Plaintiffs below for the balance of £379, which was afterwards amended by reducing the sum from £379 to £338 which was the balance mentioned in some of the accounts. I have looked through them, and do not find that any sum was remitted from Loughrea beyond the monies received there. How then has the balance been reduced? The way in which it was reduced was by the agent taking credit for salary and charges, and not by payments made out of his own money. Looking at the whole of the case, I think the Judge was not bound to direct the jury, as matter of law, to find that the remittances were made in discharge of the balance, and that he was right in [231] leaving it to the jury to say whether the remittances were to be so applied or not. The advice, therefore, which I have to give your Lordships is, to affirm the judgment. These are rather nice points, and I say nothing about costs.

Judgment affirmed accordingly.

[232]

ERROR.

From the Irish Exchequer Chamber.

FAUSSET,—*Plaintiff in Error;* CARPENTER (*Ex dem.* PALMER and others),—*Defendants in Error.*

[Mews' Dig. v. 351, 1472 ; ix. 168, 176. S.C. 5 Bli. N.S. 75. On point as to construction of deed, discussed and disapproved of in *Drew* v. *Norbury* (*Earl of*), 1846, 3 Jo. and Lat. 284 ; 9 Ir. Eq. Rep. 171, 524 ; and see *Carter* v. *Carter* 1857, 3 Kay and J. 634, 635 ; *Sidebotham* v. *Knott* 1872, 26 L.T. 703 ; and *In re Champion* (1893), 1 Ch. 115. On point as to adverse possession see *Nepean* v. *Doe d. Knight* 1837, 2 M. and W. 894, and the Real Property Limitation Acts, 1833 (3 and 4 Will. IV. c. 27), and 1874 (37 and 38 Vict. c. 57).]

A person having a legal estate in certain premises as trustee, and an equitable and beneficial interest in the same estate, executes a deed which might be construed either as purporting to pass both estates, or only the equitable estate which alone he had a right to convey ; held, that the instrument should be construed as intending to pass only the estate which he had a right to convey ; for a party shall be presumed to have intended to do only that which he had a right to do, provided the instrument be fairly and reasonably capable of that construction.

The assignee in possession of an equitable life-estate from tenant for life, without impeachment of waste, holds over after the death of the tenant for life against the trustee holding the legal estate both for tenant for life and remainder-men : his adverse possession as against the trustee does not commence till the death of the tenant for life, and till then the statute of limitations does not begin to run.

In Error on a judgment given by an inferior court on exceptions, the Court of Error is confined to the points raised by the exceptions, and cannot travel *dehors*.

Catherine, Anna-Maria, and Elinor Smith, daughters and co-heiresses of Edward Smith, became, at his death in 1758, entitled in fee to the property called the Callow-hill Estates, in the county of Fermanagh, subject to a fee-farm rent of £50 per annum. In 1771, Catherine Smith, the eldest daughter, being then of age, intermarried with Patrick Palmer, [233] barrister at law, son of the Rev. Thomas Palmer, and on the 21st September in that year a deed of settlement was executed, whereby certain lands called Corrigena and Lismacmurragh, in the county of Longford, held by Thomas Palmer on leases for lives renewable for ever, were conveyed to trustees, Robert Waller and the Rev. Henry Palmer, to the use of Thomas Palmer, the father of Patrick, till the marriage should take effect, and afterwards in trust to permit Thomas to take the rents and profits for life ; and in case Patrick should die before Thomas, or at whatever time he should die, living the said Catherine, then from Patrick's death to the use of Catherine his wife, that she might take therefrom for life an annuity of £60 ; and in case of the death of Thomas, living the said Patrick, then in trust to permit Patrick

to take the rents and profits for life, and in case of issue one child only at the death of Patrick, to convey and assign to such issue in the manner therein directed; and in case of two or more children, then in trust to convey and assign to such children in such way and in such proportions as Patrick should by deed or will appoint; and in case no appointment by him, then as Catherine should appoint; and in case of no appointment by her, then as the trustees or the survivor should appoint; and in case of no appointment, then in trust to convey and assign the said leasehold interest to the issue of the marriage, share and share alike, as tenants in common, at their respective ages of 21.

And Catherine, for the considerations mentioned, conveyed her third part of the Callowhill estates to the trustees, Robert Waller and Henry Palmer, to her own use till her marriage, and then to the use of Patrick Palmer her husband, for life, without impeachment of waste, remainder to the trustees to preserve **[234]** contingent remainders; and after the death of Patrick, *to the use of the said Catherine and her assigns during her life, without impeachment of waste*, and after her decease to the use of the issue, in such manner and for such estates as before declared in respect of the lands of Corrigena and Lismacmurragh. This deed was duly registered on the 26th October 1771.

The marriage took effect, and in 1776 Patrick the husband died, leaving Catherine, his widow, and two sons and three daughters issue of the marriage. Elinor Smith, third daughter of Edward Smith, in 1774 intermarried with the Rev. Henry Palmer, one of the trustees. In 1775 Anna Maria, the second daughter intermarried with the Rev. William Newcomen, bishop of Waterford, afterwards primate of Ireland; and in 1778 Catherine married a second husband, the Rev. Joseph Stock, afterwards bishop of Killalo, and subsequently of Waterford. Elinor, the wife of Henry Palmer the trustee, died in 1778, leaving her husband and a son surviving.

In 1793 Stock and Newcomen and their wives levied fines of their shares of the lands of Callowhill; and by lease and release, dated 31st December 1793 and 1st January 1794, they, together with Henry Palmer, one of the trustees, who had been husband of Elinor, the other co-heiress of Edward Smith, in consideration of a sum of £4000 to them paid by William Fausset, father of the Plaintiff in Error, in the proportions therein mentioned, viz.: £1333 6s. 8d. to Newcomen and his wife, £1333 6s. 8d. to Stock and Catherine his wife, and £1333 6s. 8d. to Henry Palmer; conveyed the whole of the Callowhill estates to William Fausset, his heirs and assigns for ever.

And Stock and Newcomen, and their wives, for themselves, their heirs, executors, etc., and Henry Palmer, **[235]** for himself, his heirs, etc., and for the heirs of Elinor his wife, deceased, covenanted for title and quiet enjoyment, and for further assurance, and that the fines should enure to the use of Fausset. This deed was registered in March 1801.

No appointment was made of the lands of Callowhill; and on the death of Catherine in 1806, her children by Patrick Palmer became entitled, as was alleged, to the equitable estate as tenants in common under the deed of 1771. William Fausset remained in possession of the lands from 1794 till 1821, when he died, and his son Charles Fausset, the Plaintiff in Error, entered into possession in which he had continued.

In 1820 this ejectment was brought in the Court of King's Bench by the Defendant in Error, as lessee of the children of Catherine Smith by her first husband, Patrick Palmer, and also of Anna Maria Newcomen, and James Palmer, son of Henry Palmer and Elinor Smith, and also of the representatives of Robert Waller, the surviving trustee under the deed of 1771, in whom the legal estate was vested, in order to contest the validity of the fines of 1793, and the conveyance of 1794. The demises were so laid as to include the whole of the Callowhill estates, but it was stated by the Plaintiff's counsel at the trial, that substantially the suit was at the instance of the Palmers, children of Catherine, who sought to recover only their third part.

The cause came on for trial at the spring assizes for the county of Fermanagh in 1824, and the deed of 1771, the fines of 1793, and deed of 1794, the possession of the Fausset's having been given in evidence, the counsel for the Plaintiff in Error required the Judge (Jebb) to direct the jury that the fines and **[236]** proclamations of 1793, and the deed of 1794, and the possession under it, constituted a disseisin of Robert Waller, the surviving trustee, or insisted that he ought to leave it to the jury to presume that

there had been such a disseisin; but the Judge, on the contrary, directed that the fines and proclamations had no legal effect to affect the title of the lessors of the Plaintiff at law, and that there was no adverse possession, as against Waller or his heirs; and to this the counsel excepted. The counsel next insisted that the execution of the deed of 1794 by the trustee, Henry Palmer, was an ouster of the other trustee, Waller, by the said Henry Palmer, and that the possession for 30 years under it was an adverse possession, as against Waller and his heirs, and that the suit was barred by the statute of limitations, and that the Judges ought so to direct the jury; but the Judge, on the contrary, directed them that they were not at liberty to presume such ouster, and that their right of entry was not barred by the statute; and to this the counsel excepted. The counsel also insisted that the Judge ought to direct the jury, that from the evidence they might presume that Waller had executed a confirmation of the deed of 1794, or otherwise that at least the execution of that deed by Henry Palmer operated to convey to Fausset a moiety of Catherine's third part of the Callowhill estates; but the Judge directed the contrary, and the counsel excepted. The jury found for the Plaintiff.

A bill of exceptions having been then tendered, and sealed, the same came on for argument in the Court of King's Bench in T. T. 1825, when the exceptions were overruled, and judgment given against the Plaintiff in Error; and on error in the Exchequer Chamber this judgment was affirmed. Whereupon the Plaintiff [237] in error brought his writ of error returnable in Dom. Proc., and submitted that the judgment ought to be reversed for the following reasons:

First, Because the ejectment was not brought within 20 years after the title of the lessors of the Plaintiff claiming the legal estate accrued, and that sufficient facts appear in the case to prevent the defendants in error, by force of the statute of limitations of the 10th of King Charles the First, from recovering in this ejectment.

Secondly, Because the fine levied by Joseph Stock and Catherine his wife, in Hilary Term, in the 33d year of the reign of King George the Third, with proclamations, for the purpose of conveying the estate to a purchaser, and the subsequent declaration of the uses thereof, to William Fausset, and his heirs, for full and valuable consideration, and actual possession of the said William Fausset during his lifetime, and after his death, of the defendant under such title from 1st January 1794, without entry or claim, until the present ejectment was brought, was sufficient to sustain the operation of the fine, and afford to the defendant the protection of the statute of limitations against Robert Waller, and his heirs, the lessors of the Plaintiff.

Thirdly, Because William Fausset, the purchaser for full value, was a stranger to the trusts of the deed of 1771, and had no notice thereof, and never did any act recognizing the title of the trustees, and as the fine of Hilary Term, 33d George the Third, and the deed of 1794, professed to convey a legal estate to him, he had a right to suppose that a legal estate was conveyed, and never claimed any protection from the estate vested in the trustees; he therefore entered claiming the legal estate, and by his entry and subsequent pos-[238]-session gained such a sufficient legal seisin as to afford to him the protection of the statute of limitations.

Fourthly, That the said William Fausset having been a purchaser for valuable consideration, without notice from Joseph Stock, and Catherine his wife, who were in possession, and treated the estate as their own, without any interference of the trustees, one of whom, namely, Henry Palmer, was a party to the said deed of 1794, and the execution whereof, by the said Catherine Stock, was attested by Thomas Palmer, her eldest son, and one of the *cestui que* trust of the said deed of 1771, and which deed was also attested by Mungo Henry Noble Waller, one of the lessors of the Plaintiff in the ejectment, the Plaintiff in Error is entitled to have every presumption made in his favour of which the law will allow; it ought, therefore, to have been left to the jury to say, whether, under all the circumstances, they would not presume such disseisin or adverse possession to the title of Robert Waller, the surviving trustee in the settlement of 1771, as to afford the said William Faussett, and the Plaintiff in Error, deriving title under him, the protection of the statute of limitations from the said time of the entry of the said William Fausset, under the fine and conveyance as aforesaid.

Fifthly, Because the judgment in ejectment was for the entirety of the lands contained in the said settlement of 1771, founded upon the legal title of the heirs of

Robert Waller, the surviving trustee named therein, although the said Henry Palmer, to whom jointly with said Robert Waller the legal estate had been conveyed by the said settlement of 1771, joined in the said conveyance of 1794, and thereby severed the joint tenancy, and passed to the said William Fausset the legal estate in at least his moiety thereof.

[239] For the Defendant in error it was contended that the judgment ought to be affirmed, for the following reasons:

As to said first ground of Exception.

First, Because the said fine of the said Catherine, and her second husband, was inoperative to affect or bar the title and right of entry of the lessors of the Plaintiff, at the time of bringing the said ejectment, inasmuch as none of the parties to said fine had any *legal estate* in the said lands at the time of levying the same, or at any time afterwards.

Secondly, Because the possession of the grantee under said deed and conveyance of the 1st of January 1794 cannot be considered as *adverse* to the title of the trustees in the deed of 1771, during the life of said Catherine, the said Catherine, in concurrence with her then husband, being competent to transfer her life-estate and interest in the said lands to the said grantee, by their said fine and deed, and consequently the said trustees having become the trustees of said grantee, after the execution of the said conveyance of 1794, they could not have entered or disturbed the possession of the said William Faussett, and those deriving under him, such possession having been *rightful*, and not *adverse*, during the life of said Catherine.

Thirdly, Because it is indispensable to constitute a *disseisin*, or evidence on which it may be presumed that the possession should have been held *adversely* to the legal title in the lands.

As to the second and third grounds of Exception.

Fourthly, Because presumptions are made and authorized by the law only in support of *rightful* possession, [240] and never to effect a *tortious breach of trust*, in destruction of the rights and interests of rightful owners.

As to the last ground of Exception.

Fifthly, Because the deed of January 1794 cannot be construed as insisted on by Appellant in this exception to operate to pass the said Catherine's third part of the lands and premises thereby conveyed, which was then *vested* in the said Henry Palmer *jointly* with Robert Waller *in trust* for the uses of the settlement of 1771, without violating the clear and manifest intent and object of the parties to the said deed, deducible from its language, and the covenants therein contained. This is evident from the manner in which the purchase-money is agreed and recited to be *paid in several distinct and equal thirds* to the several grantors and their respective wives, or in their right, and from the omission of the name of the said co-trustee, Robert Waller, in the said conveyance, without whose concurrence it is admitted the *whole* of said trust-estate in said third could not be transferred; and the rather as such construction would necessarily make the said Henry Palmer guilty of a gross breach of trust in the said conveyance, which the law never will suppose or admit where another reasonable construction, consistent with the apparent intent of the instrument, and the granting parties therein, can be given to the deed.

Sugden (Sir E.) and Preston, for Plaintiff in Error.

Treslove and Abbot, for Defendants in Error.

The following cases were cited: *Croft* v. ——, Plowd. 536; *Hume* v. *Haylock*, Cro. Car. 200; *Silway* v. *Silway*, 1 Vent. 260; *Rowe* v. *Power*, 2 Bos. and Pull. N. R. 1; *Lord Huntingtower's case*, in note to [241] *Pycroft* v. *Gregory*, 4 Russ. 526; *Keene* v. *Deardon*, 8 East, 298; *Malden* v. *Menill*, 2 Atk. 3; *Smith* v. *Packhurst*, 3 Atk. 135-141; 2 Stra. 1105, And. 315; *Llewellin* v. *Mackworth*, Barnard. 545; 2 Eq. Ab. 579, pl. 8.

It was objected that judgment had been given for the entirety of the estate, whereas the real parties interested claimed only a third part; but that point was not raised on the exceptions, out of which the Lords were of opinion they could not travel.

Lord Wynford (8 March): I do not think it necessary to trouble your Lordships with more than a few observations on this case. The points made are two; first, as to the construction of the deed of 1794; secondly, as to the statute of limitations.

As to the construction and effect of the deed of 1794, I take it on the principle stated by Sir E. Sugden, the counsel for the Appellant. He states that the purchaser

takes what the parties conveying assume to sell, and buys that, and no more. Then look at the deed, and see what is the scope and effect of it. Palmer and the other parties interested agree to sell, and we are to collect from the whole of the instrument taken together, whether it was the intention of H. Palmer to convey only that estate in the premises which belonged to him in right of his wife, and which he was entitled to convey, or whether it was his intention to convey also the legal estate, in which he had no beneficial interest but which he had merely as trustee. The only difficulty in this case arises from the double character held by Palmer with respect to these estates, and then let us see what he conveys. Mr. Abbot puts the principle in the strongest possible way, and that is, that your Lordships, in judging of [242] the design and object of a deed, will not presume that a party executing the deed meant to do and did what he was wrong in doing, when a construction may be put on the instrument perfectly consistent with his doing only what he had a right to do. He had a right to convey his own estate, but he did wrong if he conveyed more. The parties to this deed are Newcomen and his wife, Stock and ...s wife, and Henry Palmer, who, as his wife Elinor, the other co-heiress of Smith, was then dead, was probably tenant by the courtesy, and they conveyed the Callowhill estates to William Fausset in consideration of a sum of £4000. If the instrument had stopped there, one might say that each meant to convey the entirety—but mark what follows—in three equal proportions of £1333 6s. 8d., stated to be severally paid to each of the said grantors respectively. Each therefore takes his proportion of the price, and the fair presumption is, that each sells his proportion only. By the covenants for title and quiet enjoyment, Palmer appears to be dealing only with the interest which he had in right of his wife, and covenants for himself and for her heirs. Sir E. Sugden says that the covenants are strong in his favour, since they went to the entirety of the estate. No doubt they might be considered as leaning to his side of the question, if taken in these terms; but we must take the whole of the instrument together, and then it appears that each covenants for what he sells, and then the whole three covenant for the entirety of their interests. The plain meaning therefore is, that H. Palmer does not here convey the estate which he had as a trustee, and which he would have done wrong in conveying, but that he conveys only the estate which belonged to him in right of his wife, and which he had a right to convey.

[243] The second point is the statute of limitations; and if the argument for the Plaintiff in Error on that ground were good for any thing, it would be needless to make marriage settlements, or any settlements intended to out-last the lives of the parties to them. Catherine Stock had an equitable estate for life in the third of the Callowhill estates, and after her death it went to her children. All that she could convey was that equitable estate for life, and that she had expressly a right to assign, and she and her second husband, Stock, do convey it to Fausset, who stands, with reference to the trustees, in exactly the same situation as she did; and she being the *cestui que* trust for life, the possession of Fausset during her life could not be an adverse possession as against the trustee. Sir E. Sugden says that there may be cases where the possession of the *cestui que* trust may be adverse as against the trustee. I will not say that it is absolutely impossible that there should be such cases, but if there are, they must be strictly confined to those cases where the *cestui que* trust holds the trustee at defiance, and says to him, "You are no trustee for me, and I utterly deny your title to be my trustee." That is not this case. Sir E. Sugden says that her conveyance created a difference in the relations between the *cestui que* trust and the trustee. No such thing; for Fausset during her life stood in the same relation to the trustees that she did, and they were expressly made trustees for her assigns as well as for herself. Fausset was not in therefore by wrong, till her death, and till that time the possession was not adverse, and the statute did not till then begin to run.

As to the point of form, I need say nothing, as it has not been raised on the exceptions, and we are here confined to the exceptions. I recollect that [244] when I was Chief Justice of the Common Pleas, I sat at the head of the Court of Error in the Exchequer Chamber, on a case where it was held by eight Judges that we could not go out of the exceptions. I advise that the judgment be affirmed.

Lord Tenterden: Concurring in what has been said by my noble and learned friend, I shall trouble your Lordships with only a very few observations. The first point to be considered is the effect of the deed of 1794. The deed was executed by H. Palmer, who at the date of it had some beneficial interest in the estate in right of his

wife, whether as tenant by the courtesy, or in what other way, is not very material, and a legal interest as a trustee, and the question is whether the deed of 1794 operated as a conveyance only of that to which he was beneficially interested, or extended to that estate of which he was trustee. The question here, as your Lordships will observe, is not as to whether a person having two estates, both of which he might innocently convey, but as to a person having two estates, one of which he might innocently and properly convey, and the other of which he could not convey without fraud and a breach of trust. I am satisfied that all the parties conveying meant to convey only what belonged to themselves, and that H. Palmer only meant to convey that part which belonged to him in right of his wife. The consideration was the sum of £4000, one third to be paid to the Bishop of Waterford and his wife, one third to Joseph Stock and Catherine his wife, and the other third to Henry Palmer. That standing alone would intimate that the parties meant to convey only what properly belonged to them, and that supposition is confirmed by the covenants. Each of the parties covenants for that party [245] and those who might claim under it, and Palmer covenants for himself, his heirs, executors and administrators, and for the heirs of Elinor his wife; and it is observable that he there refers to the right of his wife; and so he covenants against any encumbrances by his wife, her father, etc., and further assures for her and her heirs. The form of the covenants show that he looked only to the rights of his wife, and to what it was lawful for him to convey, and the Court was not bound to extend the scope of the instrument further, when that was sufficient to satisfy its meaning.

Then as to the statute of limitations; the estate was by the deed of settlement of 1771 given to trustees, who were to permit her or her assigns to take the rents and profits of her third part during her life. I come to no conclusion upon any nice distinction between legal and equitable estates. My opinion is formed on the single ground that it is impossible, under these circumstances, to say, with any ground of reason, that the possession of her assignee could be considered as a possession adverse to that of a trustee holding subject to the right of that assignee. I also advise that the judgment be affirmed.

Mr. Treslove: Do your Lordships please to make any order about costs?

Sir E. Sudgen: I never heard of such a claim having been made before in a case like this. I have always understood that costs were allowed only when the appeal was without any reasonable foundation.

Lord Tenterden: I am not aware that it is a rule of this House to give no costs wherever an appeal or writ of error presents an arguable point. The Plaintiff in [246] Error has already had the judgment of two courts of law, and I propose that the judgment be affirmed with £100 costs.

As to the point of form, the Court below has power to prevent the Plaintiff below from recovering more than that part of the estate to which his lessors, the children of Catherine, are entitled.

Judgment affirmed, with £100 costs.

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[247]

ERROR.

FROM THE IRISH COURT OF EXCHEQUER CHAMBER.

COOKE and Others,—*Plaintiffs in Error;* BISHOP OF ELPHIN and Another,—*Defendants in Error.*

[Mews' Dig. v. 1254; S.C. 5 Bli. N.S. 103. Cited in *Rumsey* v. *Nicholl*, 1877, 2 C.P.D. 184.]

In quare impedit to determine the right of presentation to the vicarage of K. in the diocese of E.. Plaintiff, to prove the presentation of a clerk by the person under whom he claimed, and the clerk's admission and institution, gave in evidence a visitation-book of the diocese of E., which contained the following entry: "*Henricus Compton, in jure civili Baccalareus ac verbi Dei predicator,*

admissus fuit ad inserviendum curae animarum, in ecclesia parochiali de Kilglasse, per Edwardum, Elphin. Episcopum, sexto Octobris 1622." Throughout a long list of entries in the same book, when the duty was *ad inserviendum curae animarum*, or *ad peragendum officium curati*, the word *admissus* was used as in the above entry; when the admission was *in vicariam*, the words used were *admissus et institutus*.

The Judges of the Irish Court of Common Pleas, before whom the action was tried at Bar, directed the Jury, that the above entry as to the admission of Compton, "was in legal construction to be taken to mean that Compton had been admitted and instituted to the vicarage of K. on a presentation by some other person" to the Bishop, who claimed the advowson in right of his see, "and that the only question for the Jury was, by whom the presentation was made." Exception, that the entry should not in legal construction be taken to mean that Compton was admitted and instituted to the vicarage, but exception overruled, and judgment for Plaintiff. The judgment reversed by the Exchequer Chamber, and the judgment of reversal affirmed by the Lords, for that the Judges ought not to have taken the question as to the import and effect of the entry out of [248] the hands of the Jury, and that having so taken it upon themselves they put a wrong construction on the entry.

This was an action of *quare impedit*, commenced in 1822 by the Plaintiffs in Error against the Bishop of Elphin and his clerk, the Reverend T. Lloyd, in the Court of Common Pleas in Ireland, for the purpose of having it determined to whom belonged the right of presentation to the vicarage of Kilglass, in the diocese of Elphin. The Plaintiffs claimed the right of presentation as lay-rectors of the parish of Kilglass, deducing their title from Sir Patrick Barnwall, to whom the rectory, and, as they alleged, the advowson of the vicarage as appendant thereto, was granted by letters patent of James the First. The defence was in substance that the Bishop then was, and his predecessors had been, seised of the advowson of the vicarage in gross, and as of fee and right, in right of the bishopric of Elphin; and that the Bishop, being so seised, collated Lloyd, his clerk, who was duly admitted, instituted and inducted, and became vicar incumbent, whereby the church was full.

The action was tried at the Bar in the Court of Common Pleas in Ireland, in or about the month of May 1825. At the trial, the Plaintiffs having set out their title to the rectory of Kilglass through the Barnwall family, it became necessary to prove a presentation by one of the persons through whom they claimed. With this view the Plaintiffs produced two legal visitation-books of the diocese of Elphin, one dated the 10th August 1615, the other dated 16th October 1633; by which documents, amongst others, they proposed to establish the right of the Barnwall family to the living, and the actual presentation of the Rev. Henry Compton to the vicarage, by Sir Patrick Barnwall, [249] together with the admission and institution of that clerk, by the then Bishop of Elphin in the year 1622. One of the entries in the legal visitation-book of 1633, (being an entry respecting the admission of the Rev. Henry Compton,) is in the following words: "Henricus Compton in jure civili Baccaŕeus ac verbi Dei predicator, admissus fuit ad inserviend curæ animarum in Eccliâ pŏli de Kilglasse, per Edwardum Elphiñ Epũm, sexto Octobris, 1622." The construction of this entry is the principal point under consideration.

The learned Judges of the Court of Common Pleas in Ireland, in their summing up and charge to the Jury, declared their opinion to be, "That the said entry in the said regal visitation-book, of 16th October 1633," (meaning thereby the entry above cited,) "was in legal construction to be taken to mean, in the present case, that the said Henry Compton, in the said entry named, was admitted and instituted by the said Edward King, the then Bishop of Elphin, to the said vicarage of Kilglass, on a presentation by some other person to the said bishop; and that the only question for the consideration of the Jury respecting the said entry was, by whom the said presentation was made; and that if upon the whole of the evidence the said Jury should believe that such presentation of the said Henry Compton was made by the said Patrick Barnwall, and that the advowson of the said vicarage had been originally appendant to the said rectory, and had not been disappended therefrom, they should find a verdict for the Plaintiffs."

The Jury found a verdict for the Plaintiffs.

The Defendants' counsel took four exceptions to the directions of the Judges as to the title of the Plaintiffs, [250] and as to the advowson to the vicarage, being to be taken by intendment of law to be appendant to the rectory, if there was no sufficient evidence to the contrary. These are not here material, but they took a fifth exception to the above-mentioned direction of the Judges, as to the entry relative to Henry Compton, on which alone the question at present turns, and that was in these words:

"Whereupon the said counsel for the said Defendant did then and there, on behalf of the said Defendants, except to the said opinion of the said learned Judges, and did then and there insist that the said entry in the said regal visitation-book should not, in legal construction, be taken in this case to mean that the said Henry Compton, in the said entry named, was admitted and instituted by the said Edward King, the then Bishop of Elphin, to the said vicarage of Kilglass, on the presentation of some other person to said Bishop."

The bill of exceptions was signed by the Judges, and was afterwards argued in the Court of Common Pleas, in or about June 1827, when judgment was given for the Plaintiffs.

The Defendants thereupon brought a writ of error in the court of Exchequer Chamber in Ireland, to reverse the judgment given by the Court of Common Pleas, and the assignment of error, as to this exception, was in the following words: "And that there is also manifest error in this, that the said learned Judges did then and there further declare and deliver their opinion to the said Jury, that the said entry in the said regal visitation-book of the 16th day of October 1633, which is in the words and figures following, that is to say, 'Henricus Compton in jure civili baccĕus ac verbi Dei præ-[251]-dicator admissus fuit ad inserviend curæ animarum in Ecclia poli de Kilglasse, per Edwardum Elphin Epūm, sexto Octobris 1622,' was, in legal construction, to be taken to mean in the present case, that the said Henry Compton in the said entry named was admitted and instituted by the said Edward King, the then Bishop of Elphin, to the said vicarage of Kilglasse, on a presentation by some other person to the said Bishop; and that the only question for the consideration of the Jury respecting said entry was by whom said presentation was made; and that if upon the whole of the evidence the said Jury should believe that such presentation of the said Henry Compton was made by the said Patrick Barnwall, and that the advowson of the said vicarage had been originally appendant to the said rectory, and had not been disappended therefrom, they should find a verdict for the said Samuel Cooke, Peter Free and Edward Down."

The learned Judges in the Exchequer Chamber (16 July 1821), after over-ruling all the exceptions but that which has been hereinbefore cited, reversed the judgment of the Court of Common Pleas, and awarded a *venire de novo*. The ground of such reversal upon this exception was, that the learned Judges of the Court of Common Pleas ought not to have put any construction upon the said entry respecting the said Henry Compton, but ought to have left it entirely to the Jury to put their own construction thereon.

The Plaintiffs brought their writ of error in Parliament, and contended that this judgment of the Court of Exchequer Chamber ought to be reversed for the following among other reasons:

First, Because the learned Judges of the Court of Common Pleas were by law called upon to give, and [252] were justified in giving, to the Jury, their construction of the entry relating to the aforesaid Henry Compton; and that regard being had to the frame and language of the whole of their charge, it is manifest that they did not withdraw the question of construction from the Jury.

Secondly, Because the exception upon which the judgment of the Court of Common Pleas was reversed, and also the assignment of error upon such exception, do not raise the objection that the Court of Common Pleas did so withdraw the construction of such entry from the consideration of the Jury. The proper question raised by such exception, according to its frame and language, being only, whether the learned Judges of the Common Pleas had in their direction to the Jury put a correct construction upon the entry respecting the said Henry Compton; and not whether the said learned Judges had decided that such construction was for the Court alone, and not for the Jury, under the advice of the Court to make.

Thirdly, Because, taking the whole charge to the Jury together, the direction of the Court amounts to no more than this, that legally such entry, coupled with the other facts of the case, might bear the construction in question; and that the Jury might legally, under the circumstances of the case, put such a construction upon the said entry; and because such advice and direction were legal and proper advice and direction for the said learned Judges to give to the Jury.

Fourthly, Because, had such question of construction been left entirely to the Jury, without any suggestion or interpretation from the Court, the Jury might legally have arrived at the same conclusion as that which was stated by the Court.

[253] The Defendants in Error maintained, that the judgment of the Court of Exchequer Chamber ought to be affirmed for the following reasons, only the last three of which, however, go to the point at present in question:

First, Because the Plaintiffs have shown no title in themselves to present to the vicarage in question.

Secondly, That they have given no proof of any seisin of the advowson in any one under whom they claim.

Thirdly, Because it is not an intendment of law, in the absence of evidence to the contrary, that the advowson of the vicarage of Kilglass was appendant to the rectory.

Fourthly, Because the advowson of the vicarage did not pass to Sir Patrick Barnwall by the said patent of King James.

Fifthly, That there was no proof that Matthew Viscount Barnwall, who conformed to the Protestant Religion, was the heir of Nicholas Viscount Barnwall of Kingsland, party to the deeds of the 20th and 21st of July 1698, and who is alleged by the Plaintiffs to have professed the Popish religion: and if the said Matthew Viscount Barnwall of Kingsland was not the heir of the said Nicholas, his conforming to the Protestant religion does not confirm any title upon the Plaintiffs claiming through him.

Sixthly, That the said deed of 1698 conveyed but one moiety of the said rectory and tithes of Kilglass.

Seventhly, That the Jury ought not to have been told that the meaning of the entry in the regal visitation-book of the 16th October 1633, must in legal construction be taken to mean that the said Henry Compton in the said entry named was admitted and **[254]** instituted by the then Bishop of Elphin to the vicarage of Kilglass, on the presentation of some other person to the said Bishop; and that the only question for the consideration of the Jury respecting the said entry was by whom the said presentation was made.

Eighthly, Because in legal construction the entry in question ought not to be taken to have such meaning.

Ninthly, Because the Jury ought to have been told to compare and weigh that entry with the other evidence in the cause, and to have given their opinion upon the effect and meaning to be attached to it.

The Attorney-General and Mr. Torriano, for the Plaintiffs, contended that at present they were confined to the consideration of the 5th exception, and as to that exception they contended, that the point on which the judgment of reversal by the Exchequer Chamber turned, namely, that the inference to be drawn from the entry ought, with the whole evidence, to have been left to the Jury, was not raised by the exception, and they cited the case of *Ball* v. *Manning*, 1 Dow, 380, N.S., where Lord Tenterden said, p. 392, "if the direction had been as vague and general as has been contended, the counsel ought to have brought the point to the notice of the Judge at the time; but as that was not made a point of objection or exception at the time, the Plaintiff in Error cannot avail himself of it now." But supposing that the point could be gone into, the Judges of the Common Pleas had not taken the inference to be drawn from the entry out of the hands of the Jury, and if they had, they had put the right construction on the entry, for *admission* was large enough to include *institution*, and it might be inferred from the circumstances that it did **[255]** so here. The judgment of reversal was by the narrowest majority.

Lord Wynford: I think that while I was Chief Justice of the Common Pleas, there was a case in the Exchequer Chamber where eight Judges held that we could not go beyond the exceptions.

Doctor Lushington, for the Defendants, in answer to the observations that there was only a bare majority, read a passage from Lord Tenterden's judgment in *Ball* and *Manning*, 1 Dow, 380, N.S. cited on the other side for a different purpose, "that is an argument which cannot prevail in this House, for if all the Judges below had been of that opinion, and your Lordship were of a different opinion, it would be your Lordship's duty to act on your own opinion, although contrary to that of the 12 Judges. Courts of error would be established in vain if they were to be influenced by the opinions of Courts below, instead of being governed by their own." He contended, that he was entitled, if he thought it necessary, to go into the matter of all the exceptions; but he would have a serious task to perform if it were necessary for him to go into the question of right, and in this stage of the cause he did not think it necessary. The only question which it was necessary to argue was, whether the Judges of the Court of Common Pleas put a right construction on the entry, which certainly was a point raised by the exception, and he contended that they did not, and referred to the whole of the entries in the visitation-book as evidence that in cases of curacies there were *admissions* only; but in cases of vicarages there were superadded institution, and, except in one instance under special circumstances, induction also.

[256] Lord Tenterden: This case comes before your Lordships on a writ of error from a judgment of the Court of Exchequer Chamber in Ireland, reversing a judgment of the Court of Common Pleas there. The effect of that reversal was not to put an end to the suit, but to send it to a new trial; and if your Lordships should be of opinion that the judgment of the Exchequer Chamber should be affirmed, that will not determine the right, but merely send the case to another trial; and as I think that it ought to be affirmed I shall abstain from expressing any opinion whatever on the question of right, but shall confine any thing which I have to say entirely to the single point before us. I studiously avoid saying any thing extra-judicially that might afterwards be quoted as indicating my opinion, when the several parts of this very important case shall be under investigation below.

The suit was instituted by the three Plaintiffs in Error claiming the right of presentation to the vicarage of Kilglass. In the course of a proceeding of that kind the Plaintiff must show that he, or the person under whom he claims, has presented to the living, as this is the only legal evidence of right, otherwise any person might set up a claim and present without any shadow of right, contrary to all reason and good sense. To show their seisin, it was alleged by the Plaintiffs that Sir Patrick Barnwall, under whom they claimed, had presented Henry Compton to the vicarage in 1622, and to prove this they read an entry from the visitation-book of the diocese, of date 1633, from which it appeared that Henry Compton was admitted *ad inserviendum curae animarum*, in the church of Kilglass, by Edward King, the then bishop of Elphin, on the 6th October 1622.

The cause was tried at Bar in the Court of Common **[257]** Pleas, and many points arose, and several exceptions were taken to the directions of the Judges, and these were put on the record, and brought in error before the Court of Exchequer Chamber, and now before your Lordships.

The exceptions went to several matters, but one of them only has been made the subject of argument at the Bar, and to that I shall confine myself. The direction there given by the Judges, and the exception taken to it by the counsel for the Defendants, were in these words:

"And the said learned Judges did then and there further declare and deliver their opinion to the said jury, that the said entry in the said Regal Visitation Book, of the 16th of October 1633, which is in the words and figures following, that is to say, 'Henricus Compton, in jure civili Baccaŕeus ac verbi Dei predicator, admissus fuit ad inserviend cure animarum in Eccl̃ia pōli de Kilglasse per Edwardum Elphiñ Epūm, sexto Octobris, 1622,' was, in legal construction, to be taken to mean, in the present case, that the said Henry Compton, in the said entry named, was admitted and instituted by the said Edward King, the then Bishop of Elphin, to the said vicarage of Kilglass, on a presentation by some other person to said bishop; and that the only question for the consideration of the jury respecting said entry was, by whom said presentation was made; and that if upon the whole of the evidence the said jury should believe that such presentation of the said Henry Compton was made by the

said Patrick Barnwall, and that the advowson of the said vicarage had been originally appendant to the said rectory, and had not been disappended [258] therefrom, they should find a verdict for the plaintiffs.

"Whereupon the said counsel for the said Defendants did then and there, on behalf of the said Defendants, except to the said opinion of the said learned Judges, and did then and there insist that the said entry in the said regal visitation-book should not, in legal construction, be taken in this case to mean that the said Henry Compton in the said entry named was admitted and instituted by the said Edward King, the then bishop of Elphin, to the said vicarage of Kilglass, on the presentation of some other person to said bishop."

Some argument was used at the Bar to the effect that this was not a clear and precise direction in point of law, but that the whole was left *quodammodo* to the jury. I think, however, that the direction was such as entirely to exclude that argument; for what can be clearer than this—that the entry "was, *in legal construction*, to be taken to mean that the said H. Compton was admitted and instituted, etc., and that the *only* question for the consideration of the jury respecting the said entry was by whom the presentation was made."

I cannot for a moment doubt that that was a plain and distinct direction in point of law as to the construction to be put on the entry; and then the question arises, whether they did or did not put the right construction upon it. I am clearly of opinion that they did not. In general and ordinary speech the admission of a rector or vicar is differently expressed from that of a curate; the curate is admitted, the vicar is instituted, and generally inducted. The distinction is clear in ordinary speech, although words may be confounded in this as they are in many other instances. But in the [259] ordinary speech of learned and unlearned, admission applies to a curate, institution to a vicar.

If I were to look only to the entry itself I should be strongly inclined to think that the true construction had not been put upon it, unless there was some other evidence to show that such was the sense in which the words were to be taken in this instance, although it was not the ordinary sense; and it is on that account that so much time has been taken up, and properly taken up, by the counsel at the Bar in the examination of the other entries in this document.

Then let us look at the other entries in the document to see whether admission *ad inserviendum curae animarum*, means institution to a vicarage; and in the first place take the entries as to this same person in the Visitation Books of 1633, and we find that he was admitted to the curacies of Kilglass, Kilbride and Derrin, but that to the vicarages of Shankill and Clonfenloh, he was not only admitted, but instituted and inducted.

"Henricus Compton in jure civili Baccalæus ac verbi Dei predicator admissus fuit ad inserviend cure animarum in Ecclia pōli de Kilglasse, per Edwardum Elphiñ Epūm, sexto Octobris, 1622.

"Et admissus fuit ad inserviend cure animarum in Eccliis pōliis de Kilbride et Derriñ Elphiñ. Dioc̃ per p̄fat. Epūm, X° Aprilis, 1624.

"d̄cus Henricus admissus fuit ad vicariam de Shankill Elphiñ Dioc̃. et institutus in eandem p p̄fat̃ Epūm, X° Novembris, 1621.

"Et inductus in eandem per Erasmum Mathew archinum Elphiñ, 30° Aprilis 1622.

"Admissus et institutus fuit in vicariam de Clonfenloh, per p̄fat̃ Epūm, 18° Januarii 1627.

"Et inductus in eandem per p̄fat̃ Erasmum Mathew, septimo Junii, Anno Dni 1628."

[260] So that looking only to the case of this very person, we see here two instances in which he was admitted to curacies, and two instances in which he was instituted and inducted into vicarages. Thus far as to the particular person.

But this is not all. I do not mean to go in detail over all the entries in this book, but I took some pains in examining them, and I have found about 20 instances in which admissions to curacies are set down as "*admissus fuit ad inserviendum curae animarum* or *ad peragendum officium curati;* and more than 20 instances in which the admissions to vicarages are set down as *institutus fuit in vicariam et inductus in eandem.* And, as has been observed by Doctor Lushington, in all the entries of institution to vicarages induction follows, except in one instance, and the

exception is in the case of one of those vicarages which are set down as being usurped.

This was the visitation-book of 1633. But let us go back to the visitation-book of 1615, and see the state in which this living was at that period, the appointment of Henry Compton being in the intermediate time. In this book of 1615, mention is made of a number of vicarages as being then usurped, and among these is the vicarage of Kilglass, which is stated as being usurped by Sir Patrick Barnwall. The vicarage was then in a state which it would have been very difficult to understand, if it had not been set down as usurped by Barnwall, for it was not held by a clergyman. The plain meaning of usurped there was, that he had usurped what belonged to the vicar. He farmed the rectory which was then in the Crown, by which it was afterwards granted to Barnwall.

The visitation-book of 1633 is much fuller than that of 1615; and see how Compton is there mentioned,—[261] "Henry Compton, a good preacher, *vicarius de Clonfinagh. Episcopus confert. valet* £8 *ster. p. annum*;" and this corresponds with the entry before mentioned, where Henry Compton is represented as having been admitted, instituted and inducted into that vicarage.

Many other instances are to be found in these books, all leading to the same conclusion; and these are the reasons, without entering into the subject more at length, that induce me to think that the Judges of the Common Pleas put a wrong construction on the particular entry in question, and that the Court of Exchequer Chamber did right in awarding a *venire de novo*.

Lord Wynford: If I were called upon to decide the question of right to the advowson, as between the Bishop and the representatives of Sir P. Barnwall, I should require more time for consideration, as that is a most important point, not merely as it concerns this benefice, but also with reference to others standing in the same situation. The declaration states, that the rectory of Kilglass belonged to the Plaintiffs, and, as appendant to it, the right of presentation to the vicarage, and also (for that was necessary) that one of those under whom they claimed did present a clerk. The evidence was of various kinds, but the only question here is, whether the Court of Common Pleas decided rightly on the effect of it as far as it applied to the single point at present before us, which relates to the admission of a clerk to the vicarage. The evidence to support that is an entry in the visitation-book of 1633, which is in these words: *Henricus Compton in jure civili baculareus ac verbi Dei predicator admissus fuit ad inserviendum curae animarum in Ecclesia pŏli de Kilglass per Edwardum, Elphin Epis*-[262]-*copum, sexto Octobris* 1622. The Judges of the Common Pleas said that this entry was, in legal construction, to be taken to mean, in the present case, that the said Henry Compton in the said entry named was admitted and instituted by the said Edward King, the then Bishop of Elphin, to the said vicarage of Kilglass, on a presentation by some other person to the said Bishop, and that the only question for the consideration of the Jury respecting the said entry was, by whom the said presentation was made. The Jury being thus told that it was to be taken as clear that Compton was admitted on a presentation by some other person to the Bishop, were left to consider whether it was not on a presentation by Barnwall. The Judges were not warranted so to direct, but ought to have left the matter generally to the Jury: and suppose that had been done, and that the Jury had found that it was on the presentation of another person, and that that person was Barnwall, there would remain another very important and serious question, whether the evidence was sufficient to show that this was a presentation and institution to a vicarage, or whether Barnwall could present to the vicarage, and I could not bring myself to say that it was. It is questionable whether Barnwall ever had it in contemplation to present to the vicarage. It appeared that he himself was in by usurpation, not perhaps of the right of presentation, but of the fruits, and it was not likely that he should present to the vicarage, but only that he should appoint a person to do the duties, reserving the fruits of the vicarage to himself. But when we look through the long list of entries in this book, we find that curates are described as admitted only, while vicars are described as instituted as well as admitted; and is it possible, when, according to the ordinary rules of [263] construction, different words are considered as meaning different things, to say that they mean the same things? According to my notion of the rules of construction of

written instruments, admission, here, is applied to curacies, and institution to vicarages. My opinion then is, that the Judges of the Court of Common Pleas did wrong in taking the construction of the entry out of the hands of the Jury, and that they themselves put a wrong construction on it. I think then that this case ought to be sent back again, that it may be thoroughly sifted, not merely as to the question whether Barnwall presented, but in the more extended view as to whom the right of presentation belonged, a most important question with reference not merely to this case but to other vicarages in the same situation.

Judgment in the Exchequer Chamber affirmed.

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[265] APPEAL

From the Court of Session.

Sir RICHARD BEMPDE JOHNSTON HONYMAN,—*Appellant;* CAMPBELL *alias* HONYMAN and Children,—*Respondents.*

[5 Scots R.R. 501. Discussed in *Harvie* v. *Inglis*, 1837, 1839, 15 Shaw, 965, 968; 1 Dunlop, 542; *Lourie* v. *Mercer*, 1840, 2 Dunlop, 960; *Monteith* v. *Robb*, 1844, 6 Dunlop, 938, 943; *Mackenzie* v. *Stewart*, 1848, 10 Dunlop, 636; *Ross* v. *Macleod*, 1861, 23 Dunlop, 978, 989, 993; *Longworth* v. *Yelverton*, 1864, 4 Macq. 833, 855, 857.]

In a suit for a Declarator of Marriage founded on a promise *subsequente copula* there was no direct evidence of the promise; but from facts and circumstances, and chiefly from letters written by the Defender to the Pursuer—(the Defender having destroyed the letters written by the Pursuer to him)—the Commissary Court and Court of Session thought that there was sufficient ground to warrant the inference that a promise of marriage had been given and accepted previous to the *concubitus*, and declared for the marriage. The Judgment affirmed by the Lords.

In 1808, Miss Elizabeth Campbell, an accomplished young woman, went as governess to the family of Sir [266] William Honyman, a Judge of the Courts of Session and Justiciary, and continued in charge of his daughter for six years. In 1811, Mr. Richard Bempde Johnston Honyman, a son of Sir William, returned from India; and in September of that year came to reside with the family at Smyllum Park near Lanark. He was then 24 years of age, and his health had been in some degree affected by the climate of India. Miss Campbell was at that time 25 years of age. An attachment took place between the parties; and, as was alleged by Miss Campbell, a marriage was proposed by Mr. Honyman, and, after some hesitation, assented to by Miss Campbell; and it was agreed that they should marry as soon as they conveniently could. In January 1813, Mr. Honyman, having been chosen member of parliament for the Orkney Burghs, went to London, and, as had been agreed upon, a written correspondence took place between the parties. In April 1813, Mr. Honyman returned to Smyllum Park, and in June of the same year, according to the lady's statement, they accepted each other as husband and wife, although it was deemed necessary to conceal the marriage, as they were aware that it would be displeasing to Mr. Honyman's father, and might endanger his succession to the family estates. Mr. Honyman's income at that time was only £200 a year, and Miss Campbell had property to the amount of about £500 in all. From the period of the alleged marriage, the parties secretly cohabited together as husband and wife, and in the summer of 1814 the lady was privately delivered of a child at Smyllum Park, and, in 36 hours after her delivery, she proceeded with her child in a carriage to Edinburgh, and having recruited her own strength, and placed her child out at nurse, she returned to Smyllum, where she remained till the [267] close of the year, and then, on account of some circumstances transpiring, she finally left the family, and went to visit a friend in the vicinity of Inverary. In the summer of 1815 she returned to Edinburgh and resided with an aunt, at whose house Mr. Honyman visited her, and the intercourse was con-

tinued. In 1816 the lady became pregnant of her second child, and went to York, where she was delivered; and from that period till 1820 she resided at York, supporting herself and her children by the little property she had, and her own industry. In 1820, she returned to Edinburgh and resided with her aunt till the death of the latter in 1821. Miss Campbell then fell into a state of bad health and embarrassment, and wrote to Mr. Honyman on the subject, which led to a renewal of the intercourse, and this continued till 1823, when Mr. Honyman put an end to it. In 1824 Miss Campbell was put in gaol for debt, and wrote to Mr. Honyman, earnestly soliciting him to do something for the children. She also intimated, that as she saw that Mr. Honyman wanted to get rid of his engagement, she would, without further delay, commence proceedings to establish the marriage.

Accordingly, on the 6th of May 1825 she instituted a suit before the Commissaries, concluding for a declarator of her marriage, and of the legitimacy of her two daughters. The summons relied chiefly on a marriage contracted *per verba de praesenti;* but although vaguely and loosely drawn, it was understood as containing enough to lay a foundation for the evidence of a marriage by promise *subsequente copula*, on which alone the case turned, the marriage *per verba de praesenti* resting only on the Pursuer's allegation, while the Defender denied that there was any marriage at all in that or any other way. The summons stated that the [268] Defender had been heard by persons in his own family, as well as by others, to acknowledge the Complainer as his wife; and she referred to a letter from the Defender to her, in which he called her his "beloved wife;" but it was found that the word *wife* was written on an erasure, which threw some suspicion on it, and it was therefore not relied on in the judgment in the House of Lords.

In allusion to the allegation in the summons, that some of the Defender's family, as well as others, had heard him acknowledge her as his wife, the Pursuer, immediately before the commencement of the process, wrote a letter to the Defender, containing these words:

"When I resisted your entreaties, you said, Why should I? could I not depend upon your honour? and that no one could possibly know what had passed between us. My answer to you was, I believe I may depend upon your honour; but, were every eye shut, every ear closed, and every tongue silent, much and dearly as I love you, I should know the circumstance myself, and that would be sufficient to make me miserable, (and you know how miserable I soon was). You know how you begged, how you entreated, after this, and assured me that you was now incapable of injuring your own honour or mine. Next morning you left Smyllum for Edinburgh; you may recollect upon what errand. You returned to Smyllum upon the 24th, came in the evening to the school-room between the hours of six and seven o'clock, and entreated that I would consent to our being married. I answered, that I never would hesitate to become your wife; you to whom every affection of my heart had been long dedicated; but what a sacrifice was you making in the eyes of your friends and relations, for I could neither offer you [269] fortune nor connections, however respectable mine were, that they deemed necessary for your wife. Your answer to me was, Damn my relations, I am to consult my own happiness, not theirs. You then said, Am I to call you my wife? You may. Do then, my beloved wife, let me hear you call me husband. Dearest, dearest Dick, you are my husband. You know that, when your affections and feelings are interested, in what a strenuous manner you can speak, and that it is not the boundaries of a small room that will keep secret your voice or words when agitated. (Mark what follows.) There was one of your own family an ear-witness of what then passed, and in consequence of which I have a letter addressed to me some months afterwards, in one part of which she calls me her dear sister, and in another her dear Lady Dicky. So much can I depend upon her honour, that I feel perfectly certain, had I nothing under her own hand to substantiate the fact, that were she put to her oath, she never, for one moment, would hesitate to affirm what she asserted to my late aunt, in presence of your mother and sisters, that she was sure I was your wife; and which was distinctly heard by another witness now in life. There are also two other witnesses who can assert in what terms they have heard you name me, at a period much antecedent to the above mentioned. How little was I then aware, that what passed between us was to be of such essential service to myself and children eleven years afterwards, and how impossible it would have been for any one

to persuade me at that time that my beloved Dick was other than truth and honour itself."

In this particular, the Pursuer failed in her proof, [270] and on that circumstance the Defender remarked as follows:

"The Respondent, in conformity with the above statement as to the constitution of the marriage, positively affirms that she is in possession of evidence of it. What is that evidence? It is, 1st, The testimony of the Appellant's sister Jemima; 2d, The testimony of 'another witness now in life,' who is said to have 'distinctly heard' the Appellant's sister assert 'to my late aunt, in presence of your mother and sisters, that she was sure I was your wife;' 3d, The testimony of 'two other witnesses, who can assert in what terms they have heard you name me;' and 4th, and most especially, 'a letter,' which the Respondent states to be actually in her possession at the time that she writes, addressed to her by the Appellant's sister in consequence of her having been 'an ear-witness of what then passed (viz. on 24th June 1813), in one part of which she calls me her 'dear sister,' and in another, her 'dear Lady Dicky.'

"Alluding to this evidence, the Respondent says, 'How little was I then aware, that what then passed between us was to be of such essential service to myself and children eleven years afterwards.' And yet, of all this 'essential' evidence, not one particle has been adduced by the Respondent; nay, the Appellant's sister is the only witness whom she ventured to examine, and her testimony affords an express negative to every word which the Respondent says, while the letter that she is pretended to have written has neither been produced nor accounted for, nor proved to have been seen at any time by a single individual."

The Pursuer, however, did account for the loss of the letter alleged to have been received by her from [271] the Defender's sister, by saying that it was lost at the time she was put into gaol, when all her repositories were ransacked and her letters thrown about. The Defender's sister was examined, and positively denied having heard any thing about the matter. The Defender on being examined as a haver, admitted that in 1824 he had destroyed the Pursuer's letters written to him during the correspondence.

There was no evidence on the part of the Pursuer to establish a distinct, direct promise of marriage previous to the *concubitus;* and the strength of her case was this, that the letters written to her by the Defender previous to the *concubitus* and after it, afforded satisfactory evidence that a promise of marriage had been given previous to the *concubitus*, and that the intercourse was from its commencement virtuous, and not criminal. The following are the three letters written by the Defender from London to the Pursuer at Smyllum Park, between January and April 1813, previous to the *concubitus*.

30, Duke-street, St. James's.

You will probably have conceived, by the time which I have suffered to elapse since the permission which you so kindly granted me, that I did not intend availing myself of it; but so bewildered and agonized have I been since our separation, that I have been unable to give utterance to my feelings, or form one rational sentiment, even to her who is the tenderest object of my regards. O my dearest darling Eliza, much as I thought I loved when we were together, still does it fall far short of that affection I now feel, and so fondly cherish towards you. If the sentiments which I so ardently feel, and have so repeatedly avowed, be reciprocal, hesitate not to say so. I am unable to doubt, [272] after the innocent endearments with which you have favoured me, that it should be otherwise; yet still, as a solace to my woes, refuse not this solicitation. Write me. Tell me that I am dear to you, thou lovely girl. Would that we were once again together, and nothing shall separate us. I look forward with rapture to our again meeting, and then we must form plans for putting our feelings out of the reach of hate. I intend being with you much sooner than I intended. From the embarrassed state of my father's affairs, my residing in London is both improper and disagreeable; and it was only to please him that I ever went. God knows how bad a politician I shall make; and I would resign such a situation with great happiness. I went yesterday and paid a visit to the outside of No. 8, Millman-street. The blinds were up and the windows open. Ah! thought I, they have a different inmate in the house now to what they had when I knew it, and the con-

clusion sunk deeply on my heart. Believe me, I feel a fondness for the house, for it was once the abode of Eliza. I took a most accurate survey of it. The windows were new painted, and there was the little Chambers, who took such an insurmountable antipathy to my looking out at one them. Farewell for the present, my dearest Betsy, thou best beloved. Love me as I love you, and put my heart at rest by assuring me of it. You will receive this on Monday, and write me soon. God bless you, thou dearest girl. Again farewell, and believe me, with an attachment strong as it is pure, yours most affectionately, (Signed) R. B. J. HONYMAN.

(Addressed to) Miss Campbell.

[273] No. 2.

I received your most welcome letter this morning, my ever dearest Eliza. Well does it deserve an immediate acknowledgment. Never can I sufficiently thank you for the alacrity which you have displayed. I rejoice to think, my sweetest love, that you do know how impatient I am. If that be one of my failings in the common occurrences of this sad world, how much is it increased when expecting a letter from you. I may safely say, that the only real enjoyment I have had since leaving you, is the perusing of your letters. Many is the kiss I give them, and many is the sigh that escapes, when I think at what a distance the dear writer is at. Soon, however, I trust we shall meet, and one soft embrace will repay me an age of anxiety and distress. Oh, my darling Eliza, my dearest beloved, my sweetest and my only love, with what anxiety do I look forward to again beholding you—with what rapture do I anticipate the realising of those visions which my fancy has already formed. Nothing, I trust, will thwart the happiness I look forward to—nothing shall, nothing can: for it is felicity sanctioned by virtue herself, and everything that is tender and amiable. In offering you, my best beloved, that heart which has for a long time been devoted to you, I have only to lament that it is not a more deserving gift to her to whom it is offered. We will talk over the future when we meet. Would there was a Millman-street in Edinburgh; opportunities cannot, however, be wanting, and we must make the most of them. I delivered your dear letter this day. Send all your letters to me, and they shall be delivered. Never am I so happy as when engaged in your service. Anxiously do I look forward to Wednesday. Never, thou dearest girl, disappoint me in hearing from you. Tell me the day you mean [274] to write, that I may have something to look forward to. Believe me, I am deserving of all your sympathy, and all your love; for I am, without you, a wretched mortal. Farewell, thou in whom all my joys are centered; my lovely Betsy, adieu. Believe me ever yours, most faithfully attached.

(Signed) R. B. J. HONYMAN.

P.S.—Pray, my love, direct your next cover to your aunt's. I am apprehensive of Queen-street.

No. 3, but marked in process No. 5.

My dearest, dearest Eliza,—If I were not the very worst correspondent in the whole world, I should have wrote at least half a dozen of letters before now, in return for the affectionate ones I have received from you. I ask but a continuance of such goodness for one fortnight longer, and by that time I hope to be indebted for favours of a still more tender sort than even those of your dear letters. How much, my sweetest love, am I now your debtor, and how happy am I to acknowledge it. My dearest Eliza, my darling friend, you who are every thing to me, in whom my whole happiness is centered, and whom, while I exist, I shall never cease to love. Even death itself shall not subdue the fervour of my attachment. If it be permitted the immortal part of us to retain the recollection of those who on earth were most dear, I'll love thee then, even when my love can no more avail. You deprive me, thou who art the most dear of thy endearing sex, of a very great pleasure, by prohibiting my delivering your letters to our uncle. Be it so. I obey, as you desire. You cannot, however, insist on my not visiting the street, without being very arbitrary. No such prohibition having as yet [275] arrived, I shall continue, as heretofore, to visit it once in the day at least. As to your letters, thou dearest of women, I can never burn them. If you are afraid to trust,—but no—you are too generous: you judge people too much by your lovely self to suppose any improper use should ever be made of them. I cannot destroy, but may I be bereaved of every thing I value in existence, or existence

itself, if I ever, under even every or any circumstance, betray a sentiment or syllable of such affectionate effusions. Indeed, you may trust me, my love; but it shall only be until we meet, for I will deliver all your letters into your possession. Farewell, my only love; God bless you, my sweetest Eliza. Yours ever.

(Signed) R. J. HONYMAN.

The following letter was written by the Defender to the Pursuer subsequent to the *concubitus*.

No. 4, but marked in Process No. 3.

My darling Betsy,—I have received your letter very safely, and request you will give yourself no uneasiness about it. Careless as I confess myself to be about many things, I never had, and, moreover, most solemnly swear to you, my dearest love, that I never will have, cause to upbraid myself with inattention to any thing relating to your dear self. The assurances which you have given ought to satisfy me, but I long to hear them while locked in your arms, and pressed to that heart of hearts, the only one that mine will ever throb at approaching. You have every thing, my best beloved, for securing my affections; and the result will prove the truth of my assertion. You are every thing in the world to me. Without, I am bereft of every thing; **[276]** and possessing you, I have nothing more to ask. Trust me, love, I know my own heart; and believe me, my beloved, these are its sentiments. I am writing in the midst of interruptions, and time presses. I rejoice you are to be with us on Wednesday next. The carriage will be in on Monday with William, and you can come out in it. How I long for you, my dearest love; how I long for Wednesday, and all its joys and pleasures. What a scrawl, Betsy; how unconnected the sentences; in short, what a production. It is a letter that requires a partial eye like yours to peruse. I have time for no revisions, but I trust there is need of none. The language of the heart, in however uncouth a form, should be the most acceptable. Farewell, thou joy of my life; dearest, dearest, dearest being, darling Betsy, your ever affectionate and unalterably attached (Signed) R. J. HONYMAN.

P.S.—Let me hear of your health by Jemima (his sister). Do not tire; nor write again, as the time of our meeting is nearer than I dared to hope.

In another letter the Defender said "You have now no embraces for any one else; not even for aunt Fraser or sister Anne. I call them so, for your aunt is my aunt, and your sister my sister." There were several other letters proved, which were written in a similar style.

The following are letters written by the Pursuer to the Defender previous to the commencement of the suit, in which, while she pleads for her children, it is to be remarked that she does not insist on her claims upon the defender as her husband.

[277] Letter, Pursuer to Defender, bearing Edinburgh post-mark of 3d July 1824.

Your children are starving, and almost naked, going about without a shoe on their poor feet. Is it possible you can know this, and not do something for them? The smallest supply would be thankfully received on their account; and unless it be quickly, God only knows what is to become of them. They are at present a burden on the meagre bounty of those who can ill afford a morsel for their own children, and who cannot be expected, were they ever so willing, to be able to do it any longer. O! think but for a moment of their situation, and surely your heart cannot but pity, and your hand assist them. There is no matter how small the sum; little will supply their present wants. Do send them something by the coach of Monday, addressed to A. George, No. 5, Murray-street, Crosscauseway. Do, for Heaven's sake, send them something, or they must *die* for want, or meet with an untimely grave. What a dreadful thought! what a dreadful end! after all that has been suffered for them.

Anxiously will Monday's coach be looked for. How they are to subsist till then I know not; but may God temper the wind to the shorn lamb. O! need more be said to make you feel. No, for after what has been said, if you give them no assistance, this world with them will soon be at an end.

Saturday morning, six o'clock.

Addressed as before.

[278] No. 18. Letter, Pursuer to Defender, bearing Leith post-mark of 25th December 1824.

Sir: I did not think any thing could have induced me to write to you again; but, alas! the wants of two poor little creatures compel me to it: far less did I think that the business now pending would have been so long of being decided. I ask for nothing for myself. I merely ask for a small sum to supply their present great want. They have passed this day without food, and are likely to do the same to-morrow. The only means I have now in my power to avert starvation is to beg from door to door for them; and the most likely consequence is that I shall be sent to the police, where I must give an account of what has reduced myself and them to such want. I cannot possibly think you would like to have your neglect of them made so public. I would not have made this application, but I have wearied out the few friends I have, begging for them. I lay myself out of the question; for I have worked more in the last few months than would have been sufficient to keep me comfortable. How can you be so unfeeling to them, however much you may wish to punish me? Surely they are innocent. My mind is often in a state of madness. I wander the street without knowing whither I am going; and O! what dreadful thoughts often possess it. When I look from my window and see the broad sea before me, I think how soon might all our miseries be at an end. But O! blessed be God, my soul has yet been kept from the dreadful crime of murder. May his power preserve my soul from such a crime. I now humble myself to beg from you for them; and if you do not send something by Monday's [279] coach, do not blame me for what may be the consequence, for I am nearly distracted. You may address your parcel, as you did the last, to A. George, Murray-street, Crosscauseway. It must be carriage paid for I have nothing.

The Commissaries, by a majority, declared for the marriage; upon which the cause was brought by advocation before the Court of Session, by which the cause was remitted to the Commissaries, with instructions to allow additional proof. The Commissaries having taken and considered the additional proof, again found for the marriage, and this judgment was affirmed by the Court of Session, from which there was an appeal to the Lords. The cause was heard in the House of Lords on the 3d March 1831, when the following authorities were cited. Case of *Campbell*, 28th November 1821; *Dalrymple* v. *Dalrymple*, 2 Hag. 61; case of *Cunningham*, 2 Dow, 482; *Sassen* v. *Campbell*, Fac. Coll. 1824; *Johnstone* v. *Smith*, Dict. 12,681: *Anderson* v. *Fullerton*, Dict. 12,690; case of *Hislop*, Mor. 13,908; *Buchanan* v. *Macnab*, Mor. 13,918; case of *Linning*, Mor. 13,909; *Pennycook* v. *Grinton*, Mor. 12,077; *Smith* v. *Grierson*, Mor. 12,391. And, as to the effect of the word *wife* in one of the letters having been written on an erasure, the case of *Gibson*, 2 Dow, 270; case of *Kemp*, Dict. 16,949; case of *Adam*, Fac. Coll. 1810; and the case of the *Earl of Traquair*, 1822, were cited.

Lord Chancellor (3d March): This case is one of very great importance to the parties, and it has been argued that it is of equal importance as connected with the marriage law of Scotland. But I regard it as a mere question of fact, and in affirming the judgment I wish to guard myself against the supposition that in deciding [280] this case I am actuated by any desire in any way to alter the long established principles of the marriage law of Scotland, which ought to be strictly preserved and adhered to till altered by the Legislature.

Two points have been raised and argued in the Court below, and at your Lordships' bar; first, that the summons is confined to the case of a marriage *per verba de presenti*, and that this ground was abandoned by the Pursuer, who rested her case entirely on the ground of the promise *cum copula*. But on looking at the whole of the summons, I think there is no sufficient foundation for this objection. It is loose, certainly; but looking at the latter part, and at all that appears within the four corners of the instrument, I think the whole matter is let in. The next question then is, and it is the only one which we have now to consider, whether there was in this case a promise *cum copula*.

I take the marriage law of Scotland as I find it, although it makes so perilous an experiment on human passions when it says that a person, of the one sex at the age of 12, and of the other at the age of 14, who would not, the one till nine years, the other till seven years after, be competent by law to affect one half quarter of an acre

of an estate, may legally perform the most solemn act of life, may enter into a binding contract of holy matrimony, establishing an union for life from which issue may be procreated, and which may carry all the estates and honours of a family to the children of (it may be) a common prostitute: whether it is consistent or expedient that a system should continue by which in half a moment, when passion is predominent and reason is lulled asleep—in half a moment—no time allowed for reflection, a person at such an age is made capable of binding himself or herself in the most solemn contract of life, involving [281] consequences affecting the whole of the property and the honours of families, is a matter into which I do not at present stop to inquire. It is sufficient if the marriage be valid. A marriage may be irregular, and the parties concerned in it may be punished by ecclesiastical censures and otherwise, but still it may be valid, and draw after it all the consequences of the most valid measure, and affect the issue as completely as the most solemn marriage contracted after open publication of banns by the gravest clergyman of the Established Church. That is the law, and we are here to administer it; and such being the law, now let us proceed to consider the facts of this case.

Consent alone makes the marriage, and there are three ways in which that consent may be proved. The first is consent in fact, *per verba de presenti*; secondly, consent partly by presumption of law, and partly in fact, as when the parties live together as married, and are, habit and repute, husband and wife. The third is that which more nearly concerns this case, where there is a promise or engagement to marry *de futuro*, with *copula* following. Now a promise, like all other facts, may be proved by direct evidence, or by circumstances. It may be proved by witnesses who heard it given, or by writing; but a promise may be proved without these things. It may be inferred from circumstances which may be proved by witnesses or by writing, and if there is sufficient evidence of that kind to satisfy the Court that the promise was given, and that the subsequent *copula* did take place, the case is made out as well as if it had been proved by more direct, and what might be considered more satisfactory evidence: although in our law circumstantial evidence is, in some respects, held to be stronger than direct testimony, upon the principle that it is much more difficult to [282] make out a bad case by a train of circumstances, than to make it out by direct falsehood. This is a case of circumstances, and let us see then what the circumstances are.

I shall now take this case as if I were sitting at *nisi prius*, and stating to the jury the grounds on which they were to find their verdict. I should tell them there were three matters in issue; and that, in the first place, they must be satisfied that a serious promise was given and accepted; secondly, that cohabitation followed; and thirdly, I should tell them that if, between the promise and subsequent cohabitation, there was no disconnection, no medium, the law considered the *copula* as connected with the promise. Now here there is clearly a *copula*; and the interval between that and the promise, if promise there was, was so short, that there was no reasonable ground to question the connection. Then the only question is as to the existence of the promise. I deny that courtship, or an intention to marry, however plainly made out, can constitute, or, in the language of the Scotch law, is equipollent to a promise. There must be a promise, and the promise must be mutual and binding on both parties; for the law attaches on the promise and not on the intention. But still, courtship is a most material circumstance, when we have to consider whether there was a promise. When we consider how natural it is that lovers should marry, and that marriage is usually the result of courtship, and that in these cases mutual promises are so common, although courtship, or intention, will not supply the place of a promise, yet they come so near, that if these are once made out, we get on a good way towards our journey's end. Now, looking at the evidence as it appears in these letters, I find the strongest expres-[283]-sions of virtuous affection. He says, "If the sentiments which I so ardently feel, and have so repeatedly avowed, be reciprocal, hesitate not to say so. Love me as I love you, and put my heart at rest by assuring me of it.—Believe me, with an attachment strong as it is pure, your's most affectionately.—Farewell, thou in whom all my joys are centered!—I trust you will never be able to accuse me of having a bad heart.—I would not intentionally hurt any one, far less that being for whose happiness I would lay down my existence." And many other expressions of the same import. Then, was the attachment reciprocal, and the promise accepted? The answer to the first letter, although it is not produced, must

have come, for the next one refers to it. He says, "I received your most welcome letter this morning, my ever dearest Eliza! Well does it deserve an immediate acknowledgment. Never can I sufficiently thank you for the alacrity which you have displayed. Nothing, I trust, will thwart the happiness I look forward to; nothing shall—nothing can; for it is felicity sanctioned by virtue herself, and every thing that is tender and amiable." In the first of the letters he earnestly entreats her not to hesitate to avow a reciprocal attachment, and the answer must have been favourable; for in his next letter he says, that the answer was most welcome, and thanks her for the alacrity she had displayed. The first step is the promise; the second the acceptance. In the first letter he says that he feels an attachment to her strong as it is pure, and this certainly points to a courtship with a view to matrimony and, as Lord Stowel says, in *Dalrymple's case*, we are not to speculate an intention, but look to that which the words imply. If a person denies the intention expressed by [284] his words, he must, as Lord Stowel says, "first assign and prove some other intention; and secondly, that such other intention so alleged by him was fully understood by the other party to the contract, at the time it was entered into." We are to consider what the words naturally meant and in what sense they were understood and received; for it would be monstrous to allow a man, in such a serious transaction, using serious words expressive of serious intentions, to turn round and aver a private intention reserved in his own breast, to avoid a contract which was differently understood by the party with whom he contracted. The promise contemplates a future marriage. "Nothing," he says, "will thwart the happiness I look forward to: it is felicity sanctioned by virtue, and every thing that is tender and amiable." Can any man understand this as having any other meaning than a view to marrying, or suppose that she understood it as having any other meaning? and if the lady accepted the promise, —and she might have considered this as a direct promise,—and complied with the request, and gave a mutual promise, and all this before cohabitation, and the *concubitus* followed, the marriage was constituted. I cannot accede to Lord Glenlee's view as to the trashy nature of this tender and amiable felicity. With great respect for him, I do not think his view of the matter so philosophic or sound as to enable me to get rid of the manifest tendency of the letter. He goes on to say, "In offering you, my best beloved, that heart which has been long devoted to you, I have only to lament that it is not a more deserving gift to her to whom it is offered. We will talk over the future when we meet." What could a woman think they were to talk over but the marriage, the matrimonial future? Then in the third letter, written before the [285] *concubitus*, he says, "I should have wrote half a dozen letters before now, in return for the affectionate ones I have received from you. I ask but a continuance of such goodness for one fortnight longer, and by that time I hope to be indebted for favours of a still more tender sort than even those of your dear letters, etc.—Even death itself shall not subdue the fervour of my attachment.—You deprive me of a great pleasure by prohibiting my delivering your letter to *our* uncle." And then, in a letter written subsequent to the *copula*, he says, "You have now no embraces for any one else, not even for *aunt* Fraser or *sister* Anne. I call them so, for your aunt is my aunt, and your sister is my sister." Add to this the interest he takes in the expected event of the birth of a child. "Tell me, my Betsy, if there is any likelihood of the event which you and I talked about taking place. I must be with you to comfort and soothe you, and to partake of the joy such an event will excite." These are the expressions of one who looked to a matrimonial engagement and to a legitimate child.

Taking all the letters together, the only rational inference is that he looked to a marriage and promised, and then actually did marry this lady, and that he only deferred its public acknowledgment till the death of his father, who might think such a connection unseemly and degrading. I should differ with him on that head. She has a character as pure and unimpeached as any woman that ever came to this bar; and even if he had been a wealthy instead of a poor gentleman, having then only £200 a year, I should not have thought that he at all degraded himself by a matrimonial connection with a virtuous and an accomplished woman.

Now if there had been any doubt, under these circumstances, as to the promise, from any ambiguity in [286] the expressions, the subsequent copula would make it certain. The probability is turned to a certainty when she gives up her person as

the consideration for the promise; as if, in an ordinary contract, I had any doubt as to the price stipulated, if I saw the price paid, I should have no doubt as to what was the price stipulated. I do not here cite text writers or other authorities. I know that I am following out the principles of the marriage law of Scotland, and establishing a wholesome rule of salutary tendency to human virtue.

These are the grounds on which I think that this marriage has been made out. I have, in a great measure, laid out of view the letter in which the expression "beloved wife" occurs, as the word *wife* is written on an erasure, and is favourable to the object of the party out of whose custody it came.

The other facts are sufficient to make out the case, notwithstanding some slight doubts arising from two circumstances. The one is, that in the letter of the 14th July 1824, written by her to the Appellant, she rests her case mainly on a letter alleged to have been sent to her from the Appellant's sister, in which the latter called her, her dearest sister, and her dearest Lady Dicky, and yet that letter is not produced in evidence. I doubt whether the lady, when demanding her rights, did not, perhaps under the bad advice of friends, put forth a stronger case than she could make out, and a good case has often been marred by an attempt to make it better. Be it so; but still the evidence is sufficient, independently of any such letter. The other ground of doubt is, that in the letters in which she, in such painful terms, solicits money for her children, she makes no claim to the rights of a wife. This has a tendency to raise a doubt; but perhaps she might have been ignorant of her legal rights, [287] or of the means of enforcing them. Upon the whole, I think the judgment ought to be affirmed.

I have borne testimony to the character of the lady, as far as it appears on these proceedings, for the sake of the Appellant as well as of the Respondent. She is now his wife, and this takes off any tarnish that may have been attached to her character elsewhere. I say so for his sake as well as hers. He may have acted harshly and foolishly, under the influence of feelings of family pride. He was a young man, and may have been irritated by the state of bad health which his residence in India had produced. I look upon his acts as tenderly as possible, and I hope that both parties will go from this bar as persons whose characters are unimpeached.

Judgment affirmed.

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ERROR,

From the Irish Court of Exchequer.

HUMPHRYS,—*Plaintiff in Error;* PRATT (Sheriff),—*Defendant in Error.*

[Mews' Dig. vii. 389; xii. 1166. S.C. 5 Bli. N.S. 154. Applied in *Evans* v. *Collins*, 1844, 5 Q.B. 818; and see *Dugdale* v. *Lovering* 1875 L.R. 10 C.P. 199: *Smith* v. *Keal* 1882, 9 Q.B.D. 340: *Palmer* v. *Wick and Pulteneytown S.S. Co.* (1894) A.C. 318; and *Moxham* v. *Grant* (1900) 1 Q.B. 93, 95.]

H. gives a *fi. fa.* to a sheriff to be executed against the goods and chattels of D., and points out some cattle on the lands of D. as being the property of D., when in reality they were not; and, upon this representation, the sheriff takes them in execution. The real owner sues the sheriff and recovers, and the sheriff sues H. for his damages and costs incurred through the misrepresentation. Judgment in the Courts of Exchequer and Exchequer Chamber for the sheriff. Affirmed by the Lords.

Humphrys, the Plaintiff in Error, obtained a judgment in Michaelmas Term 1826, against Dorothea Power, and sued out a *fieri facias*, which he delivered to Harvey Pratt, the Defendant in Error, then sheriff of Kilkenny, to be executed, and pointed out some cattle then on the lands of Dorothea Power, as her goods and chattels, and upon that representation the sheriff took the cattle in execution. John Power, a son of Dorothea, brought an action against the sheriff, proved that the cattle were his, and had judgment in his favour. The sheriff then brought an action in the Exchequer against Humphrys for the amount of the damages and costs re-

covered by John Power against him the sheriff. The declaration contained five counts, to all of which the plaintiff in error pleaded not guilty; and issue being joined thereon, the cause came on to be tried at the Spring Assizes for [289] the county of Kilkenny, in the year 1828, when a verdict was found for the Defendant in Error, damages £87 15s. 1d. upon the fifth count of the declaration.

That count is as follows:

And whereas also, before and at the time of the committing of the grievances in this count mentioned, to wit, on the 26th day of December, in the year of our Lord 1826, at Kilkenny, to wit, at Dublin, in the county aforesaid, the said Plaintiff was high-sheriff of the county of Kilkenny, and the said Defendant had then and there caused to be delivered to the said Plaintiff, as such sheriff, a certain other writ of our said Lord the King, commonly called a writ of *fieri facias*, which had theretofore issued out of the court of our said Lord the King, before the Barons of the Exchequer at Dublin, at the suit of the said Defendant, against one Dorothea Power, bearing teste the 28th day of November, in the seventh year of the reign, and ret urnable into said court in eight days of St. Hilary, and directed to the sheriff of the county of Kilkenny, by which said writ our said Lord the King commanded the said sheriff, that of the goods and chattels of the said Dorothea Power in his bailiwick, he should cause to be levied the sum of £95 19s. 5d. And the said Defendant then and there represented and affirmed to the said Plaintiff, that the said Dorothea Power was possessed of certain goods and chattels liable to be seized under the said writ, within his bailiwick, which goods and chattels the said Defendant would then and there cause to be shown to the said Plaintiff, and then and there required the said Plaintiff to seize the said goods and chattels, under the said execution. And the said Plaintiff further says, that he, confiding in the said representation and affirmation of the [290] said Defendant, and believing the same to be true, and not knowing to the contrary thereof, did afterwards, to wit, on the day and year and at the place last aforesaid, seize within his bailiwick, at the request and by the directions and at the requisition of the said Defendant, under the said last-mentioned writ, certain goods and chattels, that is to say, nine cows and three heifers, which were then and there shown by the said Defendant to the said Plaintiff, as and for the goods and chattels of the said Dorothea Power, liable to be seized under the said writ, and that the said goods and chattels were afterwards claimed by one John Power as his property; and that the said Defendant, after such seizure and claim, insisted and asserted that the said claim was unfounded. And the said Plaintiff further saith, that the said Defendant, in truth and in fact, deceived and defrauded the Plaintiff in this, to wit, that the said last-mentioned goods and chattels were not at the time of the delivery of the said writ to the said Plaintiff, or when they were so shown or seized, or at any time after the delivery of the said writ to the said Plaintiff, the goods or chattels, or property of the said Dorothea Power, liable to be seized under such writ. And the said Plaintiff further says, that afterwards, to wit, on the 15th day of February, in the year of our Lord 1827, at Kilkenny, to wit, at Dublin, in the county aforesaid, one John Power, as the true and lawful owner of the said last-mentioned goods and chattels, at the time they were so shown to the said Plaintiff, and seized under the said last-mentioned writ, brought his certain action against the said Plaintiff in the Court of our said Lord the King, before the Barons of the Exchequer at Dublin, to recover damages for the seizing and taking of the said goods under the said last-mentioned writ; [291] and such proceedings were thereupon had in the said action, that the said John Power afterwards, to wit, in Trinity Term, in the 8th year of the reign of his said present Majesty, before the said Barons of the Exchequer at Dublin aforesaid, at Kilkenny, to wit, at Dublin in the county aforesaid, by the consideration and judgment of the said Court, recovered against the said Plaintiff a large sum of money, to wit, the sum of £50, as and for the value of the said goods and chattels so seized by the said Plaintiff, as last aforesaid, and the further sum of £27 15s. 1d., for costs and charges by the said John Power, about his said suit in that behalf expended, making together the sum of £77 15s. 1d.; and that afterwards, to wit, on the 19th day of November, in the year last aforesaid, at Kilkenny, to wit, at Dublin in the county aforesaid, the said Plaintiff was forced and obliged to pay, and then and there did pay, to the said John Power, the said sum of £77 15s. 1d., and was also then and there forced and obliged to lay out and expend a certain other large

sum of money, to wit, the sum of £40, in and about defending the said action so brought against him as last aforesaid, and in and about taking and pursuing other necessary proceedings made incumbent upon him, in consequence of the said seizure, and the said recovery, and was and is otherwise greatly injured; and the said Plaintiff says, that by reason of the said several premises he has been injured, and has sustained damage to the amount of £500.

The Defendant in Error entered a *nolle prosequi* upon the first, second, third and fourth counts of the declaration.

The Plaintiff in Error moved in the Court of Exchequer, in Ireland, to arrest Judgment, on the ground that the fifth count did not allege that the misrepre-[292]-sentation, as to the property in the goods, was made *scienter* or *fraudulenter*.

This motion was refused, and judgment was given for the Defendant in Error.

The Plaintiff in Error then brought a writ of error in the Court of Exchequer Chamber in Ireland; and the case having been argued, the judgment of the Court of Exchequer was affirmed.

The Defendant in Error submitted that the decisions of the Court of Exchequer and the Court of Exchequer Chamber were right, and that the fifth count set out a sufficient cause of action, and for the following reasons:

First.—That it is a principle of law, that he who affirms either that which he does not know to be true, or that which he knows to be false, to another's prejudice, and his own gain, is a wrong-doer, and must answer in damages for the injury occasioned by such falsehood.

Secondly.—That it appears by the fifth count that the Plaintiff in Error did not know what he represented to be true; for the representation, as to the property in the goods, is averred to have been untrue, and consequently, the Plaintiff in Error was guilty of falsehood, to the damage of the Defendant in Error, the Plaintiff in Error being at the time interested in making the representation

Thirdly.—That it further appears that the falsehood of the representation was prejudicial to the Defendant in Error, and caused the damage to him set out in the fifth count.

Fourthly.—That the Defendant in Error was by law bound, in performance of his duty as sheriff, to act upon the representation as to the property in the goods so made by the Plaintiff in Error, at the peril of an [293] action at the suit of the Plaintiff in Error, if he, the Defendant in Error, had neglected or refused so to act.

Fifthly.—That, consequently, a duty was imposed upon the Plaintiff in Error to represent the fact, as to the property in the goods, truly. And that it is equally a breach of duty in a case of this nature to state that as a fact which the party representing does not know to be true, as wilfully, knowingly, or fraudulently, to misrepresent the matter. That it is equally false in both cases; and that the relation in which the sheriff stands to the party making the representation, and the necessity which the sheriff is under to act on the representation if true, imposes a duty on the person making such representation, to make it truly; that is, not to state as a fact that which he does not know to be true, and which turns out to be false.

Sixthly.—That the allegation of wrong, and of consequent damage in the fifth count, is at all events sufficient after the verdict.

For the Plaintiff in Error it was contended, that the Judgment ought to be reversed, for the following reasons:

First. Because the fifth count in the declaration, on which the Judgment has been entered for the Defendant in Error, is founded on a false representation, and the said count does not allege any sufficient ground to maintain an action thereon; for by law an action will lie on a false representation only in three classes of cases; first, where the representation is made respecting the subject matter of a contract between the parties; secondly, where it is made fraudulently, and with intent to deceive; and, thirdly, where it is made with knowledge of its falsehood; whereas the said fifth count does not show any contract between the Plaintiff in [294] Error and the Defendant in Error, nor does it allege any fraud in the Plaintiff, nor assert his knowledge of the falsehood of what he represented.

Secondly. Because the said fifth count being defective in substance, cannot be made good by the verdict for the Defendant; for though a verdict may cure a defective statement of a good title to maintain an action, it cannot supply or create a title, and

it is contrary to law to presume the existence of a fraud, or a scienter, where such is not alleged; and there is nothing stated in the said fifth count, from which fraud, or a scienter, could or ought to be inferred against the Plaintiff in Error; and there is the less reason for any such inference in this case, because it appears by the record, that there were other counts in the declaration of the Defendant in Error, which distinctly averred both fraud and a scienter in the Plaintiff in Error; and that on those counts the Defendant in Error thought proper to enter a *nolle prosequi*.

Thirdly. Because the representation made by the Plaintiff in Error to the Defendant in Error, as stated in the said fifth count, must be considered as having been made innocently, and from a conviction of its truth, and that the Plaintiff in Error did not and could not derive any benefit from making such representation, if false; and even assuming that the Plaintiff in Error could derive a benefit from making such representation, yet the Defendant in Error could not maintain an action against the Plaintiff in Error for a false representation, which was not at the time known to him to have been false.

Fourthly. Because it was the duty of the Defendant in Error, as sheriff, to inform himself of the goods and chattels of the Defendant in Error, in the writ delivered to him, as set forth in the said fifth count; [295] and that, as such sheriff, he had by law ample powers to enable him to ascertain the truth or falsehood of the representation made to him by the Plaintiff in Error. And that Defendant in Error, as such sheriff, was not under any obligation to seize the goods merely on the representation made to him by the Plaintiff in Error, and must be considered as having acted on his own responsibility, and in discharge of his duty, and not under the influence of such representation.

Fifthly. Because the practice of sheriffs, in requiring an indemnity from plaintiffs in executions, and the practice of the courts of law in compelling a plaintiff who requires a sheriff to seize or sell goods under a *fieri facias*, to give such sheriff an indemnity in certain cases, demonstrates, that it is considered, that without such indemnity the sheriff could not maintain an action against the plaintiff in such execution. And that the representation of the plaintiff in an execution which is merely false, and is not accompanied by fraud or a scienter, could not be sufficient to enable a sheriff to maintain an action.

Sixthly. Because it is contrary to the policy of the law to hold out an inducement to a sheriff to sell under a *fieri facias*, without a sufficient inquiry, which will be the case if he is entitled to maintain an action against the plaintiff in an execution, who innocently shows him goods as belonging to the defendant in the execution which were really not so.

Seventhly. Because it is a novel action, going beyond the principle of any decided case, and is inconsistent with, and repugnant to, the principles of numerous well-known and established decisions.

The following cases were cited: *Pasley* v. *Freeman*, 3 T. R. 51; *Haycraft* v. *Creasy*, 2 East. 92; *Bilke* v. *Havelock*, 3 Camp. 374; *Farebrother* v. *Ansley*, [296] 1 Camp. 343; *Adamson* v. *Jarvis*, 4 Bing. 66; *Foster* v. *Charles*, 6 Bing. 396, 7 Bing. 105; *Ashley* v. *White*, Holt, 387; *Merryweather* v. *Nixon*, 8 T. R. 186.

The case was heard in the House of Lords on the 15th March 1831, Lord Tenterden presiding, assisted by Lord Wynford. Lord Tenterden intimated that it was a case which required further consideration, and judgment was deferred. In about 10 days afterwards (29th March), the judgment of the Court below was affirmed. This was on a day not appointed for hearing causes, and before the time of day at which, when no causes were set down for hearing, the House usually sat; a circumstance which deprived us of the opportunity of hearing the reasons given by Lords Tenterden and Wynford for recommending the affirmance.

[297]

APPEAL

From the Court of Session.

MONTGOMERY (Lady),—*Appellant*; BRIDGE and Others,—*Respondents*.

Lord M. dies indebted in more than £100,000, and leaves funds applicable to the payment of his debts to the amount of only £50,000. The widow enters into an obligation to pay the whole of her deceased husband's debts. Held by the Court of Session that the English creditors under this obligation are entitled to interest on the bonds and bills of exchange, till the principal is paid, on the ground that such securities carry interest by the law of England: *Secus*, as to the simple contract debts, which by the law of England do not bear interest.

Lord Montgomery died in 1824, indebted in a sum of £104,000, while the property left by him available to his creditors did not exceed £50,000. His widow entered into an engagement with the creditors to pay the whole of her deceased husband's debts, and executed a minute, and afterwards a formal instrument to that effect, and appointed a commission to collect the rents of her estates, and to apply them in liquidation of the debts; and it was stated in the instrument appointing the commission, that it was calculated that the rents for five years would be sufficient to pay off the debts. But they were found not to be sufficient, and Lady Montgomery, who in the meantime had married Sir Charles Lamb, and her husband, refused to contribute beyond the amount of the five years' [298] rent: and on a process in the Court of Session, that Court found that such was the limit of the engagement. But on appeal to the House of Lords, that judgment was reversed, and it was found that the calculation as to the five years was merely conjectural, and that the undertaking on the part of Lady Montgomery was to extinguish the debts of her deceased husband.

Lady Montgomery then resisted the payment of any thing more than the *debts*, since nothing was said in the engagement about the payment of interest on the debts. But as the House of Lords had decided that Lady Montgomery's engagement was to extinguish the debts of her deceased husband, the Court of Session decided that the engagement extended to the payment of interest on such debts as *ex contractu* or *ex lege* bore interest, and that, on that principle, Messrs. Bridge and Rundell, and the other English creditors, were entitled to interest on the debts by bond and bills of exchange. The Court, considering the question as to the interest to be allowed to these creditors as entirely a question of English law, and having satisfied itself that by the English law such debts bore interest, found accordingly, without allowing any interest on the simple contract debts, which they understood did not by the law of England carry interest, as they did in Scotland.

From this judgment Lady Montgomery, and her husband Sir Charles Lamb, appealed to the Lords, and it was contended for them that as the engagement extended merely to debts, without any specific mention of interest, no interest ought to be allowed; but this argument was soon given up, as far as respected the bond debts, but, insisted on, by Mr. Tinney particularly, as to the bills of exchange which did not, as he contended, carry interest, technically speaking, at law in England, but the interest was allowed only as da-[299]-mages for the detention of the debt; and he cited a case in which it had been held, in the King's Bench, that a petitioning creditor's debt, which was made up to the requisite sum only by the addition of interest on a bill of exchange, was not a debt so as to support a commission of bankruptcy.

Lord Chancellor (25th March): The question is, whether Lady Montgomery, who, greatly to her own honour, undertook the pious duty of paying her deceased husband's debts, was bound by her engagement to pay not only the principal, but interest from the time they became due, on such of the debts as bore interest.

In the minute, and the instrument which followed, she undertakes to pay the debts of her husband, and that may be considered as disposing of the question as to the specialties, for the interest upon them evidently came under the description of debts; and then the question is, whether, since bills of exchange, which are privileged debts, and which, by the English law as administered in equity, carry interest from the time

they are due, the interest on these bills is not a debt within the scope and meaning of that obligation which Lady Montgomery so honourably undertook.

I intimated before, the grounds on which I thought the Court below did right in including the interest on that kind of debt as debt, but Mr. Tinney has started a new argument here, which was not raised in the Court below, but which I thought worthy of further consideration. That has now, however, been displaced. Mr. Tinney says, that the obligation is confined to debts, and then he says, this being strictly an English case, that interest is not debt, and that no interest being in England allowed on simple contract debts, **[300]** no interest ought to be allowed on the bills, although, perhaps, it would be better if the law of England had, on that head, been the same as that of Scotland. Then, is interest on bills of exchange allowed by the English law to be considered as debt; and as to that, Mr. Tinney cites the case of *Cameron* v. *Smith*, 2 Barn. and Ald. 305, where it was decided, that interest on a bill of exchange could not be taken as debt, so as when added to the principal to make a good petitioning creditor's debt to support a commission of bankruptcy. On what does that rest? That interest on bills of exchange is not at law given as interest, properly speaking, so as to make a debt, but as damages for the detention; and that to make a good petitioning creditor's debt, there must be a debt of £100, independent of damages. But then the bankrupt law is entirely a creature of statute, and therefore it is held, that a petitioning creditor's debt must be strictly a principal debt. But there is a wide distinction between that, and this case. The Court of Session is a court of equity as well as a court of law, and as equity here gives interest, you are driven back to the question, whether the interest is a debt within the scope and meaning of the obligation. Now the obvious meaning of the obligation was, that Lady Montgomery undertook to pay all that was due and could have been recovered from her husband if he had been living and had funds to pay; that she occupied the same place with respect to the creditors as her husband, and stood in his shoes, and became bound to pay all for which he was liable. Now, although interest is not strictly and technically speaking *debt*, there can be no doubt but that he was bound to pay interest on the bills till the principal was paid up.

It was candidly admitted that the argument failed as **[301]** to interest on the bonds, and as to the bills also it is, when sifted, displaced. I propose that the judgment be affirmed. Under the circumstances of the case, I say nothing as to costs.

Judgment affirmed.

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[302]

ERROR.

From the Exchequer Chamber.

ATTORNEY-GENERAL,—*Plaintiff in Error;* WINSTANLEY,—*Defendant in Error.*

[Mews' Dig. i. 920. S.C. 5 Bli. N.S. 130. See *R.* v. *Sedgwick*, 1835, 2 C.M. and R. 603. Auction duty was abolished by 8 and 9 Vict. c. 15.]

A trader seised in fee of real estates, first mortgages them, and then conveys them to trustees in trust to pay off incumbrances, and for other purposes. He then becomes bankrupt; and the estates, including all interests, are sold by auction, by order of the assignees, with the concurrence of the trustees, it not appearing whether the mortgagees were at all consulted in the matter. Held by the House of Lords, affirming judgments of the Courts of Exchequer and Exchequer Chamber, that the estates so sold were estates of the bankrupt, and as such exempt from payment of the auction duty, under the Acts 19 Geo. 3, c. 56, s. 19, and 6 Geo. 4, c. 9, s. 16. [6 Geo. 4, c. 16, s. 98.]

A writ of *scire facias* was issued out of the Court of Exchequer, tested 28th day of May, in the 8th year of the reign of King George the Fourth, against Thomas Winstanley, the Defendant in Error, for recovery of the sum of £500, being the penalty of a bond entered into by the Defendant in Error, as an auctioneer. The condition of which bond, as set out upon oyer, was, that the Defendant in Error

should, within six weeks after every sale by auction, render an account of such sale, and pay the duty thereon, as therein mentioned.

To this writ of *scire facias* the Defendant in Error pleaded a general performance of the condition of the bond therein referred to.

To this plea His Majesty's Attorney-General, on behalf of His Majesty, filed two replications, upon the **[303]** first of which an issue was taken, which it is not material here to advert to. The second replication alleged, that the Defendant in Error, using and exercising the trade and business of an auctioneer, did, on the 6th, 7th, 8th, and 9th days of September 1826, sell by auction certain estates in the county of Lancaster, and that the sum of £1000 arose and became due to His Majesty for duties on such sale; but that the Defendant in Error did not, within six weeks after the said sale, make payment of the said duties.

To this replication the Defendant in Error filed a rejoinder, alleging that the estates sold by the said Defendant in Error, as in the said replication mentioned, were, on the 19th day of February, 1823, the estate of one Thomas Claughton, who, on that day, conveyed them to divers persons by way of mortgage, and afterwards, by indentures of lease and release bearing date the 19th and 20th days of February 1823, conveyed the same estates to trustees, upon certain trusts therein set forth, for discharging and satisfying certain incumbrances thereon, with remainder to the use of the said Thomas Claughton in fee; and that, on the 5th day of March 1824, the said Thomas Claughton became a bankrupt, and that a commission of bankrupt was issued against him, and assignees of his estate and effects duly appointed; and that the said estates so sold by the said Defendant in Error, were so sold by the order of the assignees, as such assignees, under the said commission, for the benefit of the creditors of the said Thomas Claughton, and by the concurrence of the said trustees named in the said deeds of trust.

To this rejoinder His Majesty's Attorney-General filed a sur-rejoinder, alleging that the Defendant in Error did sell by auction the whole of the interests in **[304]** the estates mentioned in the breach of the condition of the said bond, as well of the mortgagees and the incumbrancers, in the said rejoinder mentioned, as of the trustees under the said trust-deed, in the same rejoinder mentioned, and other than the said supposed interests of and belonging to the estate of the said Thomas Claughton, without distinguishing any of such interests at the time of such sales whereby the said duties became due to His Majesty, which were not duly paid.

To this sur-rejoinder the Defendant in Error demurred, and His Majesty's Attorney-General, on behalf of His Majesty, joined in demurrer, and the case came on for argument in Hilary Term 1828, the question for the consideration of the Court being, whether the auction-duty is payable upon the sale of the estates of a bankrupt which are in mortgage at the time of the sale, when the estates are sold together with the mortgage, without distinguishing the respective interests of the bankrupt and mortgagee.

After argument the Court gave judgment against the Crown, and in favour of the Defendant in Error, and this judgment was affirmed by the Court of Exchequer Chamber, with an understanding that it should be carried to the House of Lords, as it appeared to over-rule the case of *The King* v. *Abbott*, 3 Pri. 178. The case was accordingly brought by Error into Parliament, and heard in the presence of the Judges on the 13th April 1831. For the Plaintiff in Error it was contended that the judgment ought to be reversed, for the following among other reasons:

First. Because the estates sold by the Defendant in Error clearly came within the description of estates on which auction duty is imposed by 43 Geo. 3, c. 69, sch. A., and 45 Geo. 3, c. 30; and the only exemptions **[305]** which can by any colour or pretence be construed to extend to the estates sold by the Defendant in Error, are the 19 Geo. 3, c. 56, s. 15, which provides, "that nothing therein contained shall extend to charge with Auction Duty any Estate or Effects of Bankrupts sold by order of the Assignees, under a Commission of Bankruptcy," and the 6 Geo. 4, c. 9, s. 16 [c. 16, s. 98], which enacts, "that all Sales of any Real or Personal Estate of any Bankrupt or Bankrupts, shall not be liable to any Auction Duty;" the former of which provisions has been repeatedly adjudged by the courts of law, and particularly by the Court of Exchequer, in the case of *The King* against *Abbott*, 3 Price, p. 178, not to extend to cases like the present, where estates belonging to a bankrupt are in mort-

gage, and are sold together with the mortgage, without distinguishing the respective interests of the bankrupt and mortgagee, and the latter of which provisions does not contain any stronger words, with reference to such exemptions, than the statute upon which such decisions have taken place.

Secondly. Because the estates sold by the Defendant in Error, were not the estates of any bankrupt or bankrupts, so as to bring them within the exemption of 6 Geo. 4, c. 9, s. 16 [c. 16, s. 98], inasmuch as such estates consisted not only of the equity of redemption of the bankrupt therein, (which alone the assignees have the power to sell), but also of an additional estate, the estate of the mortgagee, which is a distinguishable and distinct estate from the bankrupt's estate, and which could not have been sold without the express consent of a third person, viz. the mortgagee, but which might have been sold by the mortgagee alone; and in that case it would doubtless have been liable to the auction duty.

[306] Thirdly. Because the estates sold by the Defendant in Error (or at least the legal and beneficial interest in such estates) were not sold for the benefit of the creditors of the bankrupt, but for the benefit of the mortgagee, and with his consent; and although the bankrupt laws undoubtedly intend that the bankrupt property distributable under them should be sold exempt from duty, inasmuch as such sales are compulsory, yet it comes not within either the meaning or the spirit of such laws to exempt from auction duty the estates of other individuals, although such individuals may be creditors of the bankrupt; nor sales which, so far from being compulsory, are entirely dependent upon the voluntary consent of third persons, as in the present case, where nothing but the equity of redemption could have been sold without the consent of the mortgagee, in whom the legal estate was vested.

For the Defendant in Error it was contended that the judgment ought to be affirmed, for the following among other reasons:

First. Because the right of exemption from the payment of auction duty, in favour of a bankrupt's creditors, is not limited to the sale of that interest which the bankrupt possesses in an estate, but is extended to the sales of all his "real and personal estate."

Secondly. Because a person whose property has become charged by mortgage or otherwise, does not cease to have an estate therein, although the amount of his interest in such property is diminished; and to deny that the estate continues in him, is equivalent to a denial that an estate can be charged with incumbrances.

Thirdly. Because the charge of auction duty upon the sale of a bankrupt's mortgaged estates is not only contrary to the letter and words of the Acts which create **[307]** that exemption, but totally contrary to the spirit and true intent of the same.

For the intention of the legislature appears to have been to favour the creditors of a bankrupt, and to provide as large a fund as possible for the payment of his debts. This intention, however, it is obvious must be wholly defeated by such a charge; and the auction duty, if payable at all, must be paid out of the funds applicable to the payment of the general creditors. If the proceeds of the sales are greater than the amount of the incumbrances, the auction duty must be paid out of the surplus which remains in the hands of the assignees, after discharging those incumbrances; and it will fall wholly upon the other creditors. If the proceeds are less than the amount of the incumbrances, or only co-extensive with them, the deduction of auction duty will preclude the possibility of discharging the whole of the incumbrances, and the incumbrancers will prove the residue of their debt under the commission of bankruptcy; so that in every case the payment of the duty must cause a diminution of that fund, for the increase of which the exemption itself was granted.

Fourthly. Because any other interpretation of the Act than the one contended for by the defendant, would only lead to a more circuitous method of conveyance, by which the interest of the creditors without security would be further prejudiced. For the assignees might in all cases discharge the incumbrances, and then sell the estate without payment of duty

Fifthly. Because the Act makes no distinction between legal and equitable estates; and the whole equitable estate, subject to charges, was in the bankrupt at the time of the sale.

Sixthly. Because the sale of an equity of redemption, as a distinct interest, is impossible; or at all events **[308]** cannot be effected without great sacrifice and loss to the creditors, whose fund it was the object of the legislature to increase.

Lord Tenterden (13 April): This case comes before your Lordships on error from the Court of Exchequer Chamber, where the judgment of the Court of Exchequer was affirmed; but as this case did appear to over-rule another case in the Exchequer, that of *Rex* v. *Abbott*, 3 Price, 178, we thought that it was fitting that the present case should be brought before the House of Lords. The case was argued principally as if the estate had been put up for sale by the mortgagee, and as if this had been a case of that kind; but it was not so precisely. The facts were, that *T. C.*, a trader, mortgaged his real estates. He afterwards conveyed the same estates to trustees, with large powers, for paying off certain incumbrances, and other purposes. *T. C.* afterwards became bankrupt, and a commission was taken out, and assignees appointed, and the sale in question was made by order of the assignees, with the concurrence of the trustees, for the benefit of the bankrupt's creditors, and without, for any thing that appeared, the mortgagees having been consulted. Such being the state of the facts, I propose that these questions be put to the Judges: 1st. Whether, when a trader, having real estates under mortgage, becomes bankrupt, and the whole interests in the estates are sold by order of the assignees for the benefit of the creditors, and no concurrence on the part of the mortgagees appears, the auction duty is payable on the whole of the sum received for the estates, or on any and what part of it. 2dly. Whether, when a trader, having estates in mortgage, afterwards conveys the estates to trustees, and then becomes bankrupt, and the whole interest in the [309] estates are sold by the assignees, with the concurrence of the trustees, it not appearing that the mortgagees were consulted, the auction duty is payable on the whole, or any part of the sum received for the estates.

Mr. Justice Bayley delivered the unanimous opinion of the Judges, in answer to both questions, that the auction duty was not payable on the whole or any part of the sum; observing, that if this had been a sale by the mortgagee, the matter might have stood on a different footing.

Lord Wynford: I was in the Court below when this case was decided there, and I differed in opinion from the rest of the Judges. I am happy to say, however, that upon fuller consideration I am convinced that they were right and I was wrong. My puzzle was about the word *estate*, and whether the estate in question, being in mortgage, could be considered as the estate of the bankrupt. But I am now satisfied that, speaking in ordinary language, this is the estate of the bankrupt, clogged with the debt of the creditor. The mortgage is merely a security, and every other interest is in the bankrupt; and therefore upon a sale of the estate by the commissioners or assignees, the sale is exempt under these Acts of Parliament from payment of the auction duty. Suppose the bankrupt's funds should not be sufficient to pay the creditors, after paying off the mortgage, the loss must fall on the bankrupt's funds. Suppose the whole subject should be swallowed up by the mortgage, the mortgagee might say that he derived no advantage from the sale beyond the mere payment of his debt. Suppose a third case, that the funds, after payment of the mortgagee and the rest of the creditors, should afford some small surplus [310] for the unfortunate bankrupt, yet the sale being a forced sale, came in principle within the exemption under these Acts. I have always said with respect to these revenue cases, "Let the officer take care that the Legislature speaks plainly." I had my doubts as to the soundness of the present judgment, looking to the decision in the case of *The King* and *Abbott*: but I am now satisfied that the judgment ought to be affirmed.

Lord Tenterden: I entirely agree in the opinion of the Judges; and it is satisfactory to find that my noble and learned friend, who differed from me in the Court below, is now convinced that the unanimous opinion of the Judges is correct.

There is some difference in the language of the different Acts relating to this subject, which occasioned some doubts. But the words of the statute of the 19th Geo. 3, c. 56, s. 15, are, "that nothing therein contained shall extend to charge with auction duty *any estate or effects* of bankrupts sold by order of the assignees under a commission of bankruptcy." The words of the 43d Geo. 3, are much the same; and then came the case of *The King* and *Abbott*. Then followed the Act of the 6th Geo. 4, which enacted, "that all sales of *any real or personal estate* of any bankrupt or bankrupts shall not be liable to any auction duty:" and the question is, whether the estate sold in this case was the estate of the bankrupt within the

meaning of these Acts. Now, when we look at the words of an Act of Parliament, which are not applied to any particular science or art, we are to construe them as they are understood in common language; and, in ordinary speech, the estate, although mortgaged, is still considered as the estate of the mortgagor, and the interest of the mortgagee as [311] merely a security; and therefore it appears to me that, according to the true construction of the words, this is the estate of the bankrupt within the meaning of the Act. If they were to be taken in any other sense, the effect would be to diminish the bankrupt's estate applicable to the payment of the creditors by the amount of the duty. Upon the whole it appears to me that, according to the intention and the words of the Act of the 6th Geo. 4 (c. 16, s. 98), no auction duty was payable on estates sold under such circumstances as the present.

Judgment affirmed.

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[312]

APPEAL

From the Court of Session.

ROBERTSON and others,—*Appellants:* ALEXANDER and others, of the Stirling Bank, and SMITH, their Trustee,—*Respondents.*

The Stirling Banking Company in 1825 stopped payment, and a sequestration soon after followed. Two or three years afterwards, before their funds had been realized and their affairs wound up, they made an offer to the creditors of a composition of 20 shillings in the pound, with interest up to the period of the sequestration, with security for payment on approval of the composition by the Court. This was accepted by more than the statutory portion of the creditors. Petitions for approval were presented, but were objected to by three creditors to a very comparatively small amount, on the ground that, since the acceptance of the composition it had been ascertained that the Company had realized, or would speedily realize, ample funds to pay their debts in full, with interest to the time of payment. The Court however considered the composition reasonable at the time it was accepted, and approved of it, and that judgment affirmed by the House of Lords.

In the course of the proceedings in the above case the trustee and one of the partners were served with diligence as havers, to produce all papers and documents relating to the subject-matter of the cause. The partner had lost some of the papers before being served with the diligence, and the trustee had destroyed one of them after being served with diligence. Petitions were presented by the objectors, praying that the trustee might be censured, and that the partner might be censured, and that his discharge might be disallowed; but the Court below dismissed the petitions, with all costs to be paid by the petitioners. This judgment was [313] partly reversed by the House of Lords, and the cause remitted, with directions that the partner should not have his costs, and that the trustee should pay costs to the petitioners.

In 1825 the Stirling Bank became embarrassed, but the partners held out the most confident expectations that they should be able to pay their creditors in full, and in that expectation several of the holders of their notes were paid. They were however obliged to stop payment, and their estate and effects were sequestrated in August 1826, under the Bankrupt Act 53 Geo. 3, c. 137, and Alexander Smith of Glassingall was appointed trustee. In 1828 some correspondence and negotiations took place between some of the partners, the trustee, and others, relative to an offer of a composition of 17s. in the pound; but this fell to the ground, as the partners were unable at that time to provide the necessary security.

In November 1829 they made an offer of a composition of 20s. in the pound, with interest up to the period of the sequestration; and on the 5th January 1830 this was expressly accepted by the statutory number of the creditors, and none had then

refused it. The composition was made payable in three months from the time of its approval by the Court.

The partners then petitioned the Court in terms of the Act, praying the Court to find the composition reasonable, and that the statutory requisites had been complied with, and to discharge the petitioners, and exoner the trustee. The Petitions were intimated in the usual manner, and out of about 3000 creditors having debts to the amount of about £200,000, the three Robertsons, father and sons, creditors to a small amount, alone appeared in opposition; and on a note having been presented for them, the Lord Ordinary **[314]** allowed them to see and answer the petitions. Answers were put in, and then a condescendance and answers having been ordered, and given in, and the record made up, the Lord Ordinary made avizandum with the cause to the First Division of the Court.

The main grounds of objection were, that there was collusion between the partners and the trustee, for the purpose of making erroneous statements to impose on the creditors: That the composition was unreasonable; since the bankrupts had realized more than enough to pay all their debts, with interest to the time of payment, and would have a reversion of £20,000 besides: That the trustee had used improper influence with the creditors to induce them to accept the composition, and had been negligent in realizing the funds; and that as the bankrupts had held out the most confident assurances to all the creditors that they would be paid in full, and had in fact so paid some of the creditors, they were bound to pay the whole, with full interest, when the funds were sufficient to do so. The bankrupts and trustee denied all collusion, or attempt at imposition, negligence, or undue influence; and the bankrupts denied that they had then realized, but they admitted that they did expect ultimately to realize, a considerable reversion.

The following were the pleas in law put in by the parties.

For the Objectors:

"1. Notwithstanding the acceptance of a composition by the statutory majority in number and value, it is perfectly competent to any creditor to object to the approval of it by the Court, on the ground that it is inadequate, unreasonable, and has been unfairly carried at a general meeting. And all or any of **[315]** these objections are, when substantiated, sufficient to overturn the acceptance of the composition.—Section 59, Bankrupt Act; Bell's Com. Vol. 2, p. 468.

"2. When assurances of *full payment* have been held out to a body of creditors by a bankrupt company, and where it is proved that from the funds of the company, and of the individual partners, full payment can be obtained, no composition, whereby the creditors are losers, *is reasonable*.

"3. When certain creditors have been paid *in full*, the remainder have a right to demand complete satisfaction of all their debts, if the funds of the bankrupts be adequate to their amount.

"4. Heritable bonds granted by a partner of an insolvent company in the knowledge of their insolvency, to members of his own family, are reducible under the Act 1621, chap. 18; and it is the duty of the trustee on a sequestrated estate to institute, *quam primum*, a reduction of such securities.

"5. A trustee on a sequestrated estate is not entitled to husband the property of the bankrupts, but is bound to realize, as soon as possible, the funds most available to the creditors; especially when directed to do so by a general meeting.—Act 54 Geo. 3, chap. 137, sect. 34 and sect. 41. Bell's Commentaries, 7, p. 412. *Williamson* against *Goodwin*, 26th November 1803; case of Sir George Colebrook, 6th Vesey, junior, 622.

"6. When three partners of a company consisting of seven are solvent, and four are insolvent, the creditors of the company have an immediate and indivisible right to the property of the former, while they have only a contingent claim on the estates of **[316]** the latter; and it is the duty of the trustee to realize those funds from which the creditors can obtain most certain and most speedy payment.

"7. The primary duty of a trustee on a sequestrated estate is to secure the interests of the creditors; and it is illegal and unjust in him to assist the bankrupts in throwing obstacles in the way of winding up the sequestration, or in effecting any arrangement to the prejudice of the creditors.

"8. That when a trustee sanctions and encourages one proposal of composition,

manifestly to the injury of his constituents, his conduct forms a strong presumption against any offer of composition, the acceptance of which he may subsequently recommend.

" 9. That a trustee is not entitled to plead difficulties arising from his own maladministration, as an argument to induce a general meeting of creditors to accept of a composition.

" 10. When any surplus reverts to the bankrupts after payment of their debts, the creditors are entitled to insist for legal interest from the date of sequestration.—Act 54 Geo. 3, chap. 137, sec. 9, and 57 ; Bell's Commentaries, vol. 1, p. 650 and 653.

" 11. When the funds of a company, and of the individual partners, are amply sufficient to pay the whole of their debts with interest, a composition whereby the creditors are losers to the extent of £18,000 is manifestly unreasonable."

For the Trustee and Bankrupts:

" 1. The trustee, with the assistance of the commissioners, has conscientiously discharged his duty **[317]** in every respect according to what appeared to him most beneficial for the creditors at large; and the partners of the bank have contributed what lay in their power to that general object.

" 2. Payments made under a temporary pressure, and in the reasonable expectation of resuming business when the pressure is over, are not struck at by any of the bankrupt statutes ; and still less do they furnish relevant grounds of objection, where the question relates to the fairness of a composition.

" 3. It is not incumbent on the trustee in a sequestration to involve the estate in lawsuits on doubtful questions, unless specially directed by the creditors, the grounds of challenge being kept entire so as to be available in the event of composition.

" 4. The charge brought against the trustee for not selling the estates of the partners who had no private creditors, and applying the proceeds in payment of the company's debts, is not only groundless, but the course of proceeding proposed by the objectors, if followed out, would have been injurious to the creditors. The claim against the partners being merely contingent, not a farthing of the price received for their private estates could have been applied to the company's debts until the whole of the company's own funds were realized and divided ; and the proceeds of the partners estates must in the mean time have lain consigned at a low rate of interest. Bankrupt Stat. s. 48. *Campbell* v. *Blaitrie*, Fac. Coll. 18 Nov. 1796.

" 5. An expected reversion liable to be disappointed by contingencies affords no ground of objection against a composition, if reasonable in itself, under existing circumstances.

" 6. The unanimous opinion of the creditors assem-**[318]**-bled at the general meetings affords the surest proof of the proposed composition being fair and reasonable.

" 7. It is not consistent with equity, nor with the principle of the bankrupt statute, that the dissatisfaction of three individuals should be allowed to obstruct a final settlement, which is approved of by thousands having a pecuniary interest to a much greater extent."

On the 10th of July 1830 their Lordships of the First Division of the Court pronounced, of this date, the following interlocutor, upon the petition at the instance of Mr. Alexander of Powis, and Mr. Smith, the trustee on the sequestrated estates: " The Lords having resumed consideration of this petition, and heard counsel on both sides, they find the said composition offered reasonable, and accepted in terms of the statute, interpone their authority thereto, and appoint an extract of the bond to be delivered to the trustee for behoof of the creditors ; declare all proceedings in the sequestration shall stop ; find the trustee exonered of his intromissions had under authority thereof, and appoint his bond of caution to be delivered up ; and find the said Edward Alexander freed and discharged of all debts contracted and due by him as an individual, or a partner of the Stirling Banking Company, on or before the 14th day of August 1826 years, excepting the composition aforesaid : Find the petitioner Edward Alexander entitled to his expenses ; allow an account to be lodged, and remit to the auditor, and decern ; allow the decreets to go out and be extracted, without abiding the course of the decreet for expenses."

[319] Similar interlocutors were pronounced on the other petitions.

From this judgment the objectors appealed to the House of Lords.

In the course of the investigation of the Company's affairs the objectors had obtained diligence against the trustee, and against one of the partners, Mr. Alexander of Powis, for the production of letters and papers. Mr. Alexander had had a considerable correspondence with different persons about the intended offer of composition of seventeen shillings in the pound, and when that matter fell to the ground he took no care of the letters, thinking them, as he alleged, of no further use, so that some of them were lost and could not be produced. The trustee delivered up all his correspondence, except one letter which he had received from Alexander relative solely to his own private affairs, as was alleged. There was this difference between the two cases, that Alexander had lost or destroyed the letters before he was served with the diligence, whereas the trustee destroyed the letter after being served with the diligence.

The objectors presented petitions to the Court against the trustee and Alexander, praying that the trustee might be censured, and that Alexander might be censured, and his discharge disallowed.

For Alexander it was answered, 1st, That the objectors had no right to call for any part of his correspondence relative to the intended offer of composition of seventeen shillings in the pound, since, as this intended offer came to nothing, the papers relating to it were his own private documents. 2dly, That he had, notwithstanding, produced as many of these papers as he **[320]** possibly could, and that the only reason for suffering any part of them to be lost was the impression that they were of no use whatever.

For the trustee the following answer was given:

"It is sufficient here to state, that in the course of the investigations made by the Appellants, with the view of opposing the approval of a composition, the Respondent was called upon as a haver of writings, and in consequence thereof produced many documents, and indeed all that were called for, so far as in his power, with the exception only of one, to which the following interrogatory and answer apply:

"Being interrogated, 'Whether or not the deponent has put away or destroyed any of the writings called for? depones, that on Saturday last, after receiving his citation, to appear and be examined as a haver this day, on looking over Mr. Alexander's letters to him, he found one entirely of a private nature, and relating solely to his, Mr. Alexander's, own private affairs; that the said letter appeared to have been written under the influence of irritation, and as it did not refer to the heritable securities, or to any intended offer of composition, and appeared to the deponent to be of no consequence whatever, the deponent destroyed it.'"

And the following were stated as reasons for dismissing the petition and complaint as against him:

"First, The ready and candid manner in which the Respondent admitted the destroying of the letter he had received from Mr. Alexander, affords a sure proof of its being an inconsiderate act, proceeding from no desire of concealing any thing in which the creditors had an interest, but merely from an impression, as **[321]** explained by him on oath, that it had been written under a momentary impulse, and was calculated to serve no good purpose.

"Secondly, The voluminous and unqualified production of writings made by the Respondent, at the call of the Appellants, comprehending, *inter alia*, even the private confidential correspondence between him and his agent in the sequestration, is utterly inconsistent with the notion of the said letter being put out of the way from any sinister motive.

"Thirdly, The testimony which the creditors have given, as to their sense of the propriety of the Respondent's conduct throughout the whole business, is equally inconsistent with any such notion; a testimony which has been in no degree withdrawn or abated, in consequence of the attack, however violent, made upon him by the Appellants."

The Court advised these petitions of complaint at the same time with the question of composition and discharge, and pronounced interlocutors of the same date, refusing the prayer of the petitions and complaints, and finding Mr. Alexander and the trustee entitled to their expenses.

From this judgment also the objectors appealed.

The whole cause was heard in the House of Lords, on the 4th February 1831, and on the same day the following judgment was given.

The Lord Chancellor (4 February): It is very much to be regretted that the Scotch Bankrupt Statute of the 54th Geo. 3. did not provide that the decision of the Court below should be final in these cases, as they are in England; the bankrupt law being in both countries the creature of statute, and it being fitting that they should depend [322] on the same principles. Now your Lordships know that in England the decision of the Court below is final in these bankruptcy cases, and that no appeal is allowed, unless by leave of the Court a peculiar bill is filed with a view to appeal. Unfortunately that is not the case in Scotland. When a case relative to this Stirling Bank came before this House while Lord Eldon sat on the woolsack, which was an appeal from a judgment of the Court below discharging a debtor, his Lordship, moved by a view of the discrepancy between these laws in the two countries, both of them the creatures of statute, doubted at first whether an appeal lay. But looking at the point of jurisdiction, and considering that it was clear that an appeal lay in the ordinary course of proceeding, and that the right had not been taken away by statute, it was difficult to say that an appeal was not competent; and here no objection was made on the ground of competency.

Lord Eldon threw out a suggestion that the defect ought to be remedied, and the law assimilated in this respect to that of England. In the 48th Geo. 3. an Act was passed taking away the right of appeal from interlocutory orders, except when the Judges were divided in opinion, or with leave of the Court. Then came the Bankrupt Act of the 54th Geo. 3.; but in neither of these Acts was any thing done as to this matter, and it is not contended that the appeal is incompetent. We are then in the same situation as that in which the Commissioners of Bankrupts, and sometimes the Court of Chancery, is placed, and are called upon to go through a mass of accounts which have been already under the inspection and consideration of the creditors who were most interested in them, and most competent to form a right conclusion respecting them.

[323] The Legislature has provided that a composition assented to by nine tenths of the creditors should be final and conclusive on the whole, if approved of by the Court, and the Court was entitled and bound to discharge the bankrupt and exoner the trustee, unless it should be made to appear to the Court that the composition was not reasonable, or that the requisites of the statute had not been complied with. Under the 59th section of the statute the Court has clearly jurisdiction to decide on the reasonableness of the composition. I take it to be clear that the Court has jurisdiction, under the 59th clause of the Act, to approve and discharge, on being satisfied that the composition had been accepted by nine tenths in number and value of the creditors, and that it was reasonable at the time when, and in the circumstances under which, it was accepted; for I think that the proposition is erroneous which Mr. Bell has stated in his very able Commentaries, but without stating any authority for it, viz. that any creditor is enabled to bring the matter before the Court, and entitled to call upon it for its disapprobation, because of circumstances different from those under which the case presented itself to the body of creditors at the time when they accepted the composition. What the Court has to consider is, what was reasonable at the time when the creditors accepted the composition—reserving always the objections on the grounds of surprise, misrepresentation, and *noviter veniens in notitiam* of circumstances which could not be known or reasonably suspected at that period, but excluding the consideration of the increased value of the subject between the time of acceptance and that of approbation.

The Court then has to decide, first, whether the composition was reasonable at the time when it was [324] accepted; and secondly, whether nine tenths in number and value of the creditors have in point of fact accepted. Now I take it to be clear, that in deciding whether reasonable or not, you can look to no better criterion than to what the creditors thought at the time it was fitting to be done. They are the best judges; they have the nearest view of the whole subject, and are the best judges of their own interest; and it was imagined by the Legislature, that to require the concurrence and approbation of so large a proportion as nine tenths in number and value was a reasonable security; that that would be done which was good for the whole. This does not exclude the jurisdiction of the Court where it may be clear that the creditors have done wrong, and have acted upon false views at the time of

the acceptance. Where that is clear, the Court may say that the composition is not reasonable, and may disallow that and the discharge, but in all these cases with a leaning to the side of the allowance.

Looking at the evidence with these views, it appears that there was here such a concurrence of the creditors, that their doing what was materially wrong was a wild supposition, and merely a bare possibility; and Courts of Justice cannot act on such bare possibilities, but must act on the ordinary rules by which wise men are guided in considering what is best for their own interest, with the care of which they may most safely be intrusted.

Taking all the circumstances into consideration, my opinion is, that the Court in approving of this composition took a sound view of the case; but I cannot concur in the view of one of the learned Judges, who seems to have considered the amount of the reversion was no relevant subject for consideration, in advising on the reasonableness of a composition. If the **[325]** reversion, for instance, had been half a million, that would have been a relevant ground of consideration with the Court, in deciding whether or not the creditors had not accepted bad terms, with reference to the state of the property at the time of the composition. But with regard to the case in question, I would advise your Lordships to affirm the appeal in the first, or composition, cause.

As to the second cause, or that of the petitions and complaints, I have come to a different conclusion. Smith was sole trustee or assignee; and after the controversy arose on these petitions, and a diligence against havers was issued, corresponding with the English *subpoena duces tecum*, and after he was served with this process, with the exigence of which he was bound to comply, he thinks fit to destroy a letter which comes under the description in the process, or at least was not clearly excluded; whereas he was not entitled to decide on his own discretion as to whether it was or was not material, or whether it was or was not within the exigency of the process, unless it clearly was not; but even if it had been clear that it was not, he ought not to have destroyed it, but should have kept it. It is needless to add, that there would be no security for the due administration of justice if such a door were to be kept open as that which the Court had thrown open in this case, by allowing persons against whom diligence as havers was taken out to destroy papers at their discretion. One of the Judges says that the trustee destroyed the paper through inadvertence; but no man was entitled to say under such circumstances that he acted from inadvertence, more particularly after notice to produce. That notice put inadvertence out of the question; and no man ought to be heard to say that he destroyed a paper, which he **[326]** was called upon to produce, through inadvertence, which however, in this case, the party did not say; for it was the expression of the Judge. If the trustee had thought, nay, even if he had been sure, that the letter was not one of those which he was called upon to produce, there might have been a better time to destroy it than when he was required to produce papers relative to the same subject-matter; but how much stronger is the case against him when he rests his defence only upon an opinion of its immateriality—a point on which it was not for him to decide, but for the Court. And yet the Judge says that it was through inadvertence; and the Court gives costs to Mr. Smith against the petitioners. I cannot understand the reason of this decision; it is certainly not the practice in England, nor even that of the Court of Session, as appears from a case lately decided. But it was said that Smith was not a man of business. If it had been otherwise, it would have been proper to remit the case, as to him, with words of censure. But as he was not a man of business, it is possible that he acted out of kindness to Mr. Alexander, without being sufficiently aware of the impropriety of what he was doing.

As to Alexander, the case was somewhat different. He too ought not to have destroyed any papers connected with this subject; he however had some reason to consider them as of a strictly private nature; but the great difference was, that he had destroyed them under that impression, before he was served with the diligence; still, even he ought not to be allowed his costs. I cannot but consider this as a point of more than ordinary importance. It is a dangerous thing to break down any portion of the brazen wall within which the due administration of justice is, or **[327]** ought to be, intrenched. The rules which are established in order to render the administration of justice as impartial and perfect as possible, are sacred, and ought to be sacredly observed.

I propose then that the Judgment, in the first case, be affirmed; and as to the two interlocutors in the second case, I propose that the interlocutor as to Alexander be remitted to the Court of Session, with instructions to dismiss the petition, but without giving Alexander his expenses; and that the interlocutor, as to Smith, be remitted, with instructions to dismiss the petition, but with expenses, to be paid by him to the petitioners, because he ought not to have taken upon himself to judge of materiality or immateriality of the letter which he had destroyed.

Judgment accordingly.

[328]

APPEAL

From the Rolls Court.

HENRY ROBERT PEARSON, FREDERICK BURNET PEARSON, EDWIN PEARSON, ARTHUR HUGH PEARSON, and WILLIAM WILBERFORCE PEARSON,—*Appellants;* and JAMES STEPHEN the younger, and ZACHARY MACAULAY, HENRY JOHN PEARSON, FREDERICK THORPE PEARSON, ALFRED PEARSON, and MARY ARABELLA PEARSON, infants, by George Gisborne Babington, their Guardian,—*Respondents.*

[Mews' Dig. xv. 995, 1071, 1313. S.C. 5 Bli. N.S. 203. Cited in *Gibbs* v. *Tait*, 1836, 8 Sim. 134. Followed in *Dick* v. *Lacy*, 1845, 8 Beav. 222. Corrected as to the order in regard to descendants surviving (2 Dow and Cl. 341) in *Lanphier* v. *Buck*, 1865, 34 L. J. Ch. 659; and see *In re Flower, Matheson* v. *Goodwyn*, No. 2, 1890, 62 L.T. 677.]

A testator bequeathed all his personal property, not before disposed of by his will, unto his trustees, in trust for his five sons, "and their respective issue (if any,) such issue to take *per stirpes*, and not *per capita*, to be divided amongst them in equal shares and proportions; the shares of such of them as shall have attained the age of twenty-one to be paid them respectively forthwith after my decease, and the shares of such of them as shall be under the age of twenty-one years to be paid to them when and as they shall respectively attain such age." Held, that this bequest was an absolute gift to each of the sons of the fifth part of the property thus bequeathed, and that if any of the sons had died before the testator the issue of such son would take his share by substitution.

John Pearson, late of Golden-square, in the county of Middlesex, on the 3d of May, 1822, duly made and executed his last will and testament, by which he appointed James Stephen the younger, and Zachary Macaulay, his trustees for the purposes of his will. After directing payment out of his personal [329] estate of his debts and funeral expenses, the will stated: Whereas my dear wife Sarah Pearson by the settlement made upon our intermarriage is entitled to a moiety of certain leasehold premises in the parish of St. Luke, in the county of Middlesex, and also entitled to two several sums of £500, four per cent. Bank annuities, and £1100 three per cent. reduced Bank annuities, my will is, that she shall with all convenient speed after my decease, at the expense of my said estate, assign and make over unto my said trustees all her right and interest therein, and in lieu thereof I direct that my said trustees do immediately after my decease, out of my personal estate, set apart and purchase in their names so much capital stock in the public funds as shall be sufficient to pay out of the dividends or annual produce thereof a clear yearly sum of £1000 unto my said wife and her assigns, for and during the term of her natural life, or so long as she shall remain my widow, for her and their own use and benefit, and from and immediately after the decease or marriage of my said wife, whichever shall first happen, that my said trustees shall stand possessed of the said capital stock so set apart as aforesaid, in trust for my five sons, Henry Robert Pearson, Frederick Burnet Pearson, Edwin Pearson, Arthur Hugh Pearson, and William Wilberforce Pearson, and their respective issue (if any,) to be divided amongst them in equal shares and proportions, such issue to take *per stirpes* and not *per capita*. And I direct my trustees to set

apart and purchase in their names so much capital stock in the public funds as shall amount to the sum of £4000 sterling; and from time to time to pay the annual produce thereof into the hands of my daughter Sarah Ann, the wife of George Gisborne Babington, during her coverture; and after her death, I direct that my said trustees shall [330] stand possessed of the same capital stock so set apart as aforesaid, in trust for my said five sons, Henry Robert Pearson, Frederick Burnet Pearson, Edwin Pearson, Arthur Hugh Pearson, and William Wilberforce Pearson, and their respective issue (if any,) to be divided amongst them in equal shares and proportions, such issue to take *per stirpes* and not *per capita*. He also directed a similar investment for the payment of a yearly sum of £600 to his daughter Frances Medley Pearson, for her life; —after the decease of my said daughter Frances Medley Pearson, I direct that my said trustees shall stand possessed of the same capital stock so set apart as aforesaid, in trust for my said five sons, Henry Robert Pearson, Frederick Burnet Pearson, Edwin Pearson, Arthur Hugh Pearson, and William Wilberforce Pearson, and their issue (if any,) to be divided amongst them in equal shares and proportions, such issue to take *per stirpes* and not *per capita*. He then directed another investment for the payment of a yearly sum of £50 to his sister-in-law, Miss Ann Norman, for and during the term of her natural life; or so long as she shall remain sole and unmarried; and from and immediately after her decease or marriage, whichever shall first happen, I direct that the same capital stock may fall into and be considered as part of the residue of my personal estate hereinafter mentioned. And I direct that in case my personal estate shall not be sufficient for the purpose of carrying into execution the trusts hereby declared thereof, that my said dear wife Sarah Pearson shall receive her said yearly sum of £1000 free and clear of any deductions to be made thereout for or on account of any deficiency which may happen in my said personal estate, and that such deficiency may fall upon the portions of my said children, Sarah Ann Babington, Henry Robert Pear-[331]-son, Frederick Burnet Pearson, Edwin Pearson, Arthur Hugh Pearson, and William Wilberforce Pearson, in equal shares and proportions. Also, I give and bequeath all the rest, residue and remainder of my monies, securities for money, stock in the public funds, goods, chattels, personal estate and effects, of what nature or kind soever not hereinbefore by me bequeathed, unto my said trustees, their executors, administrators and assigns, in trust for my said five sons, Henry Robert Pearson, Frederick Burnet Pearson, Edwin Pearson, Arthur Hugh Pearson, and William Wilberforce Pearson, and their respective issue (if any,) such issue to take *per stirpes* and not *per capita*, to be divided amongst them in equal shares and proportions, the shares of such of them as shall have attained the age of twenty-one years to be paid to them respectively forthwith after my decease, and the shares of such of them as shall be under the age of twenty-one years to be paid to them when and as they shall respectively attain such age of twenty-one years.

At the time of the date of the will, and of the death of the testator, the Appellant, Henry Robert Pearson, one of the sons of the testator, was married, and at each of those times had living four children, namely, the Respondents, Henry John Pearson, Frederick Thorpe Pearson, Alfred Pearson, and Mary Arabella Pearson.

The Appellants, Frederick Burnet Pearson, Edwin Pearson, Arthur Hugh Pearson, and William Wilberforce Pearson, the said sons of the testator, were respectively unmarried. Frances Medley Pearson died in the lifetime of the testator.

The testator was at the time of his death possessed of very considerable personal property.

In the month of July 1826, the Appellants, together [332] with George Gisborne Babington and Sarah Ann his wife, Sarah Pearson and Ann Norman, filed their bill in the Court of Chancery against the Respondents; and prayed that the will might be established, and the trusts thereof declared and carried into execution under the direction and authority of the Court; and that an account might be taken of the personal estate and effects of the testator, and of the funeral and testamentary expenses; and that the clear residue of his estate might be applied upon the trusts and towards the purposes in and by the will directed. Sarah Pearson died before the Respondents had put in their answer. A supplemental bill stating the fact of her death was then filed, and on the 7th of December 1826 the Respondents, James Stephen the younger, and Zachary Macaulay, put in their joint answer to the said original and supplemental bills, and submitted to act as the said Court should direct.

On the 21st of December 1826 the cause came on for hearing before his Honor the Master of the Rolls, when the usual decree referring it to the Master to take an account of the testator's estate was pronounced. The Master reported that the Respondents had complied with the directions in the will, as to the payment of debts and the purchase of stock, and the case then stood for further directions to ascertain the rights of the respective parties.

The cause came on for hearing for further directions on the said Master's report, before the Master of the Rolls, upon the 28th day of March 1828, when his Honor was pleased to declare that each of them the Appellants was under the will of the said testator John Pearson entitled to the interest, dividends, and annual proceeds of one fifth part of the principal money, the interest whereof was by the said **[333]** will directed to be paid to the said Sarah Pearson during her life, and to take and receive the interest, dividends and annual proceeds of such one-fifth part of the said principal money for and during the term of his natural life; and that upon the respective deaths of the appellants, the one-fifth part or share of the said principal money, to the dividends whereof such one so dying was thereinbefore declared to be entitled for his life, would be to be divided in equal shares and proportions amongst all and every the child or children of such one so dying as aforesaid; and that upon the death of Sarah Ann Babington each of the Appellants who should be then living would be entitled to the interest, dividends, and annual proceeds of one fifth part of the capital stock directed by the will to be purchased with the sum of £4000 sterling, and which said sum of £4000 sterling had been invested in the purchase of £5055 5s. 10d. three per cent. reduced Bank annuities; and to take and receive the said interest, dividends and annual proceeds of the said one-fifth part of the said last-mentioned stock for and during the term of his natural life; and that upon the respective deaths of the Appellants, the one-fifth part or share of the said stock, to the dividends whereof such one so dying would in the event aforesaid become entitled, would be to be divided in equal shares and proportions amongst all and every the child and children of such one so dying as aforesaid; and that in case any or either of them the Appellants should depart this life before the death of the said Sarah Ann Babington, leaving a child or children, the share or shares of them or him so dying would upon the death of the said Sarah Ann Babington as aforesaid, be to be divided amongst the respective children of them or him so dying; or if only one child in each case, then the **[334]** whole to that one child; and that each of them the Appellants was entitled to the interest, dividends and annual proceeds of one fifth part of the principal money, the interest whereof was by the said will directed to be paid to the said testator's daughter Frances Medley Pearson, during her life, and to take and receive the said interest, dividends and annual proceeds of the said one-fifth part of the said principal money for and during the term of his natural life; and that upon the respective deaths of the Appellants, the one-fifth part or share of the said principal money, to the dividends whereof such one so dying as aforesaid was thereinbefore declared to be so entitled for his life, would be to be divided in equal shares and proportions amongst all and every the child and children of such one so dying as aforesaid; and that upon the death of the said Ann Norman, each of them the Appellants who should be then living would be entitled to the interest, dividends and annual proceeds of one fifth part of the said £1666 13s. 4d. three per cent. Consolidated Bank annuities, and to take and receive the said interest, dividends and annual produce of the one-fifth part of the said stock for and during the term of his natural life; and that upon the respective deaths of the Appellants, the one-fifth part or share of the said stock, to the dividends of which such one so dying was as aforesaid declared to be entitled for life expectant upon the decease of the said Ann Norman, would be to be divided in equal shares and proportions amongst all and every the child and children of such one so dying as aforesaid; and in case all or any of them the Appellants should depart this life in the lifetime of the said Ann Norman, leaving any child or children respectively, then the said parts or shares, part or share, of the said sum of £1666 13s. 4d. three per **[335]** cent. consolidated Bank annuities, to the interest and dividends of which each of them the Appellants would have been respectively entitled for life as aforesaid, was to be equally divided amongst the respective children of such of them as should be then deceased, or if any or either of them the Appellants should be then dead, leaving but one child, then and in that case such child would take the

whole share of which the father would have been entitled in such case to the dividends for his life as aforesaid; and that each of them the Appellants was entitled to take and receive the interest, dividends and annual proceeds of one fifth part or share of the residue of the said testator's personal estate, for and during the term of his natural life; and that upon the respective deaths of the Appellants, the one-fifth part to the dividends whereof such one so dying was as aforesaid entitled for life, would be to be divided in equal shares and proportions amongst all and every the child or children of such one so dying as aforesaid, the shares of such of the said children as should at the death of their said father have attained the age of twenty-one years, to be paid to him, her or them respectively, immediately upon the decease of their said father, and the shares of such of the said children as should not have attained that age, to be paid to them respectively, when and as they should severally attain that age.

On the 17th day of February 1830 the decree was duly signed and enrolled.

From this decree an appeal was made, for the following reasons: Because it is evident, that according to the true construction of the said will the Appellants are severally absolutely entitled to one fifth part of the principal sum, the dividends whereof are directed by the said will to be paid to the said Sarah [336] Pearson during her life; to one fifth part of the said sum of £5055 5s. 10d. three per cent. annuities, upon the death of the said Sarah Ann Babington; and also to one fifth part of the principal money, the interest whereof is by the said will directed to be paid to the said Frances Medley Pearson during her life; and also to one fifth part of the said £1666 13s. 4d. three per cent. annuities upon the death or marriage of the said Ann Norman; and also to one fifth part of the residue of the said testator's personal estate.

The Respondents submitted that the decree was good, "Because it would be contrary to the manifest intention of the testator, and the legal construction of the words in which he has expressed the same in his will, for the Appellants to take any interest in the testator's personal estate beyond what is given to them by the said decree."

Sir Edward Sugden and Mr. Pepys, for the Appellants, contended that this was an absolute gift to each of the testator's sons, in each of the instances in which they were referred to. He cited the case of *Wilkinson* v. *South*, 7 Term Rep. 555, where, under a bequest of a term of years, "to A. and the heirs of his body, and to their heirs and assigns for ever, but in default of such issue then after his decease to B. and his heirs for ever," it was held that A. took a life-estate with a contingent limitation to the heirs of his body, and that A. dying without issue the limitation was good by way of executory devise. The same principle was adopted in the case of *Butter* v. *Ommaney*, 4 Russ. 70. The testator there bequeathed "unto and amongst all and every the child and children of his late brother Jacob Butter, deceased, and their issue, except his nephew, Bernard Butter, the sum of £2000 to be equally di-[337]-vided amongst them, share and share alike," to be paid within twelve months after his decease. The suit was instituted by the only children of Jacob Butter living at the testator's death, or at the date of his will. The question was whether the plaintiffs took the £2000 absolutely, or whether their issue and the issue of the deceased children of Jacob Butter, or any of such issue, had any interest in the bequest. The Master of the Rolls held that the legacy of £2000 vested absolutely in the three children of Jacob Butter who were living at the testator's death, to the exclusion both of the issue of those three children and of the issue of such children of Jacob, the brother, as died in the testator's lifetime. They also cited *Robinson* v. *Tickell*, 8 Ves. 142, and on the authority of all those cases contended that the children of the testator, living at the death of the testator, upon arriving at the age of twenty-one took an absolute life-interest in this property, and that in case any of them had died before the death of the testator his share of the fund would have gone to such of his children as were living when the fund came into possession. The question was, whether the word "them," in the residuary clause of the will, included the children and grandchildren of the testator. The intention of the testator was evidently to give a fifth share of the property to each of his five sons, and to their respective issue. The grandchildren of the testator could only take by substitution, and not by limitation as in the case of *Christopherson* v. *Naylor*, 1 Merivale, where the bequest was to "each and every the child and children of my brother and sisters which shall be living at the time of

my death; but if any child and children of my said brother and sisters shall happen to die in my lifetime, and leave issue, then the legacy or legacies hereby [338] intended for such child or children so dying shall be for his, her or their issue." The issue were held to take only by substitution. Therefore only the issue of such children as were living at the date of the will were entitled in the event of the death of their respective parents during the testator's lifetime. The intention of the testator was clearly manifested in this case by the special terms he had employed in describing the manner in which the property should vest in the five objects of his bounty; but if the present construction were to prevail that intention would be utterly defeated.

Mr. Jacob, and Mr. Parke, on behalf of the Respondents, contended that by the true construction of the will the Appellants were only entitled to a life-interest in this property, and they denied that the grandchildren took by substitution only. They cited the case of *Jackson* v. *Jackson*, 1 Ves. Sen. 217, where the Chancellor changed the word " or " into " and," for the purpose of making a legacy of this kind vested in their grandchildren. In the same manner in the case of *Newman* v. *Nightingale*, 1 Cox, 341, where the testator gave " £500 to the sole use of N., *or* of her children for ever," it was held that N. took only an interest for life in the £500, and that it belonged to her children after her death. The case of *Eccard* v. *Brooke*, 2 Cox, 214, very much resembled the present. In that case there was a bequest of stock to trustees, in trust after the death of A. to transfer the same to and amongst " all and every the nephews and nieces that should be then living; to wit, B. or her children, or C. or his children, or D. or his children, or E. or his children, or F. or her children, to be equally divided among them, share and share alike. The fund was [339] held to be equally devisable among such nephews and nieces, *and* their children, as were living at the time of the death of A. So that there being but one niece, and two children of another niece then living, they took the property in thirds. The Court in that case converted all the word *or* in every instance into *and*. The case of *Butter* v. *Ommaney* did not proceed upon the ground of substitution. In the present instance the question was, whether the children took or not an absolute interest. The same words would not bear the same construction when relating to real as when relating to personal property. The question was as to the meaning of the word " issue," whether it was a word of purchase or of limitation. If the latter, the issue would take by succession. That question was to be determined by the evident intention of the testator. In the case of *Doe* d. *Cooper* v. *Collis*, 4 Term Rep. 294, Lord Kenyon said, that in a will the word " issue " was either a word of purchase or of limitation, as would best effectuate the devisor's intention. In *Knight* v. *Ellis*, 2 Brown's Chan. Cas. 569, it was treated as a word of purchase. The testator there gave the accumulation of rents till A. should attain twenty-one, to be laid out, and to permit A. to receive the interest during his life: after his death the monies to go to the issue male of A., and in default of A. having issue, to the plaintiffs. A. died without issue: had he had any, the Court said they would have taken as purchasers. In the case of *Wilson* v. *Vansittart*, Ambler, 562, there was a bequest " to A. and his heirs male, equally to be divided amongst them, share and share alike," and it was construed to be a bequest to A. for life, remainder to his children equally. The same principle was adopted in *Hockley* v. *Mawbrey*, 1 Ves. jun. 142; and in *Jacobs* v. *Amyatt*, 4 Brown's Chan. Cas. 541, [340] where there was a devise of personal estate to A., to be placed at interest till A. should attain twenty-one or marry, then to be paid to her for her use during her natural life, and immediately after her decease to the heirs of her body, equally to be divided between them, share and share alike, and in default of such issue to the testatrix's brother; it was held that an estate for life only existed in A. In the present case it was impossible to say that there were any words of substitution, or any by which a *quasi* estate-tail was given to the children of the testator, but it was evidently the intention of the testator that his sons should only take a life-interest in the property.

Sir E. Sugden in reply said, that *Newman* v. *Nightingale* had long since been overruled, and that *Crook* v. *De Vandes*, 9 Ves. established that a gift to A. or his children was a gift to them that would take effect by substitution.

The Lord Chancellor (July 11) said, that in this case there appeared to have been a mistake in the judgment of the Court below. It was not necessary to take further time to consider the case, for there was no making sense of the will unless it was

construed so as to create an absolute gift to the testator's five sons. It was clear that the issue of any one of those sons would at the death of the testator take by substitution if the son himself should at that time be dead. But on the other ground the case was equally clear; and it was evident that in the hurry of the last day of the sittings the attention of the Master of the Rolls had not been fully drawn to the terms of the will. The case of *Butter* v. *Ommaney* could not stand for law if the present decision was good, and that case had always been deemed of good [341] authority. He should advise their Lordships to find that this was an absolute gift of the property, taken in the order mentioned in the will, to be paid at the time and in the manner specified to the testator's sons living at the time of his decease; but if any of the said sons was at that time dead, then to go to the issue of that son, such issue to take as the *stirpes* would have taken, and not on a division *per capita*. That construction was the only one that would not counteract any intention of the testator.*

Judgment of the Court below reversed.

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[342] IN THE COMMITTEE OF PRIVILEGES.

NETTERVILLE PEERAGE.

Mr. Russel, who appeared for the claimant in this case, mentioned, while going through the pedigree, that their Lordships House had been furnished with copies of certain wills that formed part of the proof for the claimant.

The Lord Chancellor said that that House was more exact than Courts of Law as to documentary evidence. In Courts of Law certified extracts from the parish-books, or examined copies of entries in them, were received as evidence, but that House required the books themselves to be produced, and it had always been the custom of their Lordships to require the wills themselves, and not to be satisfied with copies of them, however well attested.

The Earl of Eldon observed, that their Lordships always required the wills themselves, unless there was proof of their actual loss or destruction; and he mentioned a case on the northern circuit, where in one trial a decision had been given one way on the production of the copy of a will, but where the decision had been the other way when the will itself was afterwards produced.

Lord Wynford was also of opinion that the House of Lords would not be satisfied with any thing but the original wills themselves, and, as a proof that the [343] originals ought always to be produced, he referred to a case at Taunton, where the words of a will would have given a fee, but on the production of the will itself, and on examining it against the light, it was distinctly seen that these words had been written in after the erasure of other words that only gave a life-estate.

It was afterwards stated, that the law-officers of the Crown in Ireland had had these instruments produced when the claim was submitted to them for their report, but their Lordships held that that was not sufficient to satisfy the rules of the House, and they therefore could only consent to hear counsel on this case, subject to his undertaking to produce the original wills to their Lordships, and also subject to any objections that might arise on their production.

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[344] IN THE COMMITTEE OF PRIVILEGES.

CASE OF THE BLOOMFIELD PEERAGE.

[See 2 St. Tr. N.S. 905. See *Fermoy's* (*Lord*) *claim to vote*, 1856, 5 H. L. C. 716.]

Where three Irish peerages are considered extinct, and a new creation takes place, after which one of these peerages is revived, the new creation is valid

* As to the order made in this case, see note *ante* 2 Dow and Cl. 328. The order is set out in full in 5 Bli. N.S. 218.

under the Act of Union with Ireland, but the Crown's right again to create a new peerage will be suspended till the full number of vacancies has occurred.

In this case Benjamin Lord Baron Bloomfield claimed to have a right to vote at the election of representative Peers for Ireland. The question on the validity of his claim arose on the following facts: In the month of May 1825 Sir Benjamin Bloomfield was created by patent a Baron of the kingdom of Ireland, by the title of Baron Bloomfield of Oakhampton and Redwood, in the county of Tipperary. The patent recited that three peerages had become extinct, namely, those of Patrick Earl of Roscommon, of T. J. Warren Viscount Bulkely, and of Sylvester Douglas Baron Glenbervie, no claim having been put in for the Roscommon peerage (that which had most recently become extinct) for above a year after the death of the late earl. By the fourth article of the Act of Union with Ireland it is provided, "That if any peerage shall at any time be in abeyance, such peerage shall be deemed and taken as an existing peerage; and no peerage shall be deemed extinct unless on default of claimants to the inheritance of such peerage for the space of one year from the death of the person who shall have been last possessed thereof; and if no claim shall be made to the inheritance of such peerage, in such form and manner as may from time to time be prescribed by the House of Lords of the United King-**[345]**-dom, before the expiration of the said period of a year, then and in that case such peerage shall be deemed extinct; provided that nothing herein shall exclude any person from afterwards putting in a claim to the peerage so deemed extinct; and if such claim shall be allowed as valid by judgment of the House of Lords such peerage shall be considered as revived; and in case any new creation of a peerage of that part of the United Kingdom called Ireland shall have taken place in the interval, in consequence of the supposed extinction of such peerage, then no new right of creation shall accrue to His Majesty in consequence of the next extinction which shall take place of any peerage of Ireland."

By a judgment, dated 19 June 1828, of the House of Lords, it was declared that Michael James Robert Dillon had proved his claim to the title of the Earl of Roscommon.

In consequence of this decision, it appeared that the Bloomfield Peerage had been granted when only two peerages were actually extinct.

The peerage of John Earl of Carhampton became extinct on his death on the 17th of March 1829, and was the next extinction after the decision on the Roscommon case.

Three peerages of Ireland, in addition to that of Carhampton, have since become extinct; viz. Henry Earl of Barrymore, Frederick Earl of Ulster, Eyre, Baron of Castlecoote.

On the 31st of Dec. 1830 a patent issued, reciting these facts, and containing a grant of the dignities of a Baron and Viscount of Ireland to Standish O'Grady, of Rockbarton, by the name of Baron O'Grady, of Rockbarton, and Viscount Guillamore, of Cahir Guillamore, in Limerick.

[346] Under these circumstances the question was, whether the grant of the Bloomfield Peerage could be sustained. That grant had been made, when, in fact, only two peerages were extinct; and the Act of Union had in the first place declared that no new creation should be made till three peerages were extinct; and had afterwards provided for the restraint of the Royal Prerogative if a new creation should be made under circumstances like the present, but had said nothing as to the validity of such new creation.

The case was referred by the Crown to the House of Lords, and counsel were heard before the Committee of Privileges, to whom the House had referred it.

The Lord Chancellor (July 13): This was clearly a *casus omissus* in the Act of Union, which in this respect their Lordships were bound to construe in favour of the Crown, as the Crown possessed, but for this restriction, the undoubted power of creating as many peers as it might choose. Now it was a rule of law, that a restriction on the exercise of any power legally vested in a private individual must be construed strictly, still more must it be so construed in the case of the Crown. Unless the case on which the restriction was to operate was exactly mentioned it would not be included in the restriction. A restriction imposed by Act of Parliament upon all corporations sole, though the Crown was undoubtedly

a corporation sole, would not include the Crown unless it was specially mentioned. Grants were generally construed against the grantee; but in this, as in other respects, the Crown was an exception to the general rule, and all grants to which the Crown was a party were to be construed in favour of the Crown. These alone would be sufficient reasons to decide the present [347] case if it stood *in dubio*. It did not, however, appear to do so. The Legislature had said that the Crown should only create a peer in a certain event, and it had then provided that if the Crown, having reason to believe that that event had happened, should make a new creation, the power of the Crown should be suspended until certain other events had happened, but it did not pretend to say that the new peerage thus created should be considered as a void act of the Crown. The only effect was that the new peerage would, so to speak, be carried to the debit of the Crown's privilege, and would render one vacancy more than the usual number necessary before the Crown could again exercise its prerogative. Unless this construction was put upon the clause in the Act of Union there would be no means of knowing when the Crown had the power of making an Irish peerage. Under these circumstances he thought it was fit that their Lordships should report in favour of the claim.

Lord Wynford: If he had the least doubt upon this case he should advise their Lordships to adjourn it to have the assistance of the Attorney-General, but it was too plain to require further consideration. The King's right to confer a peerage existed at common law, and that privilege could only be affected by plain and direct words. There were none such here. The King having once exercised his prerogative, the right he conferred vested in the newly-created peer. If the case stopped there it would be sufficient, for the party could not now be deprived of his rights as a peer, as those rights were in full existence when the peerage was made. The Act then referred to a dormant claim being afterwards allowed, and said that such a peerage should be considered as revived, and so it was, but not [348] so as to deprive the peer who had been created in the mean time of the rights that he would otherwise be entitled to enjoy. The only effect of such revival was that the King's right of creation would be suspended for a further time than if the revival had not taken place. The difficulty would arise with respect to the next peerage, but there could be none with respect to the present claimant. The King's right was in full force when he exercised it. The peerage completely vested at that time, and it could not afterwards be divested by the revival of one of the peerages then considered extinct.

Claim allowed.

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[349]

APPEAL

FROM THE COURT OF SESSION.

DUNDAS,—*Appellant;* DUNDAS,—*Respondent.*

[Mews' Dig. v. 1574. See *Brodie* v. *Barry*, 1812, 2 Ves. and Bea. 127; *Allen* v. *Anderson*, 1846, 5 Hare 163.]

General F. Dundas, domiciled in Scotland, and possessed of a real estate in England, and of heritable and moveable property in Scotland, dies, leaving a trust disposition of the whole of his subject, heritable and moveable, in favour of trustees, in which they are directed to turn the whole into money, and divide the proceeds equally among his four children; and the Deed is executed in the Scottish form, attested by two witnesses. This not being sufficient to convey the English real estate, although it was clear that it was the intention of the Disponer to convey it along with the rest of his property to the trustees, the eldest son and heir-at-law insisted that it was a nullity as to the English estate, and that he was entitled to take that as heir-at-law to his father, and also to take his fourth share of the Scottish property.

Held by the House of Lords, affirming an unanimous decision of the Judges of the Second Division of the Court of Session, that the heir-at-law was put to

his approbate or reprobate (election), and must waive all objections, and allow the trust-disposition to have full effect as to the whole property, according to the intent of the Disponer, or take nothing under the disposition.

General Francis Dundas, being entitled to a real estate in England, valued at £14,000, to heritable property in Scotland, with a freehold qualification, valued at £5700, and to moveable property, in Scotland, valued at £31,500, and being domiciled in Scotland, executed a deed of trust and settlement, dated **[350]** April 1818, in favour of trustees, of his whole property without restriction, with directions to them to convert the whole into money, and to divide the produce (with the exception of a provision for his wife in case she survived) equally among his four children, two sons and two daughters. The deed was in the Scottish form, attested by two witnesses, and by the English law was inoperative as to the English real estate.

In 1824 General Dundas died, leaving this settlement unaltered, and Wedderburn Dundas, his eldest son and heir-at-law, claimed the English estate as undisposed of, and also a fourth share of the Scottish property.

The trustees then instituted a process of multiple-poinding, exoneration and declarator, concluding to have it found and declared that Wedderburn Dundas had no right to his share of the Scottish property under the trust-deed, and to the English estate separately, but was put to his approbation or reprobation (election). The facts are thus concisely and accurately stated in the condescendance for the younger children:

I. General Francis Dundas died at Edinburgh on the 15th day of January 1824, leaving four surviving children by his wife, Mrs. Eliza Cumming or Dundas, the condescenders, and their elder brother Wedderburn Dundas.

II. General Dundas was a native of Scotland, and for several years preceding his death he resided constantly in Scotland.

III. Of this date (April 14, 1818), General Dundas executed, at Edinburgh, a disposition of his whole property in favour of the Pursuers of the present action, as his trustees. In particular, he disponed to them the estate of Sansonseal, situated within the liberties of Berwick, **[351]** and subject to the law of England, and also certain heritable subjects situated in Scotland. By the same deed, he directed his trustees, after discharging the other purposes of the trust, to divide the whole of the free residue and produce or surplus of the lands, estates, heritages, property, debts, means and effects thereby conveyed to them, among such of the children, born of the marriage betwixt him and Mrs. Eliza Cumming or Dundas, as should happen to survive him, in such shares and divisions as he should appoint by a writing under his hand, and, failing such appointment, equally among the said children, share and share alike.

IV. General Dundas died without having executed any deed of division.

V. Since the death of General Dundas, it has been discovered that the conveyance of the estate of Sansonseal in favour of the trustees is ineffectual, as the law of England requires that a conveyance of freehold property should be subscribed before three witnesses, whereas the trust disposition above referred to was only subscribed before two witnesses.

VI. Wedderburn Dundas, the elder brother of the condescenders, who has succeeded to the estate of Sansonseal as heir at law, refuses to supply the defect in the conveyance of that estate in favour of the trustees, whereby the fund *in medio* consists only of the moveable property which belonged to General Dundas, and of the produce of the sale of his heritable property in Scotland.

In these circumstances, the condescenders claim:

1. That they should each be found entitled to a fourth share of the free residue of the trust funds, in terms of the deed above referred to.

[352] 2. That they should each be found entitled to a third of the remaining share, which would have belonged to their elder brother, Wedderburn Dundas, as he has forfeited his interest under the trust-deed by refusing to give effect to his father's intention, as expressed in that deed in regard to the estate of Sansonseal.

After the record was made up in the usual form and closed, the Lord Ordinary ordered cases to be prepared with a view to report to the Second Division of the Court, and subjoined the following note:

"On the merits of the case, the Lord Ordinary has not a doubt; and considers that the last case decided by the Court in circumstances *not similar* to this, but requiring the application of the principles of law recognised in questions of this sort, places this case in a very clear point of view. The Lord Ordinary alludes to *Trotter* v. *Trotter*, 5th December 1826, quoted by Wedderburn Dundas. In that case, it was admitted on all hands, both by English and Scotch lawyers, that the law of approbate and reprobate in Scotland, and the law of election in England, are to the same effect, and that they both apply wherever it is clear that a testator has intended to bequeath or convey a subject, but has failed to do so in a legal technical manner. If, in such case, the person to whom that subject belongs or falls, through the failure of the proper technical conveyance, and which he would not have got if the deed had been technically formal, has also a separate interest in the deed; and, while he claims that separate interest, claims also the subject conveyed away from him informally, he will not be permitted to take both. In Scotland, the law of approbate and reprobate applies: in England, that of election. Both go to this, that the person may make his elec-**[353]**-tion, and take one, viz. either take the share arising out of the deed, if the testator's *whole intentions* have effect, or the subject not technically conveyed; but not both.

"Now, in this case, there is no question that the law of Scotland is the rule of guidance. The late General Dundas was a native of Scotland, and domiciled in it, and left a deed executed in the Scotch form. There is no room for questioning his intentions with regard to the property called Sansonseal, situated within the Berwick bounds. It is conveyed by specific description to his trustees, along with all the rest of the landed property situated in Scotland. It may be true, and is admitted to be so, that, owing to the deed not having been executed in the form required by the English statute of frauds, it is not in form to carry the Sansonseal to the trustees, and that Mr. Wedderburn Dundas is entitled to claim it. But there being no doubt that his father did not intend that he should have that subject and a share of all the others, the law of approbate and reprobate applies, whereby he must make his choice either to abide by the Sansonseal, or let it be sold by the trustees, and take his share of the whole estate, real and personal, left by his father."

Cases were accordingly given in, and the Lord Ordinary reported to the Second Division of the Court, and the Judges unanimously pronounced the following interlocutor (14 Jan. 1829):

"The Lords, upon report of Lord Cringletie, Ordinary, having advised the closed record in this case, with revised cases for the younger children of the late General Dundas, and for Wedder-**[354]**-burn Dundas, the eldest son, and their tutors and curators, and whole process, and having also heard parties, Find, that if Wedderburn Dundas shall ultimately take the real estate situated in England, without surrendering the same to the purposes of the trust, he cannot be entitled to claim under the trust-deed any share of the heritable and moveable estates in Scotland, thereby conveyed to the trustees, and decern."

From this judgment Wedderburn Dundas appealed, for the following reasons:

I. It is admitted that, for want of legal solemnity, the trust-deed alone does not operate as a conveyance of legal estate situate in England. This want of legal solemnity does not merely give a right of exception which may or may not be exercised at the option of the party by whom it may be competently stated, and which, if not pleaded in a reduction, the Court is not bound to notice. It does not, like the law of death had, merely open a right to challenge: it operates as a complete nullity, rendering the deed of no more effect in point of law than a sheet of waste paper: nay, more, a deed labouring under such a defect is not only ineffectual as a conveyance, but it cannot even afford evidence of intention to convey; it cannot be looked at; it cannot be read; it raises no election.

II. The Respondents admit that, in consequence of the defect in the trust-deed, the Appellant is entitled to take the English estate as heir-at-law.

III. Keeping this fact in view, that the Appellant appears in the character of an English heir-at-law, claiming an English estate, his rights in reference to that estate, and that character, must be determined by the **[355]** law of England. They are not to be limited or encroached upon by rules applicable to foreign succession,

supposing even these rules to be different in their nature and opposite in their effects from those of the country where his estate is situated. The Appellant, having claimed and received from the Courts of England the estate situated in that country, goes to Scotland, and demands his share of the property to which he has a right under his father's settlement, unqualified by any condition or restriction whatever. His demand is met by the objection that he has no right to share in the benefits of the trust-deed unless he surrender his English estate. He is told that he cannot take both the estate which is not conveyed, and the personal property which is conveyed, by the trust-deed; that he must make his election, although in England he is under no obligation of the kind: that he cannot approbate and reprobate, although the deed is confessedly inoperative as to the estate in England. His rights are thus rendered subject to an implied condition in Scotland, which would not be allowed to have any effect in the country under the peculiarities of whose statute law the whole question arises.

The Court of Session has erred in raising and giving effect to an implied condition in Scotland, thereby putting the heir to his election, while no such condition could have been allowed to affect his rights in England. They have erred in not giving the same effect to the want of legal solemnity in the deed in question as the Courts of England would have done. It must be kept in view, that the statute out of which the objection arises is an English statute; that it is intended to regulate the conveyance of real property in England; and that, therefore, whatever effect would be given to the statute in England, must *ex comitate* [356] be the rule as to the effect to be given to it in Scotland. It is in vain to argue this case as if it hinged on the interpretation of a mere Scots trust-deed. The law of England enters deeply into the question; by which law alone the following important queries can be solved: What is the effect to be given to the statute of frauds? Is there in the deed, as affected by that statute, any legal evidence of General Dundas's intention to convey the estate of Sansonseal? Is there any thing which would put the heir to his election in England? These are questions to be determined by the law of England; and if by the law of that country there be neither evidence of intention, nor any room for pleading a case of election, the Court in Scotland is not entitled to presume that the first exists in order to apply the analogous doctrine of approbate and reprobate.

V. If the Court of Session does gather from the deed evidence of an intention to convey, which evidence is the sole ground for the plea of approbate and reprobate, it is plain that they can do so only by giving to the statute of frauds an interpretation different from that which it would receive in an English Court. That statute, according to the construction which has been put upon it in England, will admit of no devise of real estate whose execution is not proved by the evidence "of three witnesses. If not so proved, it is nothing. It cannot receive notice; the intention cannot be represented, for it cannot be presumed, and there is no evidence; the will, not being executed with the solemnity required by the law, as to a real estate, cannot be read, the Court cannot see any devise of real estate; and, therefore, as the estate does not appear to be devised away from the heir, no act appearing to be done, the heir in that [357] case cannot be put to election." If this be the law of England; if this be a correct statement of the legal effect of the statute of frauds; if that part of General Dundas's trust-deed which relates to the Sansonseal estate cannot be read; if there be, in fact, no devise, no evidence of intention, nothing to put the heir to his election, the doctrine of approbate and reprobate cannot find a place. There is nothing which can entitle the Court of Session to call upon the Appellant to fulfil an intention, when there is no evidence that such an intention exists. Why must the heir-at-law, claiming under the law of England, surrender an estate for the purposes of the trust, with regard to which the trust-deed is absolutely a piece of waste paper, before he can claim a share of the heritable and moveable estate conveyed to him by its provisions.

VI. An opposite opinion can be maintained on this supposition only, that all the peculiarities of this case are to be disregarded; that the situation of the parties, and of the subject in dispute, is to have no weight; that the statute, and the construction put upon it by those best qualified to judge of its meaning, is to be thrown out of view; that the Court of Session is to find intention where an English Court would find none. If the deed in question is to be considered with reference to the

statute of frauds, the construction given to that statute in England, and the construction given it in Scotland, must be the same. Every effect and every consequence which might arise out of the objection, when stated in an English Court, must flow from it when stated in the Courts in Scotland.

VII. There is no authority in the law of Scotland for saying, that a deed declared null by statute can afford evidence of intention, or be the foundation of the plea [358] of approbate and reprobate. The authorities quoted in support of the Respondents' pleas do not go to this extent. They may all be explained without adopting any such conclusion.

VIII. The case of *Trotter* v. *Trotter*, on which the opinion of the Lord Ordinary and the judgment of the Court appear to have proceeded, is not decisive of the present question. That case was special; but, as far as it does bear upon the point at issue, it supports the argument urged by the Appellant. It proves that, in the interpretation of written instruments, still more therefore in the construction of statutes, we must adhere to the rules which have been laid down by the Courts to whose jurisdiction the interpretation of the instrument or the construction of the statute naturally belongs.

For the Respondents, the following were maintained and relied upon as the reasons of appeal.

I. The construction of a deed must be regulated by the law of the country in which it was executed. *M'Hargs* v. *Blain*, July 22, 1760, Mor. 4611.

When a party executes a deed, it is naturally presumed, unless there be some evidence of a contrary intention, that he makes use of words in the sense attached to them by the law of the country in which he is then resident. In all questions, therefore, which may afterwards occur with regard to the import of the deed, recourse must be had to the law of that country, as the rule of interpretation.

Numerous authorities might be referred to in support of this proposition (July 22, 1760, Mor. 4611); but the Claimants consider it sufficient to call the attention of your Lordships to the decision in the case of *M'Hargs* v. *Blain*, which affords a striking illustration of the general principle. It was [359] there found, that a testament executed in Scotland by a person who afterwards removed to Antigua, and died domiciled there, was to be construed according to the law of Scotland, and not according to the law of Antigua; although the property of the deceased was actually situated in Antigua, and, being moveable, must, at any rate, have been held in law to be situated there, since that was the place where the proprietor was domiciled at the time of his death.

As it is admitted, therefore, that the trust-deed was executed by the late General Dundas in Scotland, where he was then domiciled, it follows, that the construction of that deed must be regulated by the law of Scotland.

It has been maintained, however, that a different rule of construction ought to be adopted in regard to that part of the trust-deed which contains a disposition of the estate of Sansonseal, on the ground that it relates to property situated in England. Had the conveyance of that estate been completed according to the English forms, and rendered capable of taking effect in England, the claimants are willing to admit, that these circumstances might, perhaps, have been considered as evidence of an intention, on the part of the Testator, that his deed of settlement should, in so far, be construed according to the rules of the English, and not of the Scotch law. It is unnecessary, however, to enter into any discussion with regard to a case which is merely hypothetical; since it is admitted, on both sides, that the conveyance of the estate of Sansonseal is not completed according to the English forms, and is not effectual in England. The question, therefore, which is now before the Court, does not relate to that part of the deed considered as a direct conveyance. Your Lordships are merely called upon [360] to decide whether, though ineffectual as a conveyance, it does not indicate an intention to convey, and whether the existence of such an intention must be determined on the principles of Scotch, or of English construction?

In so far, the present case is exactly similar to those of *Murray* v. *Murray's Trustees*, and *Trotter* v. *Trotter*, which were so recently under the consideration of the Court (*Murray* v. *Murray's Trustees*, March 4, 1828; Shaw and Dunlop, vol. 6, p. 690; *Trotter* v. *Trotter*, Dec. 5, 1826, Fac. Coll. p. 51). In both of these cases the

question occurred, whether an English Will, containing a general conveyance of the testator's whole property, but, from a defect in point of form, ineffectual as to real property in Scotland, did or did not indicate an intention to convey, so as to constitute an obligation upon the heir taking benefit under the will to effectuate that intention? It was pleaded that, in so far as it related to real property in Scotland, the import of the Will ought to be determined by the law of Scotland, as the *lex loci rei sitae*. But a majority of your Lordships expressed a clear opinion, that as the Will was an English deed it ought to be interpreted according to the rules of English law.

II. By the law of Scotland, an attempt to convey a particular subject, though executed in an inhabile manner, is held to indicate an intention to convey on the part of the maker of the deed. *Cunningham* v. *Gainer*, Jan. 17, 1758, Mor. 617.

It frequently happens that the deed of a party, though probative, proves ineffectual, from the neglect of certain forms required by law, in the transmission of the particular species of property to which it relates. In all such cases, however, it is admitted as evidence of the maker's intention in regard to that subject.

Thus, in the case of *Cunningham* v. *Gainer* (Jan. 17, 1758, Mor. 617), the bequest of an heritable subject, contained a deed regularly tested, thought ineffectual as a direct convey-[361]-ance, in consequence of the want of dispositive words, was, nevertheless, found to constitute sufficient evidence of the testator's intention, that the legatee should have the subject.

A similar decision was pronounced in the case of *Ker* v. *Wauchope*, November 23, 1815, where a disposition of heritable property, though reduced by the heir on the head of death-bed, was, nevertheless, received as a proof of the granter's intention, so as to exclude the heir from claiming benefit under the other parts of the same deed.

The Claimants submit, that the principle of these decisions clearly applies to the present case. The trust-deed executed by General Dundas is a probative instrument according to the law of Scotland, and the express disposition of the estate of Sansonseal, contained therein, although defective in certain solemnities required by the law of England, in order to render it effectual, must, nevertheless, be held to indicate an intention on the part of General Dundas to convey that estate to his trustees.

It is maintained, however, on the part of the opposite Claimant, Wedderburn Dundas, that, as the conveyance of the estate of Sansonseal is improbative by the law of England, the trust-deed cannot be held to contain any expression of the testator's will or intention with regard to that estate.

Were the present question to be determined by the law of England this position would be correct. It has, however, been already shown, that the point at issue regards a matter of Scotch, and not of English law. There is no dispute as to the effect of the trust-deed, when considered as a direct conveyance of the English estate. The question between the parties relates entirely to the Scotch property; whether the right to a [362] portion of it, conferred upon Wedderburn Dundas by the trust-deed, is or is not qualified by a certain condition? In order to ascertain the existence of that condition, the Claimants propose that the part of the deed which relates to the English property should be read; and it is surely no ground for opposing this demand, that in the English Courts the instrument would be held improbative. As the conveyance of the English property is only founded on in reference to the Scotch succession, it is obvious that, in determining whether it is admissible as an article of evidence, your Lordships must be guided solely by the rules of Scotch law.

It will not be difficult to show that the authorities which have been referred to by the opposite Claimant, in support of the contrary position, are altogether inapplicable. The import of the case of *Trotter* v. *Trotter* seems to have been completely misunderstood. It is asked, with an air of triumph, Whether on the principles of that case your Lordships are "not bound to go to the Courts of that country where the objection arises, and ascertain, not only whether it be a conveyance, but whether it affords evidence of an intention to convey?" In the case of *Trotter*, however, your Lordships were clearly of opinion that, although the objection to the validity of the conveyance of the heritable property in Scotland originated solely in the Scotch law, yet, in so far as the English succession was concerned, the question, whether there was or was not an intention to convey, fell to be determined by the law of England.

The cases of *Dundas* v. *Dundas*, and *Henderson* v. *Melvill*, relate entirely to the direct effect of informal deeds relating to heritable property. It was found by the House of Lords, reversing the judgments of the [363] Court of Session, that a deed, revoking a disposition of heritage, must be executed with the same solemnities as the original disposition. But no question occurred in either of these cases, whether such a deed, having been executed in conformity with the *lex loci*, might not be admitted as evidence of the maker's intention, so as to qualify the right of the disponee laying claim to another part of the succession.

As to the case of the Earl of *Dalkeith* v. *Book*, it might be sufficient to remark, that the decision is disapproved of by Lord Kames, in his Principles of Equity, and is contrary both to a previous decision in the case of Lady *Sempill* v. *Cunningham*, and to a later decision in the case of *Govan* v. *Boyd*, where an obligation to convey an heritable property in Scotland, executed in America, according to the American forms, was sustained as effectual. Admitting, however, that the case was well decided, and that an ineffectual conveyance does not operate as an obligation to convey, still this would not affect the present question, for the Claimants do not maintain that the trust-deed imports a direct obligation upon the heir to convey the estate of Sansonseal, but merely that it indicates an intention to convey on the part of the late General Dundas.

The case of *Crawfurd* against *Coutts*, has also been referred to by the opposite party, and a long extract is given from the speech of the late Lord Chancellor, which seems to be considered as decisive of the present question. The Claimants, however, must submit, that no opinion is there pronounced with regard to the law of Scotland. His Lordship indeed states, that, "if the *English doctrines* are to rule, this is nothing like a case of election." And he afterwards proceeds to say, that "if a testator in this country, *i.e.* in England, was required to make his will of land sixty days [364] before death, it would be quite competent for the heir to say, this is a death-bed deed; I take the benefit of the law, and I take the land under the benefit of the law: And he might also take personal benefits under the will." It surely, however, will not be maintained, that because such is the law of England the law of Scotland must necessarily be the same. In this particular point, there can be no doubt that a difference exists between the laws of the two countries. It was solemnly decided by the Court of Session, in the case of *Cunningham* against *Gainer*, and by the House of Lords, in the case of *Ker* against *Wauchope*, that a deed, though executed on death-bed, afforded good evidence of the testator's intention, and that the heir was not entitled to approbate and reprobate. The distinction between the law of Scotland and the law of England is, indeed, admitted by Lord Eldon in the passage immediately following that which has been quoted. His Lordship observes, "There may, however, be a considerable difference attending to the distinction of character between an heir in England and Scotland; and it is impossible not to see that some cases have been decided in Scotland, which very nearly support the doctrine of approbate and reprobate, as applied in this case."

While the authorities, which are founded upon by the opposite party, thus fail in establishing the proposition for which he contends, viz. that the conveyance of the estate of Sansonseal is not admissible as evidence of General Dundas's intention to make such a conveyance, various cases may be referred to, on the part of the present Claimants, where deeds regarding real property, though improbative by the law of the place where the property was situated, and, therefore, [365] ineffectual, have, nevertheless, been sustained as evidence of the maker's intention.

In the English case of *Brodie* against *Barry*, a conveyance of Scotch heritage, not conformable to the solemnities required by the law of Scotland, was held by Sir William Grant to be admissible as evidence of the maker's intention, and sufficient to put the heir to his election.

A judgment, proceeding on the same principle, was pronounced by this Court, in the case of *Gibson* against *Clearihue*. It appears from the session papers, that the deed under which the question arose, besides being inoperative, as the bequest of real property in Scotland not vested in the testator, was also improbative, having been drawn up in the English form, and not tested in terms of the statute 1681. Being probative, however, by the law of the country where it was executed, it was sustained as evidence of the testator's intention in regard to the Scotch heritage, so as to raise a case of approbate and reprobate under the foreign will.

In the case of *Martin* against *Martin, Stone* and *Foot*, an English deed, containing a general devise of the whole real and personal estate belonging to the testator, though not executed according to the forms of Scotch law, was held to indicate an intention to convey certain Scotch adjudications, so as to prevent the heir-at-law from taking them up, without forfeiting the special provisions in his favour contained in the same deed.

In the case also of *Loudon* v. *Loudon*, it appears from the notice contained in Bligh's report of the case of *Ker* v. *Wauchope*, that a deed executed in the West Indies, in the English form, was received as evidence of the testator's intention in regard to a Scotch heri-[366]-table bond, and was held to raise a question of approbate and reprobate.

The competency of founding on a deed, improbative by the law of the country where the property to which it relates is situated, as evidence of the maker's intention, was fully discussed in the case *Jankouska* or *Grieve* v. *Anderson*, of which there are two reports, one in the Faculty Collection, and the other in Morrison's Synopsis. The circumstances may be shortly stated:—Dr. Grieve, by a will executed in England in the English form, settled certain provisions upon his wife, Elizabeth Jankouska; he also devised his lands of Minidow in Scotland to trustees, with power to sell and invest the price in securities for her life-rent use. As the devise of the Scotch heritage was ineffectual, being in the form of a bequest, and also improbative according to the rules of Scotch law, the widow restricted her claim to a right of terce. But this was disputed by her husband's heirs, on the ground that she was barred, under the Act 1681, c. 10, by accepting the special provisions contained in the English deed. On the part of the widow it was pleaded, "This case comes under the exception of the statute of its being expressly provided in the deed of settlement, that the widow shall have right to both; for here it is expressly declared that, besides the provisions from the English and foreign estate, the widow is to have right, not to the terce alone, but to the total life-rent of the lands in Scotland. Answered—The settlement of the Scotch estate is *funditus* null and void, and is to be entirely set out of the question. No argument, therefore, can be drawn from the intention therein expressed; and whatever may have been the testator's intention with respect to it, he did not carry that intention [367] into effect, *habili modo; quod potuit non fecit:* he, therefore, died *intestatus* with respect to his Scotch estate. And although the widow would thereon have had a terce, had there been no conventional provisions, she having accepted such provisions, is excluded by the statute, which makes no distinction whether these provisions are from Scottish or foreign property. The Lords found that the lady was entitled to a terce." It requires no comment to point out the application of this decision to the present question. It must be obvious that the argument for Dr. Grieve's heir, which proved unsuccessful, was exactly similar to that which is now maintained on the part of Wedderburn Dundas.

III. The succession to heritable property is determined by the law of the country in which the heritage is situated; and the succession to moveable property by the law of the country where the deceased was domiciled.

This is a general proposition which cannot be disputed; and, as it is admitted that the trust-funds consist either of the moveable estate which belonged to the late General Dundas, who was domiciled in Scotland at the time of his death, or of the produce of the sale of his Scotch heritage, all claims made upon them must be considered as claims to a Scotch succession.

IV. The nature and extent of the obligations affecting the succession to property, whether devolving on the heir *ab intestato*, or by the provision of the deceased, must, even in regard to property situated elsewhere, be regulated by the law of the country where the succession is taken up, and the consequent obligations are incurred. *Kinloch* v. *Fullarton*, July 12, 1739, Mor. 4456; *Drummond*, June 7, 1798, Mor. 4478; *Balfour* v. *Scott*, House of Lords, March 11, [368] 1793, Mor. 2379; *Robertson* v. *M'Vean*, February 18, 1817; *Robertson* v. *Robertson*, February 16, 1816; *Trotter* v. *Trotter*, December 5, 1826.

The obligations consequent on the succession to property vary in different countries; but the Courts of each country are entitled to enforce these obligations, according to the rules of their own law, against all who claim as heirs under that law.

Thus in the case of *Kinloch* v. *Fullarton* (Mor. 4456), July 12, 1739, it was found, that a party who had succeeded to heritable property in Scotland was bound to discharge certain debts due by his ancestor, although it was admitted that these debts had been contracted in England, where the ancestor was domiciled at the time of his death; and it was offered to be proved, on the part of the defender, that according to the law of England such debts would not affect the heir.

The same principle appears to have regulated the decision in the case of *Drummond* (Mor. 4478), June 7, 1798. By the law of Scotland an heritable debt is considered as a burden affecting the land, to which the party succeeding to the land is ultimately liable. Mr. Drummond having succeeded to a landed estate in Scotland, over which an heritable security had been granted by his predecessor, after discharging the debt, claimed relief against the English executors, upon the ground that, by the law of England, the funds in their hands would be ultimately liable. The Court, however, refused to sustain his claim, upon the ground that the succession to the heritable property, and all the obligations attendant on it, must be regulated by the law of Scotland.

The obligations affecting the succession to property in one country may extend indirectly to property situated within another jurisdiction, that is to say, the **[369]** Courts of one country are entitled to exclude the heir from deriving any benefit from that character, until he perform some act with regard to property situated elsewhere. This does not constitute any interference with the rights of the heir under the law of the foreign country. These are not affected as long as he restricts himself to them. But when he claims new rights, under the law of a different country, either as heir-at-law, or in virtue of an express deed, he is bound to comply with all the conditions which that law imposes, even to the extent of renouncing rights vested in him independently of that law.

Thus, in the case of *Ross* v. *Aglianby* (Jan. 20, 1797, Mor. 6631. App. Foreign, No. 5), referred to by the opposite Claimant, the Court of Session held, that a widow, claiming right to a terce of Scotch property, was bound, under the Act 1681, c. 10, to renounce certain provisions settled upon her out of an English estate. It is true that this judgment was reversed by the House of Lords: but there is no reason to presume that the reversal proceeded on the ground that the Scotch Court had exceeded its jurisdiction in demanding such a renunciation. All that Mrs. Aglianby maintained was, that the English provisions in her favour were not struck at by the statute 1681. In her appeal case her plea is thus stated, "The Appellant does not mean to say that the Legislature of Scotland had not power to enact that a provision out of lands in England should bar the terce in Scotland: but what she means to say is, that no such enactment was made, or intended to be made, or could reasonably be intended." It was not disputed, that, when she claimed the terce of the Scotch property, she subjected herself to the Scotch law, even in regard to her English rights; the only question was as to the extent of the obligation which that law imposed.

[370] It will be found, accordingly, that in the subsequent case of *Robertson* v. *M'Vean* (Feb. 18, 1817), their Lordships of the First Division, notwithstanding the decision of the House of Lords in the case of *Ross* v. *Aglianby*, had no hesitation in finding, that an heir was not entitled to claim any share of Scotch moveables, until he collated his right to the whole heritage to which he had succeeded, although a part of that heritage consisted of an estate in Jamaica. It was observed on the bench, "The petitioner has no more right to retain the Jamaica estate, and at the same time interfere with the executry, than a bankrupt, who claimed the benefit of the Scotch bankrupt law, could insist upon reserving free from his creditors heritable property which he happened to possess abroad."

The judgment of the House of Lords in the case of *Balfour* v. *Scott* (March 11, 1793; Mor. 2397) is by no means inconsistent with the decision which has just been quoted; for, although it was there found that the Scotch heir was not bound to collate, this was only on the principle, that the ancestor having been domiciled in England, his succession fell to be regulated by the law of that country, which does not require collation.

A party whose claim to a succession is founded on a deed of settlement executed by the deceased, subjects himself, equally with the heir *ab intestato*, to all obligations

which, by the law of the country regulating the succession, are held to affect him. It is true that, by the law of Scotland, he is not bound to collate. This never was maintained on the part of claimants, and all the argument upon that point, contained in the case for the opposite party appears unnecessary. But, on the same principle on which the heir who claims a portion of the executry is bound to collate all the heritage to which he may have succeeded, even when **[371]** situated in a foreign country, the heir of provision is also bound to fulfil all the conditions imposed upon him by the deed under which he claims, although these may relate to foreign property, which is not directly controlled by the deed.

In the case of *Robertson* v. *Robertson* (Feb. 16, 1816), the Court held that the extent of the obligation to which a party was subjected by claiming under an Indian Will, must, even in reference to an heritable property situated in Scotland, to which he had succeeded as heir-at-law, be determined by the law of England, as the law of the place where the deceased was domiciled, and which consequently regulated the succession.

A decision to the same effect has still more recently been pronounced in the case of *Trotter* v. *Trotter*, Dec. 5, 1826, to the circumstances of which it is unnecessary to refer, as they must be still fresh in the recollection of your Lordships.

The application of the principles of these decisions to the present case is obvious. As the obligation of the heir-at-law, claiming under the English Will, was, even in reference to the Scotch heritage, held to be regulated by the law of England, so the obligation of Wedderburn Dundas, claiming under the Scotch will, must, even in reference to the English property, be regulated by the law of Scotland.

V. By the law of Scotland, a person who refuses to give effect to the intention of a testator, as expressed in a particular deed, is not allowed to take benefit under the same deed. The benefit which would have accrued to him under the deed is held to be forfeited, and is applied to compensate the loss sustained by his refusal. Erskine, B. III. t. 9, s. 10. *Cunningham* v. *Gainer*, Jan. 17, 1758. Mor. 617. *Ker* v. *Wauchope*, **[372]** May 3, 1819. House of Lords, Bligh's Reports, Vol. 1, p. 1.

If the obligation of the heir, claiming a portion of the Scotch succession under the trust-deed, is to be regulated by the law of Scotland, there can be no doubt, that by that law he is bound to fulfil the intention of the testator, as expressed in the trust-deed, with respect to the English estate of Sansonseal. If he refuse to convey that estate, he must be held to have forfeited his right to a share of the trust-funds; and, on principles of obvious equity, the portion which would have belonged to him, will fall to be divided among the present claimants.

At one time, there appears to have been a notion that, when a party, by refusing to give effect to the intention of the testator, forfeited any special provision in his favour, the portion, so left vacant, fell to the nearest of kin (Bligh's Reports, Vol. 1). But this is now exploded. In the case of *Ker* v. *Wauchope*, the ladies Mary and Essex Ker having set aside, on the head of death-bed, a disposition of both heritable and moveable property, executed by their brother, the Duke of Roxburgh, in which the life-rent of the whole was conferred upon them, it was specially found, by the judgment of the House of Lords, that they were thereby precluded from any "claim to a life-interest in the personality, either as next of kin, or in any other way." In the course of his speech, before delivering this judgment, Lord Chancellor Eldon explained the manner in which the vacant portion should be disposed of: "As the Appellants have in fact, to a certain extent, annulled the deed by judicial process, their election is thereby made to take nothing under the repudiated instrument. A question then arises, what is to become of the life-**[373]**-interest which the Appellants cannot take either as legatees, or as next of kin? In our Courts we have engrafted upon this primary doctrine of election the equity, as it may be termed, of *compensation*. Suppose that a testator gives his estate to A., and directs that the estate of A., or any part of it, should be given to B. If the devisee will not comply with the provision of the will, the Courts of Equity hold that another condition is to be implied, as arising out of the will and the conduct of the devisee, that, inasmuch as the testator meant his heir-at-law should not take his estate, which he gives to A., in consideration of his giving his estate to B.; if A. refuses to comply with the will, B. shall be compensated by taking the property, or the value of the property, which the testator meant for him out of the estate devised, though he cannot have it out of the estate intended for him. Under these circumstances, it does not appear

to me that there is any ground for advising your Lordships to affect this interlocutor, as far as regards the question of approbation and reprobation of the deed, or as far as in construction it negatives the title of the Appellants as next of kin."

In conformity with the principle which is here laid down by the highest authority, there appears to be no doubt that the claimants are entitled to the share of the fund *in medio* which would have belonged to their eldest brother, Wedderburn Dundas, had he complied with the intention of the testator, as expressed in the trust-deed, in order to compensate the loss which they have sustained by his refusal to make over the estate of Sansonseal to the trustees. (*Speddon* v. *Goodrich*, 8 Ves 481.)

The cause was heard on the 16th December 1830, when the following judgment was given:

[374] Lord Chancellor: I shall state what occurs to me at present on this case. I entertain a strong opinion upon it; but as there is some appearance of a clashing between my opinion and the expressions of the noble and learned Lords who decided the cases of *Wauchope* and *Ker*, and *Trotter* and *Trotter*, I should propose that the final judgment be postponed until I have an opportunity of looking over the cases, and, in case I should have any doubt, of talking to the noble and learned Lords to whom I have alluded.

The principles of the English law on questions of this kind have been settled in the clearest and most satisfactory manner. The principle was not only stated in *Brodie* and *Barry*, (2 Ves. and Bea. 127), but had been laid down long before by Lord Hardwicke, in *Herle* and *Greenbank*, (3 Atk. 695; 1 Ves. 298), although since that time Lord Kenyon and Lord Eldon, and Sir William Grant, appeared to think that the distinction was not so clearly founded on sense and equity as might be desirable. A note in the case of *Carey* and *Askew* (2 Bro. C. C. 58; 8 Ves. 492; 1 Cox, 241), decided by Lord Kenyon, was furnished by Sir S. Romilly, which has been published by Mr. Cox, the Master in Chancery, in vol. 1 of his Reports; and there the distinction was taken by Lord Kenyon, that when a will was ill executed for its purpose of disinheriting the heir, or putting him to his election, it was a question whether the devise might not be looked at as a condition annexed to the bequest of the personalty to the heir; whether there was not this exception to the rule, that the devise might be let in as a condition annexed for forfeiting the legacy, so that you might say that this formed a case of election. This was what they held as binding on them, as the distinction had been settled. Lord Kenyon said that it might have been better if so thin and shadowy a distinction **[375]** had not prevailed; but finding it established, they said that they had only to administer the law as they found it.

Now in this case there is no express condition; and it more resembles the case of *Cunningham* and *Gainer*, the only description of case considered by the Scotch Court.

If this decision should stand, it will not decide that the Scotch Court had any power to set aside the statute of frauds as to the conveyance to an English estate, any more than Lord Kenyon's judgment in *Carey* and *Askew*. A will not duly executed according to the statute of frauds cannot be read against the heir in an ejectment, although that which will substantially have the same effect may be done in equity. The Court of Equity says, "We do not pretend to any power to dispense with the provisions of the statute of frauds in the conveyance of real property, but are dealing with personal property; and on looking at the will to ascertain how the personal property is disposed of, we find there that a legacy is given to you on a certain condition, and we say that you shall not have that legacy unless you perform the condition." That is what the Court of Chancery has done, and it appears to me that the Court of Session in this instance has done no more. "You come to us," they say, "not as heir to real property over which we have no power, but as a legatee of personal property over which we have power, and as you claim the legacy under the will, we say that you shall take according to the whole of the will as it stands, or you must reject it altogether."

I do not put this as the same case as that of *Carey* and *Askew*, because there the condition was express, and here it is only implied; and then the question **[376]** comes to be, What is the law of Scotland with reference to the conditions; and they say, "We take the whole of the instrument together, and find that it is a Scotch deed, and we construe it according to the principles of the Scotch law, and not according to those of the English law, and we collect from the whole

that the intention of the maker of the deed was, that the whole of his property should be turned into personalty, and equally divided. You may reject this, and refuse to bring in the English real property, over which we have no power; but we have power over the personal property, and unless you comply with the intent of the maker of the instrument, as expressed in it, you shall take nothing as legatee." I am not prepared to say that the Scotch Court has not the power to say so, and that too whether the condition be express or implied. I should be disposed therefore to affirm the judgment; but wishing to examine the cases more closely, and, if I should have any doubt, being desirous to consult the noble and learned Lords as to the apparent discrepancy to which I have alluded, I propose to postpone the judgment for the present.

Judgment affirmed.

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[377]

APPEAL

From the Court of Exchequer.

DEARE,—*Appellant;* ATTORNEY-GENERAL,—*Respondent.*

[Mews' Dig. i. 68, 819; v. 872, 873. See *Deare* v. *Attorney-General*, 1 Younge and Collyer, 197.]

Information, under 45 Geo. 3, c. 58, at the suit of the Crown, against an Army Agent, for a discovery and production of documents with a view to an account Plea, 1st, That the accounts had been settled and closed at the War-Office by the issuing of the clearing warrants, and setting out the warrants, and referring to them; 2d. That the monies imprested in the agent's hands for the pay or arrears of pay of officers, were held by him as the banker or private agent of the officers by whom he was appointed; and that for such monies he was not accountable to the Crown. The plea ordered by the Court below to stand for an answer, with liberty to Attorney-General to except.

Held by the House of Lords, that both parts of the plea were bad, for that the clearing warrants did not purport on the face of them to be a final settlement of accounts, and that an army agent was a public officer, and was accountable to the Crown for monies received by him for the pay and arrears of pay of officers: that the plea might have been over-ruled, but its being ordered to stand for answer was only the more favourable to the agent: And Orders of the Court below affirmed.

This was an information exhibited, 17th September 1824, by His Majesty's Attorney-General (45 Geo. 3, c. 58, s. 25), against the Appellant Charles Deare, as surviving partner and personal representative of his father, Philip Deare, who, with the Appellant, had, in the years 1794-5-6-7, acted as army agents for several regiments, and among others for the Lanark and Dumbarton Fencible Cavalry. [378] The object of the information was, to obtain a discovery and the production and inspection of the books and other documents of the agents, in order to enable the Secretary at War to make up his accounts, and to take the proper steps to recover the balances due to the Crown.

On the 12th April 1825, the Appellant put in his answer, avoiding the discovery, and insisting that all accounts had been settled by the agents with the War-office, and that, as to the balances in the agents hands, they were accountable only to the commanding officers.

Exceptions were taken by the Crown; and the Court (27th June 1825) allowed the exceptions, and ordered, by consent, that the information and answer should be limited to the accounts of the Dumbarton and Lanark Fencible Cavalry.

The Appellant put in his farther answer, but insisted, on the same grounds as before, that he was not bound to discover. Exceptions were again taken on behalf of the Crown, and these having come on for argument, the Court suggested that it would be more convenient if the Appellant were to put his defence in the shape of a plea; and it was ordered, by consent of the parties, that the Appellant should be at liberty

to put in a plea to the whole information, limited as aforesaid. The information was accordingly amended by limiting it to the accounts of the two regiments before mentioned, and the Appellant, 3d April 1826, put in his plea.

In the first place, the Appellant, as to the whole of the information, except what related to sums imprested in his hands for pay or arrears of pay of officers, pleaded in bar: "That the accounts in the year 1800 were duly made out; and the same were then, together **[379]** with the respective vouchers thereof, delivered into the War-office, according to the rules and regulations of such office then in force, relative to army agents accounts; and all such accounts were then investigated, and the whole balance due to or from this Defendant and the said Philip Deare, or either of them, upon each of the accounts so delivered in, was ascertained by the proper officers of the War-office, duly authorized in that behalf, and the whole of such accounts were finally closed and settled at the War-office, by the issuing of the several clearing warrants hereinafter set forth, which were granted for the same respectively; and no sums or sum of money are or is now due to his late or present Majesty, from this Defendant and the said deceased Philip Deare, or either of them, in respect of all or any of such accounts; and the said clearing warrants were respectively made out and signed by the Secretary at War, and countersigned by the Lords of the Treasury for the time being, and the same were in the words and figures, or to the purport and effect following, (that is to say):

"George R.

"Whereas we were pleased by our warrant, bearing date the 9th May 1794, to order a regiment of fencible cavalry to be raised under the command of our right trusty and well-beloved William Lord Belhaven, and the said regiment having been completed, reviewed, and approved, and the establishment thereof directed to commence and take place the 9th January 1795: And whereas we have been most humbly besought to grant our warrant for the pay and allowances of the effective and commissioned and non-commissioned officers, private men, and **[380]** horses, previous to the commencement of the establishment, which we, thinking reasonable, are graciously pleased to consent to. Our will and pleasure therefore is, that out of such monies as are in or shall come to your hands for the contingent uses of our land forces, or out of such monies as are in or shall come to your hands for this use, you pay unto the said William Lord Belhaven the sum of £4969 12s. 11d. without deduction, for the pay and allowances of the effective commissioned and non-commissioned officers, private men, and horses, of our said regiment, to 8th January 1795 exclusive, agreeably to the account of the particulars hereunto annexed.

"And for so doing, this, with the acquittance of the said William Lord Belhaven, or of his assign, shall be your warrant and discharge.

"Given at our Court at St. James's, this 20th day of April 1803, in the 43d year of our reign, by His Majesty's command,

"September 19th, 1806. C. Yorke.

"To our right trusty and well-beloved Councillors Thomas Steel and John Hiley Addington, joint Paymasters-general of our guards, garrisons and land forces, or to the Paymaster-general of our forces for the time being.

"We have been made acquainted with this warrant, Whitehall Treasury Chambers, the 15th day of November 1803.

Chas. Small Pybus.
George Thynne.
Nat. Bond."

"Pay of Lanark Fencibles."

[381] The rest of the clearing warrants were set out in the plea, and were in the same form and to the same effect as the above; and the plea averred, that the issuing of these clearing warrants were, by the regulation of the War-office, the final settlement of accounts.

In the 2d place, as to the sums imprested in the hands of the agents for pay and arrears of pay of officers, the Appellant pleaded as follows:

"And as to so much of the said information as relates to or seeks any discovery concerning sums of money thereby alleged to have been imprested to this Defendant and Philip Deare, deceased, or either of them, for pay or arrears of pay of officers of the regiments, troops and companies in the said information mentioned, during the period therein mentioned, which has not been paid or accounted for to such officers, this Defendant doth also plead in bar, and for plea saith, that all such sums of money were received by the said Philip Deare and this Defendant, or one of them, as the agent of and under the authority of the commanding officers of such regiments, corps and companies respectively, and by virtue of divers powers of attorney, all of which were in the form and to the purport and effect following:

"Know all Men by these presents, that I, William Hamilton, colonel of the Lanark and Dumbartonshire Fencible Cavalry, do hereby constitute and appoint Philip Deare and Charles Deare, of Somerset Place, agents, and each of them, my true and lawful attornies and attorney, for me and in my name to ask, demand and receive of and from the Right Honourable Dudley Rider and Thomas Steele, Paymaster General of His Majesty's forces, the Paymaster General for the time being, or whom-[382]-soever else the payment thereof doth or may concern, all such sum or sums of money as is or are now due, or which shall hereafter become due and payable to me, the commissioned, non-commissioned officers, and private men, of the said regiment of fencible cavalry under my command, or any other regiment that may hereafter be under my command, or on any account whatsoever, and upon receipt thereof, and any part thereof, to make and give good and sufficient acquittances and discharges for the same, in as full and ample a manner as I could do if personally present, hereby ratifying and confirming all and whatsoever my said attornies shall lawfully do or cause to be done in the premises by virtue of these presents. In witness whereof I have hereunto set my hand and seal, this 7th April 1796.

(signed) "WM. HAMILTON." (seal.)

"Sealed and delivered (being first duly stamped) in the presence of (signed) ELPHINSTONE."

"Entered in the office for auditing Public Accounts, this 19th May 1796.

"THOS. GIBBES."

And the plea averred that the sums in question were held by the agents as the bankers or private agents of the commanding officers, and that they were not accountable to the Crown for the application of these monies, but only to the officers on whose account they had received them.

The Attorney-General considered the plea to be, as to both parts of it, bad in law, and set down the same for argument. On the 8th May 1826, the Lord Chief [383] Baron (Alexander) pronounced his judgment, and, after stating the first plea, proceeded as follows:

"Now this in effect amounts to two things, first, that all these accounts were delivered, and that the vouchers were produced and examined by the proper officers, and then that they were settled, not only by those officers, but by the issuing of those several clearing warrants hereinafter set forth. Those clearing warrants are set forth, and, if any thing amounts to a settled account in this plea, it is these clearing warrants; but upon looking upon them they purport no such thing, and it is impossible by any averment to make them amount to that; they purport directly the contrary: 'Whereas we were pleased by our warrant, bearing date the 24th of June 1795, to order an augmentation to be raised and added to the late Lanarkshire corps of Fencible Cavalry, under the command of our right trusty and right well-beloved cousin, William, Earl of Belhaven, and the said augmentation having been completed, and directed to commence on the establishment the 17th February 1796: And whereas we have been most humbly besought to grant our warrant for the pay and allowances of the effective commissioned and non-commissioned officers,' and so on, 'previous to the commencement of the establishment, which we, thinking reasonable, are graciously pleased to consent to;' then it says, 'Our will and pleasure is, that a certain sum of money shall be paid to Lord Belhaven.' How is it possible to say that that makes a settled account. I am not disposed, as to this part of the plea, to overrule it, because the effect of it would be, as I understand it from the books, to decide that, under no circumstances, could these instruments have any such operation. I am [384] not disposed to go that length at all: on the other hand, I am

equally remote from any disposition to allow it, for the reasons I have stated; for if all this was proved which is alleged in this plea, then the inference would follow, that is a proof that these vouchers were received at the War-office, and that these warrants had been issued, but that would be no answer. In order, therefore, to give the Defendant the benefit as far as we can of this defence, and at the same time to do justice to the Crown, I think the course taken ought to be this,—to let the plea stand for an answer, with liberty to except,—then the Crown will except, as if he had answered, and the Crown will have an opportunity of getting that discovery which by the course of the Court it is entitled to, and this Defendant will have the benefit of all the circumstances he has stated upon his plea, and all the benefit that the law and the opinion of the Court shall entitle him to.

"The other plea respects the monies remaining in his hands, which were issued for the pay of the officers, and for which he says, in substance, that he was the agent of these officers, and that he was accountable to them only. I think, if all the proceedings in this Court, and the rules established are to be considered for a moment, it is quite clear, that if money is issued to a person for a public trust, to be applied to the persons entitled to that money, that the Crown has a perfect right to inquire into the application of it; as to that, also, it may take the same course. There would be no difficulty in overruling it simpliciter, but I see no difficulty in taking the same course with respect to this; therefore, this plea may stand for an answer, with liberty to except."

[385] Of the same date (8th May 1826) it was ordered by the Court, that the plea should stand for an answer, with liberty to the Respondent to except, and to set down his exceptions to the former answers.

The Respondent then set down his original exceptions for argument, and the Court, by order dated 10th November 1826, allowed the whole of them.

From these Orders of the 8th May and 10th November, the agent appealed to the Lords for the following among other reasons:

I. Because the Orders complained of are manifestly in violation of that regularity and consistency in pleading which the established course of practice requires to be observed in Courts of Equity. The proceedings which have taken place are the following: An information filed against the Appellant by the Attorney-General on behalf of His Majesty; an answer by the Appellant to this information; exceptions to that answer; a further answer to the original information, which information was, by the order of the 3d of February 1826, limited to four particular years and one particular corps; an amended information; and a plea put in by the Defendant to the whole of the discovery which that information seeks. There are now, therefore, an information, an answer to that information, exceptions to that answer, an amended information, a further answer to that amended information, *exceptions* to that further answer, and a plea to the whole of the amended information, all standing on the files of the Court at the same time. The Appellant humbly complains of the orders by which the record has been brought into such a state of irregularity and confusion, and hopes that the same will be discharged or altered.

II. Because inasmuch as the Appellant has distinctly and positively sworn it to be the fact, that all accounts respecting the agency of the Lanark and Dumbarton **[386]** Fencible Cavalry, inquired after by the amended information, have been examined and finally settled, and the Attorney-General has taken no step to put that fact in issue, that fact must, according to the received rules of pleading, be taken to be true, and the Court of Exchequer had no authority to decide that the documents, referred to by the Defendant in his plea, disproved the fact which they were alleged to confirm. The Appellant humbly submits that the forms of pleading and justice of the case equally required that the plea should either have been allowed, or that an opportunity should have been given to the Defendant of proving the truth of the allegation it contained. He therefore confidently trusts that your Lordships will reverse, or so far alter the Order of the 10th of November 1826, as to enable him to show by oral and documentary evidence, which he is prepared to adduce, that the accounts in question have been examined and finally settled in the only way in which he had any reason to believe it would be necessary for them to be settled when he undertook the agency in question, or in which the accounts of army agents were settled since the War-office has been established.

III. Because after agents' accounts have been examined and settled at the War-office, and the clearing warrant issued, the Secretary at War, acting on behalf of His Majesty, has not, either by law or custom, any right to or control over the arrears which may stand to the credit of any officer in the books of the agent. They form matter of account between the officer and the agent, who becomes thenceforward the banker of the officer, and frequently acts otherwise as his private agent. The services, of which they are the compensation, have been already rendered, and the precise amount of the sum due to him has been ascertained before the clearing warrant is issued. The Crown [387] would not be answerable for those arrears to the officer in case of the agent's insolvency; and the agent, being certainly liable for their amount to the officer and his representatives, cannot be liable to another action at the suit of the Crown on the same ground at the same time.

IV. Because the Secretary at War is not by any law or custom entitled to the production of any ledgers, or other private books of account, which are sought by this information. The Appellant and his father have many years ago sent into the War-office all the accounts and vouchers which, by the established rules and regulations respecting agents' accounts, they were bound to render, and he avers and insists that the Secretary at War, until within these few years, did not claim, and does not now possess, the right to call for the production of private ledgers and books of account themselves.

The Respondent, on the other hand, submitted that the said Orders ought to be affirmed, for the following among other reasons:

First, as to the form of the Orders: That of the 8th of May 1826 is, in substance, consistent with the Order which it recites of the 3d of February 1826, which was an Order made by consent, and without prejudice to the previous proceedings, in case the plea should be overruled; and although the Court has directed that plea to stand for an answer, and not in terms overruled the plea, it was fully competent to the Court to make such direction as it has made; and it is more for the Appellant's benefit than overruling the plea; and the liberty to set down the former exceptions is consequential upon the Order so made, or else is reserved by the Order of the 3d February 1826.

[388] As to the Order of the 10th of November 1826, by which the exceptions were again allowed, it follows, that if the Court was authorized to give liberty to set down those exceptions, that they should be again allowed, as there is no discovery in any of the answers to those parts of the information to which the exceptions relate.

Second, as to the merits insisted on as a bar to discovery by the two first answers, and by the plea; viz. That the accounts were settled by means of the clearing warrants as to all sums, except arrears due to the officers; and as to the arrears, that the agents acted as the private bankers of the officers, and are not responsible to government.

The clearing warrant is both in form and substance a transaction quite distinct from the final settlement of the agent's accounts with government, and the customs or regulations of the office by which it is alleged that clearing warrants have that effect, so as to conclude the Crown from calling for an account from the agents of money imprested to them for public purposes, would be a void custom, and this plea is therefore bad in law.

As to the plea relating to money received by the agent for arrears due to officers, this part of the plea is also bad; first, because it is inconsistent with public policy and the discipline of the army, that the agent should make any disposition or arrangement whatever relating to money received for the pay of officers other than actual payment to the officer or his representatives.

The public duty of army agents binds them to make actual payment to the officers, or to account for and pay over to government all sums received by them for public purposes. Secondly, the plea states no authority [389] from the officers constituting the agents their bankers, but only a general authority from the commanding officers to receive the money; and thirdly, if the agent could show actual payment, he is still bound, till his account is finally settled with government, to make discovery, and to account for all his transactions.

Third, as to the defence set up by the first answer, but not contained in the plea,

that army agents are appointed by the colonels of regiments, and not by the Crown, and that they are not therefore agents of the Crown, or accountable to it, for public money, but solely to the colonels by whose authority they are appointed. First, army agents are agents of the Crown, and recognized as such by the Acts of the 23 Geo. 3, c. 50, and 45 Geo. 3, c. 58; and army agents are, as well by the provisions of those Acts, as also by the common law right of the Crown, to require accounts from, and to charge as debtors, all persons to whom public money is imprested, accountable and chargeable for all public money received by them.

Moreover this is a defence insisted on by answer, and not by plea; and the Appellant cannot by answer, purporting to be an answer to the whole information, object to answer any part; he must either demur, or plead, or put in a full answer.

The cause was heard at the bar of the House of Lords on the 19th and 26th February 1830, (Lord Lyndhurst, Chancellor), and the following cases were cited. *Hindman* v. *Taylor*, 2 Bro. Ch. Ca. 7; *Attorney-General* v. *Ross*, 8 Price, 190; *Attorney-General* v. *Brookesbank*, 2 Y. and J. 37; *Bondeau* v. *Wyatt*, 3 Bro. Ch. Ca. 155; *Bayley* v. *Sibbald*, 15 Ves. 135; *Gait* v. *Osbaldeston*, 1 Russ. 158; 5 Madd. 428; *Mendezabel* v. *Machado*, 1 Sim. 68; 2 S. S. 483; 2 Russ. 540.

[390] Lord Chancellor (Lyndhurst): The decision of the present Master of the Rolls in *Gait* v. *Osbaldeston*, seems at variance with his decision in *Mendezabel* v. *Machado*. But the judgment in the former case was in 1820, and in 1826 it was overruled by Lord Eldon. The latter case was decided afterwards, which explains the variance.

It has been said, that this House has a right to the opinion of the Court below on any point argued before it: so it has if it calls for it. But it would be too much to say that every new point raised here for the information of the House should be remitted to the Court below: that might make a suit interminable. A new point is raised here, and that is sent back for the opinion of the Court below. The cause comes here again, and another new point is raised, and that is sent back again. There would be no end of it. Whether to remit or not is in the discretion of the House.

Lord Lyndhurst (14 Oct. 1831): This was an information filed in the Court of Exchequer, by His Majesty's Attorney-General against the Appellant, Deare, who, together with his father, of whom he was the personal representative, had been army agents; and the object was to obtain a discovery of the balance due from the agents to the public. Deare put in his answer; and, with a view to simplify and shorten the proceedings, a course was adopted which rather lengthened the proceedings, and left the record in a more complicated state than it otherwise would have been in. But taking the record as we find it, justice may still be done between the parties.

The main point is a plea in bar to this effect: that the accounts of the Dumbarton and Lanark Fencible [391] Cavalry, to which the information was ultimately limited, were, in 1800, duly made out; and that the same were then, together with the respective vouchers thereof, delivered into the War-office, and that the accounts were then investigated, and finally closed and settled at the War-office, by the issuing of the clearing warrants hereinafter set forth; and then it sets forth the clearing warrants. That is a plea in bar to a part of the information; and certainly a plea of a settled account, if well founded, is so far an answer. But the question is, whether this is a sufficient plea of an account stated and settled. No: for it says that the vouchers were investigated, and the balance settled by the proper officers at the War-office by the issuing of the clearing warrants, so that it is a plea of a settled account by reference to these documents; but the documents, on the face of them, do not justify the inference. This, therefore, is not a good plea of a stated account, and consequently not a good defence to the suit.

But there is another plea to another part of the information, which is, "that all the sums which, after the issuing of the clearing warrants, were permitted by the officers to remain in the hands of this Defendant and the said deceased Philip Deare, were held by them as the bankers or private agents of the several officers, etc.; that such sums were placed to the private account of such officers, and that the said Philip Deare and this Defendant were not, and that this defendant is not, in any manner responsible to His Majesty for the application or non-application of any such sums."

This question came before me when I was in the Court of Chancery, and I had

no doubt but that the agent, although appointed by the Colonel, was adopted [392] by the Crown, and accountable to the Crown for the application of the money received to the purpose for which it was issued, and that the Crown had a right to investigate the accounts of the agent to see to such application. If the money be paid to the officer entitled to it, or to another by his authority, the agent is then so far discharged; but it is not sufficient for that purpose that the money is entered in the agent's books to the credit of the officer, and, therefore, the Crown has a right to investigate.

The whole plea might, therefore, have been overruled. The Court, however, did not overrule it, but ordered it to stand for an answer; but of that the Appellant had no reason to complain, for that was rather favourable to him.

Judgment affirmed.

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[393]

APPEAL

FROM THE COURT OF CHANCERY.

ATTORNEY-GENERAL, (at the relation of Magistrates of Montrose),—*Appellant;*

. GAVIN B. MILL and Another,—*Respondents.*

[Mews' Dig. iii. 391, 420, 506; S.C. 5 Bli. N.S. 593; and, in Chancery, 3 Russ. 328; 5 L.J. Ch. 153. Discussed and distinguished in *Canterbury (Mayor of)* v. *Wyburn and Melbourne Hospital* (1895), A.C. 89.]

D. M., a native of Montrose, in Scotland, residing in England, by Will made in England, and in the English form, bequeaths the residue of his real and personal estate to trustees, to be laid out in the purchase of lands, or rents of inheritance, in fee simple, for a charitable purpose, at Montrose, in Scotland, where two of the four trustees resided, one residing in England, and another in the West Indies.

Held by the House of Lords, affirming a decree of the Court of Chancery, that the bequest was void by the statute of mortmain, it not appearing from the will that the testator intended that the trustees should have the option to purchase lands in Scotland.

The late Mr. David Mill, the testator in this case, was born in the town of Montrose, in Scotland, where [394] he resided in his father's house for many years. He then went to the West Indies, where he amassed a very considerable property. About the year 1786 he returned to his native country, and resumed his original domicile; for he again took up his residence in Montrose, with the intention of remaining there during the rest of his life. In the year 1791 Mr. David Mill was induced to take a journey to London, on account of business, in the months of September or October of that year.

Shortly after his arrival in London he was seized with illness, and on that occasion made his Will, dated the 5th day of December 1791; and thereby, after directing payment of all his debts, funeral and testamentary expenses, and after bequeathing various legacies, "he gave all the residue of his real and personal estate unto James Mill, of Camberwell, his brother, George Mill, of Montrose, Hercules Mill, also of Montrose, and Patrick Bartlett, of the island of Cariacou, upon trust to invest such part of his said estate as should not then consist of real estate in the purchase of lands, or rents of inheritance, in fee simple, which purchase or purchases he directed should be made in the name of the said trustees, or the survivors or survivor of them, and by them in due and legal form conveyed from time to time, together with such part or parts of his real estate as might then happen not to be sold or disposed of for the purposes aforesaid, to other trustees and their heirs, so as at all times thereafter to support and preserve a perpetual succession in the lands and rents so to be purchased, for the intent and purpose mentioned, contained, and expressed in a certain instrument, or writing, in his will mentioned, to be executed by him, and to bear even date with his [395] will;" and he appointed the said James Mill, George Mill, Hercules Mill, and Patrick Bartlett, executors of his will.

The other deed, or instrument in writing, which is so referred to in the will as expressing the purposes to which the rents of the lands so to be purchased were to be applied, is a deed-poll, dated 5th December 1791, in which the testator describes himself as formerly of the island of Cariacou, in the West Indies, but then residing in

Charles-street, in the parish of Mary-le-bone, in the county of Middlesex; and recites, "that the testator had often observed with regret the very destitute situation in which the daughters of many gentlemen in the neighbourhood of his native town, Montrose, North Britain, have been left at the death of their fathers, and that it was his earnest will and desire to add comfort to as many of the persons of the above description as possible, he had, by his will of even date, given, devised and bequeathed, all the residue and remainder of his estate and effects, whatsoever and wheresoever, in manner therein mentioned; he therefore declared that the said gift, devise and bequest, of the residue of his estate and effects to the said James Mill, George Mill, Hercules Mill and Patrick Bartlett, and the survivors and survivor of them, and the heirs, executors, administrators or assigns of such survivor, was so made and given them upon trust, that they, the survivors and survivor of them, and the heirs, executors, administrators and assigns of such survivor, should yearly, and every year, for ever, pay the yearly rents of the said trust estate into the proper hands of the following persons, their heirs and successors, that is to say, the two persons who, for the time being, should be the testator's [396] nearest of kin, and residing within 20 miles of the town of Montrose, the said James Mill and his heirs when residing within the said distance, Sir Alexander Ramsay, of Balmain, bart., and Sir David Carnegie, of Southest, bart., and their heirs, when he or they should reside within the said distance, and to the Magistrates of Montrose for the time being; it being his desire and intention that neither of his trustees, or their heirs, assigns or successors, should act in the execution of the trusts thereinafter mentioned, but such as should reside and live within 20 miles of the town of Montrose aforesaid, to be by the said trustees, their heirs and successors, applied upon trust yearly, and every year, upon the 19th day of March in every year for ever, to pay, apply and dispose of two third parts thereof towards the relief and comfort of all such daughters of gentlemen residing in the neighbourhood of Montrose aforesaid, who should be left at the death of their fathers destitute of support, or with a scanty and insufficient maintenance, in manner following," etc. etc.

The testator, Mr. David Mill, executed several codicils to his will. By the first codicil, dated 20th of July 1799, he appointed his brother, Mr. John Mill, of Fearne, in the county of Angus, in Scotland, joint executor of his will, and joint trustee under the supplementary instrument. By the second codicil, he gave other legacies in lieu of those bequeathed in the will; but did not in any manner alter the charitable bequest. By the third codicil, dated 23d June 1802, he directed that the Respondent should bear the name of Mill, and gave and bequeathed all the rest, residue, and remainder of his estate, effects, and premises whatsoever, not before given and bequeathed by his will and codicils, unto his brother John Mill, and the Respondent, [397] their executors, administrators, and assigns, to be equally divided between them, share and share alike, and appointed them executors of his will and codicil, and confirmed the appointment of James Mill, Hercules Mill, and Patrick Bartlett, to be trustees thereof.

In April 1805, the testator, Mr. David Mill, died without having in any manner altered his will and codicils, and supplementary deed. After his death, the Respondent (the only executor residing in England), and Mr. John Mill, proved the will and codicils in the Prerogative Court of the Archbishop of Canterbury; and the Respondent assumed the name of Mill, according to the third codicil. Mr. John Mill and the Respondent then possessed themselves of the whole personal estate and effects of the testator, to a great amount.

No notice of the above charitable bequest was given to the magistrates of Montrose, or to any party interested in its establishment. On the contrary, long before Mr. John Mill and the Respondent ventured to prove the will, they took care to have an amicable suit instituted in the Court of Chancery, without any notice to the parties in Scotland interested in the charity.

In this amicable suit, the Respondent in this case appeared as Plaintiff against his surviving co-executors, Mr. John Mill and Patrick Bartlett, and the Attorney-General, who were the Defendants, Mr. John Mill, the Defendant, having the same interest with the Respondent, who acted as Plaintiff in defeating the charitable bequest. The Bill in this amicable suit was filed in Hilary Term 1806 (more than two years before the will was proved), and as the Attorney-General was necessarily included

among the Defendants as a formal party, the Bill charged, amongst other things, that the residue of the testator's real and personal estate was not [398] applicable to the charitable purposes mentioned in the deed executed in 1791 by Mr. David Mill, and referred by his will, and that the purposes of the said deed were such as could not be carried into effect; and that such residue, therefore, passed by the said subsequent testamentary instruments, and that it ought so to be declared by the Court. And in the prayer of the Bill was inserted a prayer that the devise and bequest of the residue and remainder of the real and personal estate of Mr. David Mill, for the purposes of the said deed referred to in the will of Mr. David Mill, might be declared void by the decree of that Honourable Court; and that he, the Respondent, might, together with Mr. John Mill, be declared entitled to the remainder and residue of the said real and personal estate, in equal moieties.

In 1808 this amicable suit came on to be heard before his Honour the Master of the Rolls, when the common decree was obtained for an account of the testator's estate. The Master made his report in February 1809, and on the 13th of June 1809 the cause was heard, it is believed, as a consent or short cause, at the Rolls; when, without any argument or notice as to the validity or invalidity of the bequest for the Scotch charity, a decree was obtained (not declaring the bequest of the Scotch charity void, as was prayed by the Bill), directing that the said Master should divide the clear residue of the testator's, Mr. David Mill's, personal property, which, the Master had ascertained, amounted to £39,226 11s. 9d. three per cent. Bank Annuities, and £18,634 3s. 8d. four per cent. Stock, into two equal moieties, one of which moieties was to be transferred to the Plaintiff (the Respondent), and the other to the Defendant, Mr. John Mill. The decree thus obtained in this amicable suit, [399] without any argument, and in the absence of the parties interested in the Scotch charity, as it directed the charitable funds to be divided between the parties, Plaintiff and Defendant in that suit, had the effect of defeating the charitable objects of the testator for the time.

At length the magistrates of Montrose received information of the contents of the testator's will, and of the rational and excellent purposes for which the testator had destined a great part of his property. They, therefore, immediately caused an information to be filed at their relation in the High Court of Chancery, by His Majesty's then Attorney-General, at the relation of your Appellants, Relators, against the Respondent and George Mill Nicholson (who resides in Scotland out of the jurisdiction, and is the heir-at-law of John Mill, the surviving trustee for the Scotch charitable purpose), praying that it might be declared, that under the direction to lay out the residue of the personal estate of the testator, Mr. David Mill, in the purchase of lands or rent of inheritance, for the charitable purposes to be executed in Scotland, as expressed in the said deed, the trustees for the time being were authorized or empowered, or had the option, to purchase lands or rents of inheritance in fee simple in Scotland, for the said purposes, and that the residue of the personal estate might be so laid out accordingly.

To this information the Respondent appeared, and put in a general demurrer, which came on to be argued on the 29th of April 1824, before his Honour the Vice-Chancellor. On the argument of the demurrer it was insisted, on behalf of the Respondent, that the decree on further direction in the amicable suit at the Rolls was a bar to the said information. The Vice-Chancellor, however, to prevent any technical difficulty being raised on that ground, which might prevent the [400] argument of the question as to the validity of the general question, (which his Honour was pleased to say was a question of great importance, intimating at the same time that the validity of the bequest would probably be supported,) suggested that he would allow the demurrer to be withdrawn, in order that the Respondents might plead the said decree on further directions, in bar to the said information, and that the Appellants should present a petition to have the said decree, on further directions, re-heard upon appeal at the same time with the plea. This suggestion was adopted, and the Respondents put in a plea of the decree on further directions at the Rolls, while the Appellants presented their petition for rehearing of that decree.

On the 14th day of May 1827 the information and the plea, together with the petition of re-hearing, came on to be heard together before the Lord High Chancellor, Lord Lyndhurst, when his Lordship, on the 16th of May 1827, was pleased to order that the plea should be allowed, and the petition of re-hearing be dismissed.

Against this decision, which is of so much importance, not only from its defeating this national Scotch charity, but from its general consequences as it affects parties connected at once with both parts of the United Kingdom, an appeal is humbly made to your Lordships; and it is trusted that your Lordships will reverse these orders, for the following amongst other reasons:

First: Because it is the established doctrine of the Court of Chancery to give effect to a bequest to lay out money in the purchase of land in Scotland for a charitable purpose to be executed in that country, where such bequest occurs in an English will.

[401] Secondly: Because, in all questions on the construction of the Statute of Mortmain, where two modes occur, by either of which the will may be complied with, by one of which modes the gift would be defeated by the operation of the statute, while by the other mode the statute would not apply, the Court has looked merely to that mode by which the charitable purpose can be effected; and this principle is applicable, not merely to cases where the trustees have by the words of the will an express authority to adopt either mode, but where (as in this case), from circumstances appearing on the face of the will, that option can be reasonably implied.

Thirdly: Because it is a forced construction of the will of a Scotchman (even if he were domiciled in England), where he bequeaths money to Scotch trustees to be laid out in the purchase of land, of which the rents are to be paid to persons in Scotland, to hold that the trustees have no authority or option to purchase land in Scotland, even if the persons entitled to the rents should require it. For in the case of such a bequest, if the trustees, without the direction of any Court, should, from motives of convenience to themselves and the parties beneficially interested, have laid out the money on land in Scotland, it is difficult to conceive on what principle such a purchase could be held a breach of trust, and still more difficult to conceive by what rule of equity they could be compelled to rescind such a purchase in order wholly to defeat the object of the trust.

The cause was heard in the House of Lords, on the 5th March 1830, and the cases of *Curtis* v. *Hutton*, 14 Ves. 537, and *Grimmett* v. *Grimmett*, Amb. 210, were cited.

[402] Lord Lyndhurst (14 Oct. 1831): The question in this case is, whether a bequest in a will is not void by the statute of mortmain. The testator, David Mill, was born in Montrose, in Scotland, where he resided several years. He then went to the West Indies, where he amassed considerable property. In 1786 he returned to his native country, and again took up his residence in Montrose. In 1791 he came to London, and being soon after seized with illness, he in December of that year made the will in question, and in 1805 died at Bath. The testator had no real estate in England or Scotland.

By this will the testator, after directing payment of debts, etc., and bequeathing various legacies, gave all the residue of his real and personal estate to trustees, upon trust to invest such part of his said estate as should not then consist of real estate in the purchase of lands or rents of inheritance in fee simple, which purchase he directed to be made in the names of the trustees; and there was a clause to preserve and continue a perpetual succession in the lands and rents in trustees, for the intent and purpose mentioned in a separate instrument in the will mentioned to be executed by him, and to bear even date with his will. By this separate instrument the trust was declared to be for the charitable purposes therein mentioned, and the question is, whether this bequest was legal, and that depends upon whether the trustees had the option to purchase real property in Scotland.

The cause came before me in the Court of Chancery, and I did not then see, nor can I now see, that the testator contemplated the purchase of real property in Scotland; and then it comes to be a purchase of real property generally, to be vested in trustees for cha-**[403]**-ritable purposes, in which case the bequest is void by the statute of mortmain.

This case came before Sir W. Grant at the Rolls, but the point now in question was not then raised. When the cause came before me in the Court of Chancery, I considered that the instrument did not lead to the conclusion that the testator contemplated the purchase of land in Scotland. He speaks of lands *in fee simple*, which is an English expression; and I am of opinion that the purchase of lands in Scotland was not in his contemplation. I therefore advise your Lordships to affirm the judgment.

Judgment affirmed. (No costs).

[404] APPEAL

FROM THE COURT OF SESSION.

SCOTT,—*Appellant;* ALLNUTT,—*Respondent.*

[Mews' Dig. i. 218.]

A portion of an entailed estate is sold by the heir in possession for the redemption of the land-tax, and the surplus-money is invested in terms of the statute. The heir of entail next entitled sells for valuable consideration his reversionary and contingent right to the interest of this fund, and assigns it to the purchaser by a deed prepared in the English form, and executed in England, where the parties were domiciled, but without the solemnities required by the law of Scotland.

Held by the House of Lords, affirming a decision of the Court of Session, that the interest of the money was moveable property, and was well assigned by the English deed, *comitate gentium.*

Note.—The interest in this case was taken at a specific sum, and the seller engaged to make good that sum, in case the actual interest should fall below it, and a question was raised whether this not a grant of an annuity, in which case the deed, to be valid by the English law, must be memorialized. But no opinion given on that point.

In 1806 the then Lord Elibank, by authority of the Land-tax redemption Act (42 Geo. 3, c. 116), sold the farm of Redhouse, part of the entailed estate of Ballencrieff, for the redemption of the land-tax. The farm sold for £13,150, which, after redeeming the land-tax, left a surplus of £11,801. This surplus was, in terms of the statute, vested in trustees, who were to pay the interest of that sum to the heir of entail in possession until the money should be re-invested in land.

[405] In 1816 the Hon. Alexander Murray, son of Lord Elibank, and next heir of entail, assigned to the Respondent, John Allnutt, esq., of Clapham Common, in the county of Surrey, his reversionary and contingent right to the interest or annual rent of £10,600 of the above-mentioned surplus-money, for the price of £2235, which was immediately paid to him. The deed of assignation was prepared in the English form, and executed in London, where the parties were domiciled, but was not executed with the solemnities required by the law of Scotland.

The interest was taken at £530 per annum, and the indenture, upon a recital that Mr. Murray had agreed, in case the interest should by any means be reduced below that sum, to make up the income or produce to the whole sum of £530, assigned to Mr. Allnutt all the right and interest of the said Alexander Murray in and to the foresaid annual rent.

This assignation was duly intimated to the statutory trustees.

Lord Elibank died in 1820, and Mr. Murray succeeded to the title and to the entailed estate of Ballencrieff.

In 1824, Lord Elibank, the son, executed a trust-deed to Mr. Scott, the Appellant, of the whole of his property, for the payment of his debts and for other purposes, and also an *ex facie* absolute disposition of the estate of Ballencrieff. In the same year Mr. Scott raised an action of multiple poinding in the names of the statutory trustees, and, under the trust-deed and disposition, claimed among other things the interest assigned to Mr. Allnutt, the Respondent.

After some intermediate proceedings, the Lord Ordinary (Mackenzie) pronounced the following interlocutor, of date 29 September 1825: "The Lord Or-**[406]**-dinary having considered the memorials for the parties and whole process, finds that the claim of Mr. John Allnutt is preferable upon the interests arising from the sum of £10,600 libelled, so far as the said interests are *in medio* in this process." To this interlocutor his Lordship added the following note: "The assignment of Allnutt seems sufficient as an assignation of the interests payable to Lord Elibank by the

trustees, and rents of lands to be purchased by them. The Lord Ordinary thinks the intimation to the trustees sufficient, so far as relates to interests, even before the succession of the present Lord Elibank; and the after proceedings likewise seem equivalent to intimation to the trustees. The Lord Ordinary does not think that an assignation of interests or rents needs to be intimated every term. Holding this, then, the Lord Ordinary sees no farther question in respect to the interests which accrued before the conveyance to Mr. Scott. In respect to the interests accruing after that conveyance, the Lord Ordinary thinks, that if Lord Elibank had voluntarily made a conveyance to his creditors, evacuating the right he had previously for value granted to Allnutt, this would have been very wrong; but the Lord Ordinary is satisfied his Lordship neither intended to do, nor has done this. The proviso in the general disposition seems sufficient to exclude this. If the assignation of interests, etc. to Allnutt had been in security of a debt, this proviso clause must expressly have supported it against being cut down by the conveyance to Scott; and in fair interpretation, the Lord Ordinary thinks the clause must equally support the actual assignation to Allnutt, though it gave him right to the interests, etc. directly. But further, the Lord Ordinary does not think that, in the circumstances of this **[407]** case, there was room for evacuating Allnutt's assignation to the interests by any right that Lord Elibank did, or indeed could at this time grant. The Lord Ordinary understands that an assignation of rents may be evacuated by a disposition and infeftment in the lands yielding the rents, granted to a third party. And perhaps this may hold even in the case of a disposition and infeftment granted by, and limited to the life of an heir of entail, though that seems open to some question. But here there were, in relation to the present question, no lands for Lord Elibank to dispone, or Mr. Scott to take infeftment in. The lands of Redhouse had been sold, and the price was vested in judicial trustees, who held for the purposes,—(1.) of paying the interest to Lord Elibank till land was acquired;—(2.) of vesting the capital in land, to be taken to the series of heirs of entail, and under the entail. Now, as to the latter purpose, it does not appear to the Lord Ordinary that Lord Elibank could convey over any right to Mr. Scott, or to any body. The duty of the trustees still appears to remain unchanged in that respect. They must convey the lands, not to Mr. Scott, but to the heirs of entail. In respect to the former, the purpose of the trust was already qualified by the assignation of the interests to Allnutt, and intimation thereof to the trustees, which made it the duty of the trustees to pay these interests to Allnutt, not to Lord Elibank. And after that, Lord Elibank could not dispone to Mr. Scott any right to these interests."

To this interlocutor the Lords of the Second Division adhered (16th November 1827), and from these Interlocutors Mr. Scott appealed, and contended that they ought to be reversed for the following among other reasons:

[408] I. Lord Elibank's right in the surplus price of Redhouse, and the interests annually accruing, is a real, not a personal right: it is, to all intents and purposes, heritable, not moveable.

II. No deed that is not executed according to the solemnities of the law of Scotland is effectual to carry Scotch heritage, or any right affecting Scotch heritage, or, generally, any real or heritable subject or right in Scotland; and therefore the deed of indenture, on which the Respondent claims, which is a deed unquestionably executed without these solemnities, must be altogether ineffectual to carry or transmit Lord Elibank's liferent interest in the surplus price of Redhouse, which is not a personal, but a real or heritable subject.

III. There cannot be the least doubt that the trust-deed, upon which the Appellant founds, and his infeftment in the entailed estate, is sufficient to carry, for behoof of creditors, Lord Elibank's right and interest, as heir of entail in the heritable bond; and, consequently, if the prior assignment in Mr. Allnutt's favour, shall be held ineffectual to attach that right, the Appellant is clearly entitled to be preferred to the fund *in medio*, and his preference in this action will ascertain his preferable right to the annual rents that may in future accrue.

IV. The disposition in favour of the Appellant, completed by infeftment, having been granted by Lord Elibank after his Lordship had succeeded to and was in right of the entailed estate, is clearly preferable to the assignation in favour of the Respondent, which was granted long before his Lordship's succession, and when his right to the entailed estate, including his right to the surplus price of Redhouse, was

not a thing in possession, but a mere matter in expectancy, [409] at once future and contingent, and over which he had no power when he granted the deed in favour of the Respondent.

V. There is no ground for maintaining that the assignation in favour of the Respondent can be effectual as an assignation to maills and duties, in competition with the conveyance by disposition and infeftment, in favour of the Appellant.

For the Respondent it was contended, that the judgment ought to be affirmed for the following among other reasons:

I. It does not appear that the interest in question was at all conveyed to the Appellant, or intended to be so by Lord Elibank; the trust-deed is quite general, and contains no specification of any subject whatever. On the other hand, the special disposition which followed the trust-deed was merely a conveyance to the Appellant of the entailed estate of Ballencrieff and others, with the parts, pendicles and pertinents of that estate, and all right, title and interest which Lord Elibank had in the estate, as heir of entail, during his lifetime. It is very true that the Appellant attempted to show that the surplus price of Redhouse was a part or pertinent of the estate of Ballencrieff, because it is ultimately destined to the heirs of entail; but this is a complete fallacy. The farm of Redhouse was, no doubt, at one time a part of the estate of Ballencrieff, and a special conveyance of the estate of Ballencrieff at that time would of course have carried the farm of Redhouse. But that farm having been sold under the statute, was then no part of the estate; and as to the surplus price arising from its sale, though ultimately intended for the heirs of entail, it was in the mean time vested in the statutory trustees under the authority of the Court.

[410] All that Lord Elibank could at any time have conveyed was the right of drawing the annual interest of the surplus price, as a personal claim against the trustees: but even this was not made over to the Appellant. It is no doubt true, that the general terms of the trust deed were sufficiently broad to have conveyed this personal right to the Appellant, had it remained with Lord Elibank at its date; but having been previously conveyed to the Respondent, it was not carried by the general terms of the trust deed in favour of the Appellant; on the contrary, it appears that a clause was introduced into that trust deed, saving, in the most express terms, all rights, and even preferences or securities, previously granted by his Lordship, which it was declared shall remain entire, and in the same situation in every respect as they stood before the execution of this trust right.

II. Supposing it had been intended by Lord Elibank to have conveyed the interest in question to the Appellant, and that it had been conveyed to him in the most express terms, it would have been of no avail: for the Respondent was entitled to a preference, in virtue of the previous indenture or assignation thereof by Lord Elibank in his favour, the intimation of which to the statutory trustees, first extrajudicially a few days after its date, and afterwards judicially by its production in the first process of multiplepoinding, had divested Lord Elibank thereof, and completed the Respondent's right to it, long before the deeds in the Appellant's favour had any existence.

The following authorities were referred to in the cases. For the Appellant, Ersk. B. II. t. 2. s. 3; Voet, tom. 1, lib. 1, t. 4, pars. 2, s. 11. For the Respondent, Ersk. B. III. tit. 2, s. 40. *Craufurd* v. *Craufurd*, Mor. Dict. p. 4486; *Durrie* v. *Coutts*, [411] Mor. Dict. p. 5595; Ersk. B. III. tit. 8, s. 17; Mor. p. 4501, *voce* Foreign; Mor. p. 5465, *voce* heritable and moveable; Mor. p. 4501, *voce* Foreign; Mor. p. 4502; Ersk. B. III. tit. 2, s. 40; Mor. p. 759, *voce* Arrestment; Mor. p. 162-3, *voce* Trust; Mor. p. 871-2, *voce* Assignation; Mor. p. 872; Ersk. B. III. tit. 5, s. 4.

In the course of the argument in the House of Lords, one point was taken for the Appellant which had not been at all raised in the Court below, and that was that the assignation was bad even as an English deed, because it was not merely the assignment of the interest of the £10,600 whatever that might be, but a grant of an annuity of £530, for Lord Elibank engaged to make good that sum in case the interest of the money fell short of it, and that being the grant of an annuity, it was not available as such, not having been memorialized.

The cause was heard on the 15th September 1831, when the following Judgment was given:

Lord Chancellor: Although a great deal of argument has been used, and a great deal of acuteness and subtlety have been displayed by the Counsel for the Appellant, my opinion in favour of the judgment of the Court below, which I have indicated in the course of the argument, has not been shaken ; I, however, allowed the Counsel for the Respondent to proceed, on the principle that the decision might be more satisfactory to the parties if we went through the whole case, and not because I myself entertained any doubt on the subject. We have now the advantage of having heard the Respondent's Counsel, and also the Appellant's Counsel in reply.

I do not go on one ground, which one or two of the Judges seem to have taken, viz. that Lord Elibank did **[412]** not intend by the instrument of 1824 to cut down that of 1816. The question is not what he intended, but what has he done in point of law, the effect of the instrument being to be collected from what appears within its four corners, and from the powers of the party executing it.

It is absurd to talk of intention either to cut down or not to cut down ; the question is, what has he in fact done, whether he meant it or not.

That, however, seems to be introduced merely as garnish. The question is, what is the effect of this assignation. A portion of the estate of Ballencrief was sold for the redemption of the land-tax, and it is rather extraordinary that about thirteen times as much was sold as was requisite for that purpose. The surplus was, by the provisions of the statute, to be invested in other lands, to go to the heirs of entail, and it is said that the money is consequently heritable. But the question here is, not whether the principal is heritable, but how are you to deal with the interest of the money in the interval between the time of the sale and the new investiture, and whether this is a valid assignment of the interest of that fund. The money is heritable, because it goes to the heir, and, no doubt, Lord Elibank could not have aliened the principal fund. But the interest is substantially moveable, and belonged to Lord Elibank personally, and he had a right to assign it. Upon the whole, I would advise your Lordships to affirm the judgment.

Judgment affirmed.

Note.—The Respondent's Counsel applied for costs, but the Lord Chancellor intimated that he did not think it a case for costs, since if the ground that this was an annuity, and as such required to be memorialized, **[413]** had been taken below, and a question had arisen on which of the parties the *onus* of proof as to the memorializing rested (as to which he gave no opinion) the Respondent might have found himself in some jeopardy. It was to be considered also, that one of the Judges did not appear to be fully confident that the decision was right.

[414]

APPEAL

FROM THE COURT OF EXCHEQUER.

HICKS and Another,—*Appellants;* MORANT,—*Respondent.*

[Mews' Dig. vii. 1351, 1501 ; S.C. 5 Bli. N.S. 643 ; and, in Ex., 3 Y. and J. 286.]

Sale in 1800, by the testamentary guardians of M., an infant, of some lots of his land, to redeem the land-tax. H. purchases one of the lots, and pays the price into the hands of his own agent, who was also agent for the vendors, but the agent neglects to pay it into the Bank in the terms of the Land-tax Redemption Act. M. comes of age in 1807, and afterwards accounts with the agent as if the agent were his debtor, for the purchase-money paid by H. ; and the agent not being able to pay, M., in 1825, brought his ejectment ; and the Appellants, representatives of H., filed their bill in the Exchequer to restrain proceedings in the ejectment, and to compel M. to complete the title. Bill dismissed by the Lord Chief Baron (Alexander), and the judgment affirmed by the Lords, principally on the ground that H. all along knew that the money had not been paid into the Bank, and that that was not done which was necessary to give validity to his title.

In 1794, Morant, when an infant of seven years of age, became seised in fee simple, on the death of his father, of the manor of Ringwood, in the county of Southampton. By his father's will testamentary guardians had been appointed, and they, in 1800, sold a part of the land for the redemption of the land-tax on the estate. This portion was sold in different small lots, one of which consisted of three cottages, which were purchased for £138 by a person of the name of Hicks, whose interest, at his death in 1823, became vested in the Appellants.

[415] Messrs. Harbin and Cooper, solicitors at Ringwood, conducted the sale for the guardians, and were also employed by Hicks to make the purchase, and to prepare the conveyance. The solicitors prepared the conveyance, which was dated July 1803, and was a deed of bargain and sale in the form adapted to a sale under the Land-tax Redemption Act.

Hicks entered into possession immediately after the sale, and paid up the purchase-money to the solicitors in 1803, to be by them paid into the Bank of England to the account of the National Debt Commissioners, in the terms of the Act of Parliament. The solicitors, however, did not pay the money into the Bank. Hicks remained in possession till his death in 1823, but never took steps to see to the proper application of the money, or to complete the title.

In 1804 the partnership of Harbin and Cooper was dissolved, and Cooper, to whom the purchase-money had been paid by Hicks, soon after became insolvent.

In 1808 the Respondent came of age, and soon after called for an account and particulars of the sales. Harbin did not deny his responsibility for the money received by Cooper, and in 1813 he stated his debt due to the Respondent, including the £138 paid by Hicks, at £466; and to secure this he gave the Respondent a mortgage over a house and some land, which, as afterwards appeared, was of no value, as the premises had been previously incumbered to the Respondent for more than their value. Harbin was unable to pay; and the Respondent, on receiving from him a conveyance of his equity of redemption of the mortgaged premises, released him from all pecuniary demands.

From the time of the sale till 1823 both Hicks and Morant paid the land-tax on their estates, so that both **[416]** were aware that the purchase-money had not been applied to the redemption.

In 1825, Morant brought an ejectment against the Appellants, representatives of Hicks; and in 1826, the Appellants filed their bill in the Exchequer against Morant, praying for an injunction and confirmation of the sale. The bill was dismissed by Lord Chief Baron Alexander on the 12th June 1826; and the injunction which had been granted in the interim was dissolved.

From this decree the Appellants appealed for the following among other reasons:

First, Because the Respondent, from the time when he came of age, knowing that Robert Hicks had some years before entered into a contract with the respective guardians for the purchase of the before-mentioned lot, and had paid his purchase-money to the agent of the vendors, and under the title so acquired had entered into possession of the lot, acquiesced for more than seventeen years in all that had been so done by his guardians, on the one hand never questioning or disturbing the possession of the said Robert Hicks, who had no title except under the said purchase, and on the other hand dealing with the purchase-money as his own, and without any communication on the subject being made to the said Robert Hicks, and thereby expressly adopting the said contract of sale and purchase.

Second, Because the purchase-money paid by the said Robert Hicks, being in the hands of the solicitor and agent of the Respondent, was for many years treated and recognized in the dealings and accounts between them as the money of the Respondent, for which his agent was answerable to him, and was not kept apart from the other monies of the Respondent, but was blended with the general mass of the balance due to the Respondent from his agent.

[417] Third, Because the Respondent, of his own accord, and without any communication with the said Robert Hicks, took from his agent a mortgage security for a general balance, of which the purchase-money paid by the said Robert Hicks formed a part, and afterwards, having filed a bill to foreclose the mortgage, accepted from his agent a conveyance of the equity of redemption in satisfaction of the whole debt so secured, and released him from all demands in respect of the same, by which

transactions the whole of the purchase money of the lot contracted for by Robert Hicks has been satisfied to the said Respondent.

For the Respondent it was contended, that the judgment ought to be affirmed for the following among other reasons:

First, Because the premises in question are the property of the Respondent, and he has not, by any contract or any dealing with the Appellants or their testator, or by any other means (if any other means would be sufficient) given them the right of calling upon him to relinquish that property to them.

Second, Because if the purchase-money has become lost to the Appellants or their testator, that loss was occasioned by his own neglect, and is in no manner imputable to the Respondent.

The cause was heard in the House of Lords on the 30th September and 1st October, and argued chiefly on the ground of negligence and laches. For the Respondent it was contended, that there was laches in not seeing to the due application of the purchase-money, and in not completing his title within a reasonable time; while for the Appellants it was contended, that there was more laches on the part of the Respondent, who allowed Hicks to remain twenty-three years in possession without challenging his title: and **[418]** that at any rate the Respondent had elected to take Harbin as his debtor for the purchase-money, of which, it was alleged, his acts afforded clear proof.

Lord Chancellor (21 Oct. 1831): This is an appeal from a judgment of the Lord Chief Baron (Alexander) of the Court of Exchequer. The bill was filed in that Court by the representatives of Hicks, to restrain Morant from proceeding in his ejectment, and to compel him to complete the conveyance to Hicks, which was still in *fieri*.

The case is this. While Morant was an infant, his testamentary guardians sold some lots of his estate, in order to redeem the land-tax. Hicks became the purchaser of one of these lots. The price ought, in the terms of the Land-tax Redemption Act, to have been paid into the Bank of England, to the account of the National Debt Commissioners; and in default of this, the conveyance is made void by the act, even although it should be completed at law. Although the purchaser should have paid the price to his own agent, or the agent of the vendor, still, if the money is not paid into the Bank of England, as directed by the Act, the title is void. This was what happened here. Hicks paid the purchase-money to his agent, who was also the agent of the vendor; but the agent did not pay it into the Bank, and therefore the title was at law invalid and void.

The sale took place in 1800. Morant came of age in 1807; and after the lapse of eighteen years from that time, being within two years of the time when his remedy by ejectment would have expired, he brought the ejectment, to restrain which this bill was filed. The Lord Chief Baron, after great hesitation, dismissed the bill; and, on the whole, I am disposed to con-**[419]**-cur with him, although not on exactly the same grounds. The question was, whether Morant, after his long acquiescence in the sale, was not bound, in equity, to complete the conveyance. The Lord Chief Baron thought that there was negligence on both sides. But the laches of the one out of possession was different from that of the other, who was in possession under whatever title. I look, however, very much to the acts of the purchaser. Hicks paid the money to his agent, who was also the agent for the vendors; but the agent did not pay the money into the Bank, and Hicks knew that he did not pay it: he knew it, for he himself continued to pay the land-tax on his lot, which he would not have done if the land-tax on the whole estate had been redeemed. I wish it to be understood, that my judgment rests, not merely on the ground that the money was not paid into the Bank, but on the ground that Hicks knew that that was not done which was necessary to give validity to his title. I am therefore of opinion, that the judgment ought to be affirmed; but in consequence of the doubts of the Lord Chief Baron, and my own hesitation, I think that no costs ought to be given.

Judgment affirmed, without Costs.

[420] APPEAL

FROM THE COURT OF CHANCERY.

NICOL,—*Appellant*; VAUGHAN,—*Respondent*.

[Mews' Dig. i. 355, 356; v. 510; vi. 811; vii. 264; xi. 613; S.C. 5 Bli. N.S. 505. Cited in *Browne* v. *M'Clintock*, 1873, L. R. 6 H. L. 463; and *Ex parte Morgan*, 1876, 2 Ch. D. 96.]

Issues directed by M. R. as to a bond merely upon the surmise and suggestion of a party, the bond being unobjectionable on the face of it, and all the evidence as to the circumstances under which it had been obtained being before his Honour upon a report, made after inquiry by the Master. The Order directing the issues reversed by the House of Lords, and the cause remitted, with directions to his honour to decide upon the matter himself.

Where a Master reported that a bond was voluntary, and a party excepted, on the ground that the Master ought to have reported that the bond was partly for valuable consideration and partly voluntary, and the party, at the argument on the exception, offered to withdraw it, and to have the bond considered as merely voluntary, as reported by the Master, his Honour the M. R. was of opinion that the party was bound by the exception to support the bond as partly for valuable consideration, and refused to allow the exception to be withdrawn.

The late George Nicol, of Pall Mall, bookseller, had become acquainted with the late John Duke of Roxburgh, while the latter was at Eton School, and an intimacy was contracted which continued till the death of the latter. Nicol also became intimate with the Duke's sisters, the Ladies Essex and Mary Ker, and, after their brother's death, assisted them as a friend in the management of various legal proceedings in which they were concerned, and in the management of their affairs generally. He also assisted them in raising [421] various loans of money, and became himself bound as a security for the repayment of the money, and, in particular, he became bound as co-security with them to Coutts, the banker, in a bond for £10,000. The services rendered to the ladies by Mr. Nicol were not, properly speaking, those of an agent, although in rendering them he incurred a great loss of time, and some trouble and expense, but those of an active friend, such as described by the Lord Chancellor (Brougham), who had been once the counsel in some of their suits. He attended and made suggestions to their solicitors, and became the medium of communication between their solicitors and them; and he attended the consultations of their counsel, and communicated the result to the ladies; and in this way he became extremely useful to them, who were, as his Lordship stated, of retired habits, and little acquainted with the proceedings of the world, and therefore very helpless, and who were also very proud, and therefore the more helpless.

The ladies proposed to give Nicol a bond for £12,000, and he got it prepared by his own solicitor, at their request, and took it to the house of the Lady Essex Ker, in Oxford-street, on the 15th of July 1815, where it was executed of the same date by both the ladies, in the presence of one of their servants, and delivered to Nicol. The above-mentioned bond to Coutts for £10,000 was executed of the same date.

The Lady Essex Ker, who had survived her sister, and was her heiress-at-law and sole next of kin, on the 20th of August 1819 made her will, and named Sir N. W. Vaughan (the Respondent), and another; her executors. By this will she left a legacy of £2000 to the Appellant.

In Hilary Term 1822, the executors filed a bill in [422] Chancery against the heirs and representatives of the testatrix, praying that the will might be established, and the trusts thereof carried into execution, and the usual accounts taken. In Easter Term 1824, the heirs-at-law of Lady Essex Ker filed their bill in Chancery against the executors, praying that it might be decreed that the executors should admit assets, or that an account of the personal estate might be taken; and on the

30th June 1825, the usual decree was made in both causes, and Nicol brought his charge upon the bond for £12,000 into the Master's-office.

In the discussions upon these claims before the Master, it was suggested for the first time by the solicitor for the executor of Lady Essex Ker, that the bond for £12,000 given by the Ladies Ker to Mr. Nicol was merely an indemnity bond, and that the same had been given by the said Ladies Ker to Mr. Nicol only as an indemnity against the liabilities he had entered into on behalf of the said ladies, in becoming jointly bound with them for securing to Messrs. Coutts and Company the sum of £10,000. The charge thus made against the validity of Mr. Nicol's claim to recover the whole sum of £12,000 and interest thereon, for his own benefit, was unsupported by evidence, unless the accidental circumstance that the bond to Messrs. Coutts and Company for £10,000 bore date the same day with the bond for £12,000 can be considered as affording a possible inference that such might have been the case. The point, however, was insisted upon by the solicitor for the executor of the Lady Essex Ker; and in order to enable the Master more fully to enter upon and inquire into the consideration of the said bond for £12,000, and the circumstances under which it was given, it was arranged between the parties in the said three causes and the [423] said Mr. Nicol, that an order should be obtained authorizing the said Master to inquire into all the circumstances relating to the said bond for £12,000, and that Mr. Nicol should be examined respecting the same; and accordingly, on the 28th of April 1827, an Order was pronounced in the said Court of Chancery, on the application of the said complainent, Sir Robert Williams Vaughan, and on which application the other parties interested appeared, whereby it was ordered, that the said Master should be at liberty to inquire into the consideration and all the circumstances relative to the said bond for £12,000. And whereby it was further ordered, that the said complainants in the said three causes should be at liberty to examine the said George Nicol upon interrogatories, and that the said George Nicol, and the said complainants in the said three causes, should be at liberty to examine any of the other parties in the said three causes, or witnesses, if necessary, relative to the said bond. And by the same Order, it was, by consent of all parties, ordered, that the said George Nicol should be at liberty to exhibit interrogatories for his own examination, and that he the said George Nicol, and all parties, should produce before the Master, upon oath, all papers and writings relative to the said bond, as the Master should direct.

In pursuance of the last Order, interrogatories were exhibited by the Plaintiff, Sir R. W. Vaughan, for the examination of Mr. Nicol relative to the circumstances and consideration of the said bond.

On the 4th day of August 1827, Mr. Nicol was examined upon these interrogatories by Master Cox; he was then in his 87th year, and the examination took place under the painful circumstances of his being confined to his bed of the illness of which he died.

[424] The Master, in his report, set out a correspondence between Ladies Ker and Nicol, which was produced by the solicitor of the latter, to show the nature of the services which Nicol had rendered them, and also to show that he had no undue influence over them; and on considering the letters, the examination of Nicol, and all the circumstances stated in the report relative to the £10,000 to Coutts, he certified that the £12,000 bond *was not a bond of indemnity, but was a voluntary bond, given as a bounty to Nicol, without any consideration having been paid or given by him for the same.*

To this report both parties excepted: Vaughan, because the Master had not certified that the bond was a bond of indemnity; and, Nicol, because he had not certified that it was a bond partly for gratuitous services, and partly for money lent; he having advanced some small sums to the ladies, for which, by agreement with them, he had destroyed the vouchers on receiving the bond.

In June 1828, George Nicol died, leaving his son, the Appellant, his personal representative.

In the course of the argument on the exceptions, the Master of the Rolls intimated his opinion to be, that the Appellant was bound by the exception to support his bond as given partly for services and partly for money lent; upon which the Appellant offered to withdraw his exception, and to have the bond considered as simply a volun-

tary bond, or as a remuneration for voluntary services; and prayed that the Master's report might be confirmed. The Master of the Rolls would not allow the exception to be withdrawn. All parties who could give any additional evidence as to the bond being dead, the Appellant was desirous that the Master of the Rolls, having the whole of the evi-[425]-dence before him, should decide on the merits without directing any issue. His Honour, however, refused; and, by order, dated 29th June 1829, directed the following issues to be tried at law, (refusing to direct the examination of George Nicol to be read for the Appellant at the trial.)

First, Whether the said bond for £12,000 to the said George Nicol was executed by the said Lady Essex Ker and Lady Mary Ker, as to any and what part thereof for services performed by the said George Nicol for the said Ladies Essex Ker and Mary Ker, or as to any and what part thereof for money lent and advanced by him to the said Lady Essex Ker and Lady Mary Ker.

Second, Whether the said bond was executed by the said Lady Essex Ker and Lady Mary Ker as to any and what part of the same as a bond of indemnity to the said George Nicol in respect of the engagements as an obligor with the said Lady Essex Ker and Lady Mary Ker, in a bond of the same date to Messrs. Coutts and Company for £10,000, or in respect of any other engagements into which the said George Nicol had entered as a security for the said Ladies Essex Ker and Mary Ker: and

Third, Whether the said bond to the said George Nicol was to any and what part of the said sum of £12,000 intended by the said Ladies Essex Ker and Mary Ker as a gift to the said George Nicol: and the representatives of the said George Nicol were to be Plaintiffs in the first and last of the said issues; and the Plaintiffs in Equity were to be the Defendants in those issues; and in the second issue the Plaintiffs in Equity were to be Plaintiffs at Law, and the representatives of the said George Nicol to be Defendants at Law; who respectively were forthwith to name an [426] attorney, appear and plead to issue: and it was ordered that it should be referred to the Master to settle such issues in case the parties differed about the same: and the Judges of the Court of King's Bench were to be at liberty to indorse any matter specially upon the postea; and his Honour did reserve the consideration of all further directions, and of the costs of the said suits, in like manner as the same were reserved by the said former decree, until after the trial of the said issues; and any of the parties were to be at liberty to apply to the Court as there should be occasion.

From this order of the 29th June 1829, directing the issues, the Appellant appealed for the following among other reasons:

1st. Because, inasmuch as no witnesses are now living who can be examined *viva voce* on the trial of the said three issues, or any of them, the precise and only question which could properly be made the subject of an issue was actually before his Honour the Master of the Rolls, upon argument of the said exceptions of the 29th of June 1829, and therefore no issue was necessary.

2d. Because if any issue were directed, the second issue only of the said three issues was proper to be directed.

3d. Because if any issue were directed, the order directing the same ought to have contained a direction that the aforesaid examination of the said George Nicol should be read as evidence on the part of the Appellant.

For the Respondent it was contended, that there was evidence to go to a jury, to show that the bond was a bond of indemnity—that it was a bond taken by an agent—and that it had been obtained by undue influence—and that the order ought to be confirmed.

[427] Lord Chancellor (14th Oct. 1831): The main question in this case is, whether the bond given to Nicol by the Ladies Essex and Mary Ker was a voluntary gift, or a bond of indemnity. Nicol had been on intimate terms with their brother, the late Duke of Roxburgh, and by that means became intimate with the rest of the family, and, after the Duke's death, he performed various friendly services for the ladies, for which they were under great obligations to him. Both the ladies executed this bond to him, and the Lady Essex Ker, who survived the other, left him £2000 by her will. The executors filed their bill to have the will established, and for the usual purposes in such cases; and Nicol claimed both the legacy of £2000 and the £12,000 in the bond. His Honour the Master of the Rolls directed a reference to the Master, to inquire into the circumstances under which the bond had been executed and given.

The Master made the inquiry; and in his report certified, among other things, that the bond in question was not a bond of indemnity, but a voluntary one. This disposed of two questions: first, that the bond was voluntary; secondly, that it was not a bond of indemnity. Nicol excepted to this report, on the ground that it ought to have stated that the bond was partly voluntary and partly for consideration; and the other parties excepted to it inasmuch as it had not stated that the bond was a bond of indemnity. The Master of the Rolls then directed issues to try whether the bond was voluntary in the whole, or whether it was partly voluntary and partly onerous, to use the language of the Scotch law; and next, whether it was a bond of indemnity. In the present case, as there are abundant assets, it matters not whether the bond be wholly voluntary, or partly for con-[428]-sideration; and the material question in the cause is, whether this was a bond of indemnity?

But the question which your Lordships have at present to determine is, whether the Master of the Rolls was right in directing the issues at all. On that point I entertain a very strong opinion, and that is, that you are not, merely on the suggestions and surmises of a party, to direct an issue to try whether that is a bond of indemnity which does not, on the face of it, in the least, purport to be a bond of indemnity, more especially when there is no parol evidence to be given either way. If the Respondents say that this is a bond of indemnity, which does not on the face of it purport to be any such thing, the burden of proof lies on them; and so it does on all parties stating objections to a bond which do not appear on the face of it, the seal taking away all question as to the consideration. If issues were to be directed in these cases on mere suggestions and surmises, one does not know where they would end, as some objections might be made to all bonds. It is argued that the bonds were executed on the same day; but then they were for different sums: and as to the £2000 legacy, the will of Lady Essex Ker makes no reference to the bond, thereby indicating the intention of the testatrix to give the £2000 *ultra* the bond. Then all that remains to show that this is a bond of indemnity is the identity of date; and it is going a great way to say that an issue should be directed on so very slender a foundation. I would propose, therefore, that the Order be reversed; and that the cause be sent back to his Honour, with directions to go into the matter, and decide the question on the letters and the other evidence before him; thus keeping open for the Court below the questions of whether a bond of [429] indemnity or not, and whether Nicol was an agent for these ladies, etc. These questions were never argued below; and your Lordships' directions will merely be for his Honour to deal with the matter himself, instead of sending it to a jury.

Lord Lyndhurst: I agree that this is not a case for an issue, as the whole of the evidence was before the Master of the Rolls, for himself to decide upon. As to the question whether this was a bond of indemnity, I shall say little as to that, since the point is to be sent for the Court below to decide upon. The bond on the face of it is not a bond of indemnity, and the burden of proof is on those who say that it is a bond of indemnity. After this intimation of our opinion, I agree that the matter should be remitted to the Master of the Rolls, that he may deal with it as he may see fit.

Order reversed, and the cause remitted accordingly.

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[430]

APPEAL

FROM THE COURT OF EXCHEQUER IN IRELAND.

The Hon. EDWARD MULLINS and others,—*Appellants*; against JOHN TOWNSEND, Esq.,—*Respondent*.

[Mews' Dig. i. 354: xi. 70: xiv. 877: S.C. 5 Bli. N.S. 567.]

Certain estates were devised to A. for life, then to B. for life, then to the sons of B. in tail male. During the tenancy of A., a bill was filed by a creditor of the testator for a sale of part of the estates. No inquiry into the incumbrances affecting the estates was directed; and the trustees for the tenants in tail were not made parties to the suit. The lands were sold, and a conveyance exe-

cuted by the officer of the Court, and by A., and subsequently (though not till after a compromise had been effected), by B.; and the residue of the purchase-money was ordered to be invested for the benefit of A. Held, that the bill was defective for want of proper parties; and the whole transaction was properly set aside after the death of the two tenants for life, and at the suit of the first surviving tenant in tail; and that the accounts were properly directed to be taken from the period of the death of the second tenant for life.

Where a Plaintiff in a Bill is abroad on foreign service with his regiment, the Defendant, who might have pushed on the proceedings, cannot, on the Plaintiff's return some years afterwards, discharge the Bill on account of the delay.

When a Defendant in a Bill thinks he can rely on an objection of want of parties to the Bill, he must make that objection in the Court below, and will not be allowed to make it for the first time when the Case comes before this House on appeal.

Maurice Fitzgerald, of Kerry, Esq., by a Will, dated the 7th October 1774, and by Codicil thereto, dated 26th May 1776, charged his real estate with payment of his debts, and devised all such real **[431]** estates as he should die possessed of, (in case he should die without issue), to St. Leger St. Leger, afterwards Lord Doneraile, and John Townsend, Esq., in trust for the use of Lady Anne Fitzgerald, the testator's wife, for life: remainder to Richard Boyle Townsend, testator's only nephew, for life; remainder to the first and other sons of the said Richard Boyle Townsend, in tail male; with power to the said Richard Boyle Townsend to charge the said estates with a jointure not exceeding £300, and with £3000 as portions for younger children. The testator died in June 1779, leaving Lady Anne, his widow, and Richard Boyle Townsend, his heir-at-law. Lady Anne, as sole executrix, proved the will. On the 14th of May 1784, Richard Boyle Townsend married Henrietta Newenham, and by a settlement of that date conveyed the lands in Kerry to the trustees named in Maurice Fitzgerald's will, upon trust to pay £300 per annum to Henrietta, his intended wife, in the event of her surviving him, and to raise £3000 as portions for younger children. The present Respondent was the eldest surviving son of that marriage, and there were younger children. Shortly after the decease of the testator, Thomas Mullins, afterwards Lord Ventry, the father of the Appellants, filed his bill against the said Lady Anne Fitzgerald, Richard Boyle Townsend, and the trustees created under the deed of settlement made on Maurice Fitzgerald's marriage, and charged that the said Maurice Fitzgerald had been indebted to him in various sums of money; and that the said Lady Anne alleged that the said Maurice Fitzgerald had not left sufficient personal fortune to discharge the said demands; that the trustees under former settlements alleged that there were previous outstanding debts not then satisfied; and he therefore prayed for an account of the **[432]** personal fortune of the testator, and of the debts due by the testator at the execution of his marriage settlement; and that a sale of a sufficient part of the real estates might take place to satisfy the demands of the said Thomas Mullins and other creditors. St. Leger St. Leger, and John Townsend, the trustees under the will of the said Maurice Fitzgerald, were not made parties to this suit, nor was a trustee under a former deed executed for the purpose of raising portions for younger children. Lady Anne put in an answer, contesting the validity of the demand made by Thomas Mullins; and for nearly two years that suit was not proceeded in. A decree similar to that which had been prayed for by Mullins was obtained by another creditor; but Mullins did not prove his demand under that decree. In April 1782 he prosecuted his own suit, and obtained a decree, by which certain accounts, prayed by his bill, were directed; but no account of the incumbrances affecting the real estates of the testator was ordered. The present Respondent charged in his original bill filed in the Court of Exchequer in Ireland, that this omission was designed to conceal from the Court the want of proper parties. In July 1783 the proper officer of the Court made his report, stating that the testator, Maurice Fitzgerald, died seised of certain real estates in the county of Kerry; but that no evidence was laid before him as to the personal estate of the testator; that the testator was, at his death, indebted to the said Thomas Mullins, on bond and by judgment, for principal interest and costs, in the sum of £1275; and that there were various sums due to other persons mentioned in his report. It was afterwards ordered that

Lady Anne should, in six months, pay the sums reported due, or, in default, that the lands, or a competent part thereof, should be sold by the officer of the Court for the benefit of Mullins and the other creditors. [433] This decree was afterwards made up and enrolled; and the following words were inserted in the enrolment: "And the remainder, if any, of the purchase-money, he, the said officer, is to pay over to the said Lady Anne Fitzgerald, upon her making out a good and sufficient title to such person or persons as shall be declared the purchaser or purchasers of the said lands and premises." At the time of this decree there was no tenant in tail under the will of Maurice Fitzgerald *in esse*, Richard Boyle Townsend, the tenant for life in remainder expectant on the death of Lady Anne, being then unmarried; but before the sale was effected, Richard Boyle Townsend, having intermarried with Henrietta Newenham, an eldest son, (since deceased without issue), and the Respondent, were born. The lands were put up to sale in May 1786, and afterwards, in July of the same year, (the first sale having been set aside); and at the second sale they were purchased by Thomas Rice, on behalf of Thomas Mullins, for £5050; and on the following day an order was made, that on the creditors signing receipts for their demands, and Rice paying the balance of the purchase-money into the Bank, the officer of the Court should execute a conveyance of the lands to Thomas Rice. The receipts were signed, the balance paid into the Bank, and the officer of the Court and Lady Anne executed the conveyance; but though R. B. Townsend was named a party in it, he did not execute it. In June 1788, R. B. Townsend made a motion in the Court to set aside the sale, alleging, among other reasons, that the lands had been sold at a gross undervalue. On account of the absence of Mullins, this motion stood over till the following term. The Respondent alleged, that between June and November a negociation took place between R. Boyle Townsend and Mullins, in consequence of which the former [434] agreed to accept £500 for himself and £100 for his attorney, and to discontinue his opposition to the sale; that the said money was paid; that Mullins afterwards put in an affidavit in answer to the motion, and that this affidavit remaining without reply, the Court believed the motion had been abandoned, and it was ordered to be discharged with costs, which costs were never demanded of the said R. Boyle Townsend, who shortly afterwards executed the conveyance to Rice as trustee for Mullins. In 1805, the Respondent obtained a commission as cornet in the 14th Dragoons; and shortly afterwards, by the death of his elder brother unmarried, he became entitled, as first tenant in tail under the will of Maurice Fitzgerald. In January 1808, having become acquainted with the circumstances attending the sale of the estate, he filed two bills against Thomas Mullins (who had in the mean time been created a Peer by the title of Lord Ventry), praying that the sale might be set aside; that Lord Ventry should be ordered to re-convey the estate to a trustee for the lives of Lady Anne Fitzgerald and Richard Boyle Townsend, with remainder to the Respondent in tail male, remainder to the younger brothers of the Respondent in tail male, according to the provisions contained in the will of Maurice Fitzgerald. In July 1808 Lord Ventry answered the bill; and in May 1809, the replication was filed. In October 1808 the Respondent was ordered upon foreign service, and he continued abroad with his regiment in Europe or America till 1823. In December 1823, having obtained leave of absence for the purpose, he filed his amended bill. In January 1824 Lord Ventry died without having answered it. Bills of revivor were then filed; and in the mean time Lady Anne Fitzgerald, and Richard Boyle Townsend, the Respon-[435]-dent's father, both died. The cause came on for hearing, and on the 11th May 1827 the Court decreed, that the Orders made in April 1782, and in July 1783, should be set aside for want of proper parties; but that the accounts taken in that cause should not be taken over again; that the sale of the lands in July 1786, and the supposed confirmation thereof, should be set aside as void as against the Respondent; that the deed of conveyance under that bill should be delivered up to be cancelled; that the lands in question should be re-conveyed to the uses of the will of Maurice Fitzgerald, discharged of all claims on the part of the representatives of Lord Ventry; that the Respondent was entitled to the rents, etc. from 22d November 1826 (the day of the death of Richard Boyle Townsend), upon payment of the sum of money for which the lands were sold, with interest, calculated at six per cent., from the death of the said R. B. Townsend, and that accounts should be taken between the parties, etc.

From this decree the Appellants appealed to the House of Lords, insisting, among other reasons, on the legality and fairness of the whole transaction; declaring that in the suit instituted by Thomas Mullins, in the Court of Exchequer, there was no defect of parties; that it was contrary to the practice of courts of equity to declare former decrees erroneous merely for the want of proper parties, when the persons seeking to set them aside had either been themselves parties or had had their interests properly represented; that the Respondent not having been born when the said decrees were pronounced, was fully and effectually bound thereby, the person in whom the first estate of inheritance was vested having been before the Court. The Respondent prayed the House to affirm the decree, on the grounds that the trustees under the will of [436] Maurice Fitzgerald, for persons not *in esse*, were not parties to the original cause; that the Respondent's elder brother, who had been previously born, was not in any way made a party to that cause; that the decree of 1783 directed a sale of the lands without directing any inquiry as to the incumbrances affecting the same; and directed the residue, if any, of the purchase-money, to be paid to Lady Anne Fitzgerald, who was only tenant for life; that the said decree was otherwise beneficial to the tenant for life, to the prejudice of the remainder-man; that it did not direct any inquiry as to what part of the estate was most fit to be sold; and that the sale in question, and its supposed confirmation, and all the circumstances attending the same, were a fraud upon the Court, to the prejudice of the Respondent and his then elder brother, who were at that time infants.

The case having been heard at the bar of the House of Lords:

Lord Lyndhurst delivered Judgment: This was a case arising out of a bill filed in the Court of Exchequer in Ireland, and the object of the bill was to obtain an account of the personal estate of Maurice Fitzgerald, deceased, and for the sale of a sufficient portion of his real estate as would pay the debts he owed at the time of his death. The decree obtained in 1783 had directed an account of his estate, but there were no directions given to find what were the incumbrances on the estate. There was a sale of a sufficient portion of the real estate for the purpose of satisfying the bill, but there was this extraordinary circumstance connected with it, that there was an order, that after payment of the debts the surplus should be paid over to the tenant for life. His Lordship was of opinion that the whole proceeding [437] was full of irregularity: in the first place, there were not the proper parties to the bill; in the next place, there ought to have been an account of the incumbrances upon the estate; and in the third place, there ought not to have been this order to pay over the surplus to the tenant for life. That part of the order had not been executed; it was, therefore, unnecessary that he should trouble their Lordships with any further observations upon it: but that to which he wished to direct their attention was matter of quite a different description. When the estate was put up to sale, it was purchased by the Plaintiff, Mullins. A person named Thomas Rice had bought the property in his own name, but in substance and in fact the purchase was made for Mullins. He was satisfied that the estate had been sold under the value as it existed at the time of the sale. An application was made after the sale, by the tenant for life in remainder, to set aside the sale, and to order a new sale of the estate. According to the practice of the Court of Exchequer in Ireland, that application might probably have been successful, had it been persisted in, but it happened that the parties were not all in Court. The cause was entered for hearing in one term, but the order for the hearing was enlarged till the following term, on account of the absence of the purchaser, who happened to be away from town. The delay afforded an opportunity for an arrangement between the parties, and the tenant for life in remainder agreed with Mullins to withdraw his objection if he obtained for himself a sum of £500, and for his solicitor a sum of £100. The objection was carried forward in form, but it was not really prosecuted, and was ultimately abandoned. The Court below, when the circumstances were brought before it by the Plaintiff in the present suit, was of [438] opinion, on these facts, that this was a fraudulent transaction as against the persons in remainder, who were then infants of a very tender age; and what made it more objectionable was, that their trustees were not parties to the suit. The present suit was instituted by the first tenant-in-tail in remainder, after the parties had become of age, for the purpose of setting aside this transaction. An objection was now made to this, that the suit was not prosecuted with due diligence. The suit was instituted in 1808, and

was not prosecuted till the year 1823. The objection did not lie with the Defendant Mullins, who had an opportunity of pushing on the suit; besides which, it seemed to his Lordship that there was an excuse for the Plaintiff, for he was in the Army on service abroad. There was, therefore, no objection to the claim of the present Respondent, the Plaintiff in the suit, upon that ground. Another objection made in this appeal was one founded upon a point of form, that certain parties ought to have been made parties to this suit who were not put in the bill as parties. It was said, that they were out of the jurisdiction; but it was alleged, on the other side, that there was no evidence of that. It was true there was no such evidence, but then it seemed to him that this objection ought to have been made in the Court below, and it was too late to make it in the first instance when the case came before that House on appeal. There was another objection arising upon the form of the decree itself, that it was to take effect only from the date of the death of the tenant for life in remainder, and the account was only ordered to be taken from that period. That was a favourable mode of framing the decree for the Appellants; but even if it had not been so, the parties below had not intimated their desire that the whole transaction should be unravelled from **[439]** the beginning. Under these circumstances it was only necessary that the transaction should be examined from the death of the second tenant for life, and consequently from the commencement of the interest of the Respondent. His Lordship therefore moved that the Judgment be affirmed: and it was accordingly affirmed, with costs.

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[440]

APPEAL

From the Irish Court of Chancery.

MACCABE,—*Appellant;* CATHERINE HUSSEY,—*Respondent.*

[Mews' Dig. i. 348: vii. 225. S.C. 5 Bli. N.S. 715. Distinguished in *Banco de Portugal* v. *Waddell*, 1880, 5 A.C. 170.]

Maccabe, an Irish barrister, becomes casually acquainted with Mrs. Hussey, a widow lady, possessed of some property of her own, and having large expectations from an aunt. Maccabe acquires her confidence, and engages in the management of her affairs, and persuades her to give him a deed of gift of a third of the aunt's property. When that property comes into possession he persuades her to transfer to him one-half of it for himself, and also the other half to be managed by him on her account. He makes misrepresentations to her about her son, and as to other matters, and prevails upon her to execute a release to him. Mrs. Hussey at length calls for an account, which he refuses to render. She offers him a full discharge if he would pay her the two-thirds of her property, calculated by her at £21,000. He refuses. She files her bill in Equity, and the deed of gift and release are set aside, as having been obtained by fraud and undue influence and misrepresentation, and Maccabe decreed to refund £36,500 to Mrs. Hussey. This decree affirmed on appeal.

Semble. That the Lords, although a Court of Appeal, may and do look at evidence which has been rejected below, to see whether, if admitted, it ought to have made any difference in the decree, and that although they should be of opinion that it should have been received below, yet if they should at the same time be of opinion that if received it ought to have made no difference in the decree, they will not remit.

In 1812 the Respondent, Catherine Hussey, a middle-aged widow of some property, resided and let lodgings at Maida Hill, Paddington, when she became **[441]** acquainted with the Appellant. An aunt of Respondent, a Mrs. Bowyer, resided at Worcester, and with that aunt resided another aunt of hers, a Mrs. Brewer, who was old and infirm, and possessed of large funded property. The Appellant, an Irish law student, became casually acquainted with the Respondent in 1812, and in 1813

took lodgings at her house, and soon obtained her confidence, and was consulted by her about her affairs. The Appellant also persuaded her that he was a relation of hers, and, in a year after their acquaintance, assumed the name of "Jennings," Respondent's maiden name, and still further to convince her of the relationship, he addressed her as his aunt, and at his desire she called him nephew.

The Appellant was called to the Irish Bar in 1814, and, in that year, took with him to Ireland, to complete his education at Trinity College, Dublin, an only son of Respondent, Thomas John Hussey, who had been educated at Eton. In 1814 Peter Maccabe, a brother of the Appellant, came to London, and resided for some time in Respondent's house, and from that time till 1818 took an active part in the management of her concerns along with the Appellant.

In January 1818 Mrs. Bowyer died, and consequently Respondent would become alone entitled to the whole of the property of her aunt, Mrs. Brewer, in case she died intestate. The Appellant persuaded her to take out a commission of lunacy against Mrs. Brewer. The commission was taken out, and Mrs. Brewer was found a lunatic, and to have been so from February 1816; and the whole of her funded property, amounting to about £50,000, was transferred to the account of the Accountant-general of the Court of Chancery. The Appellant further persuaded the Respondent to get herself appointed committee of Mrs. **[442]** Brewer, and to facilitate the arrangement it was agreed that a brother of Appellant, Francis Maccabe, who had just obtained his license as surgeon, should reside with the Respondent and Mrs. Brewer, at a salary of £200 a year. The Respondent was accordingly appointed her aunt's committee, and Francis Maccabe came to reside with her. From 1814 till 1818 the Appellant, or one or other of his brothers, resided with the Respondent at Worcester, to which she had removed in 1815, persuading her that it was necessary to do so in order to counteract the hostile intentions of Mrs. Bowyer, in regard to Mrs. Brewer's property, and her cruel treatment of Mrs. Brewer, and the Respondent was persuaded to promise to give the Appellant one third of Mrs. Brewer's property whenever it should come to Respondent, the Respondent being then ignorant of the amount of her aunt's property, while the Appellant was well acquainted with it by a correspondence with her solicitor.

The result was, that a deed of gift was prepared by the Appellant, and engrossed by his brother, Francis Maccabe, on stamped paper, and this deed, dated the 9th May 1818, was executed by the Respondent in the presence of the Appellant and his brother, Francis Maccabe. The deed proceeded on the following narrative:

"I, Catherine J. Hussey, late of Maida Hill, Paddington, and now of Worcester, have solemnly determined many years ago, to give or bestow one half of the property I then possessed to my ever valued and truly steadfast friend, J. P. Maccabe, esquire, barrister at law, who resides in Dublin. I accordingly, in October 1813, placed the whole of my very limited property in his hands, although he was fully aware of my intentions not at any time to require **[443]** more to be returned to me than the half of the money I gave him. He saw my necessities increased, so that I required and got from him from time to time all and more than I entirely gave him; and instead of my being now his benefactor, I am his debtor, both in money and for the performance of acts of friendship, which for seven years have been constant, but during the last four years in particular unexampled. To educate and properly bring up my only child, T. J. Hussey, had been, from my return from India, after the death of his father there in the year 1799, my only care and anxiety. I had even then but limited means: I taught him myself the first rudiments of learning, and when I had him well prepared, I placed him under the care of the respected Dr. Goodall, at Eton. Although the expense was very considerable, I continued by son at Eton till April 1814. He often alarmed me before, but at this time rendered me miserable indeed: he left me as if to return to Eton after the Easter holidays: took a considerable sum of money from me, and went away, I knew not whither. He enlisted: my hopes were blasted of ever seeing him either respectable in life, or a man of education. I applied to many, but could get no friend to take the slightest notice either of him or of me. I then wrote to beseech Mr. J. P. Maccabe to come to my relief on the occasion. He came in the midst of his business, at his own expense, three times from Dublin to London, once from London to Oxford, where I endeavoured to have my son settled, and with me from London to Worcester, to see my aunts on

the subject; but all exertions utterly failed which were made by him, myself, and every friend I had in the world. How to prevent the most gloomy prospects from being **[444]** realized, I could not devise: I knew my unfortunate boy well and feared the worst. My son's uncle, the late Mr. Edward Hussey, refused to have any thing to do with him. At length, Mr. J. P. Maccabe (although with great reluctance, I admit) consented to bring my son out of England, and received him to his home. He has had him living with him now nearly four years, in his progress through Trinity College, Dublin; and not only on account of Mr. J. P. Maccabe's having thus preserved my child to himself and to me, but for having, by unceasing exertions and the generous assistance, been the means of my continuing during the last three years in Worcester, and thereby protecting the life of Mrs. Brewer, my aunt, so as to entitle me, since Mrs. Bowyer's death, to entertain any future expectations of Mrs. Brewer's property, I do hereby declare, that I feel myself, in the presence of God and man, bound to give Mr. J. P. Maccabe one third of all the property I may at any time get in or be entitled to receive from or by my aunt Mrs. Brewer, either during her life, or after her death. And I do hereby give and grant to Mr. J. P. Maccabe, his heirs, executors, administrators or assigns, all the right and title to the one third of the said property, both before the whole comes into my possession or after I obtain it, that I have now or may at any time acquire. I am fully aware that Mrs. Brewer's property, since she was found a lunatic, has been, according to the return made, nearly £50,000, principally in the public funds; and that as she may not have made a will, and is not likely to be in a state to make one, the whole of this sum, should I survive my aunt Mrs. Brewer, will probably descend to me, I being her next of kin. That I should give nearly £17,000 **[445]** therefore, the third of what I obtain, as soon as I receive it, to Mr. J. P. Maccabe, his heirs, administrators and assigns, may be a matter of surprise to my friends, and of dispute and litigation on the part of my son. My friends are not aware of the extent of my obligations, and my son will act an unwise and ungrateful part if ever he disputes this deed. Let my child, I entreat him, ever remember that property would be but an additional injury to him, had he continued as he had done to go on, on one occasion only for years before Mr. J. P. Maccabe received him. Let my son recollect that I have for nearly five years, in order to maintain my chance of the property which I bind myself Mr. J. P. Maccabe, his heirs, shall with me, be it great or small, share in one third proportion, that is, two thirds to myself and one third to him, his heirs, executors, administrators or assigns, give Mr. J. P. Maccabe almost daily occupation and trouble, besides many, very many, wearisome journies to England at my request. He came over from Dublin to London and Worcester three times at my instance during the last seven months. I have, through the perseverance of my enemies, been obliged to impede and greatly injure Mr. Maccabe in his professional pursuits, and retard his progress; but I have in fact not been able to pay him the costs incurred on my account for travelling so many long and frequent journies. Let my son remember the number and abilities of my enemies, and that it was not alone to Mr. J. P. Maccabe, the barrister, to whom and to his heirs, executors, administrators and assigns, I thus grant one third part of all I may acquire or in any way receive of Mrs. Brewer's property, but through Mr. J. P. Maccabe I am indebted also for the services of his brother **[446]** Mr. Peter Maccabe, without whose perseverance and exertions for me, during three years in London, I could not have remained in Worcester to defeat the scheme of Mrs. Brewer's enemies. Let it also be recollected, that if I be appointed the committee of the person of Mrs. Brewer it will be owing to Mr. Chandless being silenced by the presence of a resident surgeon in the house with me. I am not able to pay one, and yet Mr. Francis Maccabe, the other brother of Mr. J. P. Maccabe, kindly undertook to give up solid advantages and remain with me. I know the whole of the facts and circumstance best, from a thorough knowledge of my son, I am convinced of my opinion, he either would not be now living, or if alive, with no credit to himself or peace of mind to me, if it had not been that Mr. J. P. Maccabe, at the juncture he did, snatched him in a manner from himself. I also well know that I have been enabled through Mr. J. P. Maccabe's means, and the assistance he obtained for me by the aid of his brothers, to preserve from an untimely end my poor aunt Mrs. Brewer. For these great services and trouble for years, the account of which it would be impossible

particularly to detail, for his loss of time and money, and out of gratitude for his undeviating adherence to my interests when my prospects were hopeless, I again repeat, that I most firmly and willingly bind myself to grant to my ever steady and faithful friend," etc. etc.

Mrs. Brewer died on the 30th December 1818, and the whole of her property in the funds was transferred to the Respondent; and the Appellant persuaded her to transfer one half of it to himself, and also the whole or a considerable portion of the other half for the purpose of managing it for her. From this time till 1821, [447] the Respondent resided at Paris or travelled in France and Italy, with occasional visits to England, but always accompanied by the Appellant, or one or both of his brothers, to each of whom the Appellant alleged she had promised to give £3000. In 1820 the Respondent's son sent a solicitor to her to make some representations to her about the Appellant; and the Appellant, being aware of this, made representations to her about the solicitor and her son, which induced her at that time to pay no attention to the statements of the solicitor. The evidence of all this, and other particulars of the same description, was furnished by the correspondence of the parties, in the course of which the Appellant addressed the Respondent as dearest aunt, and desired her to address him as her dearest nephew.

In 1822 the Respondent came to England, and insisted on having an account of her property from the Appellant, having before, in 1821, applied for the account without effect. The Appellant still refused to give the account, and peremptorily claimed one half of the property for himself. The Respondent, then calculating that the sum due to her in respect of her two thirds was about £21,500, had the Appellant arrested for that sum. It ought to have been before stated, that after the transfer of the stock as before mentioned, the Appellant, and the Respondent at his suggestion, executed mutual releases, dated the 13th May 1819. The Appellant intimated that he would plead this release to the action; and on the 8th June 1822 the Respondent filed her bill in the Irish Court of Chancery for an account, and charging fraud, misrepresentation and undue influence on the part of the Appellant. After answers, amended bills, making Francis and Peter Maccabe parties, and answers to the amended bills, witnesses were examined, and among the rest Peter [448] Maccabe was examined for the Appellant, but his evidence was rejected by the Judge on the ground that he was an interested party.

On the 12th February 1827 the cause came on for hearing, when the Appellant applied for some delay, and this was granted on his engaging to give security in £22,000 not to leave Ireland before decree should be pronounced. This security he did not give; and the Respondent, on the 21st February, applied for a *ne exeat regno*, or an attachment. An order was made for the attachment to issue, and Appellant, to avoid it, went to France, taking the property with him.

The cause came on to be heard before Lord Manners, then Lord High Chancellor of Ireland, on the 7th day of May 1827, who, after having heard the same argued at great length before him on the 8th, 9th, 10th, 11th, 12th and 14th days of the same month, and after having rejected the evidence of the Respondent Peter Maccabe, taken on behalf of the Appellant as aforesaid, was, on the 18th June 1827, pleased to decree, that the said deed of the 9th of May 1818, and also the said release of the 15th of May 1819, should be, and the same were thereby declared to have been respectively obtained by Appellant by undue influence and imposition from the said Respondent Catherine Hussey; and it was thereby ordered and decreed, that the same should be set aside accordingly, and that the transfers made by the Respondent Catherine Hussey to the Appellant, on the 8th and 12th days of May 1819, of one moiety of the stocks and funds in the pleadings of this cause mentioned, should be, and they were accordingly, decreed to have been obtained by the Appellant from the Respondent Catherine Hussey, by undue influence and imposition, and that the same should be set aside. The decree proceeded to [449] direct the proper accounts to be taken; and the Master having taken the accounts, reported that a sum of £44,113 was due from the Appellant to the Respondent. To this report exceptions were taken, and by a final decree, made on the 17th March 1830 by Sir A. Hart, Lord Chancellor of Ireland, the balance due to the Respondent was declared to be £36,444.

From these decrees the Appellant appealed. The Respondent submitted that the decree ought to be affirmed for the following among other reasons:

1st. Because the said deeds of the said 9th day of May 1818, and of the said 15th day of May 1819, were respectively obtained by the Appellant from the Respondent Catherine Hussey, by undue influence, fraud and imposition; and also because the said transfers made by the Respondent Catherine Hussey to the Appellant on the 8th and 12th days of May 1819, of one moiety of the stocks and funds in the pleadings in said cause and hereinbefore mentioned, were respectively obtained by the Appellant from this Respondent by undue influence, fraud and imposition: and also because the Appellant, by such means as last aforesaid, on or about the 14th of May 1819, caused the other moiety of this Respondent's said stocks and funds in the pleadings of the said cause and hereinbefore mentioned, to be sold, and the produce thereof to be paid to him.

2d. Because the Appellant, long before and at the time of the making of the said deeds and transfers, and obtaining possession of the said Respondent's money as aforesaid, had been and then was acting as the agent of, or had been and then was professionally concerned for and giving his advice as a barrister to said Respondent: It being a well known and long established principle of law and equity, that an agent or professional person, during the continuance of his agency or **[450]** employment, cannot receive any gift or release from his principal or client, even though fairly and properly made to him; and particularly not in a case like this, when such alleged gift and release were obtained under circumstances of such fraud, undue influence, and imposition as aforesaid.

3d. Because at all such times as last aforesaid, the Appellant had large sums of money of the said Respondent in his possession or under his control; and Respondent was unable to obtain any sums of money whatever from him without first doing as he directed or advised her, and was not therefore a free agent, being completely under the power and influence of the Appellant.

4th. Because the said sum of £3000 was obtained by the Appellant from this Respondent by undue influence, fraud and imposition; and that having no authority to pay the same over to the said Francis Maccabe, or doing so only to prevent said Respondent from recovering the same, he the Appellant was not entitled to have credit given him for the same.

5th. Because Respondent Peter Maccabe's evidence was properly rejected, he being an interested witness: having been throughout concerned and mixed up with the Appellant in deceiving and defrauding the Respondent Catherine Hussey, and obtaining her property from her, for the Appellant said Francis Maccabe and himself, some or one of them.

6th. Because the evidence and facts laid before the Court of Chancery did warrant the overruling the said three exceptions, and the making the other directions and adjudications made by the said decree of the 11th day of August 1829; and particularly the letting the Respondent, Catherine Hussey, take the said judgment debt of £3600 in part satisfaction of her de-**[451]**-mands against the Appellant, and the declaring that she had a specific lien on the said two annuities for the said sum of £3000; such said evidence and facts having clearly proved that the monies with which the said judgment debt and the said two annuities had been purchased, were part of the produce of the said stocks and funds so as aforesaid obtained from Respondent by Appellant.

Lastly. Because, under all the circumstances of this case, great fraud, imposition, and much undue influence, were practised upon this Respondent by the Appellant and his two brothers, said Francis Maccabe and Respondent Peter Maccabe, some or one of them; and because the said two decrees of the said 18th of June 1827, and of the said 11th of August 1829, are consistent with equity and justice.

It was argued for the Appellant, at the Bar of the Lords, that Peter Maccabe's evidence ought not to have been rejected, and that if their Lordships were of that opinion they could not look at that evidence to see whether its admission ought to make any alteration in the decree, as their Lordships were an appellate and not an original jurisdiction, and must remit the cause to the Court below. It was also argued that there was no imposition, as the Respondent was not likely to be imposed upon, being addicted to literature, and a strong-minded woman.

Lord Chancellor: If she had been so, when the Appellant desired her to call him "dearest nephew," she probably would have called him "dearest uncle."

Lord Chancellor (12 Oct. 1831): Notwithstanding the able argument for the Appellant, I have no manner of doubt about [452] this case. If it were before a jury I have no doubt they would find a verdict against the Appellant without turning round in the box. The actual transition of the Appellant from his profession to attach himself to this lady in the manner he did speaks volumes. First, he desires that she call him, My dear Sir; and then the lady, *inopia concilii*, promotes him to the rank of nephew, at his own desire; and at his own request she advances him to the title of My dearest Nephew, and he addresses her by the title of My dearest Aunt, although she was no more his aunt than I am. I have looked closely into the facts of the case, in order to ascertain whether there was any consideration for this extraordinary confidence and liberality, and I find it stated that he had reclaimed a lost son of this lady, and brought him up as a respectable man; but I find also that there was great misrepresentation on his part as to the conduct of the son. This somewhat resembles the case of Huguenin and Basely, 14 Ves. 273, where Basely misrepresented to Mrs. Huguenin the conduct of her solicitor, in order to get the management of her affairs into his own hands. But there are abundant facts without that to support the judgment, such as the transferring the lady's stock into his own name, and a variety of other facts, even although the evidence of Peter Maccabe should be admitted, although I am of opinion that his evidence was properly rejected.

It was ably argued by the Solicitor-General, that if your Lordships should be of opinion that the evidence was improperly rejected, you cannot look at it so as to affect your judgment one way or other, but must send it back again. But this House, sitting as a Court of Equity, often does look to evidence which has been rejected, in order to see whether, if admitted, it could affect their judgment. This is not like an application [453] for a new trial in a court of law, for there the Court cannot say, suppose the evidence had been admitted, it would make no difference in our judgment: but the reason is, that they are not judges of fact, but the jury. But sitting here as a Court of Equity, we are in a situation much nearer to that of the Court below, being judges of fact as well as of law. But even courts of law do exercise a discretion as to allowing new trials, for if they can get light enough to see that there will be no use in sending the case to a new trial, they will not send it, on the obvious principle of avoiding unnecessary litigation. I advise your Lordships therefore to affirm the judgment; but I do not propose to give costs, and for this reason, that under the circumstances it rather did the Appellant honour to court further investigation.

Judgment affirmed.

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[454]

APPEAL

From the Court of Session.

MACNEIL,—*Appellant;* JOLLY and Wife,—*Respondents.*

In a case where, in 1811, a written agreement had been obtained to discharge an heritable bond on which interest was due from 1792, which agreement was reduced as fraudulent, the Court of Session, in an action on the bond, adjudged that the simple interest from 1792 to 1811 should be turned into principal, and that on the accumulated fund from 1811, till payment, interest should be charged on biennial rests. But this judgment was reversed by the House of Lords; the ground of the reversal, as stated in the subsequent case of *Napier* v. *Lady Gordon*, being the biennial rests.

In August 1787, Daniel Macneil, of Gallochilly, granted for value, to Doctor Macneil, of Stevenson, a bond for £1000, with disposition in security of his estate at Gallochilly. In 1811, Hector Macneil, Appellant's brother, who had succeeded Daniel Macneil, his father, prevailed on Doctor Macneil to sign an agreement to grant him a discharge of all bonds and claims in respect of a debt then amounting to £3000, in consideration of a bill for £230, and of a bond for payment to the

Doctor of an annuity for the Doctor's life of 7½ per cent. on the debt. Doctor Macneil was then between seventy and eighty years of age, and although capable of managing his own affairs, had exhibited symptoms of imbecility, aggravated by a habit of dram drinking.

Doctor Macneil's law agent, on hearing of this [455] transaction, wrote, by the Doctor's desire, to Hector Macneil to have the writing delivered up to be cancelled, but Hector Macneil refused, and brought his action against Doctor Macneil to have the agreement implemented, and thereupon the Doctor conveyed the debts in question to Messrs. Moir and Bridges, the one his law agent, the other his confidential friend, as his trustees, and they brought an action in their own names and that of Doctor Macneil for reduction of the agreement.

In June 1814, the Lord Ordinary pronounced an interlocutor in both actions, which, as containing a brief but distinct statement of the facts and grounds of judgment, is here given entire.

"The Lord Ordinary (Alloway) having heard parties' procurators at great length, and made avizandum to himself with the processes and productions, and having considered the same, conjoins the process at the instance of Hector Frederick Macneil, Esq. of Gallochilly, against Dr. James Macneil, of Stevenston and Neilhall, with the action of reduction at the instance of Walter Moir, accountant, and David Bridges, merchant in Edinburgh, trust-disponees and assignees for behoof of the said Dr James Macneil, against the said Hector Frederick Macneil, of Gallochilly, Esq.; and, in the said process of reduction, finds it asserted, upon the part of the Pursuers, that Dr. Macneil is about eighty years of age, although, from his having been born in a part of Ireland where no register of baptisms had been kept, his precise age is not exactly known; and finds it not denied by the Defender, that Dr. Macneil is a man far advanced in years: Finds, that the missive under reduction, dated 25th De-[456]-cember 1811, contains an agreement to the effect, that, as the Defender had that day given the Doctor his bill for £230 sterling, payable three months after date, which was to be deducted from the account due by the Defender to Dr Macneil, he thereby agreed to free the Defender from all bonds and other claims that he had against the Defender, on condition of his granting him a bond of annuity, during his life, for a sum equal to 7½ per cent. of the balance: Finds, that Dr. Macneil having, on the very day on which the missive was written, communicated the scroll thereof, as delivered to him by the Defender, to Walter Moir, accountant, now acting as one of his trustees, that gentleman, upon the same day, wrote to Gallochilly's agent, that 'the Doctor had been just mentioning to me something of an arrangement, to be gone into by Gallochilly and him, the meaning or effect of which he does not seem to have any idea of;' and that this letter was followed by a protest, upon the 28th December 1811, on the part of the present Pursuers, as trustees for Dr. Macneil, against the Defender and his agent, demanding delivery of the agreement, as having been totally misunderstood by Dr. Macneil, and offering back the promissory note for £230 sterling: Finds, that there was no person present, upon the part of Dr. Macneil, at the time this agreement was entered into, although there was a man of business present on the part of the Defender, and who is the writer of the missive in question, which is a probative document, in terms of the act 1681: Finds, that the Defender kept this missive of agreement, and gave Dr. Macneil a scroll, not probative, whereby the Defender had it in his power, by destroying the probative document in his possession, [457] to put an end to all legal evidence of its existence, whereas Dr. Macneil had no document whatever from which the agreement could have been legally authenticated: Finds, that the accounts were not adjusted, nor was the amount of the balance due by the Defender to Dr. Macneil ascertained at the time this missive was entered into: Finds, that the agreement affords no presumption of any intention upon the part of Dr. Macneil to abate any part of his claim, nor to pass from any part of it as doubtful; but, on the contrary, to convert the whole balance of principal of whatever remained, after the payment of £230, into an annuity at the rate of 7½ per cent., which it is said the Doctor understood to be a perpetual annuity, whereas the missive in question bears that it was only an annuity during his life: Finds, that an annuity, at the rate of 7½ per cent., to a man of so great an age as Dr. Macneil, was a most unequal and unfair transaction, as the life of Dr. Macneil, at his age, was not insurable; and 2½ per cent. above the ordinary interest afforded

no compensation for the sinking of the principal for such an annuity during the Doctor's life: Finds, that a large part of the debt due by the Defender to Dr. Macneil was secured by heritable bond and infeftment; whereas this agreement for sinking the balance into an annuity does not even stipulate heritable security for the payment of that annuity, in lieu of the heritable debt, which was to be thereby extinguished; and therefore, in the whole circumstances of the case, reduces, decerns, and declares, in terms of the libel: And, in the action of Hector Frederick Macneil against Dr. Macneil, for the implement of the said agreement, assoilzies him from the conclusions [458] of that action; and, in both actions, finds the said Hector Frederick Macneil liable in expenses, of which allows an account to be given in, and decerns."

To this interlocutor the Court adhered; and, on appeal, the judgment was affirmed in the House of Lords, (March 1824).

In 1817 Dr. Macneil died, leaving a deed of settlement of the whole of his property in favour of the Respondent, Mrs. Jolly, his natural daughter and only child. In the same year, previous to his death, the trustees brought their action, (February 18, 1817), on the heritable bond, against the Appellant, Malcolm Macneil, as representing his father and brother, for payment of the debt, and interest thereon since 1792. After the death of Dr. Macneil, and the judgment of the House of Lords in the original actions by and against Hector Macneil, the Respondents, Mr. and Mrs. Jolly, obtained from the trustees a disposition and assignation of the debt, and sisted themselves as Pursuers. When the matter came to be discussed, the Respondents insisted that the simple interest, due from 1792 till 1811, should be turned into principal, and that, from 1811 until payment, compound interest should be charged on the accumulated fund. The Lord Ordinary (Eldin), pronounced the following interlocutor (12 Nov. 1825): "Having considered this minute and answers, replies and duplies, and whole process, repels the claim of the Pursuers for compound interest on the heritable debt libelled, and decerns; and appoints them to give in a state of the sum due under the heritable bond, with simple interest."

This interlocutor the Respondents brought under the review of their Lordships of the first division of the Court of Session, by a reclaiming note, which was or-[459]-dered in due course to the roll, and came to be advised of this date, when the following interlocutor was pronounced: "The Lords having resumed the consideration of this note, and heard the counsel for the parties, they alter the interlocutor of the Lord Ordinary complained of: Sustain the claim of the Pursuers for compound interest on the heritable debt libelled: Find that the Pursuers are entitled to have the bygone interests, at the rate of five per cent. per annum, accumulated on the 25th day of December 1811 years, with the principal sum, and also to have the same and accruing interests, accumulated at the foresaid rate at the end of every two years thereafter, until the whole are paid up."

From this judgment, in as far as regarded the accumulation and compound interest, the Appellant appealed to the House of Lords for the following among other reasons:

I. The judgment of the Court, ordering the bygone interest to be accumulated with the principal sum contained in the bond, upon the 25th December 1811, and awarding compound interest by biennial rests since that date, is disconform to the grounds of action, and *ultra petita* of the summons itself.

II. Lord Alloway's interlocutor of 4th December 1814, decerning for the principal sum and interest as libelled, having been acquiesced in, and suffered to become final by the Pursuers, the subsequent demand for compound interest was incompetent.

III. Accumulation of compound interest upon a loan of money is contrary to the established rules of the law of Scotland.

For the Respondents it was contended that the judgment ought to be affirmed, for the following among other reasons:

[460] I. With regard to the first point, which is, the accumulation of interest, the Respondents apprehend they are clearly entitled to it, as ordered in the interlocutor appealed from; because, while such accumulation is in no respect contrary to law, it is plainly due in equity, considering the circumstances of the case, and, particularly, that payment of the debt has been so long withheld, in consequence of the illegal and fraudulent conduct of the original Defender, Hector Frederick Macneil.

II. In any circumstances there can be no doubt of the Respondent's right to have the accumulation sustained to the full extent of the principal sum and interest and penalties concluded for in the bond; these penalties being a part of the debt, as constituted by the bond itself, and there being no reason for restricting the penalties, which are below the amount of the interest as accumulated by order of the Court.

III. The interlocutor of the Lord Ordinary, of the 10th of July 1828, granting interim decree for £3300, ought, as the Respondents humbly conceive, to be affirmed: in the first place, because the Appellant is barred from the review of that interlocutor by appeal; and, in the second place, because the interlocutor, on its own merits, is unobjectionable.

For the Respondents were cited the cases of *Hamilton* v. *Marshall*, 25 February 1813; *Montgomery* v. *Wauchope*, 4 Dow, 133; *Raphael* v. *Boehm*, 11 Ves. 92; *Duke of Queensberry's Executors* v. *Tait*, Fac. Col. 23 March 1822.

For the Appellant the following cases, Scotch and English, were cited: *Macadam* v. *Creditors of Campbell*, Mor. Dict. 10,051; *Fraser* v. *Hamilton*, Mor. Dict. 564; *Lady Braid* v. *Earl of Kinghorn*, Mor. Dict. 16,411; *Dun* v. *Colquhoun*, Mor. Dict. 16,436; *Camp*-[461]-*bell* v. *Earl of Galloway*, Mor. Dict. 3d March 1802; *Hamilton* v. *Marshall*, February 1813; *Montgomerie* v. *Wauchope*, 1812, 1813; *Duke of Queensberry's Executors* v. *Tait*, Fac. Coll. 23d March 1822; *Raphael* v. *Boehm*, 11 Ves. 92; *Thornhill* v. *Evans*, 2 Atk. 331; *Waring* v. *Cunliffe*, 1 Ves. 99; *Few* v. *Earl of Winterton*, 1 Ves. 451.

The cause was heard on the 10th and 14th of December 1830, the Lord Chief Baron Alexander sitting for the Lord Chancellor; his Lordship, not being a Peer, was precluded by the forms of the House from stating the grounds of his opinion on the case: but the judgment of the Court below was reversed.

(In a subsequent case, *Napier* v. *Lady Gordon*, it was stated that the ground of the reversal was the biennial rests.)

(*Note.*)—In *Napier* v. *Lady Gordon*, 3d October 1831, it was decided by the Lords, affirming a decision of the Court of Session, that where a person purchased an estate, the price of which bore interest from 1813, and the purchaser did not pay, on account of his not certainly knowing to whom payment should be made, and in 1821 brought his action of multiplepoinding to have that point ascertained, but without consigning the money into Court, he was bound to pay interest on the principal, and on the interest accumulated from 1813 till the date of the citation in 1821, until the money should be paid. The following observations of the Lord Chancellor (Brougham) will explain the ground of this.

Lord Chancellor: The party refusing payment on the citation has put himself in *mora*, and, under the Scotch law, is just as much liable to pay interest on the interest due at that time as on the principal, or any [462] other debt due from one man to another. In England the case is different.

One word with respect to the particular form of the action. I entertained, as your Lordships may remember, some doubt whether the case of multiplepoinding was not different from an ordinary action; for in an ordinary action you are in *mora* if you do not pay, because you know when you are to pay; but not so with respect to an action of multiplepoinding. The answer to that is what I flung out at the time, and on which I have had some communication with the learned persons on the bench in Scotland. The opinion which I had taken up, perhaps on slight grounds, is completely confirmed—that the principle of *mora* holds as good in an action of multiplepoinding as in an action of another nature. An action of multiplepoinding puts the party who does not pay in *mora* as much as any common action, because he has only to consign. There is a provision as to that, I understand, although I was not referred to it, in the 53d Geo. 3. I have since looked into that statute, from a reference in one of the printed cases, and I find that the party is safe on consigning the money into Court; and that from the time of consignment he is chargeable with no interest. But if he chooses to keep the money mixed up with his own funds, it is in vain for him to say, that he ought not to pay interest at five per cent. because he may have got only two or three per cent., or nothing at all. He is in *morâ:* he is committing laches: there is a wilful neglect of duty on his part, and therefore he shall pay full interest.

Judgment affirmed, 3d October 1831.

[463]

APPEAL

From the Court of Chancery.

Between HENRY HARRIS,—*Appellant;* CHARLES KEMBLE, JOHN SALTREN WILLETT, JOHN FORBES, FRANCIS CONST, WILLIAM HARRISON, and JAMES TROTTER,—*Respondents.*

[Mews' Dig. vii. 169. S.C. 5 Bli. N.S. 730; 7 L.J. (O.S.), 6 Ch. 79; and in Chancery, 1 Sim. 111; 5 L.J. (O.S.), Ch. 131.]

A. a shareholder in a theatre, entered into an agreement with B. C. and D., three other shareholders, by which the theatre was to be leased to them at a certain rent. He subsequently filed a bill against them for specific performance, on which they proved that another agreement, of which they had before had no notice, had been entered into some years before between A. and other parties, his then co-shareholders in the theatre, and that the earlier agreement contained conditions incompatible with the performance of that into which they had entered; they also proved that two transactions with regard to the letting of boxes had not been truly represented to them. The Vice-Chancellor held, that as the theatre had in substance the benefit represented to accrue from these lettings, the misrepresentation as to mere form was no bar to A.'s claim for a specific performance. The Lord Chancellor reversed that decision, and the reversal was held right by the House of Lords.

The Theatre Royal Covent Garden had, up to the month of October 1820, been under the management of Mr. Harris, the father of the present Appellant. In that month Mr. Harris died. His son, the present Appellant, who had previously assisted his father, then assumed the sole management, and received, as **[464]** his father had received before him, the sum of £1000 a year as compensation for his trouble. The Respondents, Kemble, Willett and Forbes, had frequently objected to the Appellant's continuing to exercise the powers of the sole management, and to the payment to him of a £1000 a year in respect thereof. In the course of the year 1821 many meetings were held upon the subject, and the Respondents then insisted that the Appellant should no longer exercise the sole control over the theatre, but that they should have a voice in the management. At that time the Appellant was, under his father's will, entitled to 12-24ths of the property of the said theatre, and in his own right to 2-24ths. The Respondent, Francis Const, was entitled, for his life, under the will of Mrs. Martindale, to 3-24ths; and the other Respondents were together entitled to the remaining 7-24ths; that is to say, the Respondent, Charles Kemble, to 4-24ths, by gift from his brother, the late John Philip Kemble; and the Respondents, John Saltren Willett and John Forbes, to 3-24ths, in equal moieties, they having respectively married the two daughters of George White, by whose will the 3-24th parts in the said theatre were bequeathed to his executors, William Harrison and James Trotter, the two other Respondents in this Appeal, in trust for his said two daughters; the reversion of Francis Const's 3-24ths was then in certain persons claiming under the will of Mrs. Martindale, but has since become by purchase, and now is vested in these Respondents, John Saltren Willett and John Forbes, in equal moieties.

The Appellant objected to admit these Respondents, or either of them, to any participation in the management of the theatre, and insisted that he had a right to be paid for his management the same annual sum **[465]** which had been taken by his father: he, however, proposed to Mr. Harrison, that he should retire altogether from the management of the theatre if these Respondents would take a lease of his shares in the theatre, at a rent to be agreed upon.

Before the said proposal of the said Appellant, he had, with a view to justify his course of management of the said theatre, furnished several statements and accounts to Mr. Harrison. The Respondents, John S. Willett and John Forbes, had occasionally referred to the books of account kept in the theatre, and after the said proposal of the Appellant they again examined the books, and with more attention, with a view to ascertain the state of the affairs of the theatre, and what had been the result

as to profit or loss of its management during former years: but, as they alleged, they found it was impossible to collect any information from them upon which they could rely, owing to the confused and imperfect manner in which those accounts were kept. The object in examining these accounts, and others furnished by the Appellant, was to ascertain the expenditure and receipt of the theatre, in order to fix the amount of rent to be reserved in the proposed lease.

From the materials so furnished by the Appellant, these Respondents were advised by Mr. Harrison to agree to give a rent calculated at the rate of £12,000 per annum for the whole theatre, and these Respondents accordingly agreed so to do, and articles of agreement were prepared.

The preparation of such articles of agreement was intrusted, on behalf of all parties, to the private solicitor of the Appellant.

The articles of agreement, dated 11th March 1822, were in effect as follows: That the Appellant and [466] these Respondents, being together entitled to 21-24ths of the theatre, should demise such their shares to Mr. Harrison, as a trustee, at a peppercorn rent, for a term of years. Mr. Harrison, the trustee, was then to grant an under-lease to these Respondents, reserving a reversion of three days of the term granted to him. The term to be granted to these Respondents was for ten years, to be computed from the 1st day of August 1821. Under this lease the rent was calculated, upon all the shares, at £12,000 a year. In a schedule annexed to this agreement, and purporting to set forth the sources of income to the theatre, it was stated, that there was a box let to Sir Edmund Antrobus, for alternate weeks, at £210 per annum; and in a second schedule, a sum of £450 a year was described as payable to the theatre in respect of a box held by Lord Holland for a term of years.

These articles of agreement were executed by the Appellant, and by these Respondents, on the 11th March 1822. Upon their execution the Appellant retired from, and these Respondents entered upon, the management of the theatre.

Very shortly afterwards these Respondents appointed Mr. Henry Robertson accountant of the theatre.

On the 13th April 1823, Francis Const exhibited his bill in the Court of Chancery against the Appellant, these Respondents, and the said William Harrison and James Trotter, as executors of Mr. White; and he thereby, after stating an indenture, dated 9th March 1812, which indenture contained certain provisions for the application of the funds of said theatre, and for the payment of certain debts specified in two several schedules annexed thereto, and after stating that there remained some part of such scheduled debts unpaid, and certain acts and applications of the funds of said theatre, [467] since these Respondents had taken upon themselves the management thereof, inconsistent with the provisions of said indenture, he prayed, among other things, that all the Defendants to his bill of complaint might be decreed to abide by, and specifically to perform the several agreements and covenants contained in said indenture of 9th March 1812.

A Receiver was appointed in the suit of Mr. Const, by order of the Lord Chancellor, in February 1824, and on the 14th of April in that year, the Appellant filed his bill for a specific performance of the agreement of March 1822. The Respondents, in their answers, alleged that they had entered into that agreement without knowledge of the Deed of 1812, through the fraud and misrepresentations of the Appellant; and relied for proof of their allegation on the fact that the box stated to be let to Sir E. Antrobus, on alternate weeks, for £210 per annum, had been in fact demised to him at a pepper-corn rent for 21 years, from September 1817, in consideration of the sum of £2625, then paid to the Appellant's father; and they further alleged, as another instance of fraud and misrepresentation, that, in the year 1820, the said Thomas Harris, the father of the said Appellant, by indenture dated 28th September 1820, assigned to Messrs. Stephenson, Remington and Co., the bankers of the said theatre, the sum of £450 a year, being the rent of the box in the said theatre held by Lord Holland for a term of years, and that such assignment was to secure not only a debt due to the said bankers from the proprietors of the said theatre jointly, but also to secure a private debt of the said Thomas Harris due to them, and that the Appellant, although he was privy to the assignment, had never informed the Respondents or the said William Harrison thereof, but allowed the said box to [468] be enumerated in the second schedule to the said agreement without any notice of

such assignment, and the Respondents to enter into the said agreement in the belief that such rent of £450 a year was unencumbered, and would be receivable by them. The Respondents alleged also misrepresentations as to the profits of the theatre in the seasons 1819-20 and 1820-21; and all these misrepresentations they alleged they had been unable to detect till the books and the theatre had been for some considerable time placed under their absolute controul.

The cause came on to be heard before Sir John Leach, then Vice-Chancellor, on the 27th day of February 1827; and on the 12th day of April following, in his judgment on this case, the Vice-Chancellor observed* that the statement respecting the profits of the theatre could not have deluded the Defendants, for they stated that Mr. Brandon was not a good accountant, and it was therefore impossible that they could have relied on his judgment. He then referred to the transaction relating to the box demised to Sir E. Antrobus, and observed, that the concealment of the real nature of this transaction was extremely incorrect, although it was the same thing to the other proprietors as if the box had been actually let to Sir E. Antrobus at the £210 a year. Upon referring to the table of annuities, it appeared that an annuity of £210 for 21 years was worth, in present money, £2692 7s. **[469]** Sir E. Antrobus only paid £2625 2s., so that Mr. Harris, the father, in effect took upon himself to account with the other proprietors for an annuity of £210 for 21 years without having received quite the full value for this undertaking, and his half the property of the theatre was as good a security to the other proprietors as if Sir E. Antrobus had undertaken to pay the £210 a year. It was, however, the duty of the father and the Plaintiff to have disclosed the truth to the other proprietors, and to have given them an option of receiving either their proportions of the £2625, or their proportions of the £210 a year; and if the Plaintiff had been well advised, he would have taken the occasion of his treaty with the Defendants to state the actual facts. But still the concealment could not be made to bear upon the validity of the agreement for the lease. Unless the Defendants could show that their interests as lessees were prejudiced by that concealment, it must be indifferent to them whether the £210 a year was accounted for by the Plaintiff or by Sir E. Antrobus. If the Defendants preferred their proportion of the price to their proportion of the rent, there was nothing in the agreement to prejudice that question.

His Honor then remarked, on the transaction relating to Lord Holland's box, that, upon reference to the books of account of the theatre, there appeared to be entries which manifested that this rent of £450 was paid to Messrs. Stevenson and Co.; and if the Defendants did not actually know the reason why it was paid, they had there sufficient notice of the transaction to put persons of ordinary prudence upon an inquiry which would have given them full information, and it was their own fault if they failed to make that inquiry. With **[470]** respect to the security of Messrs. Stevenson and Co. extending not only to the debt due from the theatre but to a private debt of Mr. Harris, it was to be observed, that as far as regarded Mr. Harris's private debt it could affect only his share of the theatre, and was the same thing as if he had given a security for his private debt by a distinct deed. His Honor's decree was therefore pronounced, directing a specific performance of the agreement.

From that decree these Respondents presented their petition of re-hearing; but the cause was finally agreed to be heard as an appeal before the Lord Chancellor, who, on the 19th May, pronounced judgment for the Respondents, and in the course of that judgment gave the following reasons for reversing the decision of the Vice-Chancellor.

The first question that presents itself naturally to consider is this: Supposing that nothing had been done under this agreement, the agreement of March 1822; suppose these gentlemen had not entered into possession of the theatre, the question is, whether, under the circumstances of this case, this Court would direct the agreement of March 1822 to be specifically performed, specifically performed generally, or

* The Editors have extracted the following sentences of the Vice-Chancellor's judgment from a very clear and copious report of it contained in the first volume of Mr. Symons' Cases in the Vice-Chancellor's Court. For the judgment of the Lord Chancellor they are indebted to a private source, on the accuracy of which they can confidently rely.

specifically performed subject to any and what modifications; and if the Court, under those circumstances, would not have felt itself justified in directing a specific performance of this agreement; the next question that arises and naturally presents itself is this, whether, in consequence of what has taken place under this agreement, and whether, in consequence of the conduct of the parties, their situation is so altered, and the circumstances are so changed, as to induce the Court, in that position of things, to direct that this agreement should be spe-[471]-cifically performed, either in general, or subject to any modification. These are the two views of the case which naturally present themselves to the consideration of the Court. The first point that occurs is with respect to the Deed of March 1812. In looking at all the evidence, I am satisfied, that at the time when the agreement of March 1822 was entered into, these parties, none of them, had in their view or consideration the Deed of March 1812. There is no evidence to satisfy my mind that they actually knew of that deed. If they did know of it, their whole conduct, and the whole negotiation, must have proceeded upon the assumption that it was no longer binding, and no longer operative between them. In point of fact, it was acted on only for a short period of time—I believe for about two years, and the payments were never afterwards made on the footing of that deed. Misrepresentations are charged to have been made with respect to the profits of the theatre in the two seasons 1819-20 and 1820-21. It is said, on the other side, that Mr. Harrison or the parties had access to the books, and that by inspecting and examining certain books they might have corrected those documents. It appears from all the evidence that the books were kept in such a manner as to render it extremely difficult, without bestowing a great deal of time and attention, and employing the skill of an accountant, to deduce any certain conclusion from them; and it does not appear in evidence whether, if those documents had been examined by the books, the error contained in them could have been easily detected; but at all events it was a representation made by Mr. Harris with a view to this agreement, with a view to the fixing of the terms of the rent.

[472] The next point for consideration is that which arises out of the box which is described as the box of Sir Edmund Antrobus. It appears, according to the statement of the case, and according to the evidence, that several years ago a contract had been entered into between Mr. Harris, the father, and Mr. Harris, the Plaintiff, with Sir Edmund Antrobus, to sell to him, for the sum of £2000, the interest in the box for the term of 21 years. The present Plaintiff was a party to that transaction; the money on the face of the deed is described as paid to both of them; how it was afterwards applied is altogether immaterial; whether it was applied for the purposes of the father only, to the purposes of the son only, or to both their uses jointly, is wholly immaterial: that this was a transaction of a very incorrect nature, to use the mildest term, no man can possibly doubt. It was concealed from the proprietors: and, for the purpose of rendering that concealment effectual, Mr. Brandon, who was the treasurer acting under the superintendence of Mr. Harris, who was the manager from time to time, accounted for the rent as if that rent had been regularly paid by Sir Edmund Antrobus, and the whole machinery was contrived for the purpose of imposing on the proprietors. This state of things existed at the time when the contract of March 1822 was entered into; Mr. Harris was aware of it; he was aware of the fraud that had been practised; he did not at that time disclose to the parties with whom he was negotiating the actual state of things, which it was his duty to have done; on the contrary, in the second schedule to the agreement of March 1822, this box was specifically enumerated, and forms a part of the agreement, a part of the property conveyed, transferred, or meant to be transferred under [473] that agreement; and I believe it is a principle established in this Court, that where a party calls for a specific performance of a contract, he must, as to every part of the transaction, be free from every imputation of fraud or deceit. It is not sufficient that compensation may be afforded; it is not sufficient to say that security may be given in some other way, or that security may be obtained upon the property, fraud is a personal bar to a proceeding of this kind. It is a personal bar, and may be a bar in a court of law, as to enforcing the agreement; but it is also a personal bar to a person making an application for a specific performance. The next consideration is, the transaction with respect to Lord Holland's box, equally incorrect with the former, into which it is unnecessary for me to enter; it ranges itself under the same class, not perhaps liable

equally to the same objection, but it is of the same class and to the same effect. I think, then, that I am justified in saying, that according to the uniform practice of this Court, if nothing had been done under this agreement, if the parties had not taken possession under it, if Mr. Harris had not given up the management, but that the agreement alone had subsisted, under those circumstances it appears to me impossible to suppose that this Court could have listened to the application for the purpose of enforcing a specific performance of this agreement, either generally or subject to any modification. The question, therefore, comes to this, whether, in consequence of the conduct of the parties, in consequence of their taking possession as they have done, holding possession for so long a period of time under the terms and according to the agreement, interfering as they have done with the property, whether that state of [474] things is such as to induce the Court to enforce this agreement by a decree for a specific performance. They have altered the theatre, as it is said, contrary to the covenant contained in the instrument, and have thereby materially injured the theatre; they have also, it is said, in the manner in which they have conducted the theatre, affected materially and essentially its interests; it is obvious, however, that all these evils are matters of account and compensation, and that it is unnecessary on any of these grounds to enforce this agreement by a decree for a specific performance. It appears to me, therefore, considering that at the time when the bill was filed two years only had elapsed, that eight years more remained, taking into consideration what I have observed with respect to the conduct of the parties during the negociations for the treaty, and the situation in which they were placed, that this Court ought not, under these circumstances, to interfere for the purpose of compelling a specific performance, which would throw upon them for the subsequent period of eight years all the conditions of this original agreement, and the lease that was to be granted under it; I do not think therefore there is any thing arising out of the conduct of the parties taking possession under this agreement, and holding it in the manner in which they did during the time they were in possession, employing their agent gradually to investigate those accounts, in finding out successively those misrepresentations, and those incorrect transactions, and the whole terminating by Mr. Const's bill being filed, and the appointment of a Receiver, I think, taking all these circumstances into consideration, there is not sufficient arising out of the conduct of the parties under the agreement of 1822 to justify [475] the Court in interposing for the purpose of compelling a specific performance.

This judgment was appealed from for the following amongst other reasons: Because the agreement of the 11th March 1822 was full and complete. Because the Respondents kept possession of the theatre long after Mr. Const had filed his bill, and therefore long after their attention was drawn to the indenture of March 1812, without objecting to the agreement on the ground of the provisions of the indenture. Because the relative rights of the parties were not altered by that indenture. Because after they had objected to the performance of the agreement, on the ground that when they entered into it they were ignorant of the existence of the indenture of 1812, they offered to continue lessees of the theatre if the rent were reduced. Because in fixing the amount of rent the Respondents were guided by the books of account, and not by the representations of the Appellant. Because the transactions regarding the boxes held by Sir E. Antrobus and Lord Holland were not founded in fraud, and the Respondents must have known the real nature of those transactions long before they gave their notice of abandonment in February 1824. Because the Appellant had always been ready to submit to any terms respecting those transactions which the Court might think fit to impose, but he contended that such transactions could not be considered a sufficient ground to rescind a solemn contract.

The Respondents submitted that the judgment ought to be affirmed for the following amongst other reasons:—Because the said Appellant was guilty, in the treaty for the said agreement, of fraud, concealment, and misrepresentation. Because the agreement [476] of 11th March 1822 was entered into by these Respondents in ignorance of the Deed of 9th March 1812; the existence of which deed, and the rights arising under it, have taken from these Respondents, and they have never since had, that for which by the agreement of 1822 they contracted. Because the Appellant is unable to perform his said contract or agreement with these Respondents as to certain parts of the property.

The Appellant's Counsel insisted, that it was not any concealment of any fact connected with the subject-matter of an agreement that would disable a party from claiming specific performance of that agreement. Such a doctrine would render it impossible for any person to claim specific performance of an agreement into which others had entered with him, for there was no one, however careful, who might not omit to mention some one particular fact, or to state fully all the circumstances connected with it. The true ground on which the doctrine as to concealment of facts proceeded, was the materiality of those facts. If the party from whom specific performance was claimed had not been injured by the effect of the concealment, if the thing concealed or omitted to be stated was too trifling to affect his interests, the Court would, notwithstanding such concealment or omission, decree specific performance of the agreement. *Fellowes* v. *Lord Gwydyr and Page*, 1 Symons, 65; confirmed in 1 Russ. and Mylne, 89. It was further insisted, that the Respondents might have had the fullest examination into every transaction, and if they had neglected to use the opportunity which their own situation as part proprietors in the first instance, and also as persons negociating an agreement, afforded them, they were not now to turn [477] round and make their own negligence the ground for excusing them from performing an agreement into which they had advisedly entered.

For the Respondents, it was contended, that the indifferent manner in which the books of accounts of the theatre were kept, the want of opportunity to examine them in detail, and to prove their accuracy by the test of daily experience, rendered it impossible for the Respondents to attain a correct knowledge of the state of affairs at the theatre, and quite exempted them from the charge of negligence. Besides this, it was urged that mere negligence was not an answer to be set up to a charge of concealment; it was not necessary for the Respondents to dispute the case of *Fellowes* v. *Lord Gwydyr and Page*; on the contrary, they might adopt its principle, and on that principle claim to be relieved from specifically performing this agreement. That case decided, that as the misrepresentation there made was not shown to have been the ground of the contract, or to have worked any injustice on the Defendant, he was bound to perform his agreement. It was impossible to assert that the misrepresentations and concealments in the present case had not worked an injustice on the Respondents. By being made to believe the income of the theatre larger than it really was, the Respondents had been induced to consent to give a higher rent than they would otherwise have thought of paying, and the injury was therefore direct and positive. The rules on which a court of equity would proceed in a suit for specific performance of an agreement were, that the agreement must be clear of the imputation of any deception. There was no authority any where, no case where misrepresentation was the ground of a contract in which the Court had decreed specific performance of it. The conduct of the [478] person seeking it must be free from all blame; misrepresentation even as to only a small part would prevent him seeking relief in a court of equity. Here there had been misrepresentation extensive enough to affect the agreement most materially, and the Appellant was therefore disabled from claiming a specific performance of it.

The Lord Chancellor (13th Oct. 1831): As this was a case in which their lordships were called on to review the decision of the noble and learned lord who had lately held the Great Seal, and as that decision had reversed the judgment of his Honor, the present Master of the Rolls, his lordship had been very desirous that the arguments should take place in the presence of a noble and learned friend of his, (Lord Plunkett,) the benefit of whose assistance he was desirous to enjoy. His noble and learned friend had attended the arguments throughout, and he was happy to say, that there was not the slightest difference of opinion among them. Having most attentively considered the case, he saw no reason to depart from the judgment which had been given in the Court of Chancery. The agreement appeared to him affected by misrepresentation, and was therefore incapable of being made the subject of the interference of a court of equity in order to compel its specific performance: he should therefore move, that the judgment of the Court below be affirmed.

Lord Plunkett said, that he entirely agreed with the Lord Chancellor. There could be no doubt that the Respondents had entered into this agreement under a mistaken impression as to certain things the subject matter of the agreement, and with regard to these, the Appellant had been guilty of that misrepresentation which would disable

him from compelling [479] specific performance of the agreement in a court of equity.

Lord Lyndhurst had most carefully attended to the arguments that had been urged to the House, but saw no reason to alter the opinion he had delivered in the court below.

Judgment affirmed.

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[480] IN ERROR,

FROM THE IRISH EXCHEQUER CHAMBER.

ELIZABETH WARBURTON,—*Plaintiff in Error;* LOVELAND, *ex dem.* G. and H. IVIE,—*Defendant in Error.*

[S.C. 6 Bli. N.S. i.: and, in Court below, 1 Huds. and Brooke, 623. The rule as to construction of statutes, stated by Burton J. (1 Huds. and Brooke at p. 648) was adopted by Lord Wensleydale in *Abbott* v. *Middleton*, 1858, 7 H.L.C. 115; and again in *Thellusson* v. *Rendlesham* 1859 ib. at p. 519. See also, on the same point, *Reed* v. *Braithwaite* 1871 L.R. 11 Eq. 520: *Rhodes* v. *Rhodes* 1882, 7 A.C. 205: *Bradlaugh* v. *Clarke* 1883, 8 A.C. 384: *Hill* v. *East and West India Dock Co.* 1884, 9 A.C. 464.]

A term for 399 years, in certain lands in Ireland, being vested in B. for life, with the residue in his daughter, a settlement is made on the intermarriage of the daughter and W., by which the whole term is conveyed to trustees, on trust to pay the rents and profits to B., the father, for life, then to W., the husband, for life, then to the daughter for life, if she survived him, and afterwards to convey the term to the first son. This settlement is not registered. On the death of B., the father, W., the husband, demises the whole term for valuable consideration to K., and the indenture is duly registered; and K. afterwards assigns for like consideration his lease of the term to I. Held by the House of Lords, in conformity with the unanimous opinions of the attending Common Law Judges, that the registered indenture shall prevail over the unregistered settlement, and that the title of the assignee of the lease is to be preferred to that of the widow of W., and of the trustees under the settlement; and that this is so whether the assignment from K. to I. was registered or not, for the unregistered assignment would pass the interest as between the lessee and assignee, and there is no conflicting claimant under a registered deed. And this construction of the Registry Act, 6 Anne, c. 2, holds good whether the party executing the prior secret conveyance, and the subsequent registered deed, be the same party or not.

A Term for 399 years, in certain lands in Ireland, being vested in Benjamin Batt and his daughter Elizabeth, in the former for life, with the residue in the daughter, [481] a settlement is made in 1779, on the intermarriage of the daughter and Bartholomew Boyd Warburton, by which the term is assigned to trustees, in trust to permit Batt, the father, to have the rents and profits for life, with remainders to the husband and wife for their lives respectively, and the survivor. This settlement was not registered; and after the death of Benjamin Batt, Warburton, the husband, demised the whole of the term then to run to two persons of the name of Keogh, at a rent of 16s. per acre. That indenture was duly registered (26 May 1800): and afterwards the Keoghs assigned their interest in the lands to George and Henry Ivie for a consideration of £3000. Warburton, the husband, died in 1823, and the wife surviving brought her ejectment in the King's Bench against the Ivies, and had judgment and possession. The Ivies, afterwards, in 1825, brought an ejectment against her in the Irish Court of Exchequer, and at the trial a special verdict was found, which is as follows:

"And the Jurors aforesaid upon their oaths find, that Richard Christmas was, in the year 1713, seised in fee of the lands in the ejectment, and, being so seised, he

duly, by indenture of lease bearing date the 1st day of March, in the 12th year of the reign of her late Majesty Queen Anne, being the year 1713, demised the same unto Thomas Grubb for the term of 999 years, who thereupon entered, and was possessed thereof under said lease for the said term; that Mary Grubb was executrix of the said Thomas Grubb, and as such executrix of said Thomas Grubb entered into and was possessed thereof for the residue of the same term; that the said Mary Grubb, by indenture of demise, bearing date the 26th March, in the year 1748, did demise the said lands to John Allen for the term of 399 years, and that said John [482] Allen entered and was possessed of said lands for the said last-mentioned term; and that the interest in the said last-mentioned lease was, in and previous to the year 1779, vested by mesne assignment in Benjamin Batt for so many years of the said term as he should live, with the remainder to his daughter, Elizabeth Batt, for the residue of the said term; that upon the marriage of the said Elizabeth Batt unto the said Bartholomew Boyd Warburton, (she being then of full age,) the said Benjamin Batt, together with the said Elizabeth, executed the indenture of settlement of the 24th July 1779, which deed was made by and between Benjamin Batt, of New Ross, in the county of Wexford, Esquire, and Elizabeth Batt, spinster, his eldest daughter, of the first part; Bartholomew Boyd Elliott, and the Reverend Robert Alexander, of the second part; and Bartholomew Boyd Warburton, of the third part; and was duly executed by the said Benjamin Batt, Elizabeth Batt, Robert Alexander, and said Bartholomew Boyd Warburton: and whereby, and in consideration of said intended marriage, the said Benjamin Batt and Elizabeth Batt assigned the said lands and their respective terms and interests therein to Bartholomew Boyd Elliott and Robert Alexander for the residue of the demised term therein, in trust to permit the said Benjamin Batt to take and receive the rents and profits of the said lands during the term of his natural life, and after his decease to permit the said Bartholomew Boyd Warburton to receive the said rents and profits during his natural life, and in case the said Elizabeth, his intended wife, should survive her said intended husband, then after his decease to permit the said Elizabeth to receive the rents and profits during her natural life, and after the decease [483] of the said Bartholomew Boyd Warburton, and Elizabeth, his intended wife, in trust to permit the first son of the said marriage to receive the said rents and profits until he should arrive at the age of 21 years, and then to convey said lands to said first son absolutely; and in case there should be no issue of the said marriage, then the said lands and the interest therein should become the sole property of the survivor of them, the said Bartholomew Boyd Warburton and Elizabeth his intended wife: and the Jurors aforesaid further find, that said deed was not registered; and that after the execution of the said settlement the said marriage was solemnized, and said Benjamin Batt during his life received the rents and profits of the said lands under the said deed, and after his death the said Bartholomew Boyd Warburton received the rents and profits during his life, and being in possession thereof on the 26th day of May 1800, by indenture of lease, dated the same day and which indenture was duly registered in the office for registering deeds on the 10th June 1800, the said Bartholomew Boyd Warburton demised the same to George Keogh and Thomas Keogh for the term of years mentioned in the said lease which is still unexpired, at and under the yearly rent of £345 19s., being at the rate of 16s. per acre: that the said George and Thomas Keogh entered and were possessed of the said term under the said lease; and afterwards, by indenture of assignment bearing date the 9th day of April 1813, in consideration of the sum of £3000, paid to them by George Ivie and Henry Ivie, conveyed their interests in said lease to said George Ivie and Henry Ivie, two of the lessors of the Plaintiff, who entered and were possessed thereunder until the time of the death of the said [484] Bartholomew Boyd Warburton on the 6th February 1823, leaving the said Elizabeth, his wife, surviving him, when the Defendant, Elizabeth, his widow, entered upon the said lands, claiming under said settlement of the year 1779, and brought her ejectment to recover possession of the same in the name of her trustee named in the said deed of 1779, and having obtained judgment thereon, executed her *habere* thereunder, on the 22d day of January 1825: and said Jurors further find, that the said George and Henry Ivie afterwards entered upon the said lands, and demised the same unto the said James Loveland for the said term in the said declaration in ejectment mentioned; by virtue of which demise the said Plaintiff entered thereupon, and was possessed for the said term so to him demised until the said Defendant Elizabeth

entered and ousted the said Plaintiff therefrom as therein mentioned; but whether, etc. etc. etc."

On this verdict judgment was given in June 1825 for the Ivies, which judgment was in June 1828 affirmed by the Court of Exchequer Chamber, the Judges being equally divided; and from that judgment Mrs. Warburton brought her writ of error returnable in Parliament; and it was contended that the judgment ought to be reversed for the following among other reasons:

1st. Because by the marriage-settlement of the 24th of July 1779, the legal estate in the premises mentioned in the declaration was transferred to Bartholomew Boyd Elliott and Robert Alexander, the trustees of that settlement; and Bartholomew Boyd Warburton, at the time of executing the indenture of lease of the 26th May 1800, was only tenant-at-will to the said trustees, and was therefore unable to transfer [485] any legal estate in the premises to George Keogh and Thomas Keogh, from whom the Defendant in error, James Loveland, derives his title.

2d. Because although the said marriage-settlement was not registered according to the provisions of the Irish statute, 6th Anne, c. 2, yet such deed of settlement was good and effectual to vest the legal estate in the said trustees as to the said lands, and to bind the parties thereto; and prevented said Bartholomew Boyd Warburton from acquiring in his marital right, on his marriage, any estate in the premises in question, he could only take under or by virtue of such settlement; and for the reason above stated, he did not take under such settlement any legal estate capable of being conveyed to a purchaser from him.

3d. Because a deed, invalid for want of title in the party conveying at the time of execution, cannot be made valid, or acquire any effect by subsequent registration.

4th. Because even supposing that the said Bartholomew Boyd Warburton took such an estate in the said premises as enabled him to convey, by the said lease of the 26th May 1800, a legal interest therein to the said George Keogh and Thomas Keogh, and their assigns, for the term of his own interest in the said premises, yet such interest did not extend beyond the period of his own life, and determined therewith; and the legal interest, if any, conveyed by the said lease also expired at his death: nor could the registration of such lease operate so as to give it any more extended effect, or to bind or affect the legal estate of the trustee of the said marriage settlement subsequently to the death of the said Bartholomew Boyd Warburton.

For the Ivies it was contended, that the judgment [486] ought to be affirmed for the following among other reasons:

1st. Because the settlement of the 24th July 1779 was not registered, and must, under the true construction of the 6th Anne, c. 2, be considered to be fraudulent and void against the lease of 26th May 1800, which was duly registered according to the provisions of that Act.

2d. Because if the settlement of 1779 had never been executed, Bartholomew Boyd Warburton would, in right of his wife, have become possessed of said lands for the residue of said term of years, and would have had full power to make the said lease of 1800; and if that settlement, not having been registered, is fraudulent and void against said lease which was registered, there is nothing to invalidate the said lease.

3d. Because the Defendants in error are purchasers for valuable consideration, and as such within the meaning and policy of the 6th of Anne, which was passed for the security of such purchasers.

4th. Because the object of the 6th of Anne was, that all deeds relating to lands in Ireland should be registered, in order that persons contracting for or purchasing lands might, by a search in the registry, have notice of all conveyances affecting same; and because that object will be defeated if the secret and unregistered settlement of 1779, of which the Defendants in error had no notice, can be set up against them.

(*Vide Latouche* v. *Dunsany* 1 Schol. and Lef. 154.)

The cause was heard in the House of Lords in March 1831, Lord Tenterden presiding as Speaker, and the Judges attending; and on the 14th of that [487] month and year, Lord Tenterden proposed the questions for the opinion of the Judges. On the 23d of February 1832, the Judges attended, when their unanimous opinion was read by Lord Chief Justice Tindal, of which, by his Lordship's favour, we have been furnished with an authentic and accurate transcript (Tindal, Ld. Ch. J. C. P. 23 Feb. 1832). It is as follows:

My Lords: The statement which this House has been pleased to submit to the consideration of His Majesty's Judges is this: An unmarried woman being possessed of land in Ireland for a long term of years, and about to marry, assigned the term by a deed, executed also by the intended husband, to trustees, upon trust to permit the husband after marriage to receive the rents for life, then to the wife for life, then the first son of the marriage, if any, with remainder over. The marriage took effect; the husband entered into possession, and received the rents and profits, and then made a lease for years for part of the term, rendering rent; the lessees entered and received the rents and profits, and then assigned the lease for a valuable consideration.

The marriage settlement was not registered; the lease by the husband was registered; the assignment of the lease is supposed not to have been registered. The wife, surviving her husband, obtained possession of the lands; the assignees of the lease brought an ejectment against her to recover the possession.

Upon this statement your Lordship's have been pleased to put the following questions; regard being had to the true construction of the Irish Register Act, 6 Anne, c. 2.

1st. Which title is to be preferred, that of the assignees of the lease, or of the widow, or the trustees under the settlement?

[488] 2d. Supposing the assignment of the lease not to have been registered, will the construction be the same?

Upon the first of these questions, the Judges who have heard the argument at your Lordship's bar, are of opinion, that regard being had to the true construction of the Irish Register Act, the title of the assignees of the lease, under the circumstances above stated, is to be preferred to that of the widow, and also to that of the trustees under the settlement; and upon the second question, they are of opinion, that supposing the assignment of the lease not to have been registered, the construction of the statute remains the same.

Upon the facts of this case, Mr. Warburton, who granted the lease of 1800, was at the time of granting it in possession of the premises; and as the marriage settlement of 1779 was never put upon the register, he must have appeared to the public, and amongst the rest to the lessees taking under the lease of 1800, to be in possession of the premises either in his own right or in right of his wife, in either of which cases he would have had the undoubted right to grant a valid term by the lease of 1800, unless the unregistered settlement of 1779 stands in the way. Now it is not disputed on the part of the Plaintiff in error, that if Mr. Warburton had been the party who conveyed the term by the unregistered settlement of 1779, and had afterwards made the lease which was registered, such lessees, being purchasers for a valuable consideration, might have availed themselves of the fifth section of the Registry Act, and that the prior settlement must have been held fraudulent and void as against the lease. Such a case is admitted to fall within the letter as well as the spirit of the Act. But it is contended by the Plaintiff in error, that the operation of the Irish Registry Act extends no further, but is confined to [489] cases in which both the earlier and the subsequent conveyances are the deeds of the same grantor; and whether such is the case, or on the contrary the Act extends to give a preference to the subsequent deed when registered against the prior unregistered deed, notwithstanding the same was executed by a former owner of the estate, is, in substance, the question now proposed for our consideration.

No case can be found either upon the English Registry Acts, or upon the Irish Act now under consideration, in which this precise question has been decided by a Court of Law. It must therefore be determined upon principle, not upon authority; and the only principle of decision that is applicable to it is the fair construction of the statute itself, to be made out by a careful examination of the terms in which it is framed, and by a reference in all cases where a doubt arises to the object which the Legislature had in view when the statute was passed. Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences; for in that case the words of the statute speak the intention of the Legislature. If in any case a doubt arises upon the words themselves, we must endeavour to solve that doubt by discovering the object which the Legislature intended to accomplish by passing the Act.

And although it would be impossible to consider a question to be free from diffi-

culty where opinions have been formed upon it in direct contradiction to each other, and each opinion has been supported with such acuteness and ability by the very learned Judges of the several Courts below, before which it has been agitated; yet we have, upon consideration, come to the conclusion, that both the closer interpretation of the words of the statute, and the construction which, at the [490] same time, most suppresses the mischief the Legislature had in view, and most advances the remedy which is held forth, warrant us in the opinion that the registered lease of 1800 is to be preferred to the unregistered marriage settlement of 1779; and that the latter, in so far as its provisions are inconsistent with the validity of the lease, is to be held altogether void.

The question appears to turn almost entirely on the construction of the fifth section of the statute, which declares in what cases, and under what circumstances, an unregistered deed shall be void. For as to the fourth section, to which considerable importance has been attached in the course of the argument, it appears to us to be confined to the case of priority of registered deeds as between themselves, and to have very little, if any, bearing upon the question immediately under discussion. Before, however, we come to the more particular consideration of the fifth section, it will be advisable to look, generally, at the preamble of the statute, and the other clauses which precede the fifth, in order that we may ascertain from the Act itself the object and general intention of the Legislature in passing it; for such intention is to be the guide of our course in case any difficulty should arise in the construction of a particular clause.

This statute, which was passed by the Irish Parliament in the sixth year of Queen Anne, is intituled, "An Act for the public Registering of *all* Deeds, Conveyances and Wills, that shall be made of any lands, tenements or hereditaments;" it begins by stating its object to be, "for securing purchasers, preventing forgeries and fraudulent gifts and conveyances of lands, tenements and hereditaments, which have been frequently practised in this kingdom, especially by papists, to the great prejudice of the [491] protestant interest thereof, and for settling and establishing a certain method, with proper rules and directions, for registering a memorial of all deeds and conveyances which, from and after the 25th day of March 1708, shall be made and executed for or concerning any honours, etc. in this kingdom, and of all wills and devises in writing, etc.;" and it then proceeds, in the first section, to enact, that a public office for registering memorials of deeds and conveyances, wills and devises, shall be established and kept in the city of Dublin, to be managed and executed by a fit and able person, etc.

The first section therefore of the Act is framed in the most general and comprehensive terms, comprising "all deeds and conveyances for or concerning any lands," without restriction or qualification as to the parties by whom such deeds or conveyances were executed, or otherwise; showing the intention of the Legislature to have been to provide, in the place and stead of the ancient and more public, and notorious, mode of transferring landed property, the means of discovering all transfers, with equal or greater certainty, by referring to a public register, upon the face of which it was intended they should all be found. The third section directs that a memorial of "all deeds and conveyances which, from and after the 25th day of March 1708, shall be made for, or concerning, or whereby, any honours, etc. within this kingdom may be anyways affected, may, at the election of the party or parties concerned, be registered in such manner as is hereinafter directed."

There is nothing, therefore, in the language of this third section which restrains the generality of the first. It is still a memorial of all deeds and conveyances which the Legislature contemplates; although it is left open to [492] the discretion of the parties to whom the conveyances are made, whether they will avail themselves of the protection of the Act, or incur the consequences to which they become liable by neglecting its provisions.

What those consequences are, the fourth and fifth sections proceed to declare. For by the fourth section it is enacted, "that every such deed or conveyance a memorial whereof shall be duly registered, shall be deemed and taken as good and effectual both in law and equity, according to the priority of time of registering such memorial, according to the right, title and interest of the person or persons so conveying such honours, etc., against all and every other deed, conveyance or disposition of the honours, etc., comprised or contained in any such memorial as aforesaid."

This clause is framed for the purpose of regulating the priorities of registered deeds and conveyances as between themselves, and is expressed in the same general terms as the preceding.

It begins by enacting "that every such deed or conveyance" that is, every deed or conveyance executed after the 25th of March 1708, affecting lands, etc. in Ireland; an expression unlimited and unqualified by any reference to the persons executing such deeds; neither requiring nor appearing to require that the party who executes must claim under a registered conveyance, or importing any other restriction; the statute then enacts "that it shall be good and sufficient, according to the priority of time of registering such memorial, against all and every deed, conveyance or disposition of the honours, etc.;" words, equally unlimited and unqualified by any consideration whether the person executing such prior deeds was or was not the same person who executed the second, whether the person executing the second deed claims under a **[493]** registered conveyance, whether he is seised or possessed *proprio jure*, or is in under a title which has come to him by act or operation of law.

We do not see how we can give full force to the expression used by the Legislature in this section unless we adopt a construction as large as the language itself. If it had been the intention of the Legislature that the priority between deeds should take place according to the time of their registration only where both the first and the second deed were executed by the same person, it surely would have been easy to have expressed this by words to that effect; but there is no expression in the fourth section which imports such a restriction, and we think we should be legislating, not interpreting, if we were of our own authority to imply such words. The fifth section, the section upon which the present questions turn, states the effect of registration as between unregistered and registered deeds in the following terms: "Every deed or conveyance not registered of all or any of the honours, etc. comprised or contained in such a deed or conveyance, a memorial whereof shall be registered in pursuance of this Act, shall be deemed and adjudged as fraudulent and void, not only against such a deed or conveyance registered as aforesaid, but likewise against all and every creditor and creditors, by judgment, recognizance, statute merchant or of the staple, confessed, acknowledged or entered into as for or concerning all or any of the honours, etc. contained or expressed in such memorial registered as aforesaid." Now in this clause also as in the former the expression is general, "every deed," and is altogether unqualified by any reference to the description of the party by whom the unregistered deed is executed, whether he be the same who executed the registered deed or another and a different person. The **[494]** same observation therefore occurs upon the fifth which has already been made upon the fourth section, namely, if the Legislature intended the unregistered deed to be void against a registered deed in such case only where both were executed by the same party, so important a qualification would scarcely have been omitted in the Act itself, or left to be supplied by interpretation in a court of law.

From this general view, therefore, both of the preamble and of the five first clauses of the statute, we think it cannot be doubted but that the statute meant to afford an effectual remedy against the mischief arising to purchasers for a valuable consideration from the subsequent discovery of secret or concealed conveyances, or secret or concealed charges upon the estate. Now it is obvious that no more effectual remedy can be devised than by requiring that every deed by which any interests in lands or tenements is transferred, or any charge created thereon, shall be put upon the register, under the peril that if it is not found thereon, the subsequent purchaser for a valuable consideration, and without notice, shall gain the priority over the former conveyance by the earlier registration of his subsequent deed.

If the words of the fifth section will bear this construction, it will be preferred to that which limits the operation of the clause to those cases only where both the conveyances are the deeds of the same man. For in the latter case the remedy is obviously incomplete. The mischief to the purchasers is the same whether the secret conveyance or charge arises from the deed of his immediate grantor or that of a former owner of the estate. If the words of the statute will comprehend both, why is he to be protected against a secret deed in the one case and not in the other? What just ground **[495]** of complaint can be urged against such a construction by the grantee

under the unregistered deed executed by a former owner of the estate? The deed, if it was a real and a *bona fide* transaction, must have been or ought to have been in his custody or power from the time of its delivery. What cause can be assigned for its non-appearance upon the register, except either collusion with the grantor or carelessness and neglect in himself, or mere accident. In neither case can he complain of the construction of the statute, by which his own fraud, or his own want of due caution, or an accident which befel himself, is not allowed to operate to the prejudice of the rights of the more diligent purchaser. Suppose a man to settle his property, upon his youngest son's marriage, on himself for life, remainder to his eldest son for life, remainder to the younger son, his wife and children, in strict settlement, remainder over in fee: the settlement is not registered, and the settlor dies, his eldest son enters, and supposing himself to have the fee, conveys to a purchaser for a valuable consideration, shall it be allowed that the younger son, his widow or his children, shall enter and evict the purchaser? Or suppose a like settlement, and a like concealment, and the father devises all his lands in trust to sell and to apply the money to debts and portions, or other purposes: after the estate is sold, and the money distributed, can the construction of this Act be such that the purchaser shall be turned out by the claimants under this settlement? Or in the particular case now before us, where Mrs. Warburton before her marriage might have registered the deed, and the trustees after the marriage were bound in duty to do so if the settlement came to their knowledge, can the proper construction of this Act allow Mrs. Warburton to avail herself of her own care-[496]-lessness, or of the breach of duty of her trustees, by establishing her unregistered deed against a registered lease made by her husband upon no other ground than that the settlement and the lease were not conveyances by the same person? If there was no provision in the Act to prevent this inconvenience, it must be submitted to through necessity; but if there are words in the Act capable of such an interpretation as would prevent the inconvenience, we think ourselves bound upon every consideration to give them such an effect. How much more then where the words themselves and their strict grammatical construction appear to require such a sense? That in all the cases above supposed a great injustice would be worked if the Act supplied no remedy, no one can deny; it appears to us that to allow the Act to authorize such mischief would not only be injustice, but would be against law. The language of the Act throughout, and more particularly in the fifth section, seems to establish this to have been its leading object, that as far as deeds were concerned the register should give complete information, and that any necessity of looking further for deeds than into the register itself should be superseded; and it is manifest that no construction of the Act is so well calculated to carry into effect this its avowed object as that which forces all transfers and dispositions of every kind, and by whomsoever made, to be put upon the face of the register, so as to be open to the inspection of all parties who may at any time claim an interest therein. But the general rules of construction which have been established from the earliest times require a large and liberal interpretation of any provision made for the suppression of fraud. In Heydon's Case, 3 Rep. 7, the Barons of the Exchequer resolved, that the construction of the statute then under consideration before them [497] must be made, "by inquiring what was the mischief and defect against which the common law did not provide? what remedy the Parliament had appointed to cure the disease of the common wealth? and what was the true reason of the remedy?" and the observation which follows in the Report is one that ought never to be lost sight of in any case, and is peculiarly applicable to the present, namely, "that the office of all Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*." This principle of construction has always been adopted by courts of justice. Thus where the statute of Marlbridge, c. 6, provides that a feoffment to the heir to defraud the lord of ward, etc. shall be void, the statute is held not to be confined to the case of a feoffment, but to extend to a grant, fine, recovery, lease and release, confirmation, or other conveyance. Thus again, where the statute of Fraudulent Gifts, 37 Eliz., c. 4, enacts, that "every conveyance of any lands, etc. for the intent and purpose to defeat and deceive such persons as have purchased or shall purchase the same lands, shall be deemed only

against such purchaser to be void, frustrate and of none effect:" it was resolved in Burrel's Case, 6 Co. 72, that the remedy was not confined to cases where the first and second conveyances were made by the same person, but that " if the father makes a lease by fraud and covin of his land, to defraud others to whom he shall demise or sell it (as all fraudulent leases shall be so intended) and before the father sells, or demises it, he dies, and the son, knowing or not knowing of the said lease, sells the [498] land on good consideration, in that case the vendee shall avoid that lease by the said Act:" and it is afterwards observed, " it is not necessary that he who sells the land should make the former fraudulent estate or incumbrance, but be the estate, etc. fraudulent, whosoever makes it, the purchaser shall avoid such fraudulent estate;" and Lord Coke adds to his report of the case, " that when he acquainted Popham, C. J. with that resolution, he allowed well of it, and said it was well done to construe the said Act in suppression of fraud." The decision in Burrel's case, which is last referred to, appears highly important in a double point of view: in the first place, as confirming and fortifying the general rule of construction above laid down; and in the next, as having a direct bearing and application to the proper construction of the fifth section of the Irish Registry Act. For the Act against fraudulent conveyances and the Irish Registry Act have the same object in view. The mischiefs to be remedied in both are to a great degree the same, namely, the frauds practised by grantors against purchasers for value: the remedy applied by both is the same also, namely, the making the former deed void against the latter: and between the terms used by the Legislature in each of the clauses by which the former deed is avoided there is almost an exact and complete agreement. When, therefore, we find the Judges deciding, in the case under the statute of Eliz., that the statute shall apply although the fraudulent estate and the *bona fide* lease are not made by the same person, it affords the strongest authority that can be furnished by analogy, that the same ought to be the construction of the clause now under discussion. It has been urged, in answer to this construction of the fifth section, that it is not to be taken by itself alone, but in conjunction with the fourth sec-[499]-tion, of which it is contended that one object was to control and qualify the operation of the next following clause. And it is further urged, that as the fourth section, in declaring the effect and operation of registered conveyances, *inter se*, gives efficacy to the first registered deed in preference to the second, not absolutely, but only " according to the right, title and interest of the person conveying," a similar restriction must be understood to be imported into the fifth section also, and that the enactment which avoids altogether the prior unregistered as against the subsequent deed which is put upon the register, must be understood with this tacit restriction, " according to the right, title and interest of the grantor in the second deed." The meaning of those restrictive words in the fourth section appears to be " according to what *would have been* the right, title and interest of the person making the second conveyance had there been no deed but what appears upon the register." For unless this be the meaning of those words in the fourth section, that clause of the statute affords no protection at all. The clause, therefore, so understood, enacts in effect, that every man who first registers his conveyance, where there is no other objection to the grantor's right to convey except a prior conveyance made by himself and unregistered, shall be preferred to the man who registers at a subsequent time the conveyance so made to him. This construction, on the one hand, excludes from the protection of the fourth section the grantee who has registered a conveyance made to him by a perfect stranger to the estate: and on the other hand includes within its protection, as between two grantees, that one who first registers his conveyance, made by the owner of the estates. To apply which construction to the facts of the present case, the husband, but for the unre-[500]-gistered marriage settlement, would have had the right and title to have made the lease of 1800. For when he married, the residue of the term of 999 years would have belonged to the wife's father for life, remainder to the wife. Now when the father died, (as he did before the making of the lease of 1800), the term would have vested in the husband in right of his wife, with full power in him alone to dispose of it. At the time therefore that the lease of 1800 was made, it would have been a good and valid lease but for the unregistered settlement of 1779. The case therefore of these lessees, if there had been a subsequent registration of the marriage settlement, would have been argued upon the fourth section, and upon that section the lessees

would, as it appears to us, have been entitled to the preference before any who claim under the marriage settlement: but it is urged that the fifth section is to be construed as if subject to the same condition. Even admitting such should be the case, and incorporating that condition into the fifth section, it would still seem that the unregistered settlement is to be held void against the registered lease, the latter being a lease granted by a person who would in all other respects, except so far as relates to the prior unregistered settlement, have had " right and title " to grant the lease. But after all, why is the clear intelligent language of the fifth section to be controlled by the more ambiguous language of the fourth? No rule of construction can require that, when the words of one part of a statute convey a clear meaning according to their strict grammatical construction, a meaning which best " advances the remedy and suppresses the mischief " aimed at by the Legislature, it shall be necessary to introduce another part of the statute which speaks with less perspicuity, and of which the words may be capable of such construction **[501]** as by possibility to diminish the efficacy of the other provisions of the Act.

It has been further argued, that the effect of the marriage settlement was to prevent the husband from having any right to grant the lease of 1800 at the time it was made, for that the wife's right was effectually conveyed as between her husband and herself by the deed of 1779; that she had no interest in her at the time she married; that she could therefore pass no interest to her husband by the marriage; that the husband consequently never had any right, and therefore could convey none to the lessee. Now it may be admitted, that as against the husband, who was party to the deed of 1779, that deed was valid; it may be admitted also, that he could not of right exercise any power over the property inconsistent with that deed; but as by the non-registration of that deed the grantees suffered him, as to the world at large, to have the appearance of right, neither they, nor any claiming under them, are at liberty to set up the deed in opposition to the persons who have been deluded by the appearance of right in the husband. This argument therefore, which would be good against the husband himself, cannot be heard from the parties claiming under the settlement against his grantee for a valuable consideration.

It is further urged in argument, that the Irish Registry Act never intended the register to contain a perfect history of the title, for that devises are not required to be registered by that Act, and therefore the conveyance by the heir, although registered, may always be set aside by the devisee claiming under a will concealed or subsequently discovered. It must be admitted that such is the necessary construction of the Act, and it is to be regretted that it is defective in that particular. But surely that defect affords no argument for so construing **[502]** it in another of its provisions as to make it inefficacious against a former unregistered conveyance. If the Act does not go far enough, at least the interpretation of the Court of Law should make it perfect as far as its enactments do extend.

One objection taken in argument to the right of the Plaintiff below to recover in ejectment has been, that she takes no legal interest in the premises. It has been asked to whom does the rent reserved by this lease belong, and by whom could it be recovered? It should be observed, that the same difficulty would have occurred, and the same question might have arisen, had both the deeds been executed by the Plaintiff in error, and had the first deed been for any other purposes and without any trust in favour of the wife. The first deed, the unregistered deed, would, as between her and the trustees, have effectually vested all her interest in the trustees, and she would have had no right or title or interest in herself: she would have nothing *of her own* to convey: and though her conveyance would by force of the Registry Act have passed a good and valid legal estate to her lessee, she never would have been capable of taking the rent reserved upon it to her own use. How the rent would have been recoverable in either case it is not necessary now to say; it is sufficient, that as against the unregistered settlement the lease conveyed the legal interest to the lessee.

Upon the whole, therefore, upon the first question submitted to us, we think the title of the assignees of the lease is to be preferred to that of the widow or that of the trustees under the settlement.

Upon the second question proposed by your Lordships, after the full discussion of the principle on which we have arrived at the former opinion, it will be sufficient to say—We think the neglect to register the assignment **[503]** of the lease does not

invalidate the claim of the assignees, because the unregistered assignment passed the interest in the lease as between the lessee and the assignee, and there is no conflicting claimant under a registered deed.

Lord Tenterden expressed his perfect concurrence in the opinions thus delivered, and moved the judgment of the House in conformity to it.

Judgment of the Court below affirmed (23 Feb. 1832).

REPORTS OF CASES heard in the House of Lords, on Appeals and Writs of Error, and decided during the Session 1831-32. By C. CLARK & W. FINNELLY, Barristers-at-Law. Vol. I.

ON APPEAL.

FROM THE COURT OF EXCHEQUER.

THOMAS WILSON,—*Appellant*: The Right Honourable WILLIAM, Baron KENSINGTON, of that Part of the United Kingdom called Ireland, and EDWARD MEREDITH,—*Respondents*.

[S.C. 5 Bli. N.S. 475.]

A custom to pay one-twentieth instead of the full amount of tithes, though proved to be very ancient, cannot be supported by such proof alone, but must be shown to have had a legal origin. In a case where this proof of legal origin was wanting, the House of Lords, affirming a decree of the Equity Exchequer, held the tenants of the lands liable to account for the full tithes.

The rectory of Llanbister, in the county of Radnor, is appropriated as a prebend to the Chancellor of the cathedral church of St. David's.

[2] On or before Michaelmas-day, 1824, the Respondent, Lord Kensington, was lessee for lives of this rectory; and the Respondent, Edward Meredith was lessee for years, under his Lordship, and they have ever since continued to be such lessee and under lessee.

Part of the parish of Llanbister is distinguished by the appellation of the Upper or Gollon Division, on which stands a chapel, called Abbey Cwmhir Chapel; and the rest is known as the Lower Division, on which stands the parish church. The upper division lies within a manor called the Manor of Gollon, and consists of two townships; viz. the township of Gollon, in the hundred of Knighton, and the township of Kefn (or Cefn) Pawl, in the hundred of Kefn (or Cefn) Llys. And the lower division, which lies within a different manor, consists of several hamlets; among which are three hamlets, called Trylwydon, Peinherney and Parogey.

The vicar is entitled to all tithes, great as well as small, arising within the three hamlets just mentioned; and is not entitled to any tithe whatever arising within any other part of the parish.

On and before Michaelmas-day 1824, and thenceforward, the Appellant occupied a farm and lands in the township of Kefn Pawl, called Kefn Pawl Farm; to which are appurtenant common of pasture and common of turbary, on part of a waste or common, called Lwyngoch Hill, lying within the same township.

The Respondents, by their bill, filed in the Court Exchequer in Trinity Term 1827, against the Appellant, Stephen Pugh, the Rev. David Lloyd, clerk, vicar of the parish of Llanbister, and John Cheesement Severn, set forth their title to the effect above stated, [3] and alleged that until Michaelmas-day 1825, a composition had been accepted, but that the said Stephen Pugh and the Appellant were accountable for tithes from that day: and after suggesting a pretence on the part of the said Stephen

Pugh and the Appellant, that from time immemorial the occupiers of their farms, lands and right of common had been accustomed to yield or pay to the prebendary and parson of Llanbister one-twentieth part only of the titheable matters arising therefrom; the Respondents submitted that, supposing such custom to have prevailed, the same was unreasonable, illegal, and void; and the prayer of the bill was, that the said David Lloyd might set forth whether he claimed any title to or interest in the tithes, which were the subject matter of this suit, and that the said Stephen Pugh and the Appellant might be decreed severally to account with the Respondent Edward Meredith for the value of the same tithes, and pay to him what upon such account should appear to be due.

By his answer, filed on the 12th of June 1827, the Appellant, admitting his occupation of the lands in question, and admitting the Respondents' title to a moiety of the tithes submitted to account, if the Respondents should establish their claim to the entirety. But the Appellant, among other things, alleged, that the manor of Gollon comprised divers townships and parts of townships in the county of Radnor, and, amongst others, the whole of the several townships of Gollon and Kefn Pawl, and that this manor was in ancient times a parish of itself, and still was o in fact, although the same, in modern times, had by reputation been considered to be within the parish of Llanbister, and other adjoining parishes: that one moiety of the tithes, as well great as small, yearly arising in the whole or most parts of the manor of [4] Gollon, and in particular in the parts thereof which comprise the townships of Gollon and Kefn Pawl, belonged to the monastery of Cwmhir before and at the time of the dissolution of that monastery, to which also the manor of Gollon and the Appellant's farm and lands, with the common appurtenant thereto, also belonged: that the said manor, etc., and the said moiety of tithes, upon the dissolution of the monastery, came to the Crown; and now belong to the Appellant by a title derived from and under a grant or grants of King Henry the Eighth: that for many years past the lessees of the prebendaries of Llanbister had received one moiety of the tithes arising in those parts of the manor of Gollon which comprised the townships of Gollon and Kefn Pawl, and which in modern times had, by reputation, been considered to be within the parish of Llanbister, and particularly one moiety of the tithes of the Appellant's said farm and lands, with the said rights of common appurtenant thereto; and the Appellant alleged that certain tithes were satisfied by the payment of moduses or customary payments, within the parish of Llanbister: that the lessees of the said prebendaries had received the moiety of tithes within those parts of the manor of Gollon which comprise the townships of Gollon and Kefn Pawl, upon the footing of the said moduses or customary payments; and that as to one estate within the township of Gollon they had received the sum of 13s. 4d. as a modus or customary payment in satisfaction of all the tithes which they claimed to receive of and from such estates.

The vicar, Mr. David Lloyd, by his answer said that he did not claim any tithes from the townships of Gollon and Kefn Pawl.

The only documentary evidence produced on the [5] part of the Respondents was a terrier from the registry of the Archdeacon of Brecon, within whose archdeaconry the parish of Llanbister is situate, made on the 17th of March 1720, and renewed and confirmed and signed by the vicar, curate, churchwardens, and seventeen of the principal parishioners of Llanbister on the 4th of October 1757. The following are among the most important of its contents: Easter-offerings are payable to the vicar by every inhabitant of the parish, and fourpence is payable yearly to the parish clerk or sexton by every housekeeper in the parish "who farms (lands of the value of) 40s. per annum, or keepes a team;" the tenth of all corn and grain *raised in the said parish, except within the manor of Gollon*, is due in kind, and other articles are titheable in a customary manner; "but in that parte of the said parishe which is in the said lordship or manor of Golon, being *abbey lands*, there is but the moiety or one halfe parte of all the tithes before mentioned due and payable by the *custom of the said manor.*"

Three witnesses proved the payment by them, and by others within their memory, of full rates and tithes in respect of lands situated within the manor of Gollon. These were paid to the parish of Llanbister, and the witnesses were present at the parish meetings of Llanbister in right of these lands.

The Appellant gave in evidence royal charters of King John, King Henry the Third, and King Edward the Third, whereby the Abbey of Cwmhir, instituted for monks of the Cistercian order, was endowed with (*inter alia*) the manor of "Gollon," and lands called Kefn Pawl; but no mention was made of a parish, rectory, or church of Gollon or Llanbister, or of any other parish, rectory, or church, or of tithes, or a moiety or other portion of tithes.

[6] From an entry in a book lodged in the British Museum, it appeared that, by a charter of 1283, a collegiate church of Abergwylly was founded for secular priests, and endowed with several advowsons, among which was "the church of Llanbister."

From another entry it appeared, that by a charter of 1299, six advowsons were granted by the Crown to the Bishop of St. David's, to be by him annexed to the churches of Abergwylly and St. David's: one of the six was called the church of "Kollan."

From other entries it might be collected that Abergwylly was shortly afterwards united to and merged in the cathedral church of St. David's, and that in the year 1335 the church of Llanbister was constituted a prebend for the chancellor of that cathedral.

The Appellant insisted that "Kollan" must have been identical with "Gollon," and have signified the advowson of a parish comprising the lands in question.

The Appellant also put in a minister's account from Michaelmas, in the thirtieth year of King Henry the Eighth, to the Michaelmas following, of the "lordships, manors, lands and tenements, and other possessions whatsoever, as well temporal as spiritual, belonging to the monastery of Cwmhir, which had been dissolved in the twentieth year of the reigning king. The demesne lands were mentioned as demised to John Turner, gentleman, at the yearly rent of 10s.: under the head of 'rents in Gollon,' were specified eighty-one tenements, let to different tenants, as rents amounting to £17 14s. 7d., which, with 18s. 8d. for the rent of twenty-eight bushels of oatmeal, price of bushel 8d.," made the total of rents in Gollon £18 13s. 3d.: among the tenements in Gollon were "Keven y Pawle," in the tenure of Tevan David ap Tevan, at the yearly rent of 3s. 4d.; and another [7] "Keven y Pawle," in the tenure of Meredith David Phillips, at the yearly rent of 5s. 4d.: no mention was made of tithes, or a moiety or other portion of tithes, or any composition in lieu of tithes.

By a royal grant of 28th July 1545, the site and demesne lands of the abbey tenements in Gollon were let at rents partly in money and partly in oatmeal. There was another grant by King Henry the Eighth, in the thirty-eighth year of his reign, to George Owen and John Bridges, of other parts of the possessions of the dissolved abbey; viz. the manor of Gollon and certain parcels of land in the town, fields, or parish (*villa, campis, seu parochia,*) of Gollon. But by neither of the two last-mentioned instruments, nor by the following documents which were also put in evidence, was a grant made of any rectory or tithes.

A licence, granted by King Edward the Sixth, in the first year of his reign, for persons claiming under the grant of 37 Hen. VIII., to alienate the premises thereby granted, which were mentioned to be situate in the parishes of Llanbister, Gollon, and Cwmhir.

An *Inquisitio post mortem* in the second year of Queen Elizabeth, on the death of John Williams. The manor of Gollon, the site and demesne lands of the dissolved monastery, and divers tenements in Gollon, were among the property, of which he is said to have died seised.

An indenture of covenant, dated 7th May 1565, whereby Nicholas Williams covenanted to convey and assure to William Fowler and his heirs, the manor of Gollon, the site and demesne lands of the monastery, and divers tenements in Gollon.

An indenture of feoffment, dated 25th May 1565, whereby the same were conveyed and assured accordingly.

[8] A licence, granted by Queen Elizabeth, in the eighth year of her reign, for Nicholas Williams and Mably his wife, to alienate the manor of Gollon, the site and demesne lands of the dissolved monastery, and divers tenements in Gollon, to William Fowler and Edward Herbert, and their heirs.

Extract from the Parliamentary Surveys of ecclesiastical benefices, made during the Commonwealth in England, (A.D. 1648—1658), beginning thus: "All that prebend or parsonage of Llanbister, in the county of Radnor, together with all tything,

corne, fruits, offerings, oblations, porcons of tyth, commodities, emoluments, advantages, issues, p'fitts, and hereditaments whatsoever or wheresoever."

Title of the terrier of 17th March 1720, and 4th October 1757, before produced on the part of the Respondents in the following words, viz. "A true, full, and perfect terrier of the vicarage house, outhouses, buildings, glebe-lands, and of all and all manner of tithes, and rate tithes, portions of tithes, and all other profits, dues, duties, and customs belonging and paid unto the prebendary and vicarage of Llanbister."

Leases granted by the Fowler family; one in the 1734, one in 1754, two in 1755, one in 1764, of the lands in question, described as situate in the parish of Llanbister, at certain money rents, together with tithes of kids, geese and pigs, formerly paid to the monastery of Cwmhir, or with other chapel dues.

Two presentations, by the Fowler family, to the curacy of the abbey chapel, described as in the parish of Llanbister.

Accounts of stewards of the Fowler family, showing the receipt of pigs, poultry, and other chapel dues.

Record of proceedings in the court of the Archdeacon of Brecon, by a curate of the abbey chapel, in [9] the year 1791, to recover chapel dues from an inhabitant of the upper division of the parish of Llanbister.

Some parol evidence was given as to the limits of the parish of Llanbister, with a view to show that the upper and lower divisions had been in all respects distinct and separate parishes. The witnesses stated that the manor of Gollon extended over seven townships.

The township of Gollon was not in the same hundred with the township of Kefn Pawl; but these townships together constituted the upper division of the parish of Llanbister.

The upper division had from time immemorial contributed one-third of the expense of keeping the parish church in repair.

Shortly after the dissolution of the abbey Cwmhir, a chapel was built near its site, which was kept in repair by the owners of the abbey estate until about thirty-five years ago. It had ever since been repaired at the expense of the parish, two divisions contributing in the same proportion as for repairing the parish church. Each division maintained its own poor.

The same witnesses spoke to the fact of a twentieth part of the produce, or half tithe only, having been paid for lands in the townships of Gollon and Kefn Pawl, and for the rest of the lands in the manor of Gollon, excepting for the abbey farm, which paid a modus of 13s. 4d. a year, and excepting for lands in the parish of Saint Harmon, which paid full tithes.

The Reverend John Picton George considered the district or place called Gollon, in the county of Radnor, to be a parish of itself, and such was the general reputation. But he did not remember to have heard any old person, now deceased, express any opinion or belief on the subject one way or the other.

[10] The cause came on to be heard before the Right Honourable Sir William Alexander, then Lord Chief Baron, in January, May and June 1830. His judgment, in substance, was, that there was no evidence of a legal origin for the apportionment of the tithes, although the custom seemed to be one of considerable antiquity, and he therefore decreed an account.

This decree the Appellant contended should be reversed, for the following among other reasons:

It appeared from the grant of King Edward I. to David, Lord Bishop of St. David's, 1299, that there was a church, and consequently a parish, of Kollan, (Gollon) in the diocese of St. David's at that time. And the grant of King Henry VIII. to George Owen and John Bridges, 37 Henry VIII., of the manor of Gollon, and the license of King Edward VI. to George Owen to alienate the manor of Gollon to John Williams and John Gresham, 1st Edward VI., and the covenant by Nicholas Williams to convey the manor of Gollon to William Fowler and Edward Herbert, all used the terms, "parish of Gollon," so that it must be inferred from these documents that the manor of Gollon, at the date of these various instruments, constituted a parish of itself, and was no part of the various parishes within which it had been reputed in modern times to be situate.

The townships of Gollon and Cefn Pawl, although reputed in modern times to be

part of the parish of Llanbister, yet were treated as a separate division of the parish, were separately perambulated, had a separate churchwarden, levied by themselves a fixed proportion of the church rate, and maintained their poor separately from the other division of the parish.

The chapel of abbey Cwmhire had the parochial rights of baptism, burial and marriage belonging to it. **[11]** Baptisms and burials still took place there, but marriages had not been solemnized in it of late years.

It appeared from the deeds of agreement with the convents of Strata Florida and Alba Landa, that it was not unusual in the diocese of St. David's for monastic bodies to enjoy a part of the tithes of their own lands. The abbey of Cwmhir was of the same order (the Cistercian) as the convents of Strata Florida and Alba Landa.

That the abbey of Cwmhir was seised of part of the tithes of its own lands, might be inferred: 1. From the minister's accounts of the possessions of the abbey, 30 and 31 Henry VIII., (purporting to be an account of its possessions, temporal as well as spiritual,) where the reservation of 28 bushels of oatmeal from its lands in the manor of Gollon, valued at 18s. 8d., being one-twentieth of the whole value of the lands, (including the oatmeal) £18 13s. 4d. pointed out strongly that the oatmeal was a payment in respect of the abbey's moiety of the tithes of its lands in the manor of Gollon. 2. From the mention of "tithes," in some of the title deeds of the Fowler family. 3. From the reservation of certain tithes in the leases granted by the Fowler family of lands within the manor of Gollon, part of the possessions of the abbey, "as the same had been accustomed to be paid to the abbots of the monastery of Cwmhir." 4. From the payment of chapel dues from this land which had belonged to the abbey of Cwmhir, to the Fowler family, but which chapel dues for many years past had been received by the curate of the chapel. These chapel dues might be a render in lieu of the oatmeal mentioned in the minister's accounts; that the render was of a spiritual nature appeared from the proceedings in the Ecclesiastical Court to enforce the payment of it.

[12] The nomination of the curate to the chapel of Cwmhir by the Fowler family, was a proof of its independence of the parish of Llanbister, and of an appropriation of tithes to the abbey of Cwmhir, to whose possessions the Fowler family succeeded, such nominations properly belonging to those to whom the tithes were appropriated. The nomination to the chapel should have been in the prebendary of Llanbister if it was a chapel belonging to that parish.

The non-render of one moiety of the tithes of Gollon and Cefn Pawl to the prebendary of Llanbister, as far back as any history went, was undisputed, and the withholding of one moiety, whilst the other moiety was paid, was very different from a mere non-render of any tithes which might be supposed to have arisen from neglect or accident. The payment of one moiety of tithes excluded the possibility of any supposition of neglect or accident. There must have been a legal foundation for the withholding of the other moiety: and where there was much evidence that the manor of Gollon was formerly a parish of itself, and that the abbey of Cwmhire was owner of one moiety of the tithes of the manor of Gollon, the law would be anxious to refer the withholding of the last moiety of tithes to these foundations, or one of them.

The language of the terriers of Llanbister and Llandewy, Istradenny, and of the Parliamentary survey, favoured the notion of the prebendary of Llanbister's being a mere portionist of tithes in the manor of Gollon.

The Respondents argued that the decree ought to be affirmed for the following reasons:

Because the Appellant admitted that "in modern times" the lands in question had, by reputation, been considered to be "within the parish of Llanbister," **[13]** and failed to prove that they are not so in fact. The Appellant had not attempted to show, in conformity with his answer, that the lands lay within a parish commensurate with the manor of Gollon; and if from the evidence a probability arose that the Upper or Gollon division of Llanbister (which was a small portion only of the manor of Gollon) was once a distinct parish, a stronger probability followed that it was incorporate with Llanbister at a very remote period: no trace was discernible of a chapel having on such an union been endowed with tithes: on the contrary, the present Abbey Cwmhir chapel appeared to have been built by a landlord for the

convenience of his tenants residing at a considerable distance from their parish church, in substitution of a monastery recently dissolved, at which they had been accustomed to attend divine service; it remained a simple donation in his family until augmented by Queen Anne's bounty; and its minister appeared to have been supported originally by indirect and subsequently by direct contribution of the tenants for whom it was designed.

Having baptism and sepulture (originally conceded as must be presumed by the vicar with the consent of the bishop and patron), this might be a parochial chapel; and with regard to spiritual concerns, such a chapel was scarcely distinguishable from a church; but its temporal appendages were widely different: the curate of such a chapel was not entitled to tithes of common right, though capable of holding them by actual endowment, and was more frequently (as in the present instance) supported by a temporal revenue. The inhabitants of a district, by exclusively frequenting a parochial chapel and keeping it in repair, were not rendered less chargeable for repairs of the mother church (*Anon.* 17. *Vin.* 576. *pl.* 9.), nor by maintaining the capellan at their sole [14] charge were they relieved from rendering tithes to the incumbent of the church. Accordingly, the inhabitants of the townships of Gollon and Kefn Pawl had always been subject to compulsory church rates, and to payment of tithes, both great and small, to the rector or vicar of Llanbister. Whether the proper quantum of tithes had been paid was a point to be separately considered.

The appointment of distinct officers and the levying of distinct rates for different divisions of the parish, the maintenance of its own poor by each division, and the consequent removal of paupers from one to the other, were not peculiar to Llanbister. Such arrangements were authorized by the statute 13 and 14 Car 2. and 12., and had been repeatedly recognised and sustained by courts of law.

In Llanbister, sacramental bread and wine for the church were provided; and Easter dues to the vicar, and a salary to the parish clerk, were paid by parishioners, without regard to the district or division in which they resided, and the parish accounts were settled at general meetings of parishioners.

The Appellant had failed to prove that the abbey Cwmhir was endowed with a moiety of the tithes in question.

The charters of endowment had been produced, and not found to contain tithes, or any property of which tithes were a fruit; and on the dissolution of the abbey, no tithes were among its possessions, of which an account was rendered by the proper minister to King Henry VIII.

The Appellant had failed to prove a title in himself to a moiety of the tithes in question.

The Appellant's claim (which is propounded with some uncertainty) seemed to wear a double aspect, *i.e.* [15] he claimed to be either seised of the impropriate rectory of a parish distinct from Llanbister, or entitled to a portion of the tithes in the parish of Llanbister.

The same evidences of title were necesary to an impropriate rectory as to an advowson.

Still more strict proof was required of a title to a portion of tithes. To establish a composition real or exchange of tithes for other property, and *à fortiori* to establish an alienation of tithes without recompence, either the original deed must be produced, or, generally speaking, evidence must be given of its having once existed. Such evidence had never been dispensed with, unless where a deed of alienation might be presumed from a chain of conveyances reaching back for centuries.

But the Appellant had no muniments of titles at all.

Grants of King Henry VIII., dated 28th July 1545, and 8th October 1546, were the avowed bases of his claim; and supposing the Crown to have been (though it did not appear to have been) seised of the rectory of a distinct parish, within which the Appellant's lands were situated, or of a portion of the tithes of Llanbister parish, neither of the royal grants contained words sufficient to convey such property to the grantees.

The grantees themselves were not considered entitled to a rectory or to a moiety of tithes; for the licenses to alien which they obtained did not include property of either kind, nor was any such found among their possessions when inquisitions were taken on their decease.

As far as appeared on the title deeds produced, none of the parties from whom the Appellant derived title ever made the moiety of tithes now claimed, or any rectory or tithes whatsoever, the subject of a settlement, will, mortgage, or other conveyance.

[16] Though the Respondents, and those under whom they claim, had been accustomed to receive a moiety only of their legal dues, such a custom, being essentially unreasonable, was not obligatory.

The witnesses spoke to usage only, indeed parol evidence could extend no further, and there was no written evidence of a right to retain a moiety of the tithes in question, excepting a terrier, which distinctly state such retention to be warranted only " by the custom of the manor."

A clue to the origin of this custom was afforded by evidence of the district over which it extends having been " abbey lands," immediately circumjacent to a monastery: as the monks might without difficulty have occupied these lands, and would have held them exempt from tithes *dum propiis manibus excolebantur*, it was not unreasonable for them to stipulate with the incumbent of the parish that their tenants should be subjected to half tithe only; such an arrangement, once made, was likely to grow into an immemorial custom, and as the manor belonged to the monastery, the practice of the abbot and his tenants would be " the custom of the manor."

Such motives might not operate universally among the incumbents of the neighbouring parishes: thus the rector of St. Harmon's, under a conviction that the monks could not conveniently cultivate lands in his parish, might refuse to narrow his legal right.

The Lord Chancellor: No doubt whatever can be entertained as to this case. My opinion coincides in almost all matters with that expressed by the Lord Chief Baron Alexander. The question here arises between the parson, prebend of Llanbister, who is also rector of the parish as it now exists, including Gollon, and the owners of the lands of Gollon, who refuse to **[17]** pay more than one twentieth of the annual produce of their lands, etc., in the way of tithes, alleging that they never have, at any time, paid more than one twentieth, or, in other words, that no payment of tithes has been claimed as due from those inhabitants to that parson. This is not as it has been put at the bar; a case of peculiar hardship upon the inhabitants: the hardship is necessarily incident to such cases. You cannot prescribe for a custom *de non decimando* where the parson has a right to tithes; so that the mere non-payment set up here goes for nothing. In no one case can a question arise, nor can any case come before the Court, where it could be proved that in no one instance since 1189 has there been a perception of tithes. No man in his senses would think of resisting a claim of tithes on such grounds alone; for by the law of the land one single payment would be sufficient to establish the claim in the face of all the other non-payments. That is the whole of the matter in which I find fault with the judgment, that it puts the case as a question of fact. The Appellants must know that a custom of only paying one-twentieth instead of one-tenth is bad in law, and must be rank as a modus; and they are bound to explain how that custom was founded, and to give its legal origin and commencement. It is said that it might originate in one of two ways; my remark on that is, that that cannot be so, for one of these two ways is worth nothing unless the other is established. They first say that Cefn Pawl formerly belonged to a separate parish, and that the parson of Llanbister was but a portioner in the adjoining parish of Gollon, and that he *quasi* parson of Llanbister, can only prove his rights co-extensive with the usage, though he is parson of Llanbister, which now includes Gollon by union. The second is, that the abbey, as it is called, of **[18]** Cwmhire, has always had the moiety of the tithes of Gollon. This second point would be good, for it would account for the parson of Llanbister only having a right to a portion of the tithes. But I do not see that the Appellants prove how Gollon has only paid part of the tithes, for they leave the residue unaccounted for, and this proof ought to be strictly given, for tithes are an undivided thing. They cannot get off paying tithes by showing that one-twentieth only has usually been paid, for they must account for the other twentieth. That they cannot do if the second question is excluded. They cannot prevail at all even if it were to be admitted that Gollon was a separate parish, and that those places which are now called Gollon and Cefn Pawl were separate parishes. The fact of their separation does not prove that the parson

of Llanbister was only entitled to a portion of the tithes of Gollon; and until the Appellants prove that, and the burden of proof is on them, they cannot succeed in establishing their exemption from payment of more than one-twentieth. If they can show that the abbey of Cwmhire has received, in any capacity, one-half of the tithes of Gollon and Cefn Pawl, that would aid the first proposition, and would account for what had become of the other part of the tithes. The first proposition is either unnecessary or superfluous: it is unnecessary if it does not assume the second, but if it does, it is superfluous. It appears to me that the evidence does not go to the extent required. There is no evidence of the monastery having got these tithes. The 18s. mentioned in the case was a money payment, and might have been made as a payment of rent, or for anything else; there is nothing to show that it was a payment strictly on account of tithes; and the argument raised on this payment is one of pure inference alone. The [19] monks of the abbey of Cwmhire were the lords of the manor of Gollon: there might have been a chapelry attached to that abbey. As it frequently happens in the north of England, it might be that Gollon might have been synonymous with Llanbister, for sometimes a parish gets a name from a leading township, and that is likely, as the abbey itself was in Gollon, which was properly therefore *caput baroniae*, and it is remarkable, in confirmation of that supposition, that where Gollon is mentioned Llanbister is not, and where Llanbister is mentioned Gollon is not. But though they might have been at one time separated, yet, as they are now united, that does not lose the right of the parson. There is every testimony of their having been united; it is impossible to say how long. The parson of a united parish has as good a right to the tithes for all as for part; and to say that he has not received them means nothing, for that amounts to a prescription *de non decimando*, which the law does not allow. In every way in which this question can be viewed with reference to the points of law, there cannot be any discrepancy of opinion. I shall therefore recommend your Lordships to affirm the judgment given in the Court below, but without costs.

Judgment affirmed accordingly.

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[20]

APPEAL.

FROM THE COURT OF EXCHEQUER CHAMBER.

JOHN DOE on the several demises of FRANCIS HEARLE, and ANNA MARIA HEARLE, his Wife, and of the said FRANCIS HEARLE.—*Plaintiff in Error:*
SUSANNA JEMIMA HICKS,—*Defendant in Error.*

[Mews' Dig. xv. 382. S.C. 6 Bli. N.S. 37; 8 Bing. 475; 1 M. and Scott, 759; and, in Court below *sub nom. Doe d. Hearle* v. *Hicks*, 1 Y. and J. 470. Approved of, and acted on, in *Farrer* v. *St. Catherine's College, Cambridge*, 1873, L.R. 16 Eq. 23; *Langdale* v. *Briggs*, 1873, 28 L.T. N.S. 469; *Green* v. *Tribe*, 1878, 9 Ch. D. 237; *Follett* v. *Pettman*, 1883, 23 Ch. D. 342; *French* v. *Hoey* [1899] 2 I.R. at p. 484; and *Leslie* v. *Rothes (Earl of)* [1894], 2 Ch. 499. And see *Wallace* v. *Seymour*, 1871, I.R. 6 C.L. 196.]

Where there is a clear and manifest intention to devise, it is incumbent on a party alleging a revocation by a codicil to prove that the intention to revoke was equally clear and manifest: if there was only a reasonable doubt, the first devise ought to stand.

A testator devised his copyhold messuage, called Plomer Hill House, with the appurtenances, to trustees, on trust for his wife for life, and subsequently, by one of several codicils revoking several of the dispositions made by his said will of all his freehold, copyhold and personal estate, he, instead of such disposition, devised all his freehold, copyhold and personal estate to his daughter. —Held, that the devise of the estate to his wife for life was not affected by this codicil.—p. 20.

This was an action of ejectment brought in the Court of Exchequer, in Hilary

Term 1826, for the recovery of a copyhold tenement and farm, called Plomer Hill House, with the appurtenances, situate in the manor of West Wycombe, in the county of Buckingham. The declaration contained several demises by Francis Hearle, and Anna Maria his wife, and by Francis Hearle alone, on the 15th day of August 1825. The defendant pleaded the general issue. The cause was tried at Aylesbury, at the Spring assizes for 1826, before Mr. Justice Holroyd. The jury found a special verdict, stating in substance that John Hicks was, at the time of making his will, seised in fee of certain freehold lands in Cornwall and Buckingham, and of a certain copyhold messuage or mansion-house, lands and hereditaments, with the appurtenances, called Plomer Hill House, being the premises mentioned in the declaration, situate in the parish of West Wycombe, in the said county of Bucks: That the said John Hicks, on the 4th day of May 1821, duly made and published his will in writing, executed and attested so as to pass real estate, and which will (amongst other devises) contained the following:—

[21] "In the first place, I give and devise all that my copyhold messuage, etc. called Plomer Hill House, in the parish of West Wycombe aforesaid, and now in my own occupation, together with the cottages or tenements and premises thereunto belonging, with their appurtenances, unto and to the use of R. B. Slater, the Earl of Cardigan, Joseph Holden Strutt, and George Farr, their heirs and assigns, upon trust for my present dear wife Susanna Jemima Hicks during her life or widowhood, or until she shall cease to reside at the said premises, or let the same, or permit them to be occupied by any other person than herself, she paying all taxes and outgoings in respect thereof, and keeping the same in good and tenantable repair; and from and after the decease or second marriage of my said wife, or on her ceasing to reside at the said premises, or letting the same to or permitting them to be occupied by any other person than herself, then and in either or any of the said cases, and whichever of the said events shall first happen, my said trustees, their heirs and assigns, shall stand and be seised or possessed of the said copyhold hereditaments and premises, with the appurtenances, upon and for such trusts, intents and purposes, and with, under, and subject to the powers, provisoes and declarations as (regard being had to the nature and quality of the tenure of the said copyhold premises) will best or nearest correspond with the uses, trusts, etc. hereinafter expressed and declared of and concerning the residue of my real estates, or such and so many of them as shall be then existing undetermined and capable of taking effect."

That on the 10th May, the 15th and 18th July, and 14th September, 1822, the said John Hicks added codicils to his will, the last of which (the only one im-[22]portant to be considered in this case) was in the following terms:

And I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me in my said will and codicils of all my freehold, copyhold and personal estate and effects of all and every kind and description, and instead and in the place of such devise, disposition and bequest thereof, I do give, devise and bequeath all and every my freehold, copyhold and personal estate and effects of every kind and description whatsoever, and wheresoever situated, unto my daughter Anna Maria Hearle; and from and after the determination of that estate, I give, devise and bequeath the same unto my grandson John Graves, and his heirs, in strict entail, as in my said will directed, with this additional clause, especial and positive orders, that in case the said John Graves should not be thirty-one years of age at the time my said estates shall devolve on him by the death of my daughter, that he shall not take or be put in possession of the same until he shall have attained such age of thirty-one years, but that the rents and profits thereof shall accumulate and be in the hands of my trustees for the use and benefit of my said grandson and his heirs; and in failure of issue of the said John Graves, I order that my said estates and effects shall go and descend as is by my said will directed. And I do hereby ratify and confirm the several annuities and donations by me in my said will and former codicils given and bequeathed. And I do further give and bequeath unto my dear wife Jemima one other annuity of one hundred pounds to be paid her in like manner and with the like restrictions as the former ones given her by my will and codicils, hereby in all other respects but what is above-mentioned confirming my said will and codicils.

[23] This codicil was executed so as to pass real estate.

John Hicks died on the 21st day of June 1825, seised of his said several estates, without revoking or adding to his will, except as appears by the said codicils respectively, leaving his wife, the Defendant, and the said Anna Maria Hearle, one of the lessors of the Plaintiff, him surviving.

The question for the consideration of the Court was, whether the devise contained in the will, by which the Plomer Hill estate was given to the testator's wife, had been revoked by the terms of the fourth codicil.

The case was argued in the Court of Exchequer on the special verdict in Michaelmas Term 1826; and in Hilary Term 1827 the Court gave judgment for the Plaintiff.

In Easter Term 1827, the Defendant below brought a writ of error in the Exchequer Chamber. The case was argued before that court in the following vacation; and in Trinity Term 1827 the Court reversed the judgment of the Court of Exchequer.

The Plaintiff below brought his writ of error here, praying that the judgment of the Court of Exchequer might be affirmed, and the reversal thereof by the Court of Exchequer Chamber reversed.

The case was argued before the Judges by Sir E. Sugden and Mr. Follett for the Appellant, and by Mr. Serjeant Russel and Mr. Patch for the Respondent.

Lord Wynford (who presided as Deputy Speaker)—I am always glad, my Lords, to see the Judges in this House. I am more so now, as I was one of those who advised this judgment in the Court below, so that if they had not been here I should certainly not have taken this seat. His Lordship, after having stated the will and codicil, said, the question for your Lord-[24]-ships is, what effect this codicil has on the devise of this estate in the will; and for the purpose of deciding that, I shall move that this question be put to the Judges—Whether, according to the true construction of the will and codicil as above set forth, the devise of the Plomer House Estate was revoked by the fourth codicil?

The Judges took time to consider the question.

Lord Chief Justice Tindal afterwards delivered (25th May), on their behalf, a judgment, of which we have, by his Lordship's favour, received the following authentic copy:

My Lords, the question which your Lordships have been pleased to propose to His Majesty's Judges is this; whether, according to the true construction of the will and codicils which have been stated upon this appeal, the devise in the will of the testator's copyhold messuage or mansion-house, barns, stables, buildings and pleasure-grounds, lands and hereditaments, called the Plomer Hill Estate, was revoked by the fourth codicil: and upon this question, though it must be admitted to be difficult to draw any certain conclusion as to the intention of the testator, the opinion which we have formed, upon the best consideration of these instruments, is, that the devise in the will above specified was not revoked by the fourth codicil. The general principle upon which this opinion proceeds may be stated thus:—The testator does by his will show a clear and manifest intention to devise the Plomer Hill Estate to his wife for life, or during her widowhood. If such devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil to show that the intention to revoke is equally clear and free from doubt as the original intention to devise; for if [25] there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand. My Lords, it is the opinion of my learned brothers and myself, that the clause of revocation, contained in the fourth codicil, does not apply to the devise in question with such clearness and certainty as to operate as a revocation of that plain and explicit devise contained in the will. In this general conclusion we all agree; but it is scarcely to be expected that, in the discussion of a question of this nature, we should all arrive at the same conclusion upon grounds precisely the same. In stating, therefore, to your Lordships those grounds upon which I have formed the opinion, not simply that there is no clear intention to revoke the devise, but that, upon the proper construction of the codicil, the clause of revocation does not apply to this particular devise, I cannot undertake to say I am expressing the opinion of all my learned brothers in each particular reason which I may advance, although in most of those reasons all concur, and I am not aware that there is any material dissent or diversity of opinion in respect to any. That the testator not only intended to devise to his wife the

enjoyment of the house and premises in which he lived during her life or widowhood, but that it was a paramount object with him, appears abundantly by the first will and codicil. It forms the first subject of the devise in his will. "In the first place, I give and devise all that my copyhold messuage or mansion-house, barns, stables and buildings, pleasure-grounds, lands and hereditaments, called Plomer Hill House, in the parish of West Wycombe, and now in my own occupation, together with the cottages or tenements or premises thereto belonging, to the [26] trustees (therein named) and their heirs, upon trust for my present dear wife Susanna Jemima Hicks, during her life or widowhood, or until she shall cease to reside at the same premises, or let the same, or permit the same to be occupied by any other person than herself, she paying all taxes and outgoings in respect thereof, and keeping the same in good and tenantable repair;" and then, in the event of her death, second marriage, ceasing to reside, or letting the premises, or permitting any other person than herself to reside therein, he directs the trustees to be seised and possessed of these copyhold premises upon the same trusts as (regard being had to the nature and quality of the tenure of the said copyhold premises) will best correspond with the uses declared concerning the residue of his real estates. He afterwards devises to his wife all his money in the funds during her life or widowhood, and after her death or marriage to such person as should be either tenant for life or in tail of his residuary estate, with a power to her to appoint £500, as therein mentioned, and then gives to her absolutely all the ready money which shall happen to be in his mansion called Plomer Hill House at the time of his decease, all the articles of plate brought by her on her marriage, his family carriage, and the wines, provisions and provender, live and dead stock, which at the time of his decease "shall be on or about the said copyhold premises," and then devises "all his household goods, furniture, books, prints, pictures, china, glass, and plate, not thereinbefore bequeathed, unto the trustees, in trust for his said wife during such time as by virtue of his will she shall be entitled to his copyhold mansion and premises, and after the determination of her estate in the same, in trust absolutely for the per-[27]-son who then, either as tenant for life or in tail male, shall be in the actual possession of his residuary real estates." The testator, therefore, by his will, has not only devised the mansion to his wife, but has shown a clear and anxious desire that his wife should continue to reside in the mansion which he then occupied, and that it should not in any manner be dismantled or unfurnished, but should be enjoyed by her in exactly the same state as that in which it was left at the time of his death. In his first codicil, made after the interval of a year, it is evident that the same intention that his wife should reside in the mansion-house, in the same state as left at the time of his death, continued to be predominant in the testator's mind; for after reciting the bequest in the will to his wife of the plate, furniture, and other articles before adverted to, he proceeds to revoke such bequest in plain and direct terms, and in lieu thereof bequeaths all his farming stock, household goods, etc., "and all other his effects which should be in or about his residence at Plomer Hill aforesaid, and usually considered as comprised in and constituting his establishment there" unto his wife, for her own use and benefit absolutely. It is further to be observed, that the testator's wife appears to have been, from the time of the making of the will down to the time of making the fifth and last codicil, the object of his peculiar bounty and regard, there being no codicil, with the exception perhaps of the third, which does not materially add to the provision already made for her by the previous dispositions in her favour. The will gives his wife a rent-charge of £300 a year for life, charged upon the residue, with a contingent increase of £100 per annum in case of the failure of issue of his son. By the first codicil, made after the death of his son without issue, he gives [28] his wife absolutely the additional annuity of £100 per annum, and bequeaths to her the residue of his personal estate absolutely to her own use. By his second codicil he constitutes her his sole executrix and residuary legatee; by the third codicil, he gives her the proceeds and profits of the five shares which he held in the County Fire-office for her life; by the fourth, the codicil in question, he gives to his wife a further annuity of £100 for life; and by the fifth, he gives to her, and at her disposal, all sums of money which she or the testator might be entitled unto out of the effects of her late father, or that any other friend might leave her: and he orders his

executors, in case she shall die before him, to fulfil her will and disposal thereof. This codicil was executed about nine months subsequently to that upon which the question arises. The will thus containing such a clear devise to the wife, with such a manifest indication of intention that she should reside in the mansion-house called Plomer Hill, and each codicil containing proof that the regard of the testator for his wife continued unabated and unimpaired until long after the execution of the fourth codicil, the first observation that arises is, that it is extremely improbable in itself that the testator should, by general words, without making any reference to his wife, or any disposition in lieu thereof in her favour, revoke the only devise of land which he had made to her, which forms the first subject of his will, to which repeated allusions are made in the will itself and first codicil, and her residence in which during her widowhood appears to have been the favourite object of his mind. Still, however, the question arises, whether he has, by the fourth codicil, revoked this devise or not. That the words used in the codicil do not necessarily revoke this devise is sufficiently manifest by referring [29] to them. The testator begins by saying, "I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me in my said will and codicil of all my freehold, copyhold, and personal estate and effects of all and every kind and description;" and concludes it by saying, "that hereby in all other respects but what is above-mentioned confirming my said will and codicils." There are no words therefore expressly revoking this devise; on the contrary, if we hold all the dispositions of his real estate to be revoked, we construe the codicil directly against the testator's declared intention. It is as much open to argument that the devise to the wife may be one of those, or the very one, which the testator intended to confirm, as that it was one of the several which he intended to revoke. Whether therefore, this devise was revoked must be determined, not by any express words to that effect, but by the consideration, whether, upon the construction of the codicil, the devise and disposition therein contained must of necessity be held inconsistent with the devise to the wife; or whether such a construction may be put upon the devise in the codicil, that both the will and the codicil may stand together. To consider this question it is necessary, in the first place, to observe how the disposition of the testator's property stood under the will, and the first codicil, at the time when the fourth codicil was made; and upon a careful inspection of the will and first codicil, it will be found that at the time of executing the fourth codicil the testator's real property stood thus disposed of, viz. the copyhold estate (the Plomer Hill house,) was devised to the wife for life, the remainder forming part of the residue. The Treravel estate stood thus: an equitable [30] estate to his daughter, Anna Maria Hearle, for life, for her separate use, remainder to her husband for life, remainder to her children in tail, as tenants in common, the remainder forming part of the residue. The residue of his property, consisting of the manor and advowson of Bradenham, two freehold farms in the county of Bucks, and so much of the testator's estate in the Plomer Hill House and the Treravel property as was undisposed of, and also comprising all his personal property, except the partial interests given to the wife, which have been before enumerated, formed one mass, which, at the time of making the fourth codicil, in consequence of the death of his only son without issue, stood devised immediately to the testator's grandson, John Graves, for life; remainder to his first and other sons in tail male; remainder to the first and other sons of the testator's daughter, Anna Maria Hearle, in tail male; remainder to his own right heirs. Whilst his property stood thus disposed of, the fourth codicil is made, in which, after declaring his intention to revoke several of the dispositions made by him in his said will and codicils of all his freehold, copyhold, and personal estate and effects of all and every kind and description, "instead and in the place of such devise, dispositions and bequests thereof, he gives, devises and bequeaths all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever, and wheresoever situated, unto his daughter, Anna Maria Hearle, and from and after the determination of that estate, unto his grandson, John Graves, and his heirs, in strict entail, as in the said will mentioned;" with the additional clause in the codicil as to the time when John Graves shall take: and in failure of such issue of the said John Graves, he orders that his said [31] estate and effects shall go and descend as is by his said will directed;

and then ratifies and confirms the several annuities and donations by him in his said will and former codicils given and bequeathed; and gives a further annuity of £100 to his wife, under the same restrictions as the former. Now if this devise in the codicil can be construed to be confined to the property which formed the testator's residue only, then the devise in the will of the copyhold estate in question to the wife for her life will remain unrevoked, and the object of the testator in his codicil may still be carried into effect; and that such may be the construction, without violating the words of the codicil, appears to be by no means unreasonable. In the first place, the codicil professes to make void "several of the dispositions heretofore made by him in his will and codicils of all his freehold, copyhold, and personal estate and effects of all and every kind and description." Now the only disposition made of all his freehold, copyhold, and personal estate and effects, is that devise which relates to the residue, in which all his property, freehold, copyhold and personal, is brought together in one mass, with the exception of that part of the personal estate which is given to the wife absolutely by the will, and which is expressly confirmed to the wife by the subsequent part of this very same codicil. In the second place, the testator says, "instead of such devise, disposition and bequest," using the singular number, which would in strict grammatical construction be applicable to the devise or disposition of the residue, but not to the various dispositions contained in the will. In the third place, the death of his only surviving son, William, who was the first taker for life under the clause disposing of the residue, makes it not improbable that he should wish to substitute in [32] the residuary clause his only surviving daughter to take the same estate therein which was before given to the son. In the fourth place, if the devise to the wife of the copyhold estate is to be held to be revoked, then, not several only of the dispositions of the real property contained in the will, but all such dispositions, are revoked or altered; for the wife's life estate in the Plomer Hill property is gone; the equitable estate for life given by the will to the daughter in the Treravel estate for her separate use is merged in a legal estate for life, given to her generally, and the daughter has a life estate in the residue, now for the first time interposed before that of John Graves. But to revoke all the dispositions of the realty in the will and codicil is against the express directions of the testator. Still further, if the devise of the Plomer Hill Estate to the wife is revoked, inasmuch as the codicil confirms the donations made in the will and codicil, the wife would still be entitled absolutely to the furniture, and to every thing which constitutes the establishment of that house. So that the house, upon the death of the late testator, would immediately go to the daughter, but stripped and dismantled of all its furniture and establishment, which the testator appeared anxiously to intend should be kept together. Again, the codicil gives an immediate estate for life to A. M. Hearle, and from and after the determination of that estate, to his grandson John Graves, and his heirs, in strict entail, "as in his said will directed." Now this express reference to the will draws the attention to that part of the will in which alone there is any mention of John Graves, that is, to the disposition of the residue. It seems therefore a very reasonable construction of the codicil to infer, that as the ultimate remainder of the property intended to be thereby disposed of is limited by ex-[33]-press reference to the clause in the will which contains the devise to John Graves in strict entail, the property itself devised by the codicil, is the same property as that contained in the devise of the will to which such reference is made, viz. the residue only. By this construction the only alteration effected by the codicil is, the substitution of a devise to the daughter for life, instead of that given to the son, to take place immediately next before the estate given to John Graves. But if the devise operates on the residue only, as before mentioned, it leaves the particular estate already devised to the widow untouched. There are undoubtedly some difficulties attending the construction of the will and codicil which ever way they are construed. It may be said against the construction above made, that the words of devise in the codicil to the daughter are immediate, and that the testator, by his first codicil, shows that he knew how to interpose a new estate, by proper terms, between those already created by the will. It certainly is so; but it is obvious, in comparing the frame of the first and the fourth codicils, and looking to the description of the witnesses to each respectively, that the former was made with, the latter without, legal assistance; so

that no great reliance can be placed on that argument. It may be argued again, that the testator by the codicil directs, that in case his grandson shall not be 31 at the time the estates shall devolve on him by the death of the testator's daughter, the rents shall accumulate for his benefit, and that if the wife took a life estate in the copyhold, *non constat* that she might survive the daughter, in which case the Plomer Hill Estate would not devolve to the grandson on the daughter's death. But it is not at all surprising for a testator, in preparing such an instrument, to have overlooked or not cautiously provided for the possibility of his wife outliving his daughter, **[34]** the more especially when the devise to the wife related only to part of the estate. It may further be contended that, by the fifth codicil, the testator has proved that he was aware that the fourth codicil had revoked the estate for life, which he had previously given by the first codicil, to his son-in-law: for he could not otherwise have devised to him the rents and profits of the Treravel estates during his life. It must be granted that the fourth codicil had necessarily that effect; but this arises not from his devise of the life estate to his daughter, for the only effect of that devise was to convert her equitable estate for her own separate use into a legal estate for life, but it arises from the devise to the grandson being made "from and after the determination of that estate," words which necessarily excluded the devise to the son-in-law, which he had before made by his first codicil. This argument therefore does not seem to turn upon the question whether the life estate to the widow is revoked or not. Upon the whole, although these and perhaps other difficulties may be urged against the construction above proposed, we think the *onus probandi* of showing that the devise to the wife is included in the clause of partial revocation is cast upon those who claim under such revocation, and that it is not shown with sufficient certainty that this devise to the wife is included in such clause; on the contrary, that upon the proper construction of this codicil the intention appears to have been that the devise to the wife should not be revoked by the codicils. Upon these grounds we think the devise in question has not been revoked.

The Lord Chancellor expressed his concurrence with the opinion of the Judges, and moved that the Judgment of the Court of Exchequer Chamber be affirmed; and it was affirmed accordingly.

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[35]

APPEAL,

FROM THE COURT OF EXCHEQUER.

WM. SPELLS GARDINER *v.* STEPHEN SIMMONS.

[Mews' Dig. i. 352; S.C. 6 Bli. N.S. 60. See *Sherburne* v. *Middleton*, 1842, 9 Cl. and F. 72; *Smith* v. *Durant*, 1861, 9 H.L.C. 192.]

If the Appellant does not appear to support his Appeal, the Respondent's Counsel are not compellable to go on, but the Appeal may be dismissed, and the House will afterwards exercise their discretion as to the Costs.

This was an Appeal from an Order of the Court of Exchequer arising out of the following circumstances: The Defendant was a farmer, holding certain lands in the parish of Lindfield, in the county of Sussex, and, in the month of June 1825, was made a Defendant in an amended bill, filed by one John Henry Nainby, against several holders of land in that parish, praying for an account of the tithes of their lands. The Respondent appeared and put in his answer; and by an order of the Court in July 1827 the bill was ordered, as against the Respondent, to be dismissed with costs for want of prosecution, unless cause should be shown to the contrary at the sittings after the then Trinity Term. Cause was not shown, and the bill being accordingly dismissed, the Respondent's costs were afterwards taxed at £32 17s. These costs were not paid; and the Respondent finally obtained an order, on the 7th May 1828, directing a writ of sequestration to issue to sequester the said J. H. Nainby's personal estate, and the rents, issues and profits of his real estate, for payment of the same. The writ was accordingly issued: but the Appellant, having put

in a claim as lessee of all the tithes of Lindfield, the sequestrators [36] served him with notice thereof, and required him to pay them all sums of money that might be due from him to the said J. H. Nainby. On proof of this service, and of demand of payment, the Court, on the 20th November 1829, ordered that the Appellant, within a week, should show cause why he should not attorn as tenant to the commissioners under the sequestration, and why he should not pay to them the sum mentioned in the writ, and the costs of the sequestration, and of that application. The Appellant showed cause against this order on affidavits, stating that he was tenant to one Maria Williamson, and not to J. H. Nainby. The Court, by an order dated the 16th December 1829, referred it to the Master, to inquire whether, at the time of the service of the writ of sequestration, the tithes belonged to Nainby; and directed that Maria Williamson should be at liberty to come in and be examined upon her claim of interest; that all parties should produce all books and papers relating to the inquiry, and be examined on interrogatories as the Master should direct; and that the Master should make his report to the Court. From the orders of 20th November and 16th December 1829 the Appellant appealed, alleging, that supposing him to have been lessee of the tithes to Nainby, yet that any money payment reserved in respect of such demise was not a rent, but only a sum of money due on a special contract, and therefore a mere *chose in action* which could not be rendered available to a sequestration: that such money, due at the time of the service of notice of the sequestration, would not run with the land to an heir or subsequent purchaser, and therefore could not be made the subject of an attornment; and that the question of fact raised by the affidavits on showing cause, being, whether the Appellant was lessee of the tithes [37] to Nainby, and not to whom those tithes belonged, the latter question had been improperly referred to the Master. The Respondent insisted that the order was in all respects conformable to the established practice of Courts of Equity, in cases where third persons were in possession of property belonging to parties whose property was amenable to the process of those Courts; that the rent of tithes might be made available to sequestration; and that the supposed alienation of the tithes by Nainby was collusive, and made with a view to defeat the sequestration.

The case was fixed for argument on the 21st June 1832; on that day Sir E. Sugden appeared at the bar on behalf of the Respondent, but no Counsel attended for the Appellant.

The Lord Chancellor inquired into the cause of this circumstance.

A gentleman, who appeared as agent for the Appellant, said he had received a notice of this case so late on the preceding evening, that he had not been able, though after using every exertion, to obtain the attendance of his Counsel. He requested that some delay might be permitted.

Sir E. Sugden consented, on condition that the costs of the day were paid. As this condition was not accepted,

The Lord Chancellor asked if the Respondent's Counsel would go on with the argument in support of the judgment of the Court below, and move that the appeal be dismissed.

Sir E. Sugden declined to do so, observing that the judgment was a good judgment, and wanted no sup-[38]-port. If the Appellant's Counsel had appeared, he should be ready to answer anything that might be advanced against the judgment, but as nothing was advanced against the judgment, it stood on its own merits, and their Lordships might do as they thought fit with the petition of appeal.

The Lord Chancellor: The course which I shall recommend to the adoption of your Lordships, is to dismiss this appeal, and to state in the order that the dismissal is for the want of the appearance of the Appellant, and that you will reserve to him the liberty of making an application to your Lordships, if he has any special circumstances to show on which he can ground such application. In the meantime, however, I should propose to dismiss the appeal for the want of the appearance of the party; and, having regard to the peculiar circumstances disclosed upon the case, I should propose doing so with £100 costs. His Lordship, however, afterwards added, Instead of dismissing the appeal with costs, I should propose that an account of the costs incurred on the part of the Respondent be given in, and then, if the Appellant thinks fit to make any application to your Lordships, we may determine on what conditions alone we can listen to it.

In a subsequent Case, where the same question arose, their Lordships referred to this Case as the precedent they should follow under similar circumstances.

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[39]

APPEAL,

FROM THE COURT OF C.P. AND K.B.

Between AJME DUVERGIER,—*Plaintiff in Error;* and WILLIAM DORSET FELLOWES,—*Defendant in Error.*

[Mews' Dig. iii. 753, 754 ; v. 514 ; x. 847. S.C. 6 Bli. N.S. 87 ; and, in Courts below, 10 B. and C. 826 ; 2 M. and P. 384 ; 8 L.J. (O.S.) K.B. 270. Discussed in *Harrison* v. *Heathcorn*, 1843, 6 Man. and G. 137, 138 ; and *Garrard* v. *Hardey*, 1843, 5 Man. and G. 483, 484. See Companies Act 1862, s. 4 ; and, as to patents, 15 and 16 Vict. c. 83, s. 36 ; and Patents Act 1883, s. 46.]

No action can be maintained on a Bond given to a person in consideration of his doing something contrary to the terms of letters patent ; and he is equally incapable of recovering, whether he knew or did not know the terms of the letters patent.

The illegality of the condition of the Bond may be shown by the Plaintiff in stating the Bond itself, with the condition, in his declaration ; or, if he omit to state the condition, it may be shown by the Defendant in his plea, and the Court will equally take notice of the illegality in either case.

Semble. If two Courts have been of the same opinion on any point, and their judgments are appealed from and affirmed, the House of Lords will give costs on the affirmance.

This was an action of debt on bond. The Defendant craved oyer of the bond and condition. It then appeared, that the bond was given to secure to the Plaintiff the sum of £10,000, if he should succeed in procuring subscribers for 9000 shares, of £50 each, in a Patent Distillery Company, which it was the object of these parties to form. A person named Jean Jacques St. Marc had obtained letters patent for the distillation of spirit from potatoes, and he, together with the Defendant and another person, carried on the distillery business, under these patents. It was proposed to form a company to engage in this business, and the Plaintiff **[40]** undertook to procure the subscribers, for doing which he was to receive the sum stated in the bond. The Defendant pleaded, that, by the terms of the letters patent, if the grantee should, during the continuance of the grant, make any transfer or assignment, or pretended transfer or assignment, of the privileges thereby secured, to any number of persons exceeding the number of five, or should open any books for that purpose, or should, with other persons, presume to act as a corporate body, the letters patent should cease, and become void. The plea then alleged, that the proposed company was intended to consist of more than five persons, and so the bond was void in law. There were two other pleas, varying the mode of stating this defence, and to all the three pleas there was a general demurrer. Judgment was given for the Defendant, in the Court of Common Pleas, in Michaelmas Term, 1828 (*see* 5 Bing. 248) ; and that judgment was affirmed on Error in the Court of King's Bench, in Eastern Term 1830 (*see* 10 B. and C. 826). The Plaintiff brought a Writ of Error, praying that the House would reverse both of these judgments.

Mr. Follett and Mr. Smirke, for the Plaintiff in Error, contended, that the Plaintiff's right of action in this case was on the obligatory part of the bond, and that the condition of the bond would not prevent him from recovering, unless that condition were in itself illegal. It was said, that the whole transaction was a fraud upon the public. There was, however, no allegation of that sort in the pleadings, which merely put the case on the ground of want of consideration ; and even if the transaction was fraudulent, it was doubtful, on the face of these pleadings, whether the Plaintiff was not the victim instead of the practiser of the fraud. Now, in order to deprive the Plaintiff of his right to **[41]** recover on this bond, it must be shown that he was a guilty party in the fraud. This was stated to be a monopoly contrary to the common

law. Lord Tenterden, in the judgment in the Court below, said, "I am of opinion, that the proviso in the patent has the effect of rendering the bond altogether void;" and Mr. Justice Littledale added, "All monopolies are illegal, unless allowed by a patent, which cannot be assigned at all unless power to that effect is given by the Crown." What was a monopoly? It was thus defined by Lord Coke, 3 Inst. 181: "A monopoly is an institution or allowance by the King, by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, working, etc., whereby any persons, etc. are sought to be restrained of any freedom or liberty that they had before in their lawful trade." If there were no legal means of assigning this patent, it would become void as soon as it was assigned; but if it could be legally assigned, then it became a legal monopoly. If it was possible for the Court to discover a legal mode of carrying on business, they would not presume that the parties were actuated by an illegal intention. The mystery alone did not make the business illegal, for mystery was almost a synonym with trade; and an indenture of apprenticeship bound a master to teach the apprentice the mystery of his art, and bound the apprentice to keep the secrets of his master. The impossibility of the engagement did not make it illegal. Suppose a man bound himself to a society, to secure from them the exclusive enjoyment of light and air, the engagement on his part would be impossible, but not illegal. The cases of the *King* v. *Webb*, 14 East, 406; *Pratt* v. *Hutchinson*, 15 East, 511; *Davies* v. *Hawkins*, 3 M. and S. 488; *Josephs* v. *Pebrer*, 3 B. and C. 639; and **[42]** *Nockells* v. *Crosby*, 3 B. and C. 814; all showed that the merely making shares transferrable would not of itself constitute an illegal society. Then came the question, whether the parties in this case had acted as a corporation. A body of men might use a common seal, act by the voice of the majority, sue by one attorney, and make bye-laws, without assuming to act as a corporation, in the illegal sense of the words. These parties did not claim to be a corporation; though doing that would not of itself be illegal. The only case on that subject was in Co. Entries, 427, where it is charged against certain parties, "*quod per spatium unius anni absque aliquo warranto, sine regali concessione infra dictam villam diversas libertates*," etc. and it then went on to allege, not only the use of a corporate name, but the assuming to do other acts which could not be legally done but by a corporation. There the offence was held to consist, not of the mere claim, but of the actual doing of corporate acts, without which the mere claim to be a corporate body would have been no offence whatever. Suppose a company were to be formed to take lands in succession: a conveyance made to them for such a purpose would be null, but their object in itself would not be illegal, though they attempted to do an act which only a corporation could do. If a stranger claimed to be mayor of a corporation, that alone would not make him subject to a *quo warranto*, for the act would be merely nugatory. To say that a body of men assumed to act as a corporation, did not necessarily involve the consequence that they assumed to act so illegally, in the same manner as the use of the word swindler had been held by the Court not necessarily to mean illegal swindling, but that it might be referred to common abuse. It was said that the company had attempted to raise money **[43]** by illegal means; but if the acts of the company were not illegal in themselves, the raising of money for the purposes of those acts was not necessarily illegal. The decisions of the two Courts had proceeded on different grounds: that of the King's Bench determined that the letters patent were not assignable; that of the Court of Common Pleas referred entirely to the illegality of the attempt to divide the benefit among more than five persons. There was nothing on the face of the bond that would make it illegal. It was said that the Plaintiff must know that to form a company of more than five persons for the purpose of working this patent, was illegal; but there was not one of the pleas which stated his knowledge of the terms of the patent, or which showed that he was at all aware of the illegality. The King might grant a patent without such a restriction as existed in the present case, and there was nothing to show that the Plaintiff knew the King had not done so here. The Plaintiff had done all he had undertaken to do, and was therefore entitled to the stipulated compensation. If the condition was illegal, then certainly the bond must be admitted to be void; but if the condition was only impossible, it was then turned from a bond with a condition, to a simple bond. Touchstone, 372, and Bacon, Abr. Obligation, E. 1, were authorities on this point. The want of power to assign was not a defence to an action on the obligatory part of the bond. The Plaintiff need not have averred

performance of the condition ; the Defendant must show its non-performance by way of defence. Suppose the bond had been on condition that the Plaintiff should procure a purchaser for the estate of the Defendant, if it should turn out that the estate was not saleable, that would not be an answer to the Plaintiff's claim. Nothing short of [44] a contrivance to cheat and defraud, in which the Plaintiff was a party, would be an answer to the action. There was no allegation of that sort in the present case. The 6 Geo. I. was repealed before this bond was entered into ; and it was to be observed, that all the authorities were cases under that statute, yet even in those cases the merely making the shares transferrable, or seeking to act as a corporate body, had not been held to be illegal. The *King* v. *Cawood*, 2 Lord Raymond 1361 ; and the *King* v. *Dodd*, 9 East, 516, were cases on the statute. In the latter of these it seemed to be the opinion of the Court that the intention of forming a company would not be within the statute, without reference to the fact of such intention having a tendency " to the common grievance," etc. in the particular instance. The next case was the *King* v. *Webb*, 14 East, 401. In the 6th count of the indictment there, everything was to be found which appeared in the pleas here, yet Lord Ellenborough held, that the offence there charged was not within the statute. The case of *Pratt* v. *Hutchinson*, 15 East, 511, was also a case upon the statute, and in that case Mr. Justice Bayley said, " The plea does not allege generally as a question for the jury, that this society was prejudicial to the public at large." There was no pretence for saying that the statute applied to the present case. The only question therefore was, whether the company was illegal at common law. That depended on the meaning of a dictum of Lord C. J. Abbott, in *Josephs* v. *Pebrer*, 3 B. and C. 644, " that trafficking in these shares may very possibly have been illegal at common law, inasmuch as it was bargaining and wagering about an Act of Parliament to be obtained in future." That point did not arise in the present case at all. The pleas stated that [45] the company intended to act as a corporation without the charter of the King, but they did not say anything about an Act of Parliament. If the intention to share the profits was to be held illegal, then there was no public undertaking that was not so, and every public company at its first formation would be under the necessity, on the one hand, of acting illegally, or, on the other, of violating a rule of their Lordships' House, which declared that a certain number of shares must be subscribed for before any company should be permitted to apply for an Act of Parliament. Yet it was manifest that no shares would be subscribed for till the terms of dividing the profits had been made one of the consequences of creating the shares. There was not enough in these pleas to show that the undertaking, or the formation of the company, was so illegal as to prevent the Plaintiff from recovering.

Mr. Lloyd, for the Defendants in Error, was not called upon to argue.

Lord Tenterden (July 3) : It appears to my judgment that this case is so plain that it will not be necessary for your Lordships to hear any further argument upon it ; and I am the more satisfied with my own opinion, as all the Judges who are now present agree in that opinion. They all agree that the judgments of the Courts below ought to be affirmed. Your Lordships happen to enjoy this advantage, that six or seven Judges are now present, not one of whom was a Judge of either of the Courts below when the judgments appealed from were given, and consequently are not influenced by their previous opinions. This is an action of debt on bond, to which the Defendant has pleaded three pleas, which, after argument on De-[46]-murrer in the Court of Common Pleas, and after Writ of Error in the Court of King's Bench, both Courts held sufficient to bar the action. His Lordship stated the nature of the patent, and of the condition thereto annexed. The condition is large, and is expressed in such a manner as to embrace almost every case that could be put of an assignment to any number of persons exceeding the number of five : " if the patentee or his agent should receive any sum of money from any number of persons exceeding five, for the purpose of dividing with them the benefits " of the patent, then it should be void. The Plaintiff only set forth the obligatory part of the bond, not the condition : the Defendant stated the condition ; and it is to this effect, that the Plaintiff shall procure 9000 subscribers to form a company, to whom the Defendant and two other persons shall part with the business they were then carrying on under the patent. It is therefore clear that, on the condition of the bond, this Plaintiff was not entitled to any money unless he formed a company, and procured 9000 shares to be taken, and unless

he obtained payment of the first instalment. If the Plaintiff, instead of confining himself to the statement of the obligatory part of the bond, had set out the condition of it, he would necessarily have shown a breach of the condition of the patent, and would have alleged enough in his own declaration to show that he could not maintain the action. But whether the matter comes before the Court on the Plaintiff's declaration or on the Defendant's plea, is a perfectly nugatory distinction. The fifth and sixth pleas aver the intention of the parties to vest the interest in more than five persons; the seventh plea introduces something else, and alleges that it was intended, at the time of making the bond, that the com-**[47]**-pany should consist of more than five persons; that they should act as a corporate body, and divide the benefit of the letters patent. The supposed illegality is put, therefore, on two grounds, first, that taken on the fifth and sixth pleas, that more than five persons were to form the company; and, secondly, that it was intended that the company should act as a corporate body. It is not necessary that both parts of the pleas should be proved. It is sufficient if either part is made out. If any one of the pleas is good, the judgment of the Court below must be affirmed. The condition of the letters patent is what I have mentioned; and the recital of the object of the bond is such, that the Plaintiff cannot be entitled to the money he claims unless he has done that which is contrary to the condition of the letters patent, that is, unless he has obtained a greater number than five persons to become members of this company, and unless he has procured them to pay the first instalment on their shares. If they did pay that instalment, they would pay it for nothing, for they could not have the benefit of the patent. The object of the instrument on which the Plaintiff seeks to recover was to invite the world to pay money for something from which they could not derive any advantage. But it is said that it is not shown the Plaintiff knew this to be the condition of the letters patent. I will not put the answer to that argument on the ground that every man must be presumed to know the effect of the instrument which he undertakes to carry into execution. If he was ignorant, it was his own fault; if he did not know, he ought to have known; but the fraud upon the public would be equal whether he did or not know that he was inviting men to do something which was illegal. The question then comes to this—can a man have the benefit of a bond by the condition of which **[48]** he undertakes to violate the law? It seems to me that it would not be according to the principles of the law of England, which is a law of reason and justice, to allow a man to maintain an action under such circumstances; it would be to hold out an encouragement to any man to induce others to become dupes, and to pay their money for that from which they could derive no advantage. Under these circumstances, I shall humbly advise your Lordships that the judgment of the Court below should be affirmed.

Judgment affirmed.

Lord Tenterden: My Lords, after the unanimous opinions of two Courts below have been given against the Plaintiff, the bringing a Writ of Error here is a persevering in an attempt to obtain from this House something which eight Judges have held him not entitled to obtain. Under such circumstances, it appears to me that justice requires that the judgment should be affirmed, with £80 costs, which is probably somewhat less than the expense that the Defendant in Error has been compelled to incur.

Judgment affirmed accordingly.

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[49]

APPEAL

FROM THE ROLLS COURT.

NICOL *v.* VAUGHAN.*

[Mews' Dig. i. 355, 356; v. 510; vi. 811; vii. 264; xi. 613. S.C. 2 Dow and Cl. 420; 5 Bli. N.S. 505; and see 1 Cl. and F. 495. Cited in *Browne* v. *M'Clintock*, 1873, L.R. 6 H.L. 463; and *ex parte* Morgan, 1876, 2 Ch.D. 96.]

Two ladies entrusted much of the management of their affairs to A. who was not a professional person. In the course of business A. became bound with them in

* As the facts of this case have been already fully given, (see 2 Dow and Clark, 420), it has been deemed unnecessary to repeat them here.

a bond for £10,000 given on their account; on the same day, they executed a bond to A. for £12,000. The survivor of the two ladies afterwards, by her Will, left a legacy of £2000 to A. The bond for £12,000 was, on the face of it, a simple money bond.—Held, that it must be taken to be a simple money bond, unless impeached by evidence which showed that it was partly for indemnity; and that the burden of proving it to be an indemnity bond lay on the party impeaching the bond.

The Lord Chancellor (23 July 1832): My Lords, this case is an appeal from the judgment of the Master of the Rolls, arising out of a former appeal, in which your Lordships were pleased to reverse the order of his Honor, directing certain issues to be tried, and to remit the case back to his Honor, to consider the question upon the evidence as it then stood before him. The matter for the decision of your Lordships now is that which was not then disposed of, but sent back to his Honor for his consideration, namely, whether or not, upon the evidence before him, this bond given by the Ladies Ker to the late Mr. Nicol, was to be considered as **[50]** a bond of indemnity to the extent of £10,000, and as a voluntary bond, either voluntary or for services performed, to the extent of the remaining £2000, or whether it was not a simple bond to the extent of £12,000 given by those Ladies, as the obligors of the bond, to Mr. George Nicol, as the obligee. His Honor, upon the question and upon consideration of the evidence then in the cause, has come to the conclusion, that it was a bond of indemnity to the extent of £10,000, and to the extent of £2000 it was a voluntary bond, given to Mr. Nicol by these Ladies: and the opinion which I certainly have formed, and which my noble and learned friend (Lord Lyndhurst), whose assistance we had on the former occasion when this was argued, also formed, is, that this bond is not to be considered as a bond of indemnity for any part of the amount at all. That opinion has not been shaken by the further consideration of the question, or by the learned and able arguments which were adduced at the bar on the part of the Respondents.

My Lords, this bond, upon the face of it, is a money bond for £12,000 and interest; on the face of it, it is clear and plain, and therefore the proof lies on the Respondents in this case, and it is for them to satisfy your Lordships that it was not what it purports to be. There being no one word of indemnity, nothing pointing towards indemnity, nothing connected with indemnity, appearing on the face of the instrument, it was for them to show, by sufficient evidence travelling out of the instrument, that the purpose for which it appears to have been granted was not the real purpose, and that it was intended only to the extent, at least, of £10,000 of the £12,000 to cover Mr. Nicol's liability, which he had incurred in the transaction with Messrs. **[51]** Coutts, and to which those Ladies, the obligors in the bond, were parties. Now the evidence which was adduced before his Honor, and the only evidence before your Lordships when we came to consider it, altogether exclusive of Mr. Nicol's own examination, is, in fact, the date of the bond being identical with the date of another bond executed by those Ladies to Mr. Coutts, and in which Mr. Nicol joined them, and became also their surety to Mr. Coutts, and which was for £10,000, executed on the same day with the bond in question. This of itself, this mere coincidence of date, is clearly insufficient; and as to the sum being the same, I still hesitate, and more hesitate now than I did before, in saying that the two instruments were for the same sum. The one is for £12,000 and the other for £10,000; and you only can make it out that they are for the same sum by deducting the £2000, and saying that £10,000 of the £12,000 is to be taken as the same sum as that in the bond which Mr. Nicol joined in with the Ladies to Mr. Coutts, and to that extent, therefore, the sums are identical, and the one is intended as an indemnity against the liability incurred by Mr. Nicol to Mr. Coutts by the other. But it is to be considered that the giving of a bond for £10,000 is not an indemnity to a party who joins with you in a bond for that amount to another, because there are costs (there is nothing for that in this bond), there are the costs which you may incur in consequence of that transaction, and against that the £10,000 bond does not give security. Why, then, the argument in answer to that, the pressure of that being felt on the part of the Respondents, is this, "true the £10,000, for that reason, is not sufficient for the costs,

which are to be taken into the account, but then the £2000 over the £10,000 was added for the express [52] purpose of covering the costs." Not to say that this is most gratuitous, that it is an assumption made to suit the purpose of the argument, it is negatived both by the finding of the learned Judge in the Court below, in the decree appealed from, and by the argument of the parties themselves (the Respondents). It is negatived by the finding in the decree; for that says that the bond was intended, to the extent of £10,000, as a counter-security for the engagement into which he had entered as surety for Lady Essex and Lady Mary Ker in the bond for £10,000, executed by those Ladies to Mr. Coutts, bearing date the 15th day of July 1815; and as to the £2000, that was intended as a voluntary gift, as a remuneration for his services. Now there is not in that decree a word about the £2000 being to cover costs, but it expressly declares that the £10,000 was indemnity, and the £2000 was a voluntary gift for services by him performed. It is equally negatived by the argument of the Respondents themselves, who, so far from taking that view which I am now referring to, of the £2000 being added to cover costs, contended, in their original case, that Lady Essex Ker, in August 1819, made and published her will, and intending to confirm the gift of £2000 secured by the bond for £12,000, she gave a legacy of £2000 to Mr. Nicol. So far from then saying, as they now contend, that the £2000 was added to the £10,000 to cover the costs and to make the whole an indemnity, they there, in precise accordance with the declaration in the decree appealed from, contend that the £10,000 was indemnity, and the £2000 was gift. Now, my Lords, when this question arose, it being quite clear that the proof was upon the Respondents, an application was made for leave to examine Mr. George Nicol himself, and he was ex-[53]-amined, upon interrogatories presented by the Respondents. It was also stated in the order, that it was by consent of parties that Mr. Nicol was to be entitled to frame interrogatories for his own examination; he was however examined on this subject on the part of the Respondents, and they appear to have moved in that examination; but whether they did or not is immaterial for my purpose; they certainly professed, and professed in the course of the argument here, that they were desirous of examining him themselves, in order to sift the matter to the bottom. Well, then, can they, after having elected to examine him themselves—can they, when his examination is taken, turn round and call upon your Lordships, as they appear to have called upon the learned Judge in the Court below, to throw that examination of Mr. Nicol entirely out of the cause, and to decide as if he never had been examined, and therefore in their favour; though if he never had been examined the matter would have stood as it did, for the correspondence proves nothing one way or the other. If the examination had not been taken, the cause must have been decided against the Respondents, that the bond was in no degree an indemnity. Can they now call upon your Lordships to dismiss Mr. Nicol's examination altogether, and to decide, either as if it were not in the cause, and therefore to decide for them; or to decide as if, being in the cause, the result of the examination had proved favourable to them. He completely negatives indemnity from the beginning to the end of his long examination; he denies that there was any such view taken of the matter; he states that the ladies knew perfectly well the whole transaction in which they were engaged; he states that the bond was given, not as a counter-security, in no respect as a counter-security, but was given partly from kindness [54] and partly from gratitude towards him, and in part, though apparently in a small part, in respect of an account of monies advanced by him to them, and which they owed him at the time they executed that bond to him for the sum of £12,000. I take it therefore in this case, which really admits of no doubt, that we must consider this bond as a simple money bond, the proof being thrown upon those who impeach it, and who are to prove it indemnity, that we must take it that they have failed in that proof, and that the case remains as it did before this gentleman, Mr. Nicol, was examined. There is nothing whatever that differs this from the ordinary case of a £12,000 bond. It is not contended, as I apprehend, that there was any fraud on the part of Mr. Nicol. In truth it is impossible to ascribe fraud to that gentleman in this transaction. There was no concealment. It is true that he made no use of the bond during the lifetime of those ladies; and from obvious motives of delicacy, and from an understanding between them, it is quite clear that he was not likely to have

done so. After the death of the survivor, Lady Essex Ker, however, he very soon after uses the bond, by depositing it with Mr. Coutts; that gentleman being the person who, if there had been any fraud in the transaction, was most likely to be cognizant of that fraud. He did not wait till Mr. Coutts, who was a very old man, died, but during the lifetime of Mr. Coutts he used the bond, by depositing it with him; and what I am about to observe also is most material; he obtained, upon the deposit of that bond, from Mr. Coutts, who must have known all the transaction, he obtained, not £2000, but he obtained an advance of £3000. With respect to fraud, the observation stares one in the face, and indeed the only suspicious part of the transaction, except one that I am **[55]** about presently to allude to; the only circumstance that can raise any suspicion of its being indemnity is the identity of the dates of the two bonds; and the easiest thing in the world, on Mr. Nicol's part, would have been to have avoided the possibility of any inference being drawn from that fact by avoiding the fact itself, and having the one bond executed upon a day somewhat distant from the other. Instead of that he has them both executed on the same day, and for a reason which he explains in his examination, that the ladies with great difficulty could be got to attend to business, and particularly business of that description, law business; and therefore it was more convenient that both transactions should take place at one and the same time. A legacy was left by Lady Essex Ker to the amount of £2000, she having survived her sister, I think, a year and a half; and it was left him for his services: in so many words, for the services rendered by him to her, stating it generally, for his services, without stating what they were. Now she survived her sister somewhere about a year and a half, and no reference is made there to the £2000 before, and which there would have been on the supposition that the £2000 was gift, and the £10,000 was indemnity. I cannot help thinking too, that her leaving £2000 without any reference to what had passed before, it not being pretended that she was not in perfect possession of her faculties at the time she made her will, it not being pretended that she did not know the whole earlier transaction, and understood it at the time she entered into it, I think that that £2000 being left for his services, without any reference to it, can be accounted for in no other way than on the supposition of her thinking that by that £12,000 he had been too little paid, and that he, having continued **[56]** the same friendly assistance to her after the death of her sister, Lady Mary, had entitled himself to a further testimony of her gratitude at her hands.—My Lords, there was some reference made in the course of the argument to the case of *Huguenin* v. *Baseley*, 14th Vesey [273]; and *Lord Selsey* v. *Rhoades*, 2d Simons and Stuart [2 Sim. and S. 41]. The latter of those cases, *Lord Selsey* v. *Rhoades*, was before the same learned Judge who decided this case in the Court below; and the former case, it is well known, was decided many years ago by Lord Eldon. I really can find no bearing of those cases upon the present. That of *Huguenin* v. *Baseley* was clearly put upon fraud and misrepresentation; and Lord Eldon, in his judgment, admits, that if the deeds had been pure, voluntary, and well-understood acts of the mind of the party, the Court would not set them aside. If, however, they are not the pure and well-understood acts of the mind of the party, then, said his Lordship, the Court will set them aside; and he put it on the ground that Mrs. Huguenin did not understand the instruments she was executing, and that the Defendant did not give her the information he was bound to give her before he suffered her to execute those deeds. In *Lord Selsey* v. *Rhoades*, his Honour there lays it down, and most correctly, that there is no rule of law to prevent a steward (it was the case of a steward having obtained a beneficial lease from his employer), he says, there is no rule of law to prevent a steward receiving a beneficial lease from his employer, but he must show that he gave the full consideration which it would have been his duty to take from a stranger; and if as a testimony of bounty of his employer, he is bound to make out that his employer had all the knowledge from him which he, the steward, had as to the value of **[57]** the lease, and the other circumstances necessary for him to know, such as the extent of the term, and the extent of the bounty which he was bestowing upon him by granting him that lease. Now upon those propositions there can be no pretence whatever to entertain the slightest doubt; no one can entertain any doubt whatever upon them; but they do not appear to me to bear upon the present case. One or both of those cases are meant to be cited for the purpose of showing that the proof is not on the

party seeking to set aside the bond, but that the proof of its not being an indemnity is upon the party setting up the bond: upon that I am clearly of opinion, that there is nothing to be found within the four corners of either of those cases which at all goes to establish so extravagant a proposition. Where the bond on the face of it is clear and plain, and purports to be for £12,000 in money, it is for those who seek to set aside that bond, it is for those who seek to construe it in a different way, and to read it as if it were not what it purports to be, but something else, it is for them to show your Lordships, by sufficient evidence, and not by surmise or conjecture, or merely endeavouring to raise a suspicion, that it is in reality a transaction different from what on its face it appears to be. My Lords, I stated that there was one circumstance in this case, but for which, I conceive, there never could have existed a moment's doubt respecting this transaction, and that is, that it was unfortunately not prepared by the man of business usually employed by Ladies Essex and Mary Ker. They do not appear at that time to have had a professional man regularly in their employ. A respectable gentleman of the name of Moore appears to have been engaged by them in some law concerns formerly, but he does not seem to have been by them regularly em-[58]-ployed as their professional agent. It is unfortunate that there was not a professional man employed by them regularly, and who, if there had been such a one, ought undoubtedly to have been the person employed in preference to Mr. Nicol's solicitors. Mr. Nicol employed them to prepare it; and but for that circumstance I really think there never could have been, from beginning to end, the least doubt or suspicion entertained of this transaction. But I am very far from saying that is a circumstance that ought to weigh in your Lordships' minds in the opinion which you are to form upon it. The peculiarities in the habits of the parties, the very close intimacy that prevailed between them and Mr. Nicol, and the fact of their not having regularly employed a professional man at that time, will, in all probability, be sufficient to account for that difficulty, the only one which I can perceive in this transaction. My Lords, upon the whole, therefore, I was of opinion, that it was impossible formerly to call upon your Lordships to sanction the inference raised from this coincidence of date; but we then had before us only the question of, whether or not those issues should be tried? we had not the question, what conclusion ought to be drawn by his Honor, he having at that time drawn no conclusion, but sent it to be tried by a jury. I am of the same opinion now, on further consideration and fuller argument, that I entertained at that time, namely, that this bond is to be taken as the Master took it, and that the exception taken by the Respondents to the Master's report ought to have been overruled by his Honor, and that accordingly this House should reverse so much of the decree appealed from as declares the bond for £12,000, executed by the Ladies Essex and Mary Ker, bearing date the 15th day of July 1815, was intended, to the extent of £10,000, as [59] a counter-security, for the engagement into which he had entered as surety for the Ladies Essex and Mary Ker in the bond for £10,000, executed by the same ladies in the same day (the 15th of July 1815); and so far also as the same decree ordered, that the sum of £5 deposited with the Registrar on setting down the exceptions to be heard, should be returned to the Respondent, Sir Robert William Vaughan; and also so far as the decree ordered, that it should be referred back to the Master, to review his report, according to the declaration; that so far as that goes the decree appealed from should be reversed; and that the report of the Master of the 21st day of March 1828 should be directed to be absolutely confirmed. My Lords, I stated, when this question was argued, regarding my noble and learned friend (Lord Lyndhurst), the benefit of whose assistance we had on the former argument, on the appeal respecting the trial of the issues, he having attended at that time, and paid great attention to it, that it would be satisfactory to me to have the benefit of his opinion upon this matter before your Lordships finally decided it: I have communicated with him upon it; he has reconsidered the case very fully, and he remains entirely of the opinion which I expressed, as far as it was necessary to be expressed, on the former occasion, and which he, as far as his observations then went, confirmed; and he is now clearly of opinion, upon the evidence as it now stands, that the Judgment of the Court below, so far as I have stated, is wrong, and therefore to that extent ought to be reversed.

Judgment of the Court below reversed accordingly.

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APPEAL

From the Rolls Court.

Sir CHARLES COCKERELL, Bart., HENRY TRAIL, Sir CHARLES RICHARD BLUNT, Bart., The Most Noble GEORGE Duke of Marlborough, and JAMES BLACKSTONE.—*Appellants;* FRANCIS CHOLMELEY,—*Respondent.*

[Mews' Dig. viii. 533: x. 1478, 1592: xiv. 1733: S.C. 6 Bli. N.S. 120: and in Ch. 1 Russ. and My. 418. See also 10 B. and C. 564: 3 Russ. 565: Taml. 435: *Cholmeley* v. *Paxton*, 3 Bing. 207. Discussed and distinguished (as reported in 10 B. and C. 564) in *In re Rutland's* (*Duke of*) *Estates* [1900] 2 Ch. 206. See also 22 and 23 Vict. c. 35, s. 13; 40 and 41 Vict. c. 18, s. 16; and Farwell on *Powers*, 2nd. ed. 359, 360.]

A testator, by his will, devised his lands to trustees, with a power of sale. The trustees sold the estate, but as it was supposed that the tenant for life, without impeachment of waste, was entitled to the produce of the growing timber, the deed for carrying the contract of sale into effect recited that the trustees had sold the lands for a certain sum, and that the tenant for life had sold the timber then standing thereon for a certain other sum. The purchase money of the estate was paid to the trustees, and invested according to the directions in the will; the value of the timber was paid to the tenant for life. Held, that this was a bad execution of the power, and that it was not cured by the subsequent investment by the tenant for life, according to the directions in the will, of the money which, under a mistake of the law, had been thus paid over to him.

Sir Henry Englefield, late of the parish of Sonning, in the county of Berks, bart., being seized of the manor of Early, and the manor, mansion-house, and lands of White Knights, in that county, made his last will and testament in writing, dated the 27th of November 1778, and executed so as to convey real estates, and, amongst other things, devised the said manor of Early, and his manor and mansion-house [61] called White Knights, and all and every his messuages, lands, etc. in the county of Berks, unto the Right Honourable Charles Sloane, Lord Cadogan, and Sir Charles Bucke, bart., and their heirs, upon trust to secure to his widow an annuity of £500 per annum, then to the use of the testator's eldest son, Henry Charles Englefield, for and during the term of his natural life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, created in favour of Francis Michael Englefield, the testator's second son, and of Teresa Anne Englefield, his daughter. And the said testator declared his will to be, that notwithstanding any of the estates and uses by his said will created or limited, it should be lawful to and for the said Lord Cadogan and Sir Charles Bucke, or the survivor, from time to time, at the request and by the direction or appointment of the person who, for the time being, should be in possession of or entitled to the rents and profits of the manor and tenements aforesaid, signified by any deed or writing under seal, attested by two witnesses, to sell, or to convey in exchange for other manors, lands, etc. all or any part or parts of the manor and tenements aforesaid, to any person or persons whomsoever, either together or in parcels, for such price in money, or any other equivalent, as to them should seem just and reasonable; and to that end for the said Lord Cadogan and Sir Charles Bucke, or the survivor, by any deed under their hands and seals, to declare such new uses as should be necessary for the executing such sales or exchanges; and when any of the said premises should be sold for a valuable consideration in money, in pursuance of the powers thereby given, all the sums of money which should arise by such sales should be laid out by the said Lord Cadogan and Sir Charles [62] Bucke, or the survivor, with such consent as aforesaid, testified as aforesaid, and be invested in the purchase of other freehold manors of inheritance, in fee simple, in possession, and of copyhold lands of inheritance, if any should be intermixed therewith, to be settled and conveyed to the same uses as were thereinbefore limited.

The testator died on the 1st of June 1780, without revoking or altering his will;

Dame Katherine Englefield and all his three children survived him: upon his death his eldest son, Henry Charles Englefield, who thereupon became Sir Henry Charles Englefield, bart., entered into the possession of the manor, mansion-house and lands of White Knights, as tenant for life, under the limitations of his father's will.

On the 1st January 1782, Sir Charles Bucke died, and Lord Cadogan became the sole trustee under the will.

In the same year, Teresa Anne Englefield intermarried with Francis Cholmeley, late of Bransby, in the county of York, esq., deceased, and the Respondent, Francis Cholmeley, was the eldest son of that marriage, and was born some time in the year 1783.

In the month of July 1782, William Byam Martin, esq., being desirous of purchasing the manor and mansion-house and lands of White Knights, employed the late Mr. Cockerell, then of Stratton Street, an architect and surveyor, to make inquiries about the property, and to treat for the purchase of it. Mr. Cockerell accordingly applied to the London attorney and solicitor, and the country attorney and solicitor of the Englefield family, for permission to view the house and grounds, and for information respecting the particulars of the property, and the price for which it was to be [63] sold, and having viewed the property, and obtained such information as he was able, Mr. Cockerell, as the agent of Mr. Martin, finally made an offer, which the then tenant for life and the trustee agreed to accept.

The real contract between the parties being a contract for the sale and purchase of the manor, mansion-house and lands of White Knights, with the addition of lands called Foxholes, at the price of £13,400, and of the timber and other trees thereon at a price to be fixed by the valuation of two surveyors, the point now in dispute was, whether the respective parties and their law advisers in carrying this contract into effect had not committed a mistake:—They conceived that, inasmuch as Sir Henry Charles Englefield was entitled, as tenant for life, without impeachment of waste, to cut down the timber and other trees upon the property contracted to be sold, and to sell the same when cut, and to receive for his own use the proceeds of such sale, he was therefore entitled to the value of the said timber and trees although left standing; and upon this mistake as to the rights of Sir Henry Charles Englefield as such tenant for life, the deed for carrying the above-mentioned contract into effect was framed.

That deed, instead of reciting the contract of the parties as one entire contract, contained a recital to the following effect: "Whereas the said Lord Cadogan, by virtue of the power given to him in the will (and at the request of Sir H. C. Englefield, properly testified), contracted with the said William Byam Martin for the sale of the manor, and of the mansion-house of White Knights, and of the outhouses, etc., and of the fixtures and furniture, etc., for the sum of £13,400; and the said Sir H. C. Englefield, who, as tenant for life, without impeachment of waste, is [64] entitled to the timber trees standing and growing, and being on the said premises, so agreed to be sold to the said William Byam Martin, hath agreed to sell the said timber and timber trees to the said W. B. Martin, at or for the sum of £2448."

The sum of £2448 was paid to Sir Henry Charles Englefield, for his own use, and the sum of £13,400 only was paid to and received by Lord Cadogan, as the surviving trustee under the will. The deed was duly executed by all parties, and Mr. Martin entered into possession of the property.

Part of the sum of £13,400 was laid out by Lord Cadogan upon mortgage security, and the residue was invested in the purchase of three per cent. consolidated Bank Annuities, and proper deeds were executed by Lord Cadogan, declaring the trusts upon which he held the said trust funds.

Francis Michael Englefield died in the year 1789.

In the month of April 1799, the sum of £13,400 stood invested and secured in the following manner, that is to say, the sum of £12,500, part thereof, upon mortgage of certain estates at Redgemont and Seckling, in Holderness, in the county of York, and the residue thereof, together with the proceeds of other parts of the estates devised by the said will, and sold under the said power, was invested in the sum of £4080 11s. 11d., three per cent. consolidated Bank Annuities, and then stood in the name of Lord Cadogan in the books of the governor and company of the Bank of England.

Part of the said sum of £4080 11s. 11d. was, on the 1st of May 1799, applied

by Lord Cadogan, with the consent of Sir Henry Charles Englefield, in redeeming the land-tax charged upon and payable out of other parts of the estates devised by the said will, [65] and the sum of £4080 11s. 11d., three per cent. consolidated Bank Annuities, was thereby reduced to the sum of £601 10s. 9d. like annuities.

The Respondent Francis Cholmeley attained twenty-one in the year 1804.

Dame Katherine Englefield died in May 1805.

In the year 1806, doubts were suggested by Mr. Nowell, the solicitor of Sir Henry Charles Englefield, whether, inasmuch as the timber and other trees expressed to be conveyed by the deed of 12th of May 1783, had not been severed from the land at the date of the execution of that deed, the sum of £2448 had been properly received by him; and whether he ought to retain the same; and in order to obviate any litigation which might thereafter arise by reason of such doubts, Sir Henry Charles Englefield, on the 29th of July 1806, purchased, and transferred into the name of Lord Cadogan, the sum of £3681 4s., three per cent. consolidated Bank Annuities, being such an amount of that stock as the sum £2448 would have produced on the 17th day of May 1783; by this transfer the amount of three per cent. Consols, in the name of Lord Cadogan, was increased to the sum of £4282 14s. 9d.

About the same time a draft of a deed-poll or declaration of trust was prepared, by the directions of Sir Henry Charles Englefield, and was intended to have been executed by Lord Cadogan, for the purpose of explaining how the said sum of £4282 14s. 9d., three per cent. Consols, had been produced, and of declaring the trusts upon which the said Lord Cadogan held the same. This draft was submitted to the perusal of Lord Cadogan's solicitor, and was approved by him on his lordship's behalf; but before the deed [66] was actually executed, and in the early part of the year 1807, Lord Cadogan died.

Teresa Anne Cholmeley, the mother of the Respondent Francis Cholmeley, died in the year 1810.

The said manor, etc. by divers mesne conveyances, became vested in the Appellants.

In consequence of the death of Lord Cadogan, and the lunacy of his heir at law, it became necessary to obtain an Act of Parliament for the appointment of trustees for the discharge of the trusts of the will, and accordingly, in May 1819, Sir H. C. Englefield, the tenant for life in possession, and the Respondent Francis Cholmeley, the next immediate remainder man in tail under the will of the said testator, Sir Henry Englefield, petitioned for leave to bring in a bill for the purpose of appointing new trustees of the said will; and an Act of Parliament was passed, whereby, after reciting the will of Sir Henry Englefield, and the sale of the said manor, mansion-house and lands of White Knights, in pursuance of the trusts thereof, all the estates devised by the will, except such as had been sold, were vested in William Cruise and Edward Jerningham, both of Lincoln's Inn, esquires, and their heirs, upon the trusts of the said will; and the executors of Lord Cadogan were empowered and directed to assign and transfer unto and into the names of William Cruise and Edward Jerningham, the sum of £12,500, secured on mortgage, and also the sum of £4282 14s. 9d. three per cent. Consolidated Bank Annuities, then standing in the name of the said Lord Cadogan, to be held by them upon such of the trusts of the will as were then subsisting.

By a decree of the Court of Chancery made in a cause depending there, wherein some of the Appel-[67]-lants were Plaintiffs, and others were Defendants, dated the 6th of April 1821, it was ordered and decreed that the said manor, mansion-house and premises should be sold, with the approbation of one of the Masters of the said Court, and with the usual directions for that purpose; and in pursuance of the said decree, the said manor, mansion-house and premises were, on the 16th of July 1822, put up to sale by public auction, before the said Master, and the Appellant, Sir Charles Richard Blunt, was allowed and reported by the said Master as the highest bidder for, and the purchaser of, the said manor, mansion-house and premises, at the price of £37,000, and upon the terms contained in the conditions annexed to the particulars of sale. The report was confirmed by an order of the 6th November 1822.

In the month of March 1822, Sir Henry Charles Englefield died, and Respondent thereupon became entitled, as the tenant in tail, to the possession of the hereditaments devised by Sir Henry Englefield's will, or to the proceeds of such of the said

hereditaments as had been sold in pursuance of the said power of sale; and as such tenant in tail he presented a petition to the then Master of the Rolls, praying that William Cruise, the surviving trustee under the said Act of Parliament, might be ordered to assign and transfer to him the sums of which he stood possessed under the trust; and that petition having been heard before the late Sir Thomas Plomer, on the 29th of July 1822, his Honor ordered that it should be referred to one of the Masters, to inquire and state to the Court whether the Respondent was entitled to receive the said sums under the provisions of Lord Eldon's Act. The Master reported that he was so **[68]** entitled; and the order for the transfer was accordingly made.

The Respondent, Francis Cholmeley, as tenant in tail, commenced his action of Formedon in the Court of Common Pleas at Westminster, in Michaelmas Term 1823, demanding against the Appellants the said manor, mansion-house and premises, and recovered judgment in such action, upon the ground that the deed of the 12th of May 1783 was void at law, and that no estate or interest in the said manor, mansion and premises, was thereby limited or appointed to the said William Byam Martin.

In Hilary Term 1826, the Appellants exhibited their bill in Chancery, which was afterwards amended against the Respondent, and, after stating the above facts, concluded by praying that it might be declared that the Appellants were, under the circumstances, entitled to the benefit of the contract and agreement for the purchase of the said manor, mansion house and premises, and to have the said contract carried into effect, and to have the said indenture of the 12th day of May 1783, reformed and amended, and made conformable to the said contract and agreement, and to have the said mistake and defect in the said last-mentioned deed rectified and made good, and that the Respondent Francis Cholmeley might be decreed to do and execute all necessary and requisite acts and deeds for confirming and establishing the Appellants' title to the hereditaments and premises mentioned and comprised in, and intended or expressed to be limited and conveyed by, the said indenture of the 12th day of May 1783, and for general relief.

To this bill the Respondent put in his answer; and **[69]** thereby insisted, that the execution of the power of sale, by the indenture of the 12th of May 1783, was void at law; and that the Appellants were not entitled to any relief in a Court of Equity against him, and were not entitled to have remedied, or made good, any defect in the manner in which the sale to Mr. Martin had been carried into effect.

The cause came on to be heard before his Honor the Master of the Rolls on the 17th of March 1830, when his Honor decreed that the Appellants' Bill should be dismissed.

From this decree the Appellants appealed, alleging that it was a settled rule in Courts of Equity that they would supply defects in executions of powers where a valuable consideration had been paid, and where the intention of the parties had been to execute the power, and they had been mistaken only in points of form. They insisted that that rule was fairly applicable to this case, where, from the beginning, there had been no other intention than that of a *bonâ fide* execution of the power by all the parties concerned in the sale of the estates. They further contended, that if there had been any irregularity in the execution of the power, it was removed by the subsequent transfer of stock made by Sir H. C. Englefield, so that no pretence existed for saying that the remainder man had suffered any injury. On the other hand, they insisted that the parties who had for such a length of time been acting upon the sale in 1783, in the belief that it was a good and valid sale, who had besides expended large sums of money in the improvement of the estate, would be unjustly deprived of the benefit of what they had done, if that sale should now be set aside.

The Respondent insisted that the construction of the power must be the same in a Court of Equity as in a **[70]** Court of Law, and in the latter the power had already been declared to be badly executed. A Court of Equity would only interfere to supply deficiencies, or correct mistakes in point of form; but here the substance of the power had been disregarded in its execution, which was indeed contrary to the intention of the donor of the power.

The Lord Chancellor (23 July): There is a very important case which I ap-

pointed to give judgment in to-day. It is a case of very great hardship—it is the case of *Cockerell* and *Cholmeley*, which was argued some time ago. I stated at the time, that, being impressed by the hardship of that case, though I certainly felt that the decree of the Court below ought to be affirmed, I should postpone advising your Lordships as to the manner in which it appeared to me it ought to be decided, until I had an opportunity of again attentively looking carefully into it, in order to see if there was any possibility of discovering means, consistently with the decided cases, consistently with the facts of the case, and consistently with the undoubted law of the case, of coming to an opposite conclusion, which attempt on my part has been in vain; and I certainly now am prepared to advise your Lordships to affirm the decree below. My Lords, when I have said I entirely agree with his Honor (from whose judgment this is an appeal) in thinking that it is one of the hardest cases, as I have already intimated to your Lordships, taking it altogether, that I have ever seen, even upon that chapter of the law,—the execution of powers—which is so fruitful at various times in cases of this description, it is fit that I should add (and it is only what I threw out at the hearing of the cause), that nothing can be more unjust than to throw any imputa-[71]-tion whatever, on the other hand, against the gentleman who has taken advantage of the law of the land as it is. He is not bound to forego that advantage; he is not only not bound to forego that advantage, but, unless he be a person to whom many thousands of pounds are a matter of no importance, as regards either his own interest or the interests of his family, it would be a piece of romantic folly, in my opinion, for him to forego that advantage which the law of the land has given him. My Lords, many who have no occasion for money for their families, either from having enough of it themselves, or their families being well provided for, may afford to be generous to others; for it is pure generosity in the way to which I have referred, but no man is to be blamed for wanting the means to be thus generous. Is it possible to think of blaming any person, merely because he is not guilty of an act of romantic generosity?—an act which, in the circumstances of this Respondent, Mr. Cholmeley, who is stated to be a gentleman with a family, would, in all probability, have been an act of folly disentitling him to praise, and probably subjecting him to censure. My Lords, in the circumstances of the case, nevertheless, I shall not recommend to your Lordships to make any order in respect to costs.

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[72] WRIT OF ERROR.

DANIEL GILES, Esq. late Sheriff of Hertfordshire,—*Plaintiff in Error; v.* HARRY GROVER and JAMES POLLARD,—*Defendants in Error.*

[Mews' Dig. v. 34, 37, 44; S.C. 6 Bli. N.S. 277; 9 Bing. 128; 2 M. and Scott, 197. See also 11 Rul. Cas. 549. On point as to property in goods seized, see *Ex parte Rayner*, 1872, 41 L. J. Bank. 26, 30; *In re Clarke* (1898), 1 Ch. 339; Sale of Goods Act 1893 (56 and 57 Vict. c. 71), s. 26; Bankruptcy Acts 1883 (46 and 47 Vict. c. 52), s. 46 (3), and 1890 (53 and 54 Vict. c. 71), s. 11. As to position of Crown, see 8 Rul. Cas. pp. 199-201, and Bankruptcy Act 1883, ss. 30, 150.]

Where goods have been seized under a *fi. fa.*, but remain unsold in the hands of the sheriff, he shall sell them under a writ of extent in chief or in aid, tested after the seizure under the *fi. fa.*, and shall satisfy the Crown's debt without regard to the previous execution.

This was an issue directed by the Court of Exchequer, in Hilary Term 1824, with a view to determine whether the effects of Henry Fourdrinier and Thomas Nicholls, debtors of the Defendants in Error, were liable to seizure under an extent in aid issued at the suit of Grover and Pollard. The goods of Fourdrinier and Nicholls had already been seized by the Sheriff under writs of *fieri facias*, and remained in his hands unsold when the extent in aid was issued. The question was, whether the execution under the writs of *fi. fa.* was an execution executed so as to change the property, and leave nothing for the extent to operate upon, or

whether the property still remained so far in the debtors as to be liable to seizure under the extent.

The case was submitted to the consideration of the Judges, who, on the 25th May and 25th June, delivered their opinions. The House of Lords took time for further consideration; and, on the 11th July, Lord Tenderden and the Lord Chancellor (Brougham) ex-[73]-pressed their concurrence with the opinion of the majority of the Judges.

Mr. Justice Patterson: In this case your Lordships have propounded two questions for the opinions of the Judges. 1st, A common person brings his action against another, and obtains judgment; issues a writ of *fieri facias* upon that judgment, and delivers the writ to the sheriff, who, in execution thereof, seizes the goods of the Defendant: while the goods remain in the sheriff's hands, and before he has sold them, a writ of extent in aid is issued against the same Defendant, as debtor of a debtor of the Crown, tested after the seizure under the writ of *fieri facias*, and is delivered to the said sheriff: shall this writ of extent be executed by the sheriff by extending the same goods, seizing them into the King's hands, and selling them to satisfy the Crown's debts, without regard to the writ of *fieri facias* under which he had first seized them?

2d. All other things remaining the same, does it make any difference whether the writ of extent was in chief or in aid?

Upon the first question much difference of opinion has long existed, and there are conflicting decisions of the courts of law. Your Lordships therefore will not be surprised to find that the Judges have not been able to agree, and it has become my duty to state my opinion upon it. I apprehend that the answer to this question depends upon two points; first, whether the property in the goods is so altered by the seizure of the sheriff under the *fieri facias*, that the extent cannot take effect; and, secondly, whether the statute 33 H. 8, c. 39, s. 74, bars the right of the Crown. As to the first point: At common law the goods of the debtor were bound from the *teste* of a writ of *fieri facias* at the [74] suit of a common person, as well as from the *teste* of the King's writ. This, as to common persons, is altered by the statute 29 C. 2, c. 3, s. 16, since which they are bound only from the delivery of the writ of *fieri facias* to the sheriff. The Crown, however, not being named in that statute, goods are still bound from the *teste* of the King's writ. But this binding, in the case both of the King and of a common person, relates only to the debtor himself and his acts, so as to vacate any intermediate assignment made by him otherwise than in market overt, 3 Lev. 191, *Phillips* and *Thompson*. (Per Lord Hardwicke, 2 Eq. Cas. Abr. 381, *Lowthall* v. *Tomkins;* and per Lord Ellenborough, 4 East, 538, *Payne* and *Drewe;* and many other cases.) And even when made in market overt, in the case of the King, it in no way affects the priority of conflicting writs. The rule as to priority between common persons always was, that the writ which was first delivered to the sheriff should be first executed, without regard to the *teste:* but between the King and a subject, that the King's writ, though delivered last, should be preferred first, on the ground expressed by Lord Coke, 9 Rep. 129, *b. Quick's* case: *Quando jus domini regis et subditi insimul concurrunt, jus regis præferri debet.* And this also without regard to the *teste*. If, therefore, a writ of *fieri facias* at the suit of a common person may be delivered to the sheriff, and, before any seizure made by him under that writ, a writ of extent at the suit of the King, tested after the delivery of the *fieri facias*, be delivered to him, it is not doubted but that the sheriff would be bound to execute the writ of extent in preference to the *fieri facias*. In the case, indeed, stated by your Lordships, the sheriff had already seized under the writ of *fieri facias* before the writ of extent was delivered to him: what then is the effect of that seizure? [75] If by it the writ of *fieri facias* is executed, if the rights of the King and the subject no longer run together, if the property in the goods be taken out of the debtor, then the writ of extent is too late, it has nothing on which to operate. But if the seizure of the goods be but an inception of the execution, if the rights of the King and the subject are still conflicting, if the general property in the goods still remain in the debtor, then the maxim will still apply, and the King's right must be preferred. It is not pretended in any of the authorities, except in some supposed loose *dicta*, that by seizure of the goods any property therein is acquired by the creditor: so far is this

from being the case, that when goods were seized by the sheriff under one writ (which had been last delivered), it was held that he might sell under the writ of another creditor, which had been first delivered, but under which he had not seized; 1 T. R. 729, *Hutchinson* v. *Johnston*; and see 7 Taunt. 56, *Jones* v. *Atherton*. Now if the seizure under a writ of *fieri facias* executed the writ, if it changed that property, and vested it in the creditor, how came it that the sheriff, having seized under the second writ, was not compelled to sell under that writ? It cannot be said that the reason was because the property was bound and altered by the delivery of the first writ, and therefore the goods could not be taken under the last, since it was held in 4 East, 532, *Payne* v. *Drewe*, that if the sheriff sell under the writ last delivered, the creditor whose writ was first delivered cannot follow the goods or their proceeds, though he has his remedy against the sheriff; and the same point had long before been determined in *Smallcomb* v. *Cross*, 1 Lord Raym. 251, 1 Salk. 320, and other cases. It seems to me to be clear from these cases, that the seizure of goods by the sheriff will not make any dif- [76]-ference as to the rights of creditors under conflicting writs, any more than the *teste* of the writs does, and will not vest any property whatever in the creditor under whose writ the seizure is made, in the cases of common persons; why then should it make any difference in the case of the Crown and a subject? It is true that in one report of the case of *Wilbraham* v. *Snow*, 1 Lev. 282, Lord C. J. Kelynge is made to say, that "the property is altered from the owner and given to the party at whose suit;" but the reporter adds a *quære*, and the other reports of the same case do not mention this supposed dictum. Again, in one report of *Clerk* v. *Withers*, 2 Lord Raym. 1075, Gould, Justice, is made to refer to this supposed dictum of Lord C. J. Kelynge; but in another report of the same case, 6 Mad. 293, Gould, J. is made to say only that Lord C. J. Kelynge held, in *Wilbraham* v. *Snow*, that the sheriff gained a general property by seizure; whereas the other Judges held that he gained a special property only; and Powys, J., is made to say that the general property remained perhaps in abeyance; all which shows only the inaccuracy of the reporters or the doubtful grounds of the decision; and as a special property in the sheriff is quite sufficient ground to warrant the decision, no other ground beyond that can reasonably be taken to have been established.

That the general property in goods, even after seizure, remains in the debtor, is clear from this, that the debtor may after seizure, by payment, suspend the sale and stay the execution, 2 Show. 87, *The King* v. *Bird*; and have back his goods without any bill of sale or assignment from the sheriff or creditor. And again, that if the sheriff, after selling a sufficient quantity of goods seized to satisfy the debt, proceed to sell more, trover will lie against him at the suit of the debtor; but [77] if the property by seizure is taken out of the debtor, it must be so taken as to all the goods seized; and what has operated to restore it? Still it is said that by the seizure a special property vests in the sheriff, and that this is an alteration of property sufficient to protect the rights of the execution creditor, and to prevent the Crown from taking otherwise than subject to those rights. It is undoubtedly true that the sheriff does by the seizure acquire a special property in the goods; he may maintain trespass or trover for them, *Wilbraham* v. *Snow*, 2 Saund. 47; 1 Sid. 438; 1 Ventris, 52; 1 Keb. 282; 1 Mod. 30; 2 Keb. 518, S. C.; and see 2 Saund. 344, *Mildmay* v. *Smith*. He is answerable to the creditor if they be rescued, and he is bound to sell them, 2 Lord Raym. 1075, *Clerk* v. *Withers*; 6 Mod. 290; 11 Mod. 34; Salk. 322; Holt, 303, 646, S.C. But on full consideration it seems to me that this property vested in the sheriff by seizure is merely that which results from his being the appointed officer of the law, and to enable him to sell goods, and to raise the money, not that thereby the property is taken out of the debtor. The goods are in substance in *custodia legis*; the seizure made by the officer of the law is for the benefit of those who are by law entitled; it is made against the will of the debtor, and no property is transferred by any act of his to the sheriff. In this respect it differs from all cases of special property, and of charges on goods created by the debtor whilst he has the absolute dominion over the goods. It is conceded that the Crown cannot avoid an equitable mortgage, *Casberd* v. *Attorney-General*, 6 Price, 411; or the lien of a factor, *The King* v. *Lee*, 6 Price, 369; or of a wharfinger, *The King* v. *Humphrey*, 1 M'Cleland and Younge, 173; or a *bonâ fide* assignment in trust for creditors, *The King* v. *Watson*, Weston on Extents, [78] 115; or any other

similar assignment or charge, because they are created when the debtor has legal power and authority to create them, and attach upon the goods before the process of the Crown, and the Crown can only take the goods subject to such liabilities as the debtor has legally created. In the case, however, of a seizure by the sheriff, the debtor has created no liability, and the Crown has a right to say that the sheriff, whilst the goods are in his hands, holds them for the benefit of any one who may have a legal charge against them as the property of the debtor. One instance apparently showing that a *fieri facias* is executed by seizure of the goods, is that of the bankruptcy of the debtor after the seizure and before sale, in which the assignment of the commissioners does not pass the property in the goods to the assignees, although it relates back to the act of bankruptcy; and although the words of the statute, 21 Jac. 1, c. 19, s. 9, respecting the distribution of bankrupts' effects, compel creditors, upon judgment, " whereof there is no execution or extent served and executed " upon the lands or goods before the bankruptcy, to come in *pari passu* with other creditors. And even a fraction of a day is made in favour of the *fieri facias*, *Thomas* v. *Desanges*, 2 B. and A. 586. It is argued, therefore, that the courts of law, by holding that seizure under an execution before an act of bankruptcy prevents the execution creditor from being driven to come in with the other creditors, have in effect held that by such seizure the execution is served and executed. Now it is to be observed, that at the time of the passing of the 21 Jac. 1, goods were bound from the *teste* of a *fieri facias* as against the debtor's own acts; and it seems not improbable that this provision of the statute might be intended to guard against creditors who might have sued out a writ, and [79] so bound the debtor's goods, but still abstained from putting it in force till after an act of bankruptcy; which would be in conformity to the principle of the subsequent sect. 11, as to goods in the possession of the bankrupt, by consent of the true owners. Besides the goods when seized are the goods of the debtor, and if the effect of the seizure were to be done away with by a subsequent act of bankruptcy, it would enable the debtor, by his own act, to defeat the creditor. The Courts, therefore, have construed the words in that Act as applying to a seizure, not to a sale. At all events, whether this conjecture be right or wrong, the decisions amount only to a construction of words in a particular Act of Parliament, with reference to the scope and object of the Act, and cannot affect the general law; and it is also to be remembered, that the Crown is not mentioned in or bound by that Act. The case of *Clerk* v. *Withers*, 2 Lord Raym. 1072, is also pressed as establishing the doctrine that the property is taken out of the debtor by the sheriff's seizure; but no such doctrine is there laid down. The facts of the case were shortly these: an administrator recovered a judgment by default against Clerk; he sued out a *fieri facias*, and Withers, the then sheriff, seized Clerk's goods: before sale the administrator died; then Clerk sued Withers (who had gone out of office in the meantime) to have restitution of his goods, contending, that as the plaintiff was an administrator, his executor or administrator could not have the benefit of the judgment, and that any new administrator, *de bonis non*, could not, because the judgment was by default. Another point was raised, which is not material here, as to Withers having quitted office: after much argument, it was held that the action would not lie, because Clerk was discharged from the debt by the seizure of the sheriff, *ad valentiam*, and [80] that the sheriff, having seized in the lifetime of the plaintiff, must account to his representatives. All this is perfectly consistent with the position that the general property in the goods, even after seizure, remained in Clerk, and establishes only that the debtor himself cannot defeat an execution once begun, nor get back his goods after seizure under a *fieri facias* without payment of the debt.

It is urged also, that when goods are once seized under a *fieri facias*, the sheriff must go on to perfect the execution, and that even a writ of error will not operate as a supersedeas. The cases to establish this position are somewhat confused: but admitting it to be established, the doctrine of change of property does not follow, for the bringing the writ of error is here also the act of the debtor himself.

For these reasons, and on the authority of the cases I have mentioned, and some others to which I must refer hereafter, I conceive that the property in the goods is not so altered by the seizure of the sheriff under the *fieri facias* as that the extent cannot take effect.

I come now to consider what is the effect of the statute 33 H. 8, c. 39, s. 74.

Premising, that it appears to me somewhat doubtful whether that section applies to any writ of extent issued in the first instance, commonly called an immediate writ of extent, and whether it was not intended to apply only to the King's writs of execution, after judgment or award of execution obtained by him in a suit, I am of opinion, that if it does apply to such an extent as the present, it does not, under the circumstances stated, prevent its priority. That statute created certain new Courts; and it must be admitted that it gave the King some new rights, for the 50th section gives to bonds made to the King the effect of statutes staple, and the 53d section gives the King [81] the same remedy on those bonds as the subject had had on statutes staple. Then, after various other matters, comes the 74th section, at a great distance; and it is this: "That if any suit be commenced or taken, or any process be hereafter awarded for the King, for the recovery of any of the King's debts, that then the same suit or process shall be preferred before the suit of any person or persons; and that our sovereign Lord the King, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debts, before any other person or persons, so always that the King's said suit be taken or commenced, or process awarded for the said debt, at the suit of our said sovereign Lord the King, his heirs or successors, before judgment given for the said other person or persons." Now, in order to arrive at the true meaning of this clause, I think we must look at the state of the law before and at the time of the passing of the Act. At common law, the King might by his writ of protection prevent any subject from suing his debtor at all, until the King's debt was satisfied; Co. Litt. 131. a. By statute 25 Edw. 3, c. 19, it was provided, that notwithstanding such writs of protection, the subject creditor might sue the debtor to judgment, but not have execution till the King's debt was satisfied; and if the creditor would undertake for the King's debt, he should then have execution both for it and his own. Such writs of protection have long since ceased; and Lord Coke says, that he cannot say anything of them from his own experience, but there is no doubt that they were in use at the time of the passing 33 H. 8 [c. 39], that Act having, by the 50th section, made bond debts to the King binding on the land of the debtor from the date of the bond, which they were not before. The 74th section seems to have been inserted [82] for the benefit of the subject, primarily with a view to land, and so as to prevent the King's bonds from binding the land as against the judgment of a subject, which also bound the land, unless the King, by putting his bond in force before such judgment obtained, had expressed his intention so to bind it. But the 74th section was also inserted, as it seems to me, with reference to the very prerogative of the King of preventing the execution of the subject, and so having first execution himself, restricted as it was by 25 E. 3, c. 19; and in this view it applies to all proceedings for recovery of the King's debts, and to executions against goods as well as lands; and it abridges the power of the Crown, as it has been considered to do in *The Attorney-General* v. *Andrew*, Hard. 23, and in 7 Rep. 18. b., *Cecil's* case. For since the 33 H. 8 [c. 39], the Crown cannot interpose and prevent the subject's execution, when he has obtained judgment before the Crown process is awarded; but in that case the subject may sue out his execution, and reap the funds of it, if he can sell before the King's execution comes into the sheriff's hands. By obtaining a judgment before the Crown process is awarded, the subject entitles himself to run a race with the Crown, so to speak, which he could not do before the statute 33 H. 8 [c. 39], nor, as I apprehend, can do even now, where he has not so obtained judgment; although, in all cases, according to *The Attorney-General* v. *Fort*, reported in a note to *The King* v. *Giles*, 8 Price, 364, if the Crown suffers the goods to be sold under a *fieri facias*, before it interposes, its process is too late, whether sued out before or after judgment obtained by the subject. The statute 33 H. 8 [c. 39], not only, as I humbly conceive, enables the subject to run a race with the Crown, in certain cases, but it leaves the issue of that race to depend on the common law maxim which I stated long ago, [83] *Quando jus domini Regis*, etc., which maxim is not denied, and is established by numerous cases: otherwise, if the words of the 74th section are to be taken in their literal sense, this absurd consequence, among others, would follow, that if a subject obtained a judgment, but did not take out execution for six months, another subject might in the interim commence a suit, proceed to judgment, take out a *fieri facias*, and deliver it to the sheriff, and so obtain priority, but that the Crown could not, as it is well put in

the argument in *Rorke* v. *Dayrell*, 4 T. R. 406. If A. recover judgment against the King's debtor on 1st January, but do not deliver his writ of execution till the 4th, and B. also recover judgment against the same person on the 3d, and deliver his writ on the same day, and on the 2d an extent issues at the suit of the Crown, and is delivered to the sheriff; according to the construction contended for, this absurdity would follow, that the King would not be preferred as against A., though he would as against B. And yet it must be admitted that B. is entitled to a preference against A. The literal meaning of the words of this section cannot, therefore, be adopted; nor am I able to see any construction that can reasonably be put upon the statute other than that which I have imperfectly expressed; but will be found infinitely better stated in Mr. Baron Graham's judgment in this very case, 8 Price, 362, and in Lord Chief Baron Macdonald's judgment in *The King* v. *Wells and Allnut*, reported in a note to *Thurston* v. *Mills*, 16 East, 278. Mr. West says, in his book on Extents, p. 108, that the statute 33 Hen. 8 [c. 39] gave the Crown a new kind of execution for all its debts, a species too of execution which before the statute was the subject's, and the subject's only. This he deduces from the 50th and 53d sections of that Act. I think that he is wrong in that view of the statute; and that the pro-[84]-ceeding by extent in the first instance, at the suit of the Crown, existed long before the statute 33 Hen. 8 [c. 39], and was only modified and restricted by that Act: but whether he be right or wrong is not, in my humble opinion, material; for even if he be right, I still hold that the true construction is that which I have already expressed. I will now proceed to consider some of the cases in which this question has arisen or been discussed. And first, the case of *Uppom* v. *Summer*, 2 Bl. 1251 and 1294. The judgment was given by Justice Gould, in Easter Term, 9 Geo. 3, delivering the opinion of Lord Chief Justice de Grey himself, Nares and Blackstone Justices: he grounds his judgment, first, on the statute 33 Hen. 8 [c. 39], as to which I have already spoken; and, secondly, on authorities which I will proceed to examine. He first distinguishes *Stringefellow's* case, Dyer, 67. b., as not having arisen on a judgment but on a statute staple, and therefore not being within the provisions of 33 Hen. 8 [c. 39]; and then relies on the case of *Lechmere* v. *Thorowgood*, 3 Mod. 236, and *The Attorney-General* v. *Andrews*, and on a passage in the Digest by Lord Chief Baron Comyns, who, tit. Debt, (G. 8,) after citing 33 Hen. 8, says, "therefore if execution be upon a judgment against the King's debtor, and before a *venditioni exponas*, an extent comes at the King's suit, those goods cannot be taken upon the extent," and cites for this position the two cases just above mentioned; and Gould, J. also mentions the case of *The King* v. *Dickenson*, Parker, 262. That was a question as to administration of assets, in which the point decided was that a judgment creditor of the deceased should be preferred to a simple-contract creditor, who, being a debtor to the Crown, had, after the death of the deceased, procured an extent in aid; a case wholly foreign to the question in *Uppom* v. *Summer*. The authorities, [85] therefore, on which Lord Chief Baron Comyns and Gould Judge, rely, are reduced to the two before mentioned, *Lechmere* v. *Thorowgood* [3 Mod. 236], and *The Attorney-General* v. *Andrew*. Gould, J. says, that the former of these cases is obscure, arising from its being reported piecemeal, and in different books, and recommends reading them in order of time as they occur, viz. the pleadings, 2 Jac. 2; 2 Ventr. 159; the first argument, 1 Jac. 2., 3 Mod. 236; the second argument and judgment, 1 Wm. and Mary, Comb. 123; 1 Show. 12; and a subsequent action between the same parties, in effect, in the Common Pleas, in *Lechmere* v. *Toplady*, 2 Ventr. 169; 1 Show. 146. I have read them all in that order, and although there are some loose dicta and extra-judicial matters stated, yet it is easy to find out what points were really determined; and they were simply these: 1st, that in an action of trespass by assignees of a bankrupt against a sheriff, who had seized goods under a *fieri facias* after a secret act of bankruptcy, the sheriff could not be made a trespasser by relation; this was *Lechmere* v. *Thorowgood*. And, 2dly, that in an action of trover, for the same seizure, against the execution creditor, the judgment for the sheriff in the action of trespass was a good bar by way of estoppel; that was *Lechmere* v. *Toplady*. I do not mean to say that I at all agree to the decision on the last point; but it was the point decided, and the only point. With respect to *Lechmere* v. *Thorowgood* the facts were shortly these:—The sheriff seized goods of one Toplady on the 29th of April, under a *fi. fa.*, after a secret act of bankruptcy, committed on the 28th of April; and whilst the

goods remained in his hands unsold, viz. on the 4th of May, an extent, at the suit of the Crown against Toplady, was delivered to him. On the 5th of May a commission of bankruptcy issued [86] against Toplady, under which the plaintiffs were appointed assignees, and sued the sheriff in trespass, a special verdict was found, and it was held that the action would not lie. Some of the reports say that it was held that the extent came too late, but this point could not have been determined, for the Crown was no party to the suit and was not heard; therefore no right of the Crown could be decided in it. Again, the Crown and the execution creditor were on the same side, the sheriff the defendant, having seized for both, no point therefore as between them could arise in the case, especially as the defendant succeeded, because it was held that the sheriff could not be made a trespasser by relation. All the reports agree in stating that to be the point decided, even Comberbach so states, although he makes Lord Chief Justice Holt say, "The property in goods is vested by the delivery of the *fieri facias*, and extent afterwards for the King comes too late, and this by the Statute of Frauds and Perjuries." This must be a mistake; it is contrary to Lord Holt's own position in *Smallcomb* v. *Cross*, Lord Raym. 252, it is wholly beside the question before him, and makes him consider the statute as binding on the King, who is not named in it. Lord Mansfield, in *Cooper* v. *Chitty*, 1 Burr. 36, says that Lord Holt could never say that the property in the goods vested by the delivery of the *fieri facias*, and that the extent for the King afterwards came too late; and adds, no inception of an execution can bar the Crown; and Lord Ellenborough also points out the inaccuracy of Comberbach very forcibly in 4 East, 539, *Payne* v. *Drewe*. With respect to the case of *The Attorney-General* v. *Andrew* [Hard. 23], it is quite apparent from a perusal of that case that the execution, which was by *elegit*, was perfected and completed by delivery of the lands before the King's writ issued; and then, as Lord Chief Baron Steel says, [87] "the subject's title is prior to the King's, and is executed." The same law and the same consequences have since been held to attach in *The Attorney-General* v. *Fort* [see 8 Price, 364], and in *Swain* v. *Morland*, 1 Bro. and Bing. 370. The two cases cited, therefore, do not bear out the position of Lord Chief Baron Comyns, nor the decision in *Uppom* v. *Summer* [2 W. Bl. 1251, 1294]; and that decision must be supported, if at all, on the statute 33 Hen. 8, on which I have already remarked. The next case is *Rorke* v. *Dayrell*, 4 T. R. 402. That case was decided principally on the authority of *Uppom* v. *Summer* and the authorities there cited, and if they should be wrong, the decision in *Rorke* v. *Dayrell* [4 T. R. 406] is wrong also. Lord Kenyon puts the case on the ground of change of property, for he says, "that as long as the property of the debtor remains unaltered, and an execution at the suit of a subject and an extent at the King's suit issue against the debtor, the title of the latter must prevail, for the point to be considered in these cases is in whom is the property." He adds, "I have always understood it to be clear and settled (and this question has very frequently occurred in the Exchequer) that if an extent at the suit of the Crown be issued prior to the time when the subject's execution is delivered to the sheriff, the former shall have the preference. But as by common law, abridged as it is by the Statute of Frauds, the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor on which the prerogative of the Crown can attach." Now, with all possible respect for every thing which fell from Lord Kenyon, I humbly conceive that he has here confounded the binding the property in goods and the alteration of the property, and that he is mistaken in supposing that [88] the property in goods is or ever was at all bound or altered either by the *teste* or delivery of the writ as regards conflicting writs, and that the binding is only as regards the debtor himself, as I have before shown; and if so, the very foundation of his judgment fails: the other Judges put the case on the statute 33 Hen. 8. These are the only decisions in favour of the subject's execution; for *Thurston* v. *Mills*, 16 East, 254, went off on another point. Against them are the uniform decisions of the Court of Exchequer, one of which is reported at length, viz. *The King* v. *Wells and Allnutt*, in the note to *Thurston* v. *Mills*, 16 East, 278: this is subsequent to both *Uppom* v. *Summer* and *Rorke* v. *Dayrell*, which are cited and relied on in argument. Now, without fully agreeing to every word said by Lord C. B. Macdonald, in giving the judgment of the Court, (some of whose positions, according to the letter, I confess appear to me untenable,) I, for one, am perfectly satisfied with the general reasons

given in that judgment. The same point was again discussed and decided in *The King* v. *Sloper and Allen*, 6 Price, 114, which is still later. There are other prior cases to which I could briefly refer; and, first, *Stringefellow* v. *Brownsoppe*, Dyer, 67, b., which was decided Mich. T. 3 Edw. 6, seven or eight years after the 33 Hen. 8. In that case, the sheriff seized Brownsoppe's goods under an *extendi facias* upon a statute staple, at the suit of Stringefellow, and before any writ of *liberate* the King's writ of extent came into his hands; and the Court held that the King's writ should be preferred, because the property in the goods was not in Stringefellow before they were delivered to him by writ of *liberate*. It is said that this is no authority to the present point, for that the *extendi facias* is in the nature of a judgment, and the *liberate* is the execution; therefore, as a judgment operates no change of property, so [89] neither does seizure under the King's hands under an *extendi facias;* but that as delivery under a *liberate* operates a change of property, so does seizure under a *fieri facias*. Now I cannot understand this reasoning at all; I can see that the award of an *extendi facias* may be and is analogous to a judgment, but how a seizure under it can be so, I am at a loss to comprehend. Again, I can see how delivery under a *liberate* of the specific goods to the creditor, as is always done, may be, and is analogous to sale under a *fieri facias*, which directs the sheriff to make money of the goods; but how the mere seizure into the sheriff's hands under a *fieri facias* should be analogous to a delivery over to the creditor under a *liberate*, I am at a loss to comprehend: I apprehend that seizure under an *extendi facias* is the inception of the execution, and so is seizure under a *fieri facias;* delivery under a *liberate* is the completion, and so is sale under a *fieri facias:* the only difference is that a *liberate* must issue to enable the sheriff to deliver in the one case; whereas, in the other, he may and ought to sell without a *venditioni exponas:* but this difference cannot vary the effect of the seizure. The principle established in *Stringefellow's* case, is, in the words of Lord Mansfield, that no inception of an execution can bar the Crown. *Stringefellow's* case was against the opinion of some of the profession at the time, but it has been recognized as good law many times since, and seems to me to be directly in point. Next comes *Curson's* case, 3 Leon. 239, and 4 Leon. 10, which only shows that after delivery under a *liberate*, the King's writ is too late. In *The King* v. *Peck*, Bunb. 8, it was taken for granted that if an extent comes after seizure under a *fieri facias*, and before sale, it shall be preferred. In *The Attorney-General* v. *Capel*, 2 Show. 480, the point decided arose out of a bankruptcy, the King's writ being preferred after an act of bankruptcy [90] and before assignment by the commissioners. It is not in point to the present question, but at the end of the judgment are these words: "Extents have been held good that have been made upon goods actually levied by virtue of a *fieri facias* and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." Also in 5 Mod. 376, *Smallcomb* v. *Buckingham*, which is the same case as is elsewhere called *Smallcomb* v. *Cross*, there is a dictum to the same effect, and many others in other places, all which dicta I merely notice to put them in opposition to other dicta as to the vesting and alteration of property by seizure. Lastly, comes the case of *The King* v. *Cotton*, Parker, 112; that was the case of goods seized under a distress for rent; and it was held that they were still liable to be taken under an extent at the suit of the King, though in the custody of the law, and therefore privileged from being taken in execution by a subject. It is said that this case is not in point, because no property at all in the goods is gained by the distrainer, who can neither maintain trespass nor trover for them, and that such is the ground of the decision, inasmuch as it lay on the claimant in the Exchequer to prove property in himself against the Crown. Now on looking at the whole of the elaborate judgment of Lord C. B. Parker in that case, I do not find that he puts the case on the form of the pleadings, but on the general principle that the property is not altered, and therefore the King has preference, and throughout his judgment he cites cases as to the effect of seizure under a *fieri facias*. Proceeding upon that principle, I consider therefore that this case is a strong authority upon principle, unless it can be shown that seizure by the sheriff alters the property, and I submit that the contrary has been shown. It is true that neither *Stringefellow's* case [Dyer 67 *b.*] nor *The King* [91] v. *Cotton* [Parker 112], are direct authorities with regard to the stat. 33 Hen. 8 [c. 39], because in neither of them had the subject obtained judgment.

Upon the whole, then, whether with reference to the statute 33 Hen. 8 [c. 39], or

independent of it, the main points appear to me to be, was the property changed by the seizure, and were the King's writ and the subject's concurring? I say that the property was not changed, and that the writs were concurring. My answer, therefore, to the first of your Lordships is, that in my opinion the writ of extent shall be executed by the sheriff by extending the same goods, seizing them into the King's hands, and selling them to satisfy the Crown's debts, without regard to the writ of *fieri facias* under which he had first seized them. With regard to the second question, I find it uniformly considered that (when once it has issued) an extent in aid has all the force and all the incidents of an extent in chief, and therefore I am of opinion that all things remaining the same, it does not make any difference whether the writ of extent was in chief or in aid.

Mr. Justice Alderson: My Lords, the first question proposed by your Lordships for our consideration is in substance this: Whether when goods seized by a sheriff under a writ of *fieri facias* remain in his hands unsold, a writ of immediate extent tested after such seizure, does upon its delivery to such sheriff entitle the Crown to a priority of execution; and after fully considering that question, I have arrived at the conclusion that it must be answered in the affirmative.

This subject has been for a long period *vexata quæstio* in our Courts. And in order the more clearly to explain the grounds on which my opinion is founded, it will be useful to advert in the outset to the extent [92] of the prerogative of the Crown as to its debts, and the principles on which that prerogative depends, and then to proceed to examine the authorities and the reasons assigned for those determinations, which are to be found in our books on this point.

The prerogative of the Crown as to its debts is laid down in various books, and cannot, I apprehend, be doubted. Lord Coke in *Harbert's* case, 3 Rep. 11, states "that at the common law the body, land and the goods of the accountant or the King's debtor, were liable to the King's execution;" and he adds, that there were "infinite precedents in the Exchequer" to prove this, antecedent to the 33 H. 8, c. 39. Lord Chief Baron Gilbert also, in his History of the Exchequer, lays it down that the second summons of the pipe is "in the nature of a *levari facias* against the body, lands and goods of the debtor." And in Lord Hobart's Reports, *Foster* v. *Jackson*, Hob. 60, the law is very clearly laid down thus: "It is a prerogative to the King to have execution of body, lands and goods: not communicated to the subject but in case of statute merchant and statute staple, and recognizance of that nature; which is by the statute law: and therefore the case put in *Bloomfield's* case, that where the party was taken in execution upon a statute and died, and yet execution was had against goods and lands after, is nothing in this case, for they were all due at the first, and therefore may be taken at once or severally."

And in Madox's History of the Exchequer, Vol. II. p. 183, and subsequent pages, a great variety of instances confirmatory of this passage of Lord Hobart, in all its parts, will be found. I have cited this passage from Lord Hobart at full length, because I shall have occasion again to refer to it in considering the [93] true construction which ought to be put on the statute 33 Hen. 8, and because I think it will be found to afford a sufficient clue to enable us to discover what was the real change in the law produced by that statute as to the prerogative of the Crown.

It is unnecessary to cite other authorities on this subject. The result of them all being, as I conceive, that the King at common law by his prerogative could either by one writ or by successive writs, as he might find it convenient, seize the body, lands and goods of his debtor. And further that this was originally a prerogative peculiar to the Crown, but afterwards extended to the subject; viz. as to the body of the debtor by the Statute of Marlebridge, c. 23, the Statute Westminster 2, c. 11, and the statute 25 Ed. 3 [c. 19], and to the lands by the Statute Westminster 2, c. 18, and in the cases of statute merchant and statute staple, and recognizance in nature of statute staple by 13 Ed. 1, 27 Ed. 3, and 23 Hen. 8, c. 6, to the body, lands and goods.

The next prerogative of the Crown about which I apprehend there is no dispute, is, that where the right of the Crown and the subject concur, that of the Crown is to be preferred, 9 Rep. 129. b. A prerogative depending, first, on the principle that no laches is to be imputed to the King, who is supposed by our law to be so engrossed by public business as not to be able to take care of every private affair relating to his revenue, Gilb. Hist. Exch. 110; and, secondly, on the ground that by the King is in

reality to be understood the nation at large, to whose interest that of any private individual ought to give way. In the quaint language of Lord Coke, *Thesaurus Regis est firmamentum pacis: et fundamentum belli.*

And, until restrained by various enactments of the [94] statute law, this prerogative extended to prevent the other creditors of the King's debtor from suing him, and the King's debtor from making any will of his personal effects, without special leave first obtained from the Crown.

But without further adverting to this ancient state of the prerogative, it is clear that at this day the rule is, that if the two rights come in conflict, that of the Crown is to be preferred.

If, however, the right of the subject be complete and perfect before that of the King commences, it is manifest that the rule does not apply, for there is no point of time at which the two rights are in conflict; nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. But if whilst the right of the subject is still in progress towards completion, the right of the Crown arises, it seems to me that the two rights do come into conflict together at one and the same time, and that the consequence in that case is, that the right of the Crown ought to prevail. Lord Mansfield expresses this proposition in shorter language when he says, "no inception of an execution can bar the Crown." *Cooper* v. *Chitty*, 1 Burr. 36.

Now if we proceed to apply these principles to the determination of the present case it will appear that the material facts are these:—*J.S.* has obtained judgment against a Crown debtor, has issued a *fieri facias* upon that judgment, and has delivered the writ to the sheriff, and the sheriff, in execution thereof, has seized the goods of the Crown debtor. The question, then, is this: Is the right of the subject perfect at the time when the goods are seized by the sheriff, or is there any further act to be done in order to make that right consummate? The most simple criterion of this [95] seems to be, whether without any thing further being done, the execution creditor is entitled to call upon the sheriff for the possession of the goods, or to pay him the debts. Now, I do not believe that it was ever contended, that the execution creditor is entitled to the possession of the goods themselves unless under some contract made between the sheriff and him, which would be equivalent to a sale under the writ. Nor can he call upon the sheriff, even after a return of goods seized *ad valentiam*, to pay him the debt for which the levy is made. If he could, it would be utterly useless to empower him to require the sheriff afterwards to proceed to a sale by the writ of *venditioni exponas*. In fact, it is clear that all he can do, even after such return, is to compel the sheriff to proceed to sale by ulterior process from the Courts. There are many authorities founded on this principle, which show that a seizure of goods *ad valentiam*, is only a temporary bar to the execution creditor, so long as the goods remain unsold in the sheriff's hands. Again, if the goods, after seizure, are destroyed by unavoidable accident, the loss falls upon the debtor. The principle is, that the sheriff is excused, where the execution fails altogether without his fault. And in that case, according to the doctrine laid down in *Foster* v. *Jackson*, Hob. 60, by Lord Hobart, the creditor may have a fresh writ of *fi. fa.* and the loss falls on the debtor. There is a third criterion, which is this, that the debtor on tendering the amount for which the levy is made, and the sheriff's charges thereon, is entitled to have a return of the goods seized by the sheriff. From these premises, two propositions seem to me to follow; 1st, that at no period of time does the execution creditor obtain any property whatever in the goods themselves; and, 2dly, that the general property in the goods [96] seized remains until the sale, in the debtor, and is not changed by the seizure, *Milton* v. *Eldrington*, Dyer, 98. b. After sale the case is very different, for by the sale the property is wholly changed from the debtor to the vendee of the sheriff, and the money, the produce of the goods, then becomes the property of the creditor, for which he may maintain an action for money had and received, and for which the sheriff is responsible to him, the original debtor being then wholly and finally discharged, *Parkinson* v. *Guilford*, Cro. Car. 539. The rule is thus expressly laid down by Mr. Baron Garrow, in delivering the opinion of the Court, after full consideration of the case of *Higgins* v. *M'Adam*, 3 Younge and Jervis, 1. "The rule is that when execution is executed, the property is changed, and execution is said to be executed when a sale has taken place." It is not, therefore,

till after the sale that the right of the execution creditor becomes consummate, and it would follow from thence, that it is not till after the sale that the right of the creditor ceases to concur with the right of the Crown. If, therefore, the right of the Crown arises at any period prior to the sale, it seems to me that on the principles above laid down, it ought to have the preference. A preference depending on similar grounds, and terminating at the same period, seems to me to be fully recognized by the Court of King's Bench, in *Hutchinson* v. *Johnston*, 1 T. R. 729. That was the case of two conflicting executions. The sheriff had seized under the writ last delivered to him, but before sale, having discovered that another writ, which was entitled to priority, had been first delivered to him, he made the sale under it, and paid the surplus only, to the creditor under the second writ, under which he had originally seized the goods. And the Court expressly decided, that until sale he had a [97] right so to do; but after sale, not; *Rybot* v. *Peckham*, cited in the note, 1 East, 731, being an express authority to that effect. And it is observable that many of the authorities which are relied on in the present case were then cited, in particular the case of *Clerk* v. *Withers*, Salk. 322; and the very proposition now before your Lordships for decision, it is to be observed, was urged as clear law by the very eminent persons who argued that case, namely, that till sale the extent prevails over the prior execution; and I apprehend that prior to the statute of Frauds, if a subject's writ of execution had come to the sheriff after seizure but before sale, under a writ of a subsequent *teste*, the sheriff would have been in like manner justified in executing it before the other writ under which he had seized, and would have been liable to an action on the case if he had omitted to do so. These authorities seem to me to show clearly, first, that no property passes by the seizure from the original debtor to the creditor; and secondly, that even in the case of conflicting rights, as between subject and subject, the point of time to which the courts uniformly look as the period when the execution is consummate, is not the seizure, but the sale under the writ. There is one case, however, which requires some observation, as it would seem to trench upon this proposition: I allude to the construction put by the Courts upon the 9th section of the 21 Jac. 1, c. 19. There is no doubt that the Courts have held that the seizure under a writ of *fi. fa.* was sufficient to satisfy the words "execution or extent served and executed," contained in this statute, and that, for the purpose of protecting the execution creditor from the effect of a prior act of bankruptcy. But this was a decision upon the construction of a particular statute, and must have reference, reasonably considered, to the [98] peculiar objects of the Legislature. It is to be observed, first, that it was prior to the statute of Frauds; the law, therefore, then was, that writs of *fi. fa.* bound the debtor's property, as to all persons claiming under him, from the *teste* of the writ, and not from its delivery to the sheriff; so that it was then possible for a party to sue out his writ of *fi. fa.*, and to omit to execute it, and so give to the bankrupt the same species of delusive credit as was provided against by the 11th section, in cases where the bankrupt was the reputed owner of another's goods. It was probably, therefore, with that view that the clause was introduced, providing that such writs should not bind, as against those who claimed under the bankrupt, from their *teste*, but only from the date of the public act done by the sheriff, in seizing the goods under the writ. For this purpose, that of giving notice to the other creditors, the seizure, and not the sale, was the important period. The present case, however, depends on the question whether the property is changed, and, until sale, this is not the case; the execution is not complete, so as to transfer the property, until that period. But it is urged, and a great portion of the argument at the bar turned upon it, that although it may be that the execution creditor has no consummate right till after sale, and although the general property in the goods remains until the sale with the debtor, yet that the sheriff has a special property in him from the time of the seizure, and that the Crown, in the event of the *teste* of the extent being subsequent to the seizure, must take the goods subject to that special property. There is no doubt that a variety of authorities may be cited, establishing as clear law, that the Crown must take subject to a special property created by the act of the party. In the case of the factor, *Rex* v. *Lee*, 6 Price, 369, it was held, that goods in his [99] hands, on which he had a lien for his advance made before the *teste* of the extent, could only be taken by the Crown subject to that lien. So, again, in the case of goods pawned or pledged before the *teste* of the extent, *Rex* v. *Cotton*, Parker, 112, and in

the case of *Rex* v. *Humphery*, M'Lell. and Y. 173, the same law prevails. In *Casberd* v. *Ward*, 6 Price, 411, an equitable mortgage created before the party creating it became a debtor to the Crown on record, was in like manner held to be valid against a subsequent extent. But I can find no instance whatever, nor do I believe that any such exists, where a special property, not created by contract between the Crown debtor and the person setting it up, or between the Crown debtor and some one under whom such person claims, has been ever allowed to prevail; and I think good reasons may be assigned for the difference. In the case of land, if the subject sell it before he becomes a Crown debtor, it is clear that the sale is good. Now, on principle, he who can make a valid sale ought to be allowed to make any contract short of that, which shall be also valid; he may, therefore, make a valid pledge. The right of the other party is consummate by the act of pledging or of sale; but the cases of a distress for rent before sale, a seizure by the messenger under a commission of bankrupt, and the case now in judgment, are very different. There the goods are all taken by an adverse proceeding from the Crown debtor, and are all under the custody of the law at the time the extent is put in; the creditor's right is but in progress, and the sheriff, the commissioners of bankrupt, and the distrainer, are real officers of the law, holding the property, and having rights given to them for the purpose of protecting them in their possession, not for their own benefit, but for the purpose of disposing of it for the benefit of **[100]** those who may ultimately be entitled to the proceeds of such property. The true description of the state of such property is, that it is in the custody of the law; whereas, in the case of the factor, wharfinger, pawnee, or equitable mortgagee, it is in the custody of the party himself having a beneficial interest under a valid contract. Lord C. B. Gilbert, speaking of lands (and the principle is the same as applied to goods, although the charge takes effect at a different period), says, that nothing can hinder the King's charge but what amounts to a precedent alienation; and a *liberate* in pursuance of a previous judgment amounts to an alienation of the land; and yet before the *liberate* there is a seizure of the land by a public officer, for the purpose of its being by the *liberate* alienated to the creditor. By the seizure the land is taken into the custody of the law, by the *liberate* it is alienated to the creditor, and from the date of the latter the right of the Crown is ousted. I am aware of the various cases and authorities that exist in which it has been determined that trover will lie by a sheriff after seizure of goods under a *fi. fa.*, and I do not dispute the proposition that this shows that the sheriff has for some purposes a special property in the goods so seized. But it seems to me that this point is not really material. The special property which the sheriff or any other public officer has, is not a property beneficial to himself; it is a property conferred on him to enable him to discharge his public duty. The goods are in *custodia legis*, and the special property of the sheriff is given to him that this *custodia legis* may be rendered safe. If, then, it be true, as many cases have determined, and in particular the *King* v. *Cotton*, Parker, 112, that goods in *custodia legis* are in a situation in which the Crown's right and that of the subject may come in conflict, I do **[101]** not think that it really makes any difference whether the officer having the custody has greater or less powers to defend it conferred on him by the law. The real question seems to me to be, whether the property has wholly or in part gone from the debtor to some person claiming adversely to the Crown, or whether it is only in progress to that result. The sheriff or other public officer holds it with more or less of powers given for its protection, but really for the person ultimately entitled to receive the proceeds. If that person be a subject, having a prior writ delivered to the sheriff, the sheriff holds for him the proceeds of the goods seized under a subsequent writ, as in *Hutchinson* v. *Johnstone*, 1 T. R. 729; or if, as in the present case, the Crown's extent comes in before sale, he holds for the Crown. I have hitherto considered this as if it were *res integra;* but I shall now proceed to consider it upon authority merely. The leading case upon this subject is *Stringefellow's* case, Dyer, 67 *b.;* and the authority of that case, though doubted for a time, cannot now, I think, be disputed. It was recognized as good law by Lord Hobart, in *Sheffield* v *Ratcliffe*, Hob. 339; by Lord Rolle, in his Abridgment; by Lord Hardwicke and the two Chief Justices, Ryder and Willes, in *Rex* v. *Cotton* [Parker, 112]; and by the Courts of Common Pleas and King's Bench, in *Uppom* v. *Sumner* [2. W. Bl., 1251, 1294], and *Rorke* v. *Dayrell* [4 T. R. 406]. I do not think it necessary to add the various

cases in the Exchequer on this point. It is, however, contended that *Stringefellow's* case [Dyer, 67 *b.*] is distinguishable, and undoubtedly it is so, in its facts, from the present. The main ground of distinction is, that there remained in that case a further act to be done by the Court, namely, the award of the *liberate*. And it is said by Mr. Baron Wood, 8 Price, 318, that the *liberate* and the *fi. fa.* are equivalent to each other; but I think that proceeds on a mis-statement **[102]** of the true point in the case. The right vested by the *liberate* in the creditor is to have the identical lands and the identical goods delivered to him; the creditor's right is therefore consummate by the *liberate*. But the *fi. fa.* does not command the sheriff to seize and deliver the goods to the creditor (in which case the *fi. fa.* and seizure would be equivalent to the *liberate* after the previous seizure), but in substance it commands him to seize and sell, and to pay the money produced by the sale to the creditor. The act of sale, therefore, and not the act of seizure, puts the sheriff in the same situation, with respect to the creditor, as the *liberate* under an extent; for by the act of sale the creditor has vested in him a consummate right to the produce of the sale. Now *Stringefellow's* case clearly decides that until the *liberate* the lands and goods seized, and in the hands of the sheriff, remain liable to the Crown process: that case, therefore, appears to me in principle to have decided that until the creditor obtains a consummate right, the Crown's rights are not ousted, and so to govern the present case. The case of *Rex* v. *Cotton*, is a much stronger authority; it seems to me to be decisive of this question. Its authority, looking at the persons by whom it was decided, and those by whom that decision was affirmed, must be admitted to be of great weight. It is not a little singular to find, that although the point now before your Lordships was there treated as the proposition, and that case as the corollary, it should now be contended, that although *Rex* v. *Cotton* is good law, still the proposition from which that case was in truth only a corollary, cannot be supported. The principle there laid down clearly was, that goods in *custodia legis* continued liable to an extent until the period arrived at which some person other than the **[103]** original debtor had acquired a consummate right in them; and the Court clearly held that goods seized by a sheriff, but before sale, were so liable. The fanciful doctrine of a special property in an acknowledged public officer being at all material, seems never to have occurred to those great men who decided that case. The reason why the expressions as to special property are there introduced, seems to me obvious enough: the distress is in the custody of the creditor himself, and therefore it might have been plausibly enough contended, that he having the possession, his special property (if he had any) was to be protected for his own benefit. But the Court, looking to the substance and not to the form, decide that in seizing he acted as an officer of the law; that he held as such, and that the goods were not really in his possession, but in the custody of the law, they having come to him by a special authority given by the law, and not by the act of the party, as in the case of a pledge or the like, and the consequence being that no property, nor even any possession *in jure*, passed to him. This case seems to me to be *à fortiori* to the present case. I proceed to enumerate shortly the other cases, in which the law has been laid down in the same way. In *Rex* v. *Peck*, Bunb. 8, the reporter says it was taken for granted that the law was so. In the *Attorney-General* v. *Andrew*, Hard. 23, it is not indeed distinctly stated whether the party had obtained possession under the subject's prior extent before the right of the Crown commenced, but I think it can hardly be doubted that he had; for there Lord C. B. Steel observes, that the subject's title is "prior to the Crown's, and is executed." Now it appears from *Empson* v. *Bathurst*, Hutton, 52, that until the *liberate* no fee is due to the sheriff, because the execution is not executed. I think this explains the lan-**[104]**guage of Lord C. B. Steel, and makes it consistent with what he adds, that "*Stringefellow's* case [Dyer, 67 *b*] is unanswerable." In the case of the *Attorney-General* v. *Capel*, 2 Shower, 482, it is stated that "although the goods were actually in *custodia legis*, yet because the extent came before the property was vested by an assignment, it was held a good extent. Extents have been held good that have been made of goods actually levied by virtue of a *fi. fa.* and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." This latter passage Mr. Baron Wood (who omits the former part of the Report) calls "a note of the reporter, unwarranted by the case." To me it appears as a reason assigned by the Court for their previous judgment. The case of *Lechmere* v. *Thorowgood* [3 Mod. 236] has been much relied on by the other side; but I cannot think it to be an authority of

any weight. It is observable that the decision in that case is clearly right, and it is difficult to perceive how this point could ever have arisen. There the extent at the suit of the Crown was executed before any assignment under the bankruptcy had been made; so that, according to all the authorities, the plaintiffs had no ground of action; and the execution and the extent being set up by the same parties, no question of priority *inter se* could well have arisen. Again, the writ of *fi. fa.* was issued before the sheriff had notice of the bankruptcy; and as the action was trespass, the Court, on that ground, might well decide in his favour. The dictum attributed to Lord Holt, that "the King's prerogative had been taken away by the Statute of Frauds," cannot be supposed to have really fallen from that learned Judge: and yet this case, although thus questionable in its application to the present subject, has been one of the main grounds **[105]** on which the two principal authorities on the other side, *Uppom* v. *Sumner*, and *Rooke* v. *Dayrell*, have been decided. The case of *Clerk* v. *Withers* [2 Ld. Raym. 1075] seems also to me to be wholly inapplicable to the present question; indeed, like *Lechmere* v. *Thorowgood*, it is only to be cited for certain dicta of the Court as to the execution being complete by the seizure, for the decision itself is clear enough. It was there argued, that the death of the creditor, after seizure under the *fieri facias*, did not give to the debtor the right of recovering back his goods from the sheriff. And the Court held that it did not; for on the one hand there was no act to be done in Court necessary to give the sheriff authority to act, his authority being complete by the *fi. fa.*; and therefore the death was immaterial to the purpose. But, 2dly, the levy under the writ was pleadable in bar to another action for the same debt: so that the debtor sustained no injury by the execution proceeding. But indeed this case would prove too much; for it is also true that after the award of the *fi. fa.*, and before seizure, the same result would follow. *Thorowgood's case*, Noy, 73, cited by Gould, J., in giving his judgment. Now it is not pretended that an award of *fi. fa.* would bar the Crown before seizure; the principles, therefore, of that decision are wholly inapplicable to this question. There are some dicta in that case, certainly, which may be relied on; but I think that if they are read, as all such dicta ought to be, with reference to the case then before the Court, they also will be found not applicable to the present subject. To some purposes, no doubt, the execution may be called complete by the seizure. It undoubtedly was so at that time, as regarded priority between an execution creditor and the assignees of a bankrupt. It was not so in all cases, however, even between subject and sub-**[106]**-ject, as appears from *Hutchinson* v. *Johnstone* [1 T. R. 729]; and I think it is not so *multo fortiori* in a case between the subject and the Crown, which has a prerogative peculiar to itself of interposing *in medio*. *Curson's* case, 3 Leon. 239, is still less applicable: it depends on a totally different principle. There Curson acknowledged a statute to Starkey, and afterwards another to J. S., who assigned to the Crown: the liability, therefore, on which the Crown proceeded was created subsequently to that to Starkey. After this, Starkey obtained possession under his execution; and it was held that the debt to the Crown did not bind the lands from its assignment, so as to avoid the subsequent but consummate execution. It may be observed also, that this case is within the stat. Hen. 8; for the judgment was prior to the King's debt, and the execution was consummate before the King's extent. Lord C. B. Gilbert, p. 94, gives this reason for it; for he says "the creditor Starkey did not by the *liberate* take the land *sub onere* of the King's debt, because his lien was antecedent to it; and it were repugnant to construe him to take the land *sub onere* of the King's debt, when he took it in satisfaction of a debt precedent." So again, on the same principle, it has been held that if A. infeoff B. of his lands, after a judgment confessed by him to C., the Crown, as assignee of C., cannot take more than C. could, viz. a moiety of the land; although, no doubt, if the judgment had been confessed to the Crown originally, the Crown could have taken the whole. In fact, it depends on the principle that where the law allows a party to contract, it will not permit that contract, by any matter arising *ex post facto*, to be made of no value: a principle to which I have before referred, in distinguishing goods on which there is a lien by contract from goods in the custody **[107]** of the law. The case of *Uppom* v. *Sumner* [2 W. Bl. 1251, 1294], which is the leading authority on the other side, would, I think, be entitled to much greater weight if it had not proceeded a good deal on the case of *Lechmere* v. *Thorowgood* [3 Mod. 236]. Even taking the different

reports of that case in the way suggested by Mr. Justice Gould, no great advantage as to clearness can be derived; and I cannot help thinking that the better course would have been to have placed no great reliance on a case in which a part was to be picked up from one reporter, and a part from another, in order to make something like a connected account, instead of attributing the confusion to the most obvious and natural cause, viz. the inaccuracy of the reporter. The same observation applies to the case of *Rorke* v. *Deyrell* [4 T. R. 406]; the Court there also relied a good deal on *Lechmere* v. *Thorowgood*. I shall not at present refer to the main ground on which both these cases proceed, viz. the statute of Hen. 8, because I proceed to consider that question separately. Subsequently to both these, the cases of *Rex* v. *Wells and Allnutt* [see 16 East, 278], and *Rex* v. *Sloper and Allen* [6 Price, 114], arose, in which the present question was decided, after reviewing all the authorities, in the affirmative. Upon the whole I have arrived at the conclusion that the preponderance of authority also, as well as the principle on which such authorities ought to proceed, establishes the proposition, that where an extent of the Crown comes after seizure and before sale, it ought to be preferred, unless by the statute 33 Hen. 8, c. 39, s. 74, there has been an alteration made in the ancient prerogative, by which the priority has been taken away. I there come, in the last place, to the consideration of the true construction of that statute. There can be no doubt, even without authorities on this subject, that the statute must be construed as abridging the prerogative: but authori-[108]-ties are not wanting. In *Cecil's* case, 7 Rep. 92, the Court so expressly resolve; and other passages might be as easily cited, if necessary, to the same effect. The real question however is, not, whether the prerogative is abridged, but, to what extent it is abridged by the clause. If taken literally, the clause would, as has been well observed, place the Crown in a worse situation than a subject: this could hardly be the real intention of the Legislature, in a reign not remarkable for such concessions. There are, however, two grounds, either of which, as it seems to me, is sufficient to show that this clause of the statute is not applicable to the present question. First, the words are confined to suits commenced or taken, or process awarded, for the recovery of the King's debts. Now, I apprehend that an immediate extent does not fall within either of these descriptions: they are confined to suits and process for the recovery of the King's debts in the ordinary course, from his solvent debtors. An immediate extent is founded on an affidavit of the insolvency of the debtor, and issues not for the purpose of seizing his property for the amount of the debt, but all his lands and goods into the hands of the Crown, there to remain till the Crown debt is satisfied. It is, therefore, rather like a forfeiture incurred by him in consequence of his failure, than a suit or process for the recovery of the debt. Again, it may, according to the admitted course of the Exchequer, issue in the midst of the proceedings in an ordinary suit, and even where the debt is disputed; *Rex* v. *Pearson*, 3 Price, 288. In an ordinary extent, which is a prerogative execution, the debt of course is conclusively settled by the judgment; but in an immediate extent the debt is not settled, but may be disputed by the debtor on the return of the writ: in fact, it is then that the suit or process [109] respecting the King's debt, properly speaking, begins. These various differences seem to me to show that this proceeding could not have been contemplated by the Legislature, when they speak in this clause of suits and process for the recovery of the King's debts. But, 2dly, I think, and this will appear from a reference to the state of the law as it existed at the time the statute was passed, that even if an immediate extent were a suit or process for the recovery of the King's debt, still the clause would not be applicable to this case.

This is very clearly stated by Lord Coke, 1st Inst. 131 b.: "As to the third protection *cum clausula volumus*, the King, by his prerogative, regularly is to be preferred in payment of his duty or debt by his debtor, before any subject, although the King's debt or duty be the later; and the reason hereof is, for that *thesaurus regis est firmamentum belli et fundamentum pacis*; and therefore the law gave the King remedy, by writ of protection, to protect his debtor, that he should not be sued or attached until he paid the King's debt. But hereof grew some inconvenience; for to delay other men of their suits, the King's debts were more slowly paid; and for remedy thereof it is enacted by the statute 25 Ed. 3, c. 19, that the other creditors may have their actions against the King's debtor, and proceed to judgment, but not to execution, unless he will take upon him to pay the King's debt, and then he shall have execution against the King's debtor for both the two debts."

It appears, therefore, that when the statute 33 Hen. 8 was passed, the creditors of a Crown debtor could not proceed further than judgment, but were liable to be restrained altogether from taking out execution upon such judgment. By that statute new powers were given to the Crown, and new restraints, on the other **[110]** hand, imposed on the prerogative: certain debts to the King, not of record, which before did not bind the subject till recorded, were placed on the footing of a statute staple, and so bound from the time of contracting them. It is so laid down by Lord C. B. Gilbert, page 88, and is in conformity with the general law, which I have before stated from Lord Hobart's reports; for, in order to make the King's debts, not of record, bind from the time of their contracting, a statute would clearly be required. Lord C. B. Gilbert, in another part of his treatise, says, "this branch of the statute had its origin in the practice introduced by the 3 H. 7, c. 3, of taking recognizances to the King before justices of the peace, instead of the ancient mode in use, before conservators of the peace, sheriffs and constables; the two latter of whom, when they bailed, took the obligation in their own names, and not to the King. Now these recognizances to the King being only personal securities, it became a doubt when they began to bind the lands of the subject, and formerly they held that such recognizances did not bind the land till they were returned of record." And the 56th section, which, if construed literally, would appear wholly useless, as far as related to the Court of Exchequer, may, I apprehend, have a sensible construction given to it by referring to the second part of the 54th section, by which the King was authorized to proceed with suits depending in the name of a common person, to his Grace's use, and which therefore required to be placed on the same footing as to execution with suits originally brought by the Crown. I think, therefore, that so far as relates to the King's debts, all that was in effect done by the various sections of the 38 Hen. 8, c. 39, was to give a priority to the particular debts not being of record, as if they had been contracted **[111]** originally by a recognizance in the nature of a statute staple, which binds from the time of the contracting. Now reasoning *á priori*, it would be probable that such a new power would have some counterbalance, in order to place the subject as nearly as possible in the same situation as he was by the 25 E. 3 [c. 19]. By that act the subject's writ of execution might be stayed from the time the King's debt on record was contracted; a date easily to be ascertained; but when the King's debt, not of record, was to bind by this new power from the time of its being contracted, it might become very difficult for a third person to ascertain that period; and it might well be considered unjust to superadd such a hardship in the case of a person who levied under an execution, sued out, indeed, after the King's debt was contracted, but after a contract, of which, not being of record, he could know nothing. It would, therefore, be not unnatural to suppose that some restriction would be imposed, rendering it necessary for the Crown, seeking to avail itself of the new power, to take some public steps before the judgment obtained by the subject should thus lose its efficiency. Now, I apprehend that this was in fact done by the 74th section, which I construe as providing, that if before the King's debt is put in suit, the subject has obtained a judgment, on which, but for the new law, he might have sued out a writ of execution in due course, he shall still have the writ of execution, and proceed on it, notwithstanding the King's debt was in existence, and in defiance of any writ of protection from the Crown. In this case, therefore, the Crown is prevented from staying the proceedings by any writ of protection, and the creditor, if, by using due diligence, he can cause the sheriff to seize the goods and sell them before the extent comes on the part of the Crown, shall be entitled to reap the **[112]** fruits of his diligence. The words are, "the King shall have first execution," which I think means, "shall first have a writ of execution from the Court." In like manner, in the statute, 25 E. 3, c. 19, the words are, that the creditor, having settled for the King's debt, "shall have execution" against the defendant, which clearly there means, shall have a writ of execution. Upon the words, therefore, as well as upon the intention of the 33 H. 8, c. 39, s. 74, as collected from the act itself, compared with the statutes which preceded it, I have come to the conclusion, that according to the true construction of the 74th section, it has no reference whatever to the question now before your Lordships. I am aware that this is contrary to the construction put on the statute in the cases of *York* v. *Dayrell*, and *Uppom* v. *Sumner*; but after fully considering those authorities, and the reasons assigned there [2 Show. 480], which

do not satisfy my judgment, and finding them in opposition, as it seems to me, to the cases of *Rex* v. *Cotton* [Parker, 112], *Attorney-general* v. *Capell*, *Rex* v. *Peck*, *Rex* v. *Wells and Allnutt* [see 16 East, 278], *Rex* v. *Sloper and Allen* [6 Price, 114], and, I should also say, to the *Attorney-general* v. *Andrew* [Hard. 23], and the uniform course of the Court of Exchequer, I think that those cases are not well decided, and that, both on the ground that they are contrary to the true construction of the act, as deduced from a proper reading of it, if the question were *res integra*, and also on the ground that they are opposed to cases of greater weight and authority, to which I have also referred. I have to apologise to your Lordships for the length at which I have considered this question; but I trust that the importance of it, and the great weight due to the authorities, on both sides, will be a sufficient reason for my having so done.

On the second question I shall not detain your **[113]** Lordships, as I believe there is no difference of opinion upon it. I think that it should be answered in the negative.

Mr. Justice Taunton: The first question propounded by your Lordships to the Judges is one of very considerable difficulty, arising, in my humble judgment, not so much from the nature of the subject when properly understood, as from the conflicting decisions of the Courts in Westminster Hall. This question may be considered in two points of view, first, whether by the seizure, on the part of the sheriff, of the goods under the writ of *fieri facias*, the property is so altered as to leave nothing in the debtor upon which the writ of extent can attach; and, secondly, whether the statute 33 Hen. 8, c. 39. s. 74, applies to the present case; which latter inquiry involves a consideration of the law as to the prerogative with respect to the King's debts before, and at the time of passing that statute.

With respect to the first point, it is so clearly laid down in all the text books, as a general proposition, that the property of goods is not altered, but continues in the defendant until execution executed, that it cannot be necessary to say much on that point. But then a question arises, when is execution executed, that is, completed? It would seem from the language of the writ of *fieri facias*, that the sheriff has not completed the whole of his duty under the writ until he has converted the goods and chattels seized into money, for the writ enjoins him, that of the goods and chattels of the defendant he cause to be made so much money; and he is further enjoined that he have that money before the King at Westminster, on the return-day, to be rendered to the plaintiff; so that the selling or making of the goods into money appears to be the most **[114]** essential part of the sheriff's duty. But it has been contended in many of the cases upon this subject, and more particularly by the late Mr. Baron Wood, in his elaborate judgment in the case of *The King* v. *Giles*, 8 Price, 314, that the execution is executed by the seizure, and certainly, if that were the case, there would be an end of the question, because it is abundantly clear that after execution executed an extent from the Crown comes too late: *The Attorney-general* v. *Fort*, 8 Price, 364, in a note. In such case the property is altered, and the Crown cannot, in process against A, seize the goods of B. Considering the authority by which this proposition of the seizure alone changing the property has been maintained, it becomes necessary to investigate the law upon the subject, and examine the grounds upon which it has been supported. If the property be altered by the bare seizure, to whom does it pass? They say to the sheriff. But this cannot be, for the goods would not be forfeited by his outlawry or conviction of felony, nor would they pass under a grant of all his goods; and if, after seizure, the defendant pays the debt to the sheriff, he is entitled to have his goods again without any grant from the sheriff, or, if a leasehold, without a reassignment. So also, I apprehend, if goods in execution are burnt, or otherwise injured, without fault of the sheriff, it is the loss of the defendant. The sheriff, under the writ, has a mere power to sell, without any interest vested in him, except that which every bailee, such as a carrier, wharfinger, etc. who is answerable over, has for his own protection. This interest, if so it may be called, is denominated a special property, as contradistinguished from a general property, and in respect of this we know that he may bring trover for the goods seized against a stranger, but it is not a beneficial interest. In addition to these **[115]** illustrations, there is the authority of Lord Hardwicke, who lays it down, in 2 Eq. Cases Abridged, 381, that neither before the Stat. of Frauds, nor since, is the

property in the goods altered, but continues in the defendant until the execution executed. The cases cited by Mr. Baron Wood, in support of his opinion that the property is altered by the sheriff's seizure, and before actual sale, by no means bear him out. The first case he cites, with respect to goods and chattels, is *Lechmere and others* v. *Thorowgood and another*, Comberb. 123; 3 Mod. 236. That was an action of trespass, not trover, brought against the sheriff. The extent there was after the seizure, and before any sale or *venditioni exponas;* and it appears, certainly, that a question was made, whether the extent did not come too late, and the Judges are reported to have intimated an opinion that it did; but the case was not decided upon that ground; judgment was ultimately given for the defendant, (and not for the plaintiffs, who impeached the validity of the extent), upon the ground that they could not be made trespassers by relation. The opinions, therefore, thrown out, were mere *obiter dicta*, and the reports themselves are very loose and unsatisfactory. In one of them, Comberbach's, Lord Holt is, indeed, reported to have said, "the property of the goods is vested by the delivery of the *fieri facias*:" but this is directly contrary to the opinion of Lord Hardwicke, in 2 Eq. Ca. Abr., and to the cases of *Bardon* v. *Kennedy*, 3 Atk. 739, and *Phillips* v. *Thompson*, 3 Lev. 191; in the latter of which it was decided, that by the delivery of the writ, the goods were only so bound that the defendant could not dispose of them afterwards, and that the delivery of the writ to the sheriff is no execution thereof; and this dictum of Lord Holt, Lord Mansfield, in *Cooper* v. *Chitty*, 1 Burr. 20, **[116]** suspected was a mistake of the reporter. The next case relied on by Mr. Baron Wood, is *Clerk* v. *Withers*, 6 Mod. 290; in that case the principal question was, respecting the operation of the stat. 17 Car. 2, c. 8, upon a judgment by default, obtained by an administrator, whether, as that statute applies in terms only to judgment after verdict, there could be any personal representative of the intestate who could by process compel the sheriff to sell. It was incidentally contended there by counsel, that a seizure by the sheriff was a satisfaction of the debt, and therefore that the plaintiff, who had brought a *scire facias* to have restitution, should not have it. But the utmost length to which Lord Holt carried this, was, that the seizure to the value of the debt discharges the defendant, unless the execution be afterwards avoided, and that the seizure, so long as it continues, is a sufficient bar. But the point really determined was, that an execution, being an entire thing, when once begun shall, as between the parties, be proceeded with, notwithstanding a change of sheriff, or the death of the plaintiff, nothing having occurred to avoid the seizure, or to intercept the authority of the sheriff before sale: the sale under such circumstances being considered but a formal part of the execution. There was no decision that, as against one having a paramount claim, the property by the seizure was irrevocably changed, but the whole is consistent with the hypothesis, that the goods in such a case are in the custody of the law. With respect to the argument drawn from the statute 21 Jac. 1, c. 19, which provides, that where no execution or extent has been served and executed, creditors by judgment statute, etc. or other security, shall not be relieved thereupon for more than a rateable part of their just and true debts with the bankrupt's other cre-**[117]**-ditors, without respect to any greater sum in such judgment, etc., or other security; upon which it has been determined, that when a creditor has obtained judgment and sued out execution, and a seizure has been made under it, if before sale an act of bankruptcy intervenes, the judgment creditor shall not be obliged to come in under the commission, but the sheriff may proceed to sell the goods; and from which determinations Mr. Baron Wood draws the conclusion, that they must have proceeded on the ground, that as soon as goods have been seized under a *fieri facias*, that seizure is considered in law as being an execution executed: the answer is, that these determinations only prove that, as between subjects, an execution once begun by seizure, shall proceed notwithstanding a subsequent act of bankruptcy and commission issued; and in the case of *Audley* v. *Halsey*, Cro. Car. 148, which I believe was the first decision to this effect, wherein the circumstances were nearly the same with those in *Stringefellow's* case, Dyer, 67, b., the main difference being, that in the one the bankrupt commissioners claimed against the extent upon the Statute Staple, and in the other the Crown, the Court expressly distinguished it from the case in Dyer, by saying, "for there, although the goods were extended, yet they were not delivered to the cognusee, and the writ was not returned, and the writ of privilege was for debt due to the King, wherein the King had his

prerogative by the Common Law." In addition, I may observe, that the distinction taken in the recent cases of *Wymer* v. *Kemble*, 6 Barn. and Cres. 479; *Notley* v. *Buck*, 8 Barn. and Cres. 160; and *Morland* v. *Pellatt*, ib. 722, which were in exposition of the statute 6 Geo. 4, c. 16, s. 108, proceeded principally upon this very difference between a mere naked seizure before bankruptcy, and a seizure consummated by sale, or the pay-[118]-ment of the money directed to be levied. In *Wymer* v. *Kemble*, the goods of the debtor had been seized under a *fieri facias*, and delivered to the creditor under a bill of sale by the sheriff, then a bankruptcy followed, and it was held that the Plaintiff had ceased to be a creditor, the original debt having been extinguished by the sale. The like decision was come to in *Morland* v. *Pellatt*, where, though there had been no sale of the goods, the balance of the money directed to be levied had been paid over to the sheriff before the act of bankruptcy; but in *Notley* v. *Buck*, where the sheriff had made a seizure before the act of bankruptcy, but the goods remained in his hands unsold at the time of it, it was held that the sheriff could not pay over to the creditors the proceeds of the execution received upon a sale after the bankruptcy.

But although the position that the property is not divested out of the debtor by mere seizure under *fieri facias* was partly admitted by the counsel for the plaintiff in error in this case, yet it was most strongly pressed by him in his argument, that by the seizure the judgment creditor here had a claim on the goods, or a special property therein, and that the Crown under an extent can only take, subject to that lien, a special property; and this right of the judgment creditor, he observed, had not been adverted to in any of the cases, with respect to the property. Many other cases might be added, but enough probably has been said; and I will only add the authority of Mr. Justice Bayley. In *Morland* v. *Pellatt* [8 B. and C. 722], that learned Judge says, "after seizure and before sale, the sheriff has a special property in the goods, but the debtor has the general property up to that time, therefore the debt is not extinguished, and the judgment creditor has a security for his debt; this special property is [119] in him, not as trustee for the judgment creditor, but for the purpose of his own protection." Neither had the judgment creditor in this instance any lien on the goods. Let us see what a lien is? In *Hammond* v. *Barclay*, 2 East, 227, Mr. Justice Grose says, "A lien is a right in one man to retain that which is in his possession belonging to another till certain demands of him, the person in possession, are satisfied." The Master of the Rolls, in *Gladstone* v. *Birley*, 2 Meriv. 404, lays it down, "the question always is, whether there be a right to detain the goods till a given demand shall be satisfied." In *Lickbarrow* v. *Mason*, 6 East, 25, note, Mr. Justice Buller observes, "liens at law exist only in cases where the party entitled to them has the possession of the goods, and if he once parts with the possession after the lien attaches the lien is gone." In *Heywood* v. *Waring*, 4 Camp. 291, Lord Ellenborough says, without possession there can be no lien. A lien is a right to hold, and how can that be held which was never possessed. In *Hallett* v. *Bousfield*, 18 Ves. 188, Lord Eldon * asks, "how can the doctrine of lien, that is the right of a party having property in his possession to retain it until his demand is satisfied, be applied to the interest of a freighter, who has no possession, the whole being in the possession of the owner?" (And many other dicta to the same effect are collected by Mr. Montague in his Summary of the Law of Lien, Introd. Ch. p. 1, etc.) So here I ask, how can the doctrine of lien, to retain these goods, be applied to this judgment creditor, who had no possession, the goods being in the possession of the sheriff? The sheriff seizes, not as the agent or servant of the party, but as a minister of justice, and an officer of [120] the Court, therefore his possession is not the possession of the creditor, but the custody of the law; but if there was no lien, the cases of *The King* v. *Humphery*, 1 McCl. and Y. 173; *The King* v. *Lee*, 6 Price, 369; and *Casberd* v. *The Attorney-general*, 6 Price 411, which were cases of a wharfinger's and a factor's lien, and an equitable mortgage by deposit of the title-deeds, are inapplicable, the creditor there having actual possession of the articles in respect of which he claimed. But when goods are in what is called the custody of the law, the

* The question here ascribed to Lord Eldon is given in the report among the arguments of counsel.

property is as it were in abeyance, and must ultimately belong to the party to whom, under all the circumstances, the law adjudges it.

But it was said, that the judgment creditor, by force of the seizure, had at least a security. This has certainly been so decided with reference to the 6 Geo. 4, c. 16, s. 108. But I do not see what it proves. The security may be vested and certain, or it may be contingent and defeasible. It does not necessarily import present property, nor even beneficial interest. If tenant for life without impeachment of waste, or tenant in tail, sell trees standing and growing on the land, which he may lawfully do, the vendee, in common language, might be said to have a security for the money which he has advanced, but if the vendor should die before the trees are severed from the soil, the right of the remainder-man or issue in tail steps in and defeats that of the vendee. So here, although the judgment creditor had a security, yet still it was a possible case—I say no more at present—that a *jus tertii* might interpose and destroy it.

This brings me to the consideration of the second branch of the question, namely, whether the extent in this case at the suit of the Crown constituted such a *jus tertii*. It is perfectly clear, that at Common Law the King had very peculiar prerogatives, much beyond **[121]** the common right of a subject, for the recovery of his debts. Of these (not to mention others which are not to the present purpose) one was, that "where one was indebted to the King and likewise to other persons, the King's debt was to be preferred in payment, that is, the King was to be paid before any other creditor of the party," and, consequently, to be preferred in an execution; 2 Madd. Exch. 183, c. 23, s. 7. The general rule is, and this has been acknowledged in all the cases, that when the right of the King and that of a subject concur, that of the King shall prevail; see the instances put in, *The Attorney-general* v. *Andrew*, Hardres, 23; Plowden, 258, 259, 264. But in ancient times the law of prerogative went further than this, and provided the most effectual means of security that the King's title should always be the first. It prohibited the creditors of a King's debtor even from taking out execution until all the King's debts were satisfied, although the King's debts were the later in point of time; and if the King's debtor, notwithstanding, was sued or attached, the King had a remedy by a writ of protection to protect his debtor; Co. Litt. 131, b.; Fitz. N. B. 65, 66, tit. *Protection; The King* v. *Cotton*, Parker, 125. A King's debtor could not make a will to dispose of his chattels to the King's prejudice, nor could his executor have administration without permission from the King or justices or barons of the Exchequer, upon giving security to answer the King's debts; see numerous precedents in Maddox's Exch. c. 23. Those prerogatives have at different times been controverted and regulated by statutes, but these very statutes testify their existence. Thus in the stat. of Magna Charta, 9 Hen. 3, c. 18, it is enacted, that if any holding of the King a lay-fee do die, and the sheriff show the King's letters patent of his summons **[122]** for debt, which the dead man did owe to the King, it shall be lawful to the sheriff to attach and enrol all the goods and chattels of the deceased being found in the lay-fee to the value of the debt, so that nothing thereof should be amoved until the debt be paid off, and the residue should remain to the executors to perform the testament of the deceased. Again, the stat. 25 Ed. 3, c. 19, after reciting, that forasmuch as the King had before that time made protections to divers people which were bounden to him in some manner of debt, that they should not be impleaded of the debts which they owed to others till they had made *gree* to our Lord the King of that which to him was due by them by reason of his prerogative, and so during such protections no man hath sued nor durst implead such debtors, enacts, that notwithstanding such protections, the parties which have actions against their debtors shall be answered in the King's Court by their debtors, and if judgment be thereupon given for the plaintiff or demandant, the execution of the same judgment shall be put in suspense till *gree* be made to the King of his debt, and if the creditors will undertake for the King's debt, they shall be thereunto received, and shall have execution against the debtors of the debt due and adjudged to them, and also shall recover against them as much as they shall pay to the King for them. After the passing, therefore, of this statute, which considerably abridged the ancient prerogative, although a subject might pursue his debtor to judgment, yet he could not sue out execution until the King's debts were paid or secured. The King being entitled to the first execution, this execution, it is material to recollect, at the common law, was against the body, the lands and the goods of

the accountant or the King's debtor; Sir *William Harbert's* case, 3 Rep. [123] 12, b.; the words of Lord Coke on this point are, "it was resolved, that at the common law the body, the land and the goods of the accountant or the King's debtor were liable to the King's execution, for *Thesaurus regis est pacis vinculum et bellorum nervi;* and therefore the law gave the King full remedy for it; and therewith agrees 5 Eliz., Dyer, 224, and Plow. Com. 321. Sir *William Cavendish's* case, who was treasurer of the chamber, 24 E. 3; *Walter de Chirton's* case, and infinite precedents in the Exch., to prove, that for the King's debt, the body and the land of the debtor shall be liable by the common law before the statute of 33 Hen. 8, c. 39." The statute did not give to the Crown this triple remedy, and whether it could be pursued, as now, by one single process, or must have been separately worked out by different writs, is a matter of no moment. Thus stood the law until the statute 33 Hen. 8, c. 39, passed; and upon this short statement there seems to be no doubt, that if no alteration of the law in this respect was made by that statute, the King in the present instance is entitled to preference under the extent, although it did not reach the sheriff until the *fieri facias* was partly executed by seizure; for it would be absurd to hold, that when it was unlawful to issue any execution before the King's debt was paid, the creditor, by his disobedience to the law in suing out an execution, should gain an advantage over the King. Then has the statute 33 Hen. 8, c. 39, altered the law in this matter? That statute, sec. 74, enacts, that if any suit be commenced or taken, or any process hereafter awarded for the King, for the recovery of any of the King's debts, that then the same suit and process shall be preferred before the suit of any person or persons, and that our said Sovereign Lord, his heirs and successors, shall have the first execution [124] against any defendant or defendants of and for his said debts before any other person or persons, so always that the King's said suit be taken and commenced, or process awarded for the said debt at the suit of our said Sovereign Lord the King, his heirs or successors, before judgment given for the said other person or persons. It has been very properly observed by Lord Chief Baron Macdonald, in his judgment in the case of *The King* v. *Allnutt,* 16 East. 280, 281, n., that, according to the construction put upon this clause in the cases of *Uppom* v. *Sumner* [2 W. Bl. 1251, 1294], and *Rorke* v. *Dayrell* [4 T.R. 406], it must have the effect of postponing the King's execution, though it should happen to be prior both in teste and delivery to the subject's execution on his prior judgment, which would be putting the Crown, as to its execution, upon a worse footing than a subject, inasmuch as between subject and subject the priority of the delivery of the writ of execution always determines the question of preference, without regard to the priority of the judgment. Such a result surely could never have been intended, and this goes some way to show that the construction animadverted upon is not the right one. But I am of opinion, upon other grounds, that this section of the statute has been misunderstood. The first branch declares generally, that the King's suit and process shall be preferred before the suit of any person or persons. This seems to be distinct from the latter branch, which confirms the right that the King had before this statute, of having the first execution, not a preference where there are two concurring executions, one at the suit of the King, but the first execution, that is, the sole and exclusive execution, against any defendant for his debts before any other person. Then comes the condition or proviso, "so always that the King's said suit be taken and commenced or process awarded before [125] judgment given for the said other person." Now I take this sec. 74 to be a supplement to chap. 19 of the 25th Ed. 3, and the judgment mentioned herein to mean judgment obtained by favour of the latter statute. Then the meaning will be this, where the subject has obtained no judgment, the King is entitled, as of course he must be if he sued out process, to the first execution. But if the subject has obtained a judgment before any process sued out by the Crown, the execution thereof shall not be divested by stat. 25 Edw. 3, c. 19, but be put in suspense till *gree* be made to the King of his debts; but in such case he is at liberty to follow it up by execution, although the King's debt be not paid, and if he can get his execution completely executed before the King's process be sued out, he will be safe, for the King is only to have absolutely the first execution where the King's suit is taken and commenced, or process awarded, before judgment given for the other person. By this construction the greater difficulties, in my humble judgment, will be overcome, though perhaps some may remain; and this will account

for the disuse of protections afterwards, which would be unavailing when the King had no longer a right in all cases to the first execution.

So much by way of argument from the account we have in our books of the ancient prerogative, and from the statutes. The cases that have been decided upon this question have been so often cited, that it is unnecessary to go through them all; I will only observe, that the weight of authority appears to me to preponderate very considerably in favour of the right of the Crown. The course of decision in the Court of Exchequer has been uniformly, with the exception of *The Attorney-general* v. *Andrew*, Hardr. 23, and Mr. Baron Wood's opinion in *The King* v. *Giles* [8 Price, 364], on that side; and **[126]** considering that this is the King's great court of revenue, in which the Judges are more particularly conversant with these matters, this consistency of judgment ought to carry great weight with it. In *The Attorney-general* v. *Andrew* [Hard. 23], the reasons assigned by the Judges are extremely short, and in truth consist only of two: the one, that the statute 33 Hen. 8. [c. 39] abridges the prerogative and controls the Common Law, and that the words in the 74th section make a condition precedent, and imply a negative; the second, that there the subject's title was prior to the King's, and was executed. I have already explained why, in my opinion, the interpretation that has been made of this statute is an erroneous one, and why this statute does not affect the present case. With respect to the holding that the subject's title was executed if liberates had issued upon the elegits, which does not appear to have been the case, there is no doubt but that this was so; but if nothing more had been done than extending the lands upon the elegits, I take the liberty of saying, that the subject's title was not executed, and for this *Stringefellow's* case, Dyer, 67, b, 3 Ed. 6, is my authority. In that case, Stringefellow had issued out a writ of *extendi facias*, to have execution of a statute staple; the sheriff made extent of the defendant's lands, and seized them into the King's hands, but did not make livery; and afterwards a writ of the King's prerogative, issued out of the Exchequer, reciting the prerogative which the King ought to have to be first served and paid by his debtors, and commanded the sheriff to levy the debt of the goods of the debtor, and if he had not sufficient, then to extend his land. This writ was delivered to the sheriff after the day of the return of the first writ, but before the first writ was returned. On the sheriff returning to the King's writ that the **[127]** debtor had no goods or lands to be extended besides the goods and chattels, lands and tenements above extended, and therefore, as to the further execution of that writ, he had done nothing, it was holden in the Exchequer for law, that the sheriff should be amerced if he would not amend his return, namely, return the extent into the Exchequer for the service of the King's debt; and Justices Hale and Bromley were of the same opinion, because the property of the goods and land was not in Stringefellow before they were delivered to him by the writ of liberate. This case has always been acknowledged for good law; and although a query is subjoined by the reporter, because the goods, on being seized into the King's hands to be delivered to the party, were in the custody and consideration of the law, and privileged from all other executions, yet this doubt proceeds from not attending to the distinction between the King's case and that of a common person. In the case of a subject, goods distrained or seized in execution cannot be again taken for that reason, but it is otherwise in the case of the King; *The Attorney-general* v. *Capell*, 2 Show. 481; see also the note by Manwood Chief Baron, in margin, Dyer, 67, b.

The cases of *Uppom* v. *Sumner* [2 W. Bl. 1251, 1294], and *Rorke* v. *Dayrell* [4 T.R. 406], appear to me to have been determined on wrong principles. Little research seems to have been made, in either, into the nature and extent of the royal prerogative at common law; in the first, the judgment proceeded principally on the statute 33 Hen. 8; and in the latter, on the mistaken assumption that the property was changed by the delivery of the writ to the sheriff. With all my respect for the learned Judges by whom these cases were decided, and no one can have greater, I cannot assent to them, and I say this with the more freedom, because on no less than three **[128]** solemn occasions the Court of Exchequer has subsequently testified a similar dissent. The case of *Thurston* v. *Mills*, 16 East. 254, is no authority either way, because, although the Court intimated they had formed an opinion on the point, it was not divulged. With these exceptions, the determinations of the Courts will be found from the earliest times to have been in favour of this prerogative; I therefore humbly

give it as my opinion that the first question propounded by your Lordships should be answered in the affirmative.

With respect to the second question submitted to the Judges, as to any difference whether the writ of extent be in chief or in aid, I am of opinion that in this respect there is no difference between an immediate extent and an extent in aid. It appears to have been the practice in very ancient times, that if the King's debtor was unable to satisfy the King's debts out of his own chattels, the King would betake himself to any third person who was indebted to the King's debtor, and would recover of such third person what he owed to the King's debtor, in order to get payment of the debt he owed to the Crown. 2 Madd. Exch. p. 189, c. 23, s. 8. In like emergencies, the King's debtors or accountants were wont to have writs of aid whereby to recover their debts of such persons as were indebted to them, in order to enable them to answer the debts they owed the King. Many precedents of both modes of proceeding are cited by Maddox in the notes, c. 23, ss. 8 and 12. One of them is in the fifth year of Rich. 1, in the great roll whereof it is stated, that Henry de Cornhill owed the King £100 for the arerage of the cambium of all England except Winchester, and £6 for the fenne of the land of Engelran de Musterel. And William Earl of Albermarle acknowledged before the barons of the Exchequer that he owed so much **[129]** to Henry de Cornhill, and thereupon William Earl of Albermarle was charged, as debtor to the King, with the said respective sums. Others are of the reign of Hen. 3 and Edw. 1; in some of them the mandate is to the sheriff to distrain a former sheriff, or to aid collectors and assessors in distraining persons indebted to the King for aids or the like, and therefore are not properly extents in aid, the process being against persons originally indebted to the Crown; but in some instances, as in those of the executors of Hubert de Burgh, Walter de Walford, and the executors of the late Bishop of Hereford, the mandate to the barons is, that they distrain the debtors of those particular persons, in order that the King may be satisfied the debts which they owe to him respectively, according to the law and custom of the Exchequer. This process, though now called an extent in the second degree, is in principle the same as that called peculiarly an extent in aid, the only difference being, that in the one case the Crown is the real as well as the nominal plaintiff; in the other, the process is sued out for the recovery of the debt due to the King's debtor and for his benefit. It is clear, therefore, from these authentic records, that the practice of charging the debtors of a person indebted to the King for the King's debt goes back as far as the period of legal memory, and the process has been gradually moulded into its present shape, and limited to its present extent, by statutes and by the rules and decisions of the Court of Exchequer.

I am of opinion, therefore, that it makes no difference whether the writ of extent was in chief or in aid.

Mr. Baron Vaughan: After much consideration devoted to the question which your Lordships have been pleased to propound to the Judges, I am of opinion **[130]** that the writ of extent issued by the Crown, under the circumstances stated, ought of right to supersede the subject's execution.

During the progress of this inquiry my mind has been agitated by doubts suggested by a review of the conflicting judgments which have been pronounced in the superior courts of Westminster Hall upon this long controverted question, involving a claim to exercise an important prerogative of the Crown on the one part, and a valuable civil right of the subject on the other

The arguments in favour of the plaintiff in error may be resolved into the following propositions:

First, That no prerogative right existed in the Crown by the Common Law to issue an extent whereby the goods and chattels and lands of the King's debtor might be extended, and his body seized, to enforce the payment of his debt.

Secondly, That, admitting the existence of such prerogative right under the Common Law, it was restricted and controlled by the statute 33 Hen. 8, c. 39, so as to prevent its operation in the case *sub judice*.

Thirdly, That, independent of all prerogative right, after an actual seizure of the sheriff under a *fieri facias*, at the suit of a judgment creditor, the property in the goods taken became thereby altered, no longer continuing the property of the debtor, and consequently no longer amenable to the process of the Crown.

Fourthly, That the sheriff acquired by the seizure such a special property in the

goods as to deprive the Crown of any benefit to be derived from this process of extent.

The main question depends upon the true construction of the 33 Hen. 8, c. 39, s. 74; but, in the interpretation of this statute, the important preliminary inquiry presents itself; viz. whether before, and independent of, any legislative enactments, the Crown was **[131]** not entitled by the common law to extend the lands and to take the body, as well as the goods and chattels, of the King's debtor in satisfaction of the debt. Sir Edward West, in his Treatise upon the Law and Practice of Extents, states, (but, as I conceive, erroneously,) that the Crown derived its power of issuing an extent from the provisions of this statute. In page 108, he observes, that "this statute gave to the Crown a new kind of execution for all its debts; a species too of execution, which before that statute was the subject's execution, and the subject's only;" and in page 110 he repeats "that the subject's process by extent being imparted to the Crown, the Crown will of course have the same rights in the use of that process as the subject."

The author of that treatise seems to have been betrayed into this error by what I would rather call an equivocal, than an inaccurate, expression of Lord Coke in his Comment upon the 8th cap. Magna Charta, 2 Inst. 19, which contains the following passage: "after the statute 33 Hen. 8, c. 39, was made for levying the King's debts, the usual process to the sheriff at this day is, *Quod diligenter per sacramentum*," etc. From the words, *after the statute*, Mr. West infers that the King was not empowered, by virtue of his prerogative at the common law, to issue any writ of extent to enforce the payment of his debts *before* that statute, such authority being created and conferred, for the first time, by the provisions of that act. Lord Chief Baron Gilbert understands this expression of Sir Edward Coke's, *after the statute*, etc., in the same sense, although he suggests a doubt respecting its accuracy; for in page 127 of his Treatise on the Court of Exchequer, after transcribing a process known by the name of the Long Writ, he observes, "My Lord Coke says this writ was made *since* **[132]** *the statute*, but of this I have great doubt, because it seems so contrived that an inquisition should be found whether the debtor had any goods or chattels, and if upon inquisition there were none found, *then* to extend the lands and to take the body of the debtor. So that it seems this writ might have been used before the stat. of Hen. 8, [33 Hen. 8, c. 39] without any violation of Magna Charta, for if it were found that the debtor had no goods, they might seize the lands and take the body; and, therefore, it seems to be a writ that was used upon motion to the court, and in cases of necessity, *before* the stat. of Hen. 8; but since that statute they may have a *capias levari*, or extent, without any such inquisition touching the goods." The opinion of Sir E. Coke appears to me to have been misapprehended. I do not understand him to affirm that the King had no power of issuing an extent for the levying of his debts before the statute, but that the particular writ of which he gives only a partial extract, had been the usual process to the sheriff since that statute, and was so at that day. Indeed, the very first passage in the 8th chap. of Magna Charta, upon which he is commenting, "*Nos vero vel ballivi nostri non seiziemus terram aliquam vel redditum pro debito aliquo quamdiu catalla debitoris praesentia sufficiant ad debitum reddend et ipse debitor paratus sit inde satisfacere*," was introduced in ease of the subject, for the purpose of restraining the power of the Crown, and correcting an abuse of the prerogative, by preventing the seizure of the lands and rents of the Crown debtor, where goods and chattels could be found sufficient to satisfy the debt. Lord Coke observes upon this passage, that "by order of the common law, the King for his debt had execution of the body, lands, and goods of the debtor," and adds, "this is an act of grace, and restraineth the power the King had before." Both the text and the comment, therefore, conspire to prove that **[133]** Lork Coke could never intend to ascribe the origin of the process of extent to the stat. of Hen. 8: indeed, the reports of that eminent lawyer are replete with resolutions confirming the prerogative right of the crown to issue process of this description from the earliest times. I will cite one case only from his reports in proof of this position, Sir William Harbert's case, 3 Rep. 12, b. It was there resolved, that at the common law, the body, the lands, and the goods of the King's debtor, or accomptant, were liable to the King's execution, for that *thesaurus regis est pacis vinculum et bellorum nervi*, and, therefore, the law gave the King the full remedy for it; and therewith agrees the 5th Eliz. Dyer, 224, and Plow.

Com. 321, a; Sir William Cavendish's case, 24 Ed. 3; Walter de Chirton's case; and infinite precedents in the Exchequer, to prove that for the King's debt the body and land of the debtor shall be liable by the common law before the statute 33 Hen. 8, c. 39. I have before observed, that Lord Coke gives only a partial extract of the usual process which he states to have issued since the statute 33 Hen. 8 [c. 39]. If the whole of it had been inserted, it would have appeared from the concluding part whether it issued from the office of the King, or of the Lord Treasurer's Remembrancer.

The long writ introduced and commented upon by Lord Chief Baron Gilbert, in the chapter in which he expresses his doubts respecting the accuracy of Lord Coke as to the period of time when that species of process was first issued for the purpose of securing the King's debts, was undoubtedly a writ from the office of the King's Remembrancer, as appears from the concluding part of it, containing an injunction not to sell until the further order of the court; from the bonds remaining in the custody of the King's Remembrancer; and from **[134]** its referring in distinct terms to the stat. 33 Hen. 8, as the authority from which it emanated, and being also signed by Masham, who was at that time an officer, not in the Lord Treasurer's, but in the King's Remembrancer's Office. Without professing to have examined the infinity of precedents to which Sir Edward Coke alludes, the searches I have made have satisfied my mind, that from that department of the revenue office in the Court of Exchequer under the control and management of the Lord Treasurer's Remembrancer, a strong prerogative process or writ, combining in effect the *fieri facias*, the *levari facias*, and *capias corpus*, has, from the earliest times, been issued upon special application, founded upon the necessity of the case, without any previous summons or notice, and directed at once against the goods and chattels, lands and tenements, and body, of the Crown debtor, to levy all such debts as, by being charged upon the revenue rolls in that office, were become in the nature of recorded debts or duties. The more ordinary and usual course of proceeding was to transmit them to the Pipe-office, and enter them upon the roll annexed to the summons of the pipe, to be levied by that process; and if returned *nihil* by the sheriff, to introduce them into a schedule, as described by Lord Chief Baron Gilbert, and send them into the office of the Lord Treasurer's Remembrancer, to be levied by the general prerogative process, or long writ, which issued periodically, at two stated seasons of the year, for the recovery of all such debts. I will not abuse your Lordships' patient attention by stating the reasons which have led me to conclude that Lord Chief Baron Gilbert may have confounded the long writ issued from the office of the King's Remembrancer, under the authority of the statute 33 Hen. 8, with the long writ, which it has been **[135]** immemorially the course of the Court of Exchequer to issue from the office of the Lord Treasurer's Remembrancer. It may be sufficient for the purpose of the present inquiry to take it, upon the authority of so eminent a judge, who presided at the head of the Court of Exchequer, that long anterior to the statute of [33] Hen. 8 [c. 39], such debts of the Crown as were entered on the great roll in the Treasurer's Remembrancer's Office might be levied by a process having the force and virtue of an immediate extent. I would, therefore, conclude my observations upon this first branch of the inquiry with a passage from Lord Chief Baron Gilbert's Treatise on the Court of Exchequer, p. 90, "An extent of a later *teste* supersedes an execution of the goods by a former writ; because by the King's prerogative at common law, if there had been an execution at the subject's suit, and afterwards an extent, the execution was superseded until the extent was executed, because the public ought to be preferred to private property."

I proceed to the second branch of the inquiry, how far the statute 33 Hen. 8, c. 39, restricts or controls this prerogative. In considering the legal operation and effect of such of its clauses as have relation to this question, we should remember, that it was passed at a period of time when that monarch was in the plenitude of his power, when the revenues of the Crown had been recently greatly augmented by the surrender and dissolution of the abbies and monasteries, and by the daily increasing commerce and prosperity of the kingdom; nor can we forget, that the history of that reign records more frequent examples of sacrifices extorted from his subjects than of any voluntary surrenders of his acknowledged prerogatives to them. Upon the first forty-nine sections of this statute, relating **[136]** to the erection of the court of surveyors of the King's lands, its officers, and their authority, (all which have long since ceased to exist,) it becomes unnecessary to make any observations. The object of the legislature

in the six consecutive enactments, from section 50 to 56 inclusive, was the more speedy recovery of debts due to the Crown upon obligations and specialities, which not being (before that act) enrolled of record, were not amenable to the strong prerogative process of extent. The statute, therefore, gave them the force and effect of obligations acknowledged, according to the statute staple at Westminster. It gave also to the King his costs, as to a common person. It gave to each of the several courts, as well to those recently erected as to those already existing, and mentioned in the 55th section, the same co-extensive power and authority to commence and prosecute suits for debts and duties grown due to the Crown in respect of obligations remaining in each of those several courts and offices, and to hear and determine them, and to award execution upon the body, lands and goods of the parties condemned therein. But it appears to me a fallacy to suppose that, because it directed in what offices and courts (some of those courts being then recently erected) the suits should be commenced, and what process might in their discretion be used, (mentioning, *inter alia*, the *capias*, *extendi facias*, etc.,) therefore the power of issuing such process was given, for the first time, to the Court of Exchequer. As applied to obligations and specialties, which before that statute were matters in *pais*, not yet ripened into matters of record, I admit they were not liable to the immediate extent until rendered mature for that process by becoming enrolled of record. The sections to which I have referred, from 50 to 56, appear to me exclusively appli-**[137]**-cable to the debts and duties accruing in respect of the obligations and specialties mentioned in those sections. Section 57 enlarges the jurisdiction of the several courts therein enumerated: extends their authority to a variety of other subjects having no relation to the present inquiry; and after introducing various regulations respecting the offices of receiver, auditor, accomptant, etc. (imposing penalties upon them for the breaches of their respective duties) the statute proceeds to enact the 73d and 74th sections, the last of which gives occasion to the present question. The 73d section directs, that in all actions and suits for the recovery of any debts which shall accrue to the King by reason of any attainder, outlawry, forfeiture, or gift of the party, or by any other collateral way or means, it shall be sufficient to declare generally, without showing the circumstances at large, according to the due order of the Common Law. Then follows immediately the much controverted 74th section. The first branch of this clause, introducing the proviso, contains a plain declaration of the King's prerogative right, under the Common Law, by which he was at all times entitled to have his suit preferred, and to have first execution. The proviso was undoubtedly intended to ingraft some qualification or restriction upon that right, or at least to confer a privilege upon the subject; and the question arises, as to the extent of that restriction or privilege. By stat. 25 Ed. 3, c. 19, the subject (notwithstanding the King's ancient prerogative of granting writs of protection) was empowered to implead his debtor, and to proceed to judgment, with a stay of execution until the King's debt was satisfied: and it seems to me that this further privilege was granted by the 74th section of 33 H. 8, c. 39, viz. that he should no longer be restrained from proceeding to issue an execution in those cases to which **[138]** that section applied, viz. in which the Crown had neither commenced any suit nor awarded any process before his judgment was obtained. The Legislature did not, I conceive, intend to interfere in any cases of conflicting or concurrent executions, but simply to remove the restraint continuing upon the subject at the time of the passing of the act of the 25th Ed. 3 [c. 39], and to permit him to sue out execution, without being guilty of any violation of the law, which before the stat. 33 Hen. 8 [c. 19] he could not do. The section being silent as to which execution shall be first satisfied, imports only (according to my view of it) that the subject's execution may first issue, still leaving the prerogative right of the Crown to issue an extent unimpaired.

Supposing this to be the true construction of the statute, to what suit of the Crown does this 74th section extend? Does the proviso or condition control and override all the preceding clauses in the act, or is it confined and limited in its operation to the subject-matter of the 73d section immediately preceding? This question is involved in some obscurity. The collocation of the sections would favour the latter and more limited construction, but the words in the 74th section are sufficiently general and comprehensive to embrace other debts than those designated in the 73d section as accruing to the King by "attainder, outlawry, forfeiture, or gift of the party, or by any other collateral way or means." At the

same time, if the restriction be construed to apply to every species of Crown debt, so as to include the obligations and specialties mentioned in the 50th section, it would involve the difficulty, nay absurdity, of supposing that an act of Parliament, passed for the professed purpose of facilitating the speedy recovery of the King's debts, by giving them the force and effect of a statute staple, would, instead of [139] expediting their payment, place the King in a more unfavourable position than any of his subjects. In every case between subject and subject, the point of time to determine the priority of execution is not the moment in which judgment is obtained, but that in which the execution is delivered to the sheriff; whereas the construction contended for by those who impugn the preferable title of the Crown, would give to the subject, in possession of a judgment, the power of postponing indefinitely the King's execution, unless there had been an inception of his suit, or an award of his process, before such judgment was signed. I interpret the word "debts" in this section (taking it with reference to all the previous provisions of the statutes) to mean such debts as, not being enrolled of record, are in *fieri only, unascertained, and remaining to be recovered* through the medium of a suit to be commenced, or "process to be awarded," inasmuch as informations for penalties always conclude with a prayer that process may be awarded. This construction would also embrace such debts as are mentioned in the immediately preceding section; and unless the Crown had in all such cases actually commenced the suit, or awarded its process, the subject, having obtained a judgment, might proceed to issue execution, and thereby, in obedience to the language of the proviso, prevent the King from having first execution, to which before that statute he was entitled. I do not, however, read the clause as prohibiting the Crown from issuing an extent under the circumstances stated in this case. I come next to consider the question, whether, after seizure by the sheriff under a *fieri facias* at the suit of a judgment creditor, the property in the goods taken becomes thereby altered, so as to be no longer liable to the extent of the Crown? The Crown claims to be entitled to priority in the execution of its [140] process by virtue of its prerogative. The subject denies the existence of any such prerogative, asserting, that after the execution has once begun by an actual seizure made, the Crown has no longer any right to intervene, the subject's execution from that time being entitled to the preference. Upon this question the Crown, as representing the public in respect of the revenue, and an individual creditor, in right of his private claim, are at issue. For the subject, the cases of *Uppom* v. *Sumner* (2 W. Bl. 1251, 1294) and *Rorke* v. *Dayrell* (4 T.R. 406), and for the Crown, *The King* v. *Wells* and *Allnutt* (see 16 Pirie 278), and *The King* v. *Sloper* and *Allen* (6 Price 114), are relied upon as conclusive; and your Lordships are constrained to elect by which of these decisions you will abide, for no sophistry of argument can reconcile them. After the elaborate comment upon these cases, and upon all the authorities applicable to this subject, and upon the principles to be deduced from them, which your Lordships have heard from those who have preceded me, I shall state shortly the reasons which have determined me to prefer the latter judgments delivered by the Court of Exchequer, as containing the sounder exposition of the law, and as resting upon the more solid foundation. Any judgment pronounced by the Court in which Lord Chief Justice de Grey presided, assisted by that great constitutional lawyer Sir William Blackstone, by Mr. Justice Gould, and Mr. Justice Nares, presents, upon the first view, the strongest claim to the concurrence of any English lawyer; but I must confess, after weighing the reasons assigned, and the authorities upon which the judgment of the court of Common Pleas in *Uppom* v. *Sumner* professes to be founded, I cannot yield my judicial assent to it. The whole argument upon the stat. 33 Hen. 8, as reported in 2, Sir W. Blackstone's Reports, is comprised in this single observation, viz. [141] that the former part of the 74th clause is declaratory of the old prerogative law, and the latter a new restriction, so that it shall not take place after judgment given for the subject. The authorities on which this judgment proceeded are still more unsatisfactory. The case of *Lechmere* v. *Thorowgood*, as reported in Comberbach, 123, and 3 Mod. 236, is relied on as the prominent ground of the decision; which, together with *Attorney-general* v. *Andrew*, Hardr. 23, and the passage extracted from Lord Chief Baron Comyns' Digest, vol. 2. 538, viz. "if execution be upon a judgment against the King's debtor, and before *venditioni exponas* an extent comes

at the King's suit, those goods cannot be taken on the extent," are referred to as comprehending the pith and marrow of the law embodied in this solemn judgment. As to *The Attorney-general* v. *Andrew*, Lord Chief Baron Steel's judgment appears to have proceeded on the ground that the execution, which was an *elegit*, was *perfect and consummated* before the extent issued: Hardr. 27, he says, "the subject's title is prior to the King's, and *is executed*." And he adds, "*Stringefellow's* case, in Dyer (67 *b.*), is unanswerable." And as to the passage in Lord Chief Baron Comyns' Digest, vol. 2, 538, I do not understand him as throwing the preponderating weight of his own great name into the scale to guarantee the credit of any decision where he cites cases to support it. Upon the authority, therefore, of the single case of *Lechmere* v. *Thorowgood*, admitted by Mr. Justice Gould to be a little obscure, from being reported only piecemeal and in different books, is built the disputable, or, I would rather say, the untenable proposition, that after execution begun, but not completed, the King's extent comes too late. I have examined with care the several reports of this case in **[142]** Comb. 123; 3 Mod. 236; 1 Show. 12, and 2 Vent. 160, from which it will appear, that the action was trespass by the assignees of a bankrupt against the sheriff of London and others, for seizing goods under a *fieri facias* against the bankrupt after an act of bankruptcy committed by him. The act of bankruptcy was committed on the 18th of April; the seizure was on the 29th. After the seizure, an extent issued at the suit of the Crown. The case was twice before the court, once in Trinity Term, 4 Jac. 2, of which 3 Mod. gives the account; and again 1 W. and M., to which Comberbach and Shower refer: "The court were of opinion a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time." The question, therefore, as to the right of the Crown to have the extent preferred to the execution, was not the point depending in judgment; and supposing Lord Holt to have said what Comberbach imputes to him, viz. that the extent came too late after the *fieri facias* delivered to the sheriff, it could be regarded only as an *obiter* and extra-judicial *dictum*. When the same question arose in *Rorke* v. *Dayrell* (4 T. R. 406), as in *Uppom* v. *Sumner* (2 W. Bl. 1251, 1294), Lord Kenyon, after expressing his perfect satisfaction with that decision, relied upon this proposition as the basis of his judgment, viz. that as long as the property of the debtor remained *unaltered*, and an execution at the suit of the subject, and an extent at the King's suit, issue against the debtor, the title of the Crown must prevail; for the point to be considered is, in whom is the property? He then proceeds to state, that as the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor on which the prerogative of the Crown can attach. With great deference to the judg-**[143]**-ment of so profound a lawyer, I venture to question the soundness of this opinion, preferring the doctrine of Lord Hardwicke, in *Lowthal* v. *Tonkins*, 2 Eq. Cas. Abr. 382, who says, "That neither before the statute of frauds, nor since, is the property in the goods altered, but continues in the defendant until the execution executed. The meaning of these words, the goods shall be bound by the delivery of the writ to the sheriff, is, that after the writ is so delivered, if the defendant makes an assignment of his goods, unless in market overt, the sheriff may take them in execution." The same opinion was expressed by Lord Holt, in *Smallcomb* v. *Cross and another*, 1 Lord Ray. 251, who says, "if writ of execution be delivered to the sheriff against A., and A. becomes a bankrupt before it be executed, the execution is superseded; and, consequently, the property in the goods is not absolutely bound by the delivery of the writ to the sheriff. But the teste of the writ binds against all sales and acts of the party himself." The same point was decided in *Phillips* v. *Thompson*, 3 Lev. 191. Lord Kenyon, in the judgment I am commenting upon, says, "the point to be considered is, in whom is the property?" I would try it by that test. If the property be not in the debtor after the seizure, and before the sale, I would ask, in whom is it? The debtor may, at any moment before the sale, pay the debt and demand the goods: nor is any bill of sale necessary to retransfer the property in order to confirm his title. Suppose the goods, whilst remaining in the custody of the sheriff, to be consumed by lightning or destroyed by fire, or by an armed tumultuary force, would the execution be satisfied or the debt discharged? surely not. The judgment of the Court of King's Bench, in *Thurston* v. *Mills*, 16 East. 254, furnishes a direct **[144]** authority on this point. Goods

were taken in execution by the sheriff under a *fi. fa.*, and whilst remaining unsold, an extent at the suit of the Crown, of a subsequent teste, issued, under which the sheriff took them, subject to the former seizure, and afterwards sold them under a *venditioni exponas* from the Court of Exchequer. Money had and received was brought by the plaintiff in the original action against the sheriff for the proceeds of the sale. Lord Ellenborough, in delivering his judgment observes, "neither the money nor the goods were originally, nor at the time of the action brought, the property of the plaintiff." The sheriff had indeed seized them under a *fieri facias*, but the plaintiff acquired no property in them by the sheriff's seizure. If they had been burnt in the hands of the sheriff, the plaintiff would not have borne the loss. Lord Kenyon concludes his judgment in *Rorke* v. *Dayrell* (4 T. R. 406), in these words: "with respect to what is supposed to have been said by Lord Mansfield, in *Cooper* v. *Chitty* (1Burr. 36), of Comberbach having mistaken Lord Holt's opinion in *Lechmere* v. *Thorowgood* (3 Mod. 236), it is as probable that the report of that observation is mistaken." If Lord Kenyon, before he delivered his judgment in *Rorke* v. *Dayrell*, had fortunately referred to his own note of *Cooper* v. *Chitty*, which has since been published by Mr. Hanmer, from his Lordship's original manuscript, instead of impeaching, he must have borne testimony to the accuracy of Sir James Burrow's report of Lord Mansfield's judgment in that particular. The notes of Lord Kenyon and of Sir J. Burrow on this point are in such perfect harmony, that the one may be considered a *fac simile* of the other, and I will transcribe them. Lord Mansfield is reported by Sir J. Burrow to have said, "that Comberbach, in giving the judgment of the court, which is the only **[145]** sensible part of his whole report, (for it is plain to me that he did not understand the former argument on the former day, which is the first part of his report of the case,) agrees with Shower, and says, 'that the court were of opinion, that a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time;' but he must be mistaken in the first part of his report, for Lord Chief Justice Holt could never say, that the property of the goods is vested by the delivery of the *fi. fa.*, and the extent of the King afterwards comes too late. No inception of an execution can bar the Crown." The following passage is extracted from Lord Kenyon's report of *Cooper* v. *Chitty*, as published by Mr. Hanmer, p. 422: "This case of *Lechmere* v. *Thorowgood* is reported in two other books: in Comberbach, 123, the latter part of the case is agreeable to that of Shower, that a construction should not be made to make the officer a trespasser by relation. As to the other part of the report, it is manifest to me that he did not understand what they were arguing about, for he makes Lord Holt say, what he could never say, about barring the extent of the Crown. In 3 Mod. it is as plain that the reporter misunderstood what passed, for he says, that the extent came too late, and that the property was bound by the *fi. fa.*, though the contrary is very clear." The inference I draw from all the authorities upon the subject, whether the question be considered with regard to executions on statute staple, or to executions at Common Law by *fi. fa.* or *elegit*, is this, namely, that the extent of the Crown must be preferred if the execution be not perfectly executed by the delivery of the land to the creditor, or **[146]** by the sale of the goods; that the inception of the execution by the bare seizure of the goods will not bar the Crown; that the execution must be no longer in progress but completed; and that until the actual sale the property is not altered or divested from the original owner. Mr. Baron Wood, in the elaborate judgment delivered by him in the Court below, and reported in 8 Price, 314, seems, throughout his most able argument, to admit, that in order to exclude the process of the Crown, the execution of the subject must be executed. But he insists that the act of seizure by the sheriff is for that purpose a full and final execution. But neither the cases he cites, nor his reasoning to illustrate that position, have succeeded in making me a convert to his opinion. *Curzon's* case, 3 Leon. 239; 4 Ib. 10, cited by that learned Judge, to show that the prerogative of preference is determined when the subject's final execution has begun, proves, on the contrary, as it appears to my mind, that it is not determined until the subject's execution was perfect and consummated by the delivery of the land to the creditor under the *liberate*. The only point remaining to be considered, namely, whether the sheriff acquired by the seizure such a special property in the goods as to defeat the process of the Crown, has been so fully discussed by my learned brothers who

have preceded me, and to whose judgment I take leave to refer (more especially to my brother Alderson's) as illustrating my view and incorporating my opinion on that subject, that I willingly spare your Lordships the fatigue of attending to my examination of it in detail. That the sheriff is invested with power, as the ministerial officer of the law, to protect the property whilst remaining in his custody, for the benefit of those who may be entitled to it, can-[147]-not be disputed. Against a wrong doer, he may maintain trover or trespass; but from thence I apprehend no inference can be drawn unfavourable to the rights of the Crown. He may still be called upon to execute His Majesty's process of extent, subject to any legitimate claim of property in third persons previously existing and capable of being established. My brother Alderson has accurately defined the state and condition of such property as being in *custodia legis*. I will therefore dismiss this last head of inquiry with an observation of Lord Hobart's, extracted from his judgment in *Sheffield* v. *Radcliffe*, Hob. 339, when commenting upon *Stringefellow's* case, 1 Dyer, 67, so often referred to. The passage is in these words: "Stringefellow sued an extent upon statute staple against Brownesoppe. The sheriff of Bedfordshire extended the land and appraised the goods, and seized them into the King's hands, but before *liberate* an Exchequer writ for a debt of £100 of the King's, to be levied upon Brownesoppe, came to the sheriff, who returned on the writ this special matter into the Exchequer, and he made the same return into the Chancery upon the *liberate*, and that there were no other goods; yet he was enforced, notwithstanding the custody of the law, to serve the King." For these reasons, I am of opinion, that the King's extent is entitled of right to be preferred to the subject's execution, and that there is no solid distinction to be made between an extent in chief and an extent in aid.

I fear that I have rendered myself obnoxious to the imputation of trespassing too largely upon your Lordships' valuable time. My apology for doing so may be found in the importance and difficulty of the subject, which has for so many years been considered in West-[148]-minster Hall as *vexata quæstio*, distracting and dividing the opinions of the most enlightened judges. If the judgment, which I have humbly submitted to your Lordships be deemed erroneous, I shall at least have the consolation of reflecting that I am under the shade of great authority, "*Magno se judice quisque tuetur.*"

Mr. Justice Gaselee: My Lords, I have the misfortune to differ in opinion from those of my brothers who have preceded me, and I understand from a great majority of those who are to succeed me in addressing your Lordships upon this occasion; and when I consider, that the two noble and learned Chief Justices, to whom this case was referred upon a writ of error, brought to review a judgment which was given in the Court of Exchequer in favour of the defendant in error, reported to the Lord Chancellor, that the question was one which has agitated the courts of Westminster Hall for a great many years; that there had been a difference of opinion in the courts of Westminster Hall, the Court of King's Bench in one case, and the Court of Common Pleas, in another having decided that the extent was not entitled to priority over the execution at the suit of the subject; that the Court of Exchequer has uniformly decided the other way, viz. that the extent was entitled to priority; and that their Lordships' having heard the case argued, and considered it very maturely, had not been able to come to a decision upon the subject and agree upon what advice they should give to the Lord Chancellor; I am a little surprised that so considerable a majority of the judges should have formed an opinion adverse to that which is the result of the best consideration I have been able to give to the subject.

[149] The first question propounded by your Lordships for the opinion of the judges, branches out into two; viz. first, whether the property is altered by the seizure of the sheriff under the writ of *fieri facias;* and secondly, whether the statute 33 Hen. 8, c. 39, s. 74, abridges the prerogative process of the Crown, and prevents it from taking effect, unless it be issued antecedently to the subject's execution, or, in the words of the statute, unless the King's suit be taken or commenced, or process awarded for the debt at the suit of the King, his heirs and successors, before judgment given for the other person or persons. In considering the first of these questions, I would call to your Lordships' attention, that the question in this case is not, as in many of the cases in which the decision has been given in the Court of Exchequer in

favour of the Crown, whether the claimant has such a property in the goods as to enable him, according to the technical practice of the Court, to come in and claim the property under the usual rule, upon the return of the writ and inquisition into the Court; in which case no one can be allowed to traverse the King's title without showing title in himself: but here the question is generally, whether the writ shall be executed by the sheriff, by extending the same goods into the King's hands and selling them to satisfy the Crown debt, without regard to the *fi. fa.*, under which he had first seized them. It is admitted, and indeed, after the decision in *Swain* v. *Morland*, (1 B. and B. 370; 3 B. Moore, 740,) it is too late to deny, that after an execution is once executed at the suit of a subject, an extent coming to the sheriff on the part of the Crown to be executed on the same property, comes too late. One question, therefore, on this case is, at what time may an execution be said to be executed? Now, my Lords, there **[150]** are many authorities which lay it down, that by the seizure, (the sale being but the formal part of the execution,) the property vests in the sheriff. The first authority I shall trouble your Lordships with on this point is the opinion of Lord Holt, in the case of *Lechmere* v. *Thorowgood*, reported in several books, and amongst others in Comberbach, 123, in which Lord Holt is stated to have said, "the property of the goods is vested by the delivery of the *fi. fa.* and the extent afterwards for the King comes too late, and that, on the statute of frauds and perjuries." It is true the case does not appear to have been decided on that ground, but because the taking being lawful at the time, the officer could not be made a trespasser by relation; and that Lord Mansfield in *Cooper* v. *Chitty* [1 Burr. 36], says, that the reporter must be mistaken in the first part of the report. In 4 T. R. 411, Lord Kenyon is stated to have said, with respect to what is supposed to have been said by Lord Mansfield in *Cooper* v. *Chitty*, of Comberbach having mistaken Lord Holt's opinion in *Lechmere* v. *Thorowgood*, it is probable that the report of that observation is mistaken. But in the Banker's case, 11 State Trials, 28, Lord Holt says, as soon as a *fi. fa.* is delivered to the sheriff, and upon it goods are levied, the property of the goods is altered, and the sheriff becomes the debtor to the plaintiff. The case of *Clerk* v. *Withers* [2 Ld. Raym. 1075] is also to the same effect. That case is as follows: F. Dives, as administrator of J. Dives recovered £303 against Clerk, upon a bond to his intestate, upon judgment by default in the Common Pleas, and sued out a *fi. fa.* tested of Trinity Term, 1 Ann, returnable in Michaelmas Term, directed to the sheriffs of London, which was delivered to the sheriffs on the 1st August in the same year, who on the same 1st August seized goods to the value. F. Dives, **[151]** the administrator died 9th September following. The sheriff returned the seizure to the value *sed remanent, etc. pro defectu emptorum.* On the 29th September, the sheriff was removed and another put in. Defendant Clerk now sued out a *sci. fa.* against the then sheriff, for restitution of his goods, and upon demurrer, judgment was given against the plaintiff in the Court of Common Pleas, and he then brought a writ of error; and now the case having been twice solemnly argued at the bar, the Court *seriatim* affirmed the judgment. Mr. Justice Gould says, "the execution is executed in the life of the administrator, and the sale, namely, the formal part of it may be done by the same writ. The sheriff, by the levying the goods by a *fi. fa.* as he seizes the goods, gets a property in them against all persons, and may have trespass against the true owner, if he gets them; and so he may have trover, as appears in *Wilbraham* v. *Snow* [2 Saund. 47], where Chief Justice Kelynge held, that he gains a general property; but all the rest say, that it was only a special property, so as to sell, etc. This is not like the case put before, of an extent; for in that case there must be a *liberate*, which is by award of the court." Mr. Justice Powys says, "this execution is so far completed, that it is a vesting of the property in the sheriff. The selling is but a formal part of the execution, and by the seizure and writ, he has authority to sell; and the *venditioni exponas* adds not to his authority, but is to spur him on to sell." And Mr. Justice Powell says, "execution is an entire thing; and, therefore, where a sheriff levies goods, and while they remain in his hands for sale, a new sheriff is chosen, he who begins the execution shall go on with it and sell the goods, and not deliver them over to the new sheriff, who is the officer of the **[152]** court. The reason is, that execution is one entire thing, Year Book, 34 Hen. 6, pl. 36; and, therefore, where it began it shall end, and that is the reason that a supersedeas after execution begun shall not supersede it upon error, because it is an execution from the first levying of the goods, and not like the case of an *extendi facias*, because the

extent is only a seizure into the King's hands, and there must be another award of the court, namely, a *liberate* to deliver them over to the plaintiff." By Holt, Chief Justice: "It is true, after he has seized goods to the value of the debt, though he be out of office, yet he is bound to make sale of the goods and to make a return; and when he has made a return of the seizure of the goods, and that they remain in his hands for want of buying, that is not a discharge of the command of a writ, but only an excuse that he has not the money, and he is compellable by law to bring it in; and though a *venditioni exponas* does lie, yet a distringas is the proper remedy; and there are two sorts of *distringas nuper vicecomitem*, before mentioned, Year Book, 34 Hen. 6. pl. 36. The one a *distringas* to the new sheriff to distrain the old one, to sell the goods and bring the money into court; the other to distrain him to sell *et denarios inde provenientes*, to deliver to the new sheriff to bring into court. Now, if a distringas lies to the new sheriff to compel the old sheriff to sell, that shows the old sheriff has an authority to sell by virtue of the former writ; and that which commands the new sheriff to distrain, the old one to sell and bring in the money, is the most usual, Rastell's Entr. 164; Thes. Brev. 90. Now then, since the sheriff is compellable to sell, having seized the goods, what should hinder, in this case, that he should not sell, **[153]** notwithstanding the plaintiff's death; for the writ is as forcible and compellable upon him to levy and bring in the money as if the plaintiff had lived. When he seizes the goods by virtue of the writ, the defendant is actually discharged, though they are not sold, for the plaintiff must depend upon his execution, and rely upon that; he has no further remedy against the defendant, but altogether against the sheriff. This came in question upon an ejectment brought by an administrator *de bonis non*; and it was held, that the extent was void, for the writ was abated, and no matter whether the plaintiff died before the return of the seizure or after. But in case there be no act of the court to be done, but an elegit sued out, which commands the sheriff to deliver the lands extended to the party; if, there, the executor or administrator die after the inquisition and before the delivery, in that case the death of the plaintiff shall not avoid the execution; and that appears by the case of *Harrison* v. *Bowden*, though not so very plain." If he do not sell between the teste and return of the distringas, he shall forfeit issues; and after goods once seized, no writ of error or supersedeas shall stay the sale. In *Wilbraham* v. *Snow* [2 Saund. 47], the point was, that the sheriff may maintain trespass or trover against any person who takes away goods which he has seized in execution, *Mildmay* v. *Smith* [2 Saund. 344]; and by seizure of the goods in execution, the sheriff has property in them, so that he may reseize them, and sell when he is out of office as before. In the case of a *fi. fa.* there is no further act to be done. Although the terms of the writ direct the sheriff to bring the money into court to render to the plaintiff, it is not necessary he should do so. He not only may pay it over himself to the plaintiff, but in the case of **[154]** *Parkinson* v. *Guildford* [Cro. Car. 539], it is said, an action of debt may be maintained against him or his executors if he does not do so after he has sold the goods. It is true that authorities have been cited on the other side, and amongst others, *The King* v. *Peck*, (Bunb. 8). In that case a *fi. fa.* issued out of the Court of Common Pleas at the suit of *Robarts* v. *Peck*, which was tested 3d of April, by virtue of which the sheriff levied the goods, etc. but before the sale thereof, or the return of the writ, an extent came to the sheriff at the suit of the Crown, to levy the goods, etc. of Peck, tested 2d of May. The sheriff returned this special matter on the *fi. fa.*, and likewise upon the extent, into the Court of Exchequer, on which it was said, that Peck had possession of the goods the 30th of April, on which Mr. A. moved to quash the inquisition, and Mr. F. moved that the sheriff might amend his return. Baron Pryce was for quashing the inquisition, which being found by a jury, he did not see how the sheriff could amend it. The Lord Chief Baron Bury and Baron Montague were of opinion the sheriff might amend his return, and an order was made for that purpose, which was what the sheriff wanted to indemnify him, in case anything had been moved against him in the Common Pleas on the return of the *fi. fa.* There is a note in that case in these terms, "Take notice, it was taken for granted, that though the goods were levied by virtue of the *fi.fa.* three days before the teste of the extent, yet there was no bar to the Crown; but *quere*, if they had been sold, for then execution had been executed." Stringefellow's case has also been very much relied upon on this part of the case, as an authority on the part of the Crown. That case is thus reported in Dyer, 67 b. [The

learned judge here quoted the facts of that case:] "and it was **[155]** holden in the Exchequer for law, that the sheriff should be amerced if he would not amend his return, namely, to return the extent into the Exchequer for the service of the King's debt; and Justices Hall and Bromley were of the same opinion, because the property of the goods and land was not in Stringefellow before delivery to him by the writ of *liberate*." The distinction, however, between that case and the case of a *fi. fa.* has not only been very fully pointed out in the opinions of some of the judges in the case of *Clerk* v. *Withers* [2 Ld. Raym. 1075], above cited; but is also very pointedly observed upon by Mr. Baron Wood, in the case now in judgment, in 8 Price 314. It is, that the extent is not the execution, and gives no authority to the sheriff to sell or deliver over to the party; it merely authorizes the sheriff to seize the property, but not to do anything with it until the *liberate* issues, which is in fact the execution. The *fi. fa.* commands the sheriff to make the money of the goods. No further authority is requisite to empower the sheriff to sell and to pay the money over to the plaintiff. This distinction is also shown in Playne's case, in Cro. Eliz. 47. "A lessee for years was obliged to pay his rent. In debt upon it he pleaded that the lessor was bound in a statute, and upon that, an *extendi facias* was awarded to seize the lands and tenements of the lessor into the Queen's hands, which was executed accordingly, and upon that a *liberate* was awarded, and in the mean time between the *extendi facias* returned and *liberate* awarded, the rent was incurred, for which he was chargeable to the Queen, and demands judgment." The opinion of the whole Court was clear to the contrary. Before the *liberate* awarded *nihil operatur*, for he remains always tenant to the lessor, and chargeable to him for his rent; and the writ before is but of form, **[156]** when it speaks of the seisin into the Queen's hands, for it is never seen that lands were seized upon that writ. So that here, upon an *extendi facias*, it is clearly held that nothing was divested out of the debtor until the *liberate*. In *Smallcombe* v. *Cross*, 1 Lord Raym. 251, which has been cited on the part of the Crown, there is the following note. "In this case, Mr. Northey said, *arguendo*, that it is the common practice at this day, that if a *fi. fa.* be delivered, and the goods appraised and sold, and the writ is not returned, and an extent for the King comes out of the Exchequer, it will overreach the former sale; but, *per curiam*, it is a very dangerous practice." It is, however, now admitted, that the sale would bar the Crown; and I only mention this note to show how far the argument has in earlier times been carried in support of the alleged rights of the Crown. A passage at the end of the case of *The Attorney-general* v. *Capell* [2 Show. 480], was also cited on the other side, viz. "extents have been on goods actually levied by virtue of a *fi. fa.* and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." This passage does not appear to be part of the judgment of the Court in *The Attorney-general* v. *Capell*, in which the question was, whether the extent was too late coming after the commission of bankruptcy but before the assignment. There is nothing in the case wanting, or in any way calling for the inference, which, as Mr. Baron Wood says, in his judgment, is a mere *gratis dictum* of the reporter of that case.

The result of a due consideration of the foregoing cases seems to me to be, that the property is altered, and the Crown barred by the levy under the *fi. fa.* It is not necessary to go the length of showing that **[157]** the sheriff has the general property in the goods. There are several cases which show, that where the general property remains in the debtor, yet if another has any special property in or lien upon the goods, the Crown shall not take the goods but subject to that lien. Thus, an equitable mortgage which binds the Crown, and against which the Crown is entitled only upon satisfaction of the lien of the mortgagee to its full extent; *Casberd* v. *The Attorney-general* [6 Price 411]: or the lien of a factor, who has accepted bills to the amount of the value of the goods consigned to him; *The King* v. *Lee* [6 Price 369]: or of a wharfinger, on the goods of his customer in his possession for his general balance, which has been decided to be available against the Crown, *The King* v. *Humphrey*, 1 M'Cl. and Y. 173. Mr. West's Treatise on Extents, p. 98, says, the plaintiff in an execution may be said to have an interest in goods which have been taken under his execution, the goods being under the custody of the law, and the sheriff having the special property in them, the general property remaining in the defendant under the execution. But it is said that that rule cannot apply to the case

in question, because at any time before sale, and after the seizure, the debtor may, by payment of the debt, suspend the sale and stay execution. The same answer would apply to the case of the factor, wharfinger, and other persons above named, in all which the debtor, upon payment of the debt, regains the property.

If the decision on this part of the case is in favour of the plaintiff in error the remaining question will not arise, but if not, I am of opinion that the stat. 33 Hen. 8, c. 39, s. 74, abridges the prerogative process of the Crown, and prevents it from taking effect in this case, the King's suit not having been taken or commenced, or process awarded at his suit before **[158]** judgment on the *fi. fa.* The following are the words of that section: "And be it also enacted by the authority aforesaid, that if any suit be commenced or taken, or any process be hereafter awarded for the King, for the recovery of any of the King's debts, that then the same suit and process shall be preferred before the suit of any person or persons, and that our said sovereign lord the King, his heirs and successors, shall have first execution, so that the King's suit be commenced before judgment given for the said other person or persons." Before proceeding to the further consideration of this part of the case, I should call your Lordships' attention to the fact that, in the present case, so far from the King's suit being taken or commenced, or process awarded before the judgment was given for the other person, the debt was not due to the King but to the debtor of the King's debtor, and was not put on the record until after the giving the judgment, the issuing of the *fi. fa.*, and the actual seizure of the goods under it. In the case of *The Attorney-general* v. *Andrew* [Hard. 23], it was determined by all the Court that the statute did abridge the prerogative. The case was, Sir William Harrison acknowledged two judgments in debt to one Andrew, upon bond, and was bound to one Feilder on a bond bearing date before the judgments. Feilder assigned his debt to the King, Andrew takes out execution upon his judgments, viz. two *elegits;* by one he has the moiety, by the other the other moiety of Sir W. Harrison's lands extended. Then process issued out of the Exchequer for the debt assigned to the King, and the principal question was, whether or no the King should be preferred in this case? After argument, the Court, in Trinity Term, 1656, gave judgment for defendant. Baron Parker said—"The King has many prerogatives, *pro bono publico,* but in the case in question, the statute 33 **[159]** Hen. 8, abridges the prerogative, and controls the common law; affirmative statutes do not alter the common law, but negative statutes do; and here is a negative implied, see Stringefellow's case, in Dyer, 67 b.; also Lassel's case, in Dyer, 364." Baron Nicholas agreed, "before the statute 33 Hen. 8, the King was not bound, but the statute has made an alteration, though it sounds in the affirmative, for it enacts a new thing, and *ita quod* makes a condition precedent and a limitation." He then refers to certain authorities, as showing how such statutes are to be expounded, and that the clause would else be idle. Chief Baron Steel—"the subject's title is prior to the King's, and is executed; the words of the statute 33 Hen. 8, are introductive, Cecil's case, 7 Rep. 18 b., and Stringefellow's case, are unanswerable." It is observable, that although so much stress is laid on Stringefellow's case on the part of the Crown on this occasion, Chief Baron Steel and Baron Parker, in the above case of *The Attorney-general* v. *Andrew* [Hard. 23], cite it as being conclusive in favour of the subject. The case of *Uppom* v. *Sumner*, 2 Blacks. 1251, 1294, is precisely the same as the present. Uppom, the plaintiff, in Easter Term, 17 Geo. 3, recovered a judgment against Cann in the King's Bench, in debt, for £1020; and on the 16th of April 1777, sued out a *fi. fa.* returnable on Monday next after the morrow of the Ascension, 12th of May; a warrant on which was, on the 18th of April, delivered to the officer, who on the same day took the goods, and kept possession of the same by virtue of the warrant. On the 24th of April, before any sale of the goods, an extent was sued out, and delivered to the sheriff, against the goods of Cann, to levy £621 4s. 9d., a debt to the King; and a warrant was on the Monday delivered to the **[160]** same officer, who then had the goods in his possession under the former warrant, and who two days after had the goods appraised, and on the 30th of April took an inquisition on the extent, the plaintiff Uppom's attorney attending and putting in his claim. The goods were sold on the 23d of May, and the sheriff being called upon by Uppom to return his writ, returned *nulla bonâ.* When the cause was first called on, the Plaintiff's counsel thought they could not support their case, and accordingly judgment was given without argument. It was, however, afterwards argued, and after

time to consider, Mr. Justice Gould delivered the unanimous opinion of Chief Justice De Grey, who was present at the argument himself, and Justices Blackstone and Nares, that in this case the extent did not take place of the execution, the King's suit being commenced after the judgment. It had been contended in argument by Mr. Serjeant Grose, who afterwards was one of the judges, and agreed with the rest of the court in the judgment in *Rorke* v. *Dayrell* [4 T. R. 406], that the statute 33 Hen. 8. [c. 39] only restricts the prerogative in the particular revenue courts erected by and mentioned in that Act. But in giving judgment, Mr. Justice Gould, after stating the particular parts of the Act, says, about seven sections only, viz. sections 50, 74, 75, 76, 77, 78, and 80, contain general provisions, extending to all the King's subjects, and are applicable to all the King's Courts, as well as to the courts of revenue, where the subject of them falls under consideration. Indeed, he says, it would have been absurd to have one law prevail in the King's Bench and Common Pleas, and another in the Exchequer and Duchy, with regard to such questions as the present, the priority of the King's debts before those due to a subject. The learned Judge, after stating the 74th sec-**[161]**-tion of the Act, says, "the former part of this clause is declaratory of the old prerogative law, the latter is a new restriction of it, so that it shall not take place after judgment given for the subject." With respect to the case, *Lechmere* v. *Thorowgood*, upon which so much has been said, he said, "in *Lechmere* v. *Thorowgood*, it appears by Comberbach, 123, and 3 Mod. 236 that first Herbert, and then Holt, were clearly of opinion, that after execution begun, but not completed, (and of course after judgment signed,) the King's extent came too late." This case is a little obscure from its being reported only piecemeal, and in different books, but with some attention it will be found to be clear and consistent; by reading the several parts of it in order of time as they occur; viz. the pleadings, 2 James 2, 2 Ventris, 156; first argument, 4 James 2, 3 Mod. 236; second argument and judgment, 1 William and Mary, Comberbach, 123, 1 Shower, 12; and a subsequent action between the same parties in effect in the Common Pleas, viz. *Lechmere* v. *Toplady*, 2 Vent. 169. In *The Attorney-general* v. *Andrew*, Hardr. 23, it was held by the Court of Exchequer, that when there was a judgment and execution by elegit, a debt of the King prior to the judgment, but the process thereon sued out after, it should be postponed to the judgment. And from these authorities Lord Chief Baron Comyns, in his Digests, collects this doctrine, that if execution be upon a judgment against the debtor, and before *venditioni exponas*, an extent comes at the King's suit (which is the very case at bar,) those goods cannot be taken on the extent; and this opinion is also supported by *The King* v. *Dickinson*, Parker, 262. The case of *The King* v. *Dickinson* was this: A. was indebted by judgment to B., by bond to C. and D., and by simple **[162]** contract to E., and died. E. being a debtor to the King caused the debt due to him to be seized into the King's hands, and upon this a *scire facias* issued against Dickinson, executor of A.; and before the return of it, C and D., the bond creditors, obtained judgment; and then Dickinson pleaded to the *sci. fa.* the prior and the subsequent judgment. The Attorney-general demurred. The points argued in Hilary Term, 1691, were first, whether the subsequent judgment should be preferred to the King's debt, for it was admitted that the preceding judgment should be preferred. The second is unnecessary to state. This case was adjourned to this term (Easter, 4 Wm. and Mary, 1692,) when it was adjudged for the King, that his debt should be preferred before the subsequent judgment, namely, before any bond, Hardres, 23; but a precedent judgment should be preferred before it, upon the words of the 26 s. 33 Hen. 8, c. 39. "So always that the King's suit be taken and commenced, or process awarded for the debt of the King, before judgment given for the other persons." In *Rorke* v. *Dayrell*, 4 T. R. 402, the Plaintiff, sued out a *fi. fa.* returnable on 12th January 1788. The writ was delivered on the 7th January to the sheriff, who on the 8th seized the goods. Before the sale, namely, on the 11th, a writ of extent issued tested on that day, and on the 12th it was delivered to the sheriff, who acted under the extent, and returned *nulla bona* to the *fi. fa.* The case was argued on the statute of the 33 Hen. 8, c. 39, s. 74. The Court were unanimously of opinion that the extent came too late. Lord Kenyon states—"Where the King and a subject stand in equal degree, there is no doubt but that the King's prerogative must prevail, and therefore, where the property of the goods remain in the **[163]** King's debtor at the time, and an execution

at the suit of the King and another at the instance of the subject are sued out, the former will be preferred. On this principle the case of *The King* v. *Cotton*, Parker, 112, proceeded: that was not the case of an execution, but a distress; the goods taken were *in custodia legis*, as a pledge to answer the demand of the landlord, and the property in the goods was not divested out of the tenant. Now, in this case, the sheriff had actually seized the goods under the plaintiff's writ of execution; and an execution once begun shall proceed; it shall not stop on the issuing a commission of bankrupt against the debtor; and in this respect, I know no distinction between the case of the Crown and that of a subject. As to the stat. 33 Hen. 8, c. 39, s. 74, either it did or it did not give some new privilege to the Crown. If the counsel for the Crown contend that it did, they must take the word *execution* as referring to personal chattels, and then the words are against the King, because here there was a judgment by the plaintiff. If it did not introduce some new benefit, then the Crown must be referred to its ancient prerogative, which only extends to the case I stated at first, namely, when the King and a subject stand in equal degree, and the property is not altered, then the former shall prevail. With respect to what is supposed to have been said by Lord Mansfield in *Cooper* v. *Chitty* [1 Bwn. 367], of Comberbach having mistaken Lord Holt's opinion in *Lechmere* v. *Thorowgood* [3 Mod. 236], it is as probable that the report of that observation is mis-stated." Justice Ashhurst says, "The case of *Oppom* v. *Sumner* [2 W. Bl. 1251, 1294] certainly underwent a great deal of consideration before it was decided; all the prior authorities were thoroughly examined at that time. **[164]** Unless, therefore, it could be shown that the case proceeded upon wrong principles, it ought to govern the present. The words of the stat. Hen. 8, are clear and decisive, that the King's suit shall be preferred to that of any other person. So always that the King's suit be taken or commenced, or process awarded before judgment be given for the said other persons. Now this Act of Parliament gave a new prerogative to the King in various instances which he had not had before; by that he is enabled to issue immediate execution in cases which he could not before, for before he had only a right to such execution when the debt was upon record. And as this was a new prerogative, the legislature had a right to restrain him; and they have in express terms restrained him where the subject's judgment is prior to the inception of the King's execution." Mr. Justice Buller says, "This case arises on the stat. 33 Hen. 8 [c. 39], for previous to that Act the Crown could not issue immediate execution on a bond debt. Though the cases that have already happened on this statute show that the Act is not to be confined to bond debts only, but that it extends to all debts and executions. It is so stated, in express terms, by Lord Coke, in Sir T. Cecil's case, 7 Rep. 18 b. If this Act of Parliament be restrictive on the Crown, it goes a great way to determine this question, for if it be, it expressly requires that the King's suit shall be commenced before judgment is given for the subject. Now that was expressly decided in the case of Hardres, where the whole Court were of opinion, that the statute does abridge the King's prerogative. And there Chief Baron Steel said, 'the subject's title is prior to the King's, and is executed.' On this ground, I put the question to the **[165]** counsel in argument, 'What effect a judgment obtained by a subject would have, where he lay by till the King's extent was executed.' I am inclined to think, that in such a case the execution by a subject would be postponed; but it is not necessary to decide that point in the present case. As to the effect of the statute 33 Hen. 8, c. 39, it is impossible to have a more direct authority for the restriction on the King's prerogative than in 7 Rep. 19 b., where it is said, 'The act hath given a benefit and advantage to the King; first, in making every bond made to the King in nature of a statute staple; secondly, in giving remedy to the King himself for obligations made to others to his use; thirdly, to recover costs and damages; fourthly, in suing of execution for all his debts; fifthly, in charging the issue in tail, and the heir who hath the land of the gift of his ancestor;' and, therefore, it was the intent of the Act, to gratify the subject, that where a new provision was made for the levying of the King's debts in a more speedy and beneficial manner than the King had before, the subject also should have some new benefit which he had not before. Now that new benefit was, to give him a preference in cases where his judgment was obtained before the extent of the King issued." Mr. Justice Grose says, "the simple question is this, whether the King's right of issuing an extent upon a bond, supersedes a prior judgment of a

subject. If the Crown have such a right, it must arise upon the statute of 33 Hen. 8, c. 39, s. 74; Gilb. Hist. Exch. 165. Now the words of this clause in the Act are extremely pointed to show, first, what the King's prerogative was before; secondly, how far the prerogative was intended to be assisted in these cases, and how far to be limited. But it is said, **[166]** that 'execution' in this Act was intended only to affect lands. But there is no reason why it should be so confined; it must mean every kind of execution to which the King was entitled before the passing of this Act, otherwise the King would be bound in cases where he had a prerogative before. Thus, this case stands on the words of this statute. The authorities also are decisive; first, the case in Hardres is very pointed; and there it was not even hinted that execution in this Act ought to be confined to an execution against land. Then came the case of *The King* v. *Dickinson*, and Lord Chief Baron Comyns, (2 Com. Dig. 538. 648; G. 8;) drew this conclusion from the cases, that, if execution be upon a judgment against the King's debtor, and before a *venditioni exponas*, an extent comes at the King's suit those goods cannot be taken on the extent. Therefore as well on the decisions as on the construction of the statute 33 Hen. 8, the plaintiff is entitled to recover." After the decision of these two cases of *Uppom* v. *Sumner* [2 W. Bl. 1251, 1294], and *Rorke* v. *Dayrell* [4 T. R. 406], come the case of *The King* v. *Wells and Allnutt* [See 16 East 278], in the Court of Exchequer, which as to the point upon which the Court delivers their judgment, for there was another upon which the case might have been put, was precisely similar to the present. The Court of Exchequer gave judgment for the Crown; and such has been the practice of that court ever since. That case, however, was principally founded upon the case of *The King* v. *Cotton* [Parker 112]. The principle on which that case was decided, being stated in the judgment of the Lord Chief Baron in *The King* v. *Wells and Allnutt*, to be, that if the King's execution bore teste before the property was altered, it bound that property. The case, however, of *The King* v. *Cotton* arose upon a distress, and not upon an execution, which I apprehend, and it is so stated by Lord **[167]** Kenyon in his judgment of *Rorke* v. *Dayrell*, makes a material difference; the sheriff, in the case of seizure under an execution, having in my judgment at least a special property in the goods. In the case of *The King* v. *Wells and Allnutt*, the Lord Chief Baron relied much on Stringefellow's case [Dyer 67 b.], the difference between which and the present case I have already pointed out, viz. that in that case, the *liberate* is the execution, and was not issued until after the issuing of the Crown process. The question was afterwards brought before the King's Bench, in *Thurston* v. *Mills*, (16 East. 254,) and twice argued, and the Court were prepared to give their judgment; but on the day on which it was to have been given, they suggested a doubt as to the form of the action, and directed a third argument upon that point only, upon which they gave their judgment against the plaintiff. What the judgment was which the Court were prepared to give upon the general question, it is impossible to say. It is not probable that it was in favour of the defendant, or at least unanimously so, for if so, they would probably have put the question at rest for ever. It is not likely the Court would have raised another question, and have given their judgment upon the question so newly raised. With respect to the observation which has been made, that if the statute were to be construed literally, the Crown would be in a worse situation than the subject, if the King's suit must be commenced before judgment given for the subject; for then, if the subject's judgments be first, he would have preference, though his execution were last, which is not the case even between subject and subject. I apprehend the true answer to that observation is, what was suggested by Mr. Justice Buller, in his judgment on *Rorke* v. *Dayrell*. He thought it unnecessary to decide on that **[168]** particular case, viz. that in case of a laches or delay on the part of the subject, his execution would be postponed. I believe, by looking to the writ of extent itself, it will appear by the terms of it that it is issued by virtue of this statute. Without trespassing further, therefore, upon your Lordships' time, my humble answer to your Lordships' questions are, first, that this writ of extent shall not be executed by the sheriff by extending the same goods, seizing them into the King's hands, and selling them to satisfy the Crown debt, without regard to the writ of *fieri facias*, under which he had at first seized them; and secondly, that all other things remaining the same, it makes no difference whether the extent was in chief or in aid.

Mr. Justice Littledale: The question is, whether under the particular circumtances of this case, the execution of the Crown or that of the subject is to prevail. Connected with these questions, the case of *Oppom* v. *Sumner*, (2 Black. 1251. 1294,) came before the Court of Common Pleas in 1779, and was decided against the Crown; *Rorke* v. *Dayrell*, (4 T. R. 402,) afterwards came before the Court of King's Bench, and was also decided against the Crown. Then, *The King* v. *Wells and Allnutt*, (16 East. 278, *n.*) came before the Court of Exchequer, and was decided in favour of the Crown. After that, *Thurston* v. *Mills*, (16 East. 254,) came before the Court of King's Bench, in order to have the question settled; but after hearing the case argued twice upon the principal point, it went off on a point of form, that an action for money had and received would not lie, and therefore the question remained as it was. As no judgment was delivered, it is immaterial to conjecture what the opinion of the judges was. After these, *The King* v. *Sloper and Allen*, (6 Price, [169] 114,) came before the Court of Exchequer, and the Court there acted upon the case of *The King* v. *Wells and Allnutt*, in favour of the Crown. In this case an information in the nature of an action for a false return was filed, and after judgment for the Crown in the Court of Exchequer, the Court of Error, when it had been twice argued, determined that an information for a false return would not lie, as the return was true in fact though false in law. In giving my opinion, I shall not consider whether the judges on these occasions were more or less competent to decide them, from having filled one situation or another, or whether any of them laid too much or too little stress upon former authorities; such a discussion would protract the case into a very great length, without any beneficial result. The present case is brought forward to settle the law where there have been contrary decisions; and I shall consider the case as it would have stood if none of these later cases had occurred. In ascertaining what is the King's prerogative, two questions arise; first, as to its extent independently of the statute 33 Hen. 8, c. 39; and secondly, upon the effect of that statute. The Crown, by its prerogative, has some privileges and advantages by the Common Law beyond what a subject has, and a reason for this is given in Gilbert's History of the Exchequer, p. 90; "because the public ought to be preferred to private property, and the rather because the King is supposed by public business not to be able to take care of every private affair relating to his revenue; and therefore, no time occurs to the King, and if he was to be prevented of his execution by another person coming in before him, laches must be imputed to him, which the law does not allow." And in Co. Litt. 131 b., Lord Coke gives, as a reason, "that *thesaurus regis* [170] *est fundamentum belli et firmamentum pacis.*" And there is no doubt, that where the King and subject stand in an equal degree, the King's prerogative must prevail. One of the advantages which the King had was, by giving protection to his debtor, that he might not be sued or attached till he paid the King's debt. But inconvenience being felt from it, it was enacted by 25 Ed. 3, c. 19, "That notwithstanding such protections, the parties which have actions against their debtors shall be answered in the King's Court by their debtors, and if judgment be thereupon given for the plaintiff as demandant, the execution of the same judgment shall be put in suspense till *gree* be made to the King for his debt; and if the creditors will undertake for the King's debt, they shall be thereunto received and shall have execution against the debtors of the debt due adjudged to them, and also shall recover against them as much as they shall pay to the King for them." No question can arise upon this Act of Parliament, because it only applies to those cases where protection had been granted to the King's debtors, which has not been done here; and indeed, it apears from Co. Litt. 131 b., that these protections are now entirely fallen out of use.

On the part of the Crown it is contended, that the King, by his prerogative, has a right to be first served and paid by his debtors, provided his process issues at any time before there is a complete divesting of the property out of the debtor. And that, although upon the seizure by the sheriff under an execution, there is a special property vested in him, yet that the general property remains in the debtor till there is an absolute alteration, which can only be by sale. This extent of prerogative is denied by the judgment creditor, and he says, that upon the seizure by the sheriff, the property [171] is divested out of the debtor; and whether it be so or not, yet that the execution is executed by the seizure, and that the Crown process comes too late.

The first case in the order of time relied on by the Crown, is that of *Stringefellow*

v. *Brownesoppe*, (Dyer, 67 b.), which as it has been already stated, it is not necessary for me to go through again. The same case is also to be found in Roll Abr. 528, tit. Prerogative de Roy. Some doubt seems to have been expressed at the time as to the propriety of the decision, but assuming it to be right, I do not think it trenches on the grounds on which I form my opinion, because that was an *extendi facias* on a statute staple, under which the goods are by a writ directed to be seized into the hands of the Crown; and after that is done and so returned by the sheriff, another writ called a *liberate* issues, demanding the sheriff to deliver them to the creditor to hold until he shall be satisfied his demand. The property therefore does not pass out of the debtor till the *liberate*, and the execution cannot be considered as executed till the *liberate* is executed. And in *Blayne's* (Cro. Eliz. 47) case, where a question arose, whether a lessee was liable for rent incurred before the time of a writ of *extendi facias* and a *liberate*, it was held, that before a *liberate* awarded, *nihil operatur*, and the writ of *extendi facias* is but of form when it speaks of seizing into the Queen's hands, for it never was seen that lands were seized upon that writ. *The King* v. *Andrew*, (Hardr. 23), is relied upon on the part of the Crown, for what Chief Baron Steel gives as the reason of his judgment against the Crown, that the title of the subject was prior to that of the King, and was executed. Whatever effect that opinion of Chief Baron Steel may have upon the statute 33 Hen. 8, it can have none to support the **[172]** doctrine of prerogative contended for on the part of the Crown, because as the title of the subject was complete on the delivery of the land on the eligit, the question of prerogative could not arise. The case of *Smallcombe* v. *Cross and Buckingham*, (1 Ld. Raym. 275; 1 Salk. 320; 5 Mod. 376, and in other books,) has also been mentioned. That arose on two writs of *fieri facias*, at the suit of different creditors, delivered to the sheriff on the same day, and he executed the last the first, and therefore proves nothing as to the point of prerogative. And as to any question arising, whether the execution was executed, it is to be observed, that there was no seizure under the first writ. In the report of 5 Mod. Shower says, in argument as to the prerogative, "that if the King's writ of extent came out after execution, yet the execution is superseded, and the King's extent shall take up the goods; but if the sheriff had sold the goods by bill of sale, etc. the property is altered and shall not be divested by the King's writ." This does not reach the point under consideration, for he does not state at what stage of the execution the King's extent is supposed to come in, and if it did bear upon the point, it is only the statement of counsel. In *Sir Edward Cook's* case, (2 Roll's Rep. 294.) Mr. Justice Doddridge says, in page 296, "If a writ comes for the King before the execution is finished, the King shall be preferred, as is to be seen in the case of *Brownesoppe*, in 4 and 5 M." [Dyer 67 *b.*] But the question is, when in point of law the execution is finished, and as he takes his authority from *Brownesoppe's* case, his opinion carries it no further than that case; Chief Justice Hobart, in p. 299, of the same case, says, "it is certain that where a man is debtor to the King, the King shall never lose his debt but where there is nothing to satisfy **[173]** him." This expression of Hobart does not, however, advance the point contended for by the Crown, for nobody could have any doubt about that. *The Attorney-general* v. *Capell*, (2 Show. 480,) was a question between the Crown and the assignees of a bankrupt, and in the conclusion of the case it is said, "Extents have been held good, that have been made upon goods actually levied by virtue of a *fieri facias* and in the sheriff's custody, the extent coming before bill of sale made, so as the property was not altered." As far as that statement goes, it is in point for the Crown, but it does not appear how that statement came to be introduced. Sir Bartholomew Shower argued the case as counsel for the assignees, and after his argument, he says, that it was answered, etc. etc., by which I understand, that it was answered by the counsel for the Crown. Then a case in the Exchequer is cited, and then at the end of the case, the statement above mentioned is added; and which, therefore, I presume, was added by the counsel for the Crown by way of illustration; and if so, it is only the statement of counsel. *The King* v. *Cotton*, (Parker, 112,) is also relied upon, as in favour of the Crown; but that was a case of a distress for rent, which had been seized and appraised before the extent came in, but there is a great difference between a distress and an execution. Chief Baron Parker, in p. 121, says, that "a distrainor neither gains a general nor a special property, nor even possession in the cattle or the things distrained. He cannot maintain trover or trespass, for they are in

the custody of the law by the act of the distrainor, and not by the act of the party distrained upon." In p. 125, he says, "Though a sheriff may maintain trespass or trover for goods taken in execution by him against a wrong-doer, because he is answerable over for the [174] value, yet goods so taken in execution remaining unsold are liable to seizure upon an extent." This opinion of Chief Baron Parker is in point for the Crown, and though it was not upon the question in the case, yet it is illustrative of it, and is certainly entitled to great attention. *The King* v. *Peck* (Bunbury, 8,) is in point for the Crown, if it can be relied upon. That was a question, whether the sheriff should amend his return, and upon an order being made it appears to have been what the sheriff wanted. At the end of the case there is a N. B. "it was taken for granted, that though the goods were levied by virtue of the *fieri facias* three days before the teste of the writ of extent, yet that was no bar to the Crown, but, *quaere*, if they had been sold, for then execution had been executed." If the last reason be the only one that can be adduced, I think it cannot be supported, as I think the execution is executed by the seizure under the *fieri facias*. What is said in Chief Baron Gilbert's History of the Exchequer, p. 89, may also be cited for the Crown. He says, "but goods were bound at Common Law from the teste of the writ, whether it was a *levari* or a *fieri facias*, because otherwise the debtors by alienation of the chattels might disappoint the executions of their lords, who having by their process a right to distrain goods, there arose a lien on those goods from the time the *levari* was taken out, and the King's prerogative could not be less than the right of the subject, and therefore bound the goods from the teste of the writ; but this was found inconvenient, and therefore by 29 Car. 2, c. 3, no execution shall bind the property of goods but from the time of the delivery of the writ to the sheriffs;" but this Act seems not to extend to the King, for an extent of a later teste supersedes an execution [175] of the goods by a former writ, because, by the King's prerogative at Common Law, if there had been an execution at the subject's suit and afterwards an extent, the execution was superseded till the extent was executed, because the public ought to be preferred to private property, and the rather because the King is supposed by public business not to be able to take care of every private affair relating to his revenue, and therefore no time occurs to the King; and if he was to be prevented from his execution by another person coming in before him, laches must be imputed to him, which the law does not allow, and since the King is preferred in the execution, therefore an executor is obliged by the law to pay the King's debt on record, before a debt on record to a subject. Where the Chief Baron is, as above, speaking of the King's prerogative as to priority of execution, it does not appear what particular circumstances of the subject's execution he alludes to. He afterwards goes on to point out instances where the King's extent shall be preferred though the subject's execution is running at the same time; but they appear to apply to cases of the subject's execution on a statute staple, as to which no doubt can be entertained but that it is not complete till the *liberate*. The expression of Lord Mansfield, that no inception of an execution shall bar the Crown, is also relied upon for the Crown; but the question is, what is an inception of an execution, and whether this execution has not gone beyond an inception, and whether the execution is not executed.

These appear to be the principal authorities for the Crown as to the general extent of the prerogative, independent of the statute Hen. 8. There can be no doubt but the property is partially divested out of the debtor, and up to the extent of enabling the sheriff to [176] carry the writ into effect he has a special property in the goods; and so far the property is changed, and the sheriff may maintain either trespass or trover against persons who take the goods from him without lawful excuse, as appears by the cases *Tyrrel* v. *Bash* (Cro. Eliz. 639), *Wilbraham* v. *Snow* (2 Saund. 47), and is taken for granted in *Clerk* v. *Withers* [1 Salk. 322, 323], to which I shall presently refer, and in *The King* v. *Cotton* [Parker, 112], already cited. The property is not vested in the creditor, though the contrary is laid down in some cases, because the sheriff is not to deliver the goods to the plaintiff; he is to make of the goods the sum recovered by the judgment, and which sum is to be paid to the plaintiff, who, by the mere seizure, has nothing to do with the goods; and, in that respect a *fieri facias* differs from an elegit, where the sheriff is to deliver goods, as well as lands, to the plaintiff at a reasonable price. But I think that the property is not wholly divested out of the defendant by the act of seizure, because if a second execu-

tion come in before sale under the first, the sheriff may seize under that, which he could not do if the property were wholly out of the debtor; and so, if upon a writ of *fieri facias* the sheriff has sold as much as will satisfy the first writ, and he continues to go on and sell other goods, the debtor may have an action of trover against the sheriff for such sale, as appears by the case of *Stead* v. *Gascoigne* (8 Taunt. 527). And so also the debtor may, I apprehend, maintain trover against the sheriff in case of his selling after the debtor has tendered him the amount of the money to be levied under the writ, vide *The King* v. *Bird* (2 Show. 87). The Crown contends that as it is only a special property which is divested out of the debtor, and the general property remains in him, the execution of the Crown is to [177] attach upon the whole property, as much as if there had been no special property divested. But I do not assent to that, and I think that the execution of the Crown cannot have any greater effect upon the property which remains in the debtor than the execution of a private individual upon it.

It will be proper to see what is the effect of the seizure; whether it constitutes a change of property or not in case of other conflicting creditors; whether under executions, or commission of bankrupts, or otherwise; and I think that, generally speaking, as between subject and subject, the execution is executed by the mere act of seizure, and as the execution is begun the sale cannot be stopped by any subsequent proceedings. It is so in case of a writ of error, which operates as a supersedeas from the time of the allowance of the writ of error. If it be allowed before the goods are seized, it operates as a supersedeas. This point was completely settled in the case of *Menton* v. *Stevens*, (Willes, 271); and Chief Justice Willes enumerated several cases on the subject, which I shall here state from his judgment in the case of *Charter* v. *Peeter*, 40 Eliz. Cro. Eliz. 597, in the King's Bench: it was this: a *fieri facias* was awarded, by virtue whereof the sheriff took the defendant's goods, and before sale the record was removed into the Exchequer Chamber by writ of error, and a supersedeas awarded. The sheriff returned a seizure of the goods, and that they remained in his hands, *pro defectu emptorum:* a restriction was prayed, but denied, and it was holden, *per totam curiam*, that as the sheriff had begun the execution regularly, he must complete it as far as he had gone, and a *venditioni exponas* was awarded to perfect it. It is there said it was so held in the case of *Sir Miles Corbet* v. *Rookwood*, 39 Eliz., though the record was removed by [178] a writ of error; and in Dyer, 98, a., 99, b., there is a case exactly to the same purpose. In Moore, 542, Hilary, 40 Eliz., if the sheriff take goods in execution under a *fi. fa.*, and has them in his hands not sold, and then a supersedeas comes to the sheriff, yet he shall not deliver the goods, but shall proceed to the sale of them, because the beginning of the execution was before the supersedeas delivered, and the execution being entire, shall not be divided. In *Pocock* v. *Honeyman* (Yelv. 6), a writ of error and supersedeas to the sheriff after a *fi. fa.*, he shall proceed to the sale of the goods which he has levied before the supersedeas, but shall levy no more, *per totam curiam*. In the case of *Baker* v. *Bulstrode* (1 Vent. 255), it was held, that if, before the writ of error, the sheriff returns *fieri feci et non inveni emptores*, the execution is not to be undone. And in the case of *Clerk* v. *Withers* (1 Salk. 322, 323), it is said, that the execution is one entire thing, and is not to be superseded after it is begun. The only case to the contrary is in 2 Roll. Abr. 491, where it was said, that if the supersedeas comes before the sale, the goods shall not be sold, because (as it is said there) the property is not altered by the seizure; which reason not being a true one, Chief Justice Willes says, I give no credit to this case. Now, from the determination above cited, it appears that the execution is considered as executed by the seizure under the *fieri facias;* and though the writ of supersedeas forbids the sheriff from executing any process of execution, he may, nevertheless, proceed to sell goods already seized.

I shall now state other cases in which it appears to be considered that the execution is complete by the seizure under the *fieri facias*. *Lechmere* v. *Thorowgood and another*, sheriffs of London (3 Mod. 236), was an action of trespass by the assignees of a bank-[179]-rupt, for taking their goods. On a special verdict, it was stated that one Toplady, on the 28th of April, became bankrupt, against whom a judgment was formerly obtained. The judgment creditor sued out a *fi. fa.* and the sheriffs, on the 29th of April, seized the goods of Toplady. After the seizure, and before any *venditioni exponas*, that is, on the 4th of May, an extent issued against two persons

who were indebted to the King, and by inquisition Toplady was found indebted to them, whereupon parcel of goods were seized by the sheriffs upon the extent, and sold ; but before the sale, or any execution of the Exchequer process, a commission of bankrupt issued against Toplady, and the commissioners, on the 2d of June, assigned the goods to the plaintiff. The question was, whether the extent did not come too late, and it was held it did ; or whether the *fi. fa.* was well executed, so that the assignees of the bankrupt's estate could have a title to those goods which were taken before in execution, and so in *custodia legis*, and it was held they had no title. The same case is reported in 1 Shower, 12 ; and it is said in a note in Shower, that it was decided entirely with reference to the liability of the officers. It is also reported in Comberbach, 123 ; and Lord Holt there says, " that the property of the goods is vested by the delivery of the *fieri facias*, and the extent afterwards for the King comes too late, and that on the statute of frauds and perjuries." The reason given is not a correct one. It is most likely a mistake of the reporter ; and taking into consideration the whole of the various reports of this case of *Lechmere* v. *Thorowgood*, I do not consider it as having decided this precise point, but only as showing a general opinion of the judges of that day, that the extent of the Crown should not be preferred to that of the subject in a case [180] like the present. *Clerk* v. *Withers*, though it does not relate to an extent, yet it shows in what light the seizure under a *fi. fa.* is considered, and that the execution is thereby in effect considered to be executed. It is reported also in 6 Mod. 290, 2 Lord Raym. 1072, 1 Salk. 322. That was a writ of error on a judgment in the Court of Common Pleas upon a *scire facias*, by Clerk against the defendant, sheriff of Middlesex. The case appeared to be, that one Dives, as administrator of J. S., had recovered a judgment for £304 against Clerk, and sued out a *fi. fa.* directed to the defendant, sheriff of Middlesex ; and upon that writ the defendant returned that he had seized goods to the value of the debt, and that they remained in his hands for want of buyers. Afterwards, and before the goods were sold, Dives died, and Clerk sued out this *scire facias* to the defendant to show cause why the goods should not be restored to him, supposing, that now that Dives was dead, there was nobody could have the fruits of execution ; and upon demurrer to this writ judgment was given for the defendant in the Common Pleas. The point determined is, that the death of a party, who has sued out a *fieri facias* after the seizure of goods, but before the sale of them, will not abate the execution, or entitle the party against whom the execution was sued out, to a restitution. In Lord Raymond, Lord Holt says, " After seizure of the goods there is nothing to be done by the sheriff but to bring the money into Court ; " and Mr. Justice Gould says, " The substantial part of the execution is executed in the lifetime of the executor, and there is nothing wanted to complete it but the formal part. For as soon as the sheriff seizes the goods by virtue of the writ of *fieri facias*, he gains a special property in them, and may maintain trespass against the [181] defendant if he takes them away." So it is said in Cro. Eliz. 635, he may maintain trover against a stranger that takes them away. *Wilbraham* v. *Snow*, (2 Saund. 47, 1 Lev. 282), Mr. Justice Powel says, " An execution is an entire thing, and that sheriff that takes the goods in execution shall go on and sell, though he is out of his office, and not the now sheriff." And in the report 6 Mod., Mr. Justice Powis says, that the selling is but the formal part of the execution. In the judgment of the Court in Salkeld, it is said, " An execution is an entire thing, and cannot be superseded after it has begun." I shall now state in what cases the execution has been considered as executed, arising upon questions of the construction and operation of the bankrupt laws. By 21 Jac. 1, c. 19, s. 9, it is enacted, " That all and every creditor and creditors having security for their several debts by judgment, statute, recognizance, specialty, or other security, or having made attachments of the goods and chattels of the bankrupt, whereof there is no execution or extent served and executed upon any of the lands, tenements, hereditaments, goods, chattels, and other estate of the bankrupt, before such time as he shall become bankrupt, shall not be relieved on any such judgment, statute, etc. for any more than a rateable part of their just and due debt with the other creditors of the bankrupt, without respect to any such penalty or greater sum contained in such judgment, statute, etc. or other security." Upon this statute it has been determined, that where a creditor has obtained a judgment, and sued out a *fieri facias*, and a seizure has been made under it, if before sale an act of bankruptcy intervenes, the judgment creditor shall not be

obliged to come in under the commission, but the sheriff may proceed to [182] sell the goods. The words of the act being, "whereof there is no execution or extent served or executed," it might be contended, that the execution under which the sheriff has seized, but not sold, is not an execution executed, because there has been no sale; but the determinations upon the statute of James show, that as soon as goods have been seized under the *fieri facias*, that is considered in law as being an execution executed, and the sale is but a formal part of the execution of the process, and has therefore no further effect on the goods in respect of the alteration of the property in them. It cannot be necessary to quote any authority for this position, because the constant practice at *Nisi Prius* in disputes between the assignees of a bankrupt and the judgment creditor, is to inquire whether the act of bankruptcy, or the seizure of goods under a *fi. fa.*, was first, and to consider the execution executed by the seizure under the *fieri facias*. I think, therefore, it appears quite clear, that on all cases between subject and subject, the execution is considered as executed by the mere seizure of the goods under the *fieri facias*. Then the material question is, whether under the process of the Crown the same rule is to hold as between subject and subject. There is no doubt but the interest of the Crown is to be preferred, all things being alike in the two cases. The Crown has a preference by having the goods bound from the *teste* of the extent, which is an advantage that the subject has not; and if the extent be tested before the seizure under the *fieri facias*, the extent will prevail; but there seems no reason upon principle, why, if a rule be perfectly well established as between subject and subject, that the execution is executed by the seizure under *fi. fa.*, the same principle should not be applied in all cases, even where the Crown is concerned. There [183] is no doubt a sort of property remaining in the debtor, upon which, as a second execution may attach, the extent may attach also; but it does not therefore follow that it is not only to attach, but also to do away with the execution in the sheriff's hands. And it should seem that the extent ought only to affect that portion of the property which remains in the debtor, in the same way as the second execution of a private creditor does. In the case of a pledge of goods by the owner, the Crown's extent can only take the goods subject to the pledge, as is admitted by Chief Baron Parker in *The King* v. *Cotton* [Parker], p. 118. So also in *The King* v. *Lee* (6 Price, 269), it was held, that if a factor has a lien upon goods in respect of acceptances, it was held that the Crown could only take the goods subject to the claim of the factor. So also, according to the case of *Casberd and another* v. *Ward and others* (6 Price 4, *n.*) a deposit of title deeds by a simple contract debtor of the Crown is an equitable mortgage, and binds the Crown. So a wharfinger has a lien against the Crown for his general balance. And if, by the charge upon the property by the contract of the party, the Crown only takes it subject to the charge, the same reason ought to apply where a creditor has obtained a claim upon the property by the process of the law. I shall now consider what effect the 33 Hen. 8, c. 39, has upon the case. By the 50th section of the Act, bonds to the King are put on the same footing as statutes staple; and in the 52d and following sections, up to and including the 57th, provisions are made for the course of proceeding for the King's debts; a further provision is made in the 73d section; and then comes the 74th, upon which the question arises, "That if any suit be commenced or taken, or any process hereafter awarded, for the King, for the recovery of any [184] of the King's debts, then the same suit or process shall be preferred before the suit of any person or persons; and our said Sovereign Lord, his heirs and successors, shall have first execution against any defendant or defendants of and for his said debt, before any other person or persons, so always that the King's said suit be taken or commenced, or process awarded, for the said debt, at the suit of our said Sovereign Lord the King, his heirs or successors, before judgment given for the said other person or persons." And, in my opinion, as there was no award or process for the King's debt till after judgment was obtained for the private creditor, and till after the goods were seized under a *fieri facias*, the execution at the suit of those creditors must prevail over the extent. In construing acts of parliament it is a safe rule to follow the very words of the act, unless so strict an interpretation be irreconcileable with other clauses, or be contrary to the general intent of the act, or be inconsistent with some established principle of law, which it may be supposed it was not intended to interfere with. But general objections are made to this right of the creditors falling within this act of parliament: it is said, first, that this pro-

ceeding by extent is not a taking or commencing a suit, or awarding process. It is certainly not taking or commencing a suit, but I think it is awarding process. An extent is a writ, and is constantly so called. It commands the sheriff to take the body of the debtor, and so far that part of the execution is complete. It is true that, as to goods, it is not complete till a *venditioni exponas* issues, as it is part of the command of the writ that the goods are not to be sold till a writ of *venditioni* issues; and so, in the case of a subject, the execution on a statute staple is not complete till a **[185]** *liberate* issues; but then when the writ of *liberate* is sued out, it has relation to the writ of extent, and they become but one extent, as is said by the Court in *Audley* v. *Halsey* (Cro. Cra. 148). But I cannot doubt that a writ of extent is process, not only immediate extents in chief, but also extents in aid; and as soon as a debt from a third person to the King's debtor is found by inquisition, and recorded, it falls within the 55th and 56th sections of 33 Hen. 8 [c. 39], and an *extendi facias*, as there mentioned, may be awarded. The common course of proceeding upon a record debt to the Crown, whether it be originally of record, or whether it be not originally of record, but recorded by inquisition under a commission, is by *scire facias*, where the debt is not in danger of being lost, and in that case the *extendi facias* is the ultimate process of execution; but if the debt be in danger of being lost, then an extent may issue in the first instance. But no extent in the first instance, either against the immediate debtor to the Crown, or against persons indebted to the Crown debtor, ever issues, unless there be an affidavit that the debt is in danger. In *The King* v. *Pearson* (6 Price, 292) Chief Baron Thomson says, "In the case of an extent, an affidavit of the insolvency of the debtor is made, but if that cannot be done, the *scire facias* is the only course." The Crown has not an election except in cases of insolvency. And the rule in the Exchequer of the 15th Charles requires that he who desires any debt to be proved by inquisition in his aid, shall make oath, amongst other things, that the debtor is much decayed in his trade, so that, unless a speedy course be taken against him, the debt is in great danger to be lost. But it can make no difference as to the nature of the extent, whether it issue upon a judgment obtained by a *scire facias*, or whether it issue **[186]** in the first instance. The proceeding by extent in the first instance is alluded to in the 55th section of the statute of Henry 8 [33 Hen. 8, c. 39], as one way of proceeding, by the various modes there mentioned, and, amongst others, by *extendi facias*, if need shall require; and in this very record the extent is said to be according to the form of the statute made for the recovery of the debts of our Lord the King, as is the common form. But I do not think it material whether the extent in aid be an execution or not, for, at all events, it is a process for the recovery of the King's debts, which is all that the statute mentions, for it is something sued out, by which, in the usual course of the Court, the King's debt will eventually be paid. It is said the 74th section applies only to land and not to goods. I see nothing in the clause so to restrict it; the 56th section speaks of execution upon the body, lands, and goods of the party, and there seems no reason to suppose that the 74th section should be less extensive in its operation.

Assuming, then, that the 74th section applies to the case of extents in aid, and also to goods, it is to be considered whether it increases or abridges the prerogative of the Crown, and in what degree. Upon this statute it was held, in *Sir Thomas Cecil's* case (7 Rep. 93, b.) that the act has given a benefit and advantage to the King, first, in making every bond made to the King in the nature of a statute staple; secondly, in giving remedy to the King himself for obligations made to others to his use; thirdly, to recover costs and damages; fourthly, in suing of executions for all his debts; fifthly, that the King shall be preferred in his execution before common persons; sixthly, in charging the issue in tail, and the heir who hath the land of the gift of his ancestor. And therefore it was **[187]** the intent of the act to gratify the subject, that where a new provision was made for the levying of the King's debt in a more speedy and beneficial manner than the King had before, the subject also should have new benefit which he had not before. And it may be said here, that one of the new benefits was to give the subject a preference in cases where his judgment was obtained before the extent of the King issued. In *The King* v. *Andrew* (Hardr. Rep. 27), Mr. Baron Parker says, "The King has many prerogatives *pro bono publico*; but in the case in question, the statute 33 Hen. 8 abridges the prerogative, and controls the common law. Affirmative statutes do not alter the common

law, but negative statutes do, and here is a negative implied." And Mr. Baron Nicholls says, " Before the statute 33 Hen. 8 the King was not bound, but the statute has made an alteration, though it sounds in the affirmative, for it enacts a new thing, and *ita quod*, which makes a condition precedent and a limitation." Here are, therefore, opinions expressed, in different cases, as to the general effect of the statute in abridging the King's prerogative. And *The King* v. *Dickinson* (Parker's Rep. 262), is a confirmation of this doctrine as to the effect of the statute of [33] Hen. 8 [c. 39]. A. was indebted by judgment to B., and by bonds to C. and D., and by simple contract to E., and died; E. being a debtor to the King, caused the debt due to him to be seized into the King's hands; and upon this a *scire facias* issued against Dickinson, executor of A., and before the return of it C. and D., the bond creditors, obtained judgment; and then Dickinson pleaded to the *scire facias* the first judgment, and the subsequent judgments. The Attorney-general demurred. The Court held that the King's debt should be preferred before the subsequent judgments and before [188] any bond; but a precedent judgment should be preferred before it upon the words of the stat. of Hen. 8. And Chief Baron Comyns, in his Digest, tit. *Debt*, (G. 9), says, " By the statute 33 Hen. 8, c. 39, suit or process for the King's debt shall be preferred before other persons, so always as that the King's suit be commenced, or process awarded, before judgment for the said other persons; " and in the next placitum he says, " and, therefore, if execution be upon a judgment against the King's debtor, and before a *venditioni exponas* an extent comes at the King's suit, the goods cannot be taken on the extent," and he refers to 3 Mod. 236, and Hardres, 27. The former of these cases is *Lechmere* v. *Thorowgood*, and the latter is *The King* v. *Andrew*, upon which I have already remarked; and I only quote this passage from Comyns' Digest to show, in a general way, in what light he considered the statute of 33 Hen. 8 [c. 39]. The meaning of the 74th section seems to me to be, that if the Crown proceeds to execution it shall have the first execution; but in order to be entitled to that privilege, the suit must be commenced, or process be awarded, at the suit of the King, before the judgment obtained by the creditor, and that unless it be so the Crown shall have no such priority. By the first execution, I understand, the prerogative privilege of execution, whatever that privilege may be, and of which the Crown may avail itself if there be process from the Crown before the judgment by the creditor. But if the process be not awarded before such judgment obtained, then the Crown stands in no other light than a common creditor. The cases of *Butler* v. *Butler*, (1 East, 338), and *The Attorney-general* v. *Aldersey*, there cited, may be mentioned as in favour of the Crown on the construction of the statute of Henry 8; [189] but there the only question was, whether a penalty constituted a debt, which the courts held it did; but in both those cases the proceedings on the part of the Crown were commenced before the judgments were given for the subject, and therefore they could not avail themselves of the provisions of the statute.

Upon the best consideration I have been able to give to this case, I think that this writ of extent should not be executed by the sheriff, by extending and seizing the goods into the King's hands, and selling them to satisfy the King's debt; and I think it makes no difference whether the extent be in chief or in aid.

Mr. Baron Bayley: The question proposed for the consideration of the Judges is in substance this, whether, if the sheriff has seized the goods of a debtor under a *fieri facias*, and those goods remain unsold in the sheriff's hands, they are liable to an extent of the Crown, tested after such seizure, and may be seized and sold to satisfy the Crown's debts, without regard to the writ of *fieri facias*? and I am of opinion that they are so liable. The writ of extent directs the sheriff to inquire what goods and chattels the King's debtor, against whom it issued, had in his bailiwick at the time it issued, and to take and seize the same into his hands, there to remain until the King's debt be satisfied. The question then is, whether, by the seizure under a *fieri facias*, the goods so seized cease, as against the Crown, to any and what extent to be the goods and chattels of the debtor, or whether the Crown is not entitled to treat them as the goods and chattels of the debtor, to all intents and purposes, and to the same extent, as if there had been no seizure under the *fieri facias*?

The command to the sheriff by the writ of *fieri facias* [190] is, that of the goods and chattels of the defendant he cause to be made the sum for which judgment is given. Till money is made the execution is in progress only. The seizure of goods

is only in order that money may be made; the goods are still the debtor's goods. If he satisfies the execution, it is matter of right that they shall be returned to him; he has no occasion for a bill of sale from the sheriff; he is entitled to them upon the footing of his original ownership. If the act of God destroys them, he has no remedy. That the Crown is entitled to consider land and goods as continuing the land and goods of the King's debtor notwithstanding a seizure thereof into the King's hands upon an *extendi facias* out of Chancery, upon a statute staple, is clear from *Stringefellow's* case [Dyer, 67, *b*], which has been cited; and the foundation of that right may be collected from the recital in the writ, that is, the prerogative of the Crown to be first paid and served by its debtors; and if the prerogative is to prevail against a seizure into the King's hand upon an *extendi facias*, why is it not to prevail against a seizure into the hands of the sheriff, who is the King's minister, upon a *fieri facias?* Can any satisfactory reason be given for a distinction? The foundation of the King's right, in the one case, is, that the property remains in the original owner till *liberate;* and I apprehend it remains, as against the Crown, in the other, in the original proprietor, till the things are sold. That the Crown is entitled to consider property as continuing to belong to the King's debtor, notwithstanding a commission of bankruptcy, which has been called a statuteable execution, until a conveyance is made thereof under the commission, is established by *Rex* v. *Hanbury*, in 1668; and *Rex* v. *Capel*, in 1686 (2 Show. 481); and *Brassey* v. *Dawson* (Strange, 978,) in 1733; and that it is equally entitled, notwithstand-
[191]-ing a seizure upon a distress for rent, is taken for granted in *Rex* v. *Dale* (Bunbury, 42), in the year 1719, and was solemnly adjudged in *Rex* v. *Cotton* (Parker, 112), in 1751. But I forbear stating these cases at length to the House, notwithstanding the strong analogy they bear to the case supposed in your Lordships' question, because they have been already stated, and because the authorities directly upon the point are so numerous and strong. The first authority I am aware of upon the point is the dictum of Mr. Justice Doddridge, in *Sir Edward Cooke's* case (2 Roll. 295). He lays down this position, "If a writ come from the King before the execution of the subject be finished, the king shall be preferred, as may be seen in *Brownsoppe's* case and in *Stringefellow's* case; and though there be sufficient for you and for the King, you must wait till the King is satisfied; and if there be not enough for both, you must suffer not only delay but loss; for when the public and private interest are put in the balance of justice, the public shall weigh down the private, because the public is better than the private." In *The Attorney-general* v. *Capel*, in the Exchequer, (Show. 481), Shower says, "Extents have been held good that have been made upon goods actually levied by virtue of a *fieri facias*, and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." In *Smallcombe* v. *Buckingham* (5 Mod. 376, 377,) where the question was, which of two subjects' writs of *fieri facias* should have the priority? it had been said, *arguendo*, that if the King's writ came after a sale by the sheriff under a *fieri facias*, the goods might be seized again for the King. Shower sets the matter right: "If the King's writ of extent comes out after execution, yet the execution is superseded, and **[192]** the King's extent shall take up the goods; but if the sheriff had sold the goods by bill of sale, the property is altered, and shall not be divested by the King's writ." In *Rex* v. *Peck* (Bunbury, 8) 1716, the sheriff seized upon a *fieri facias* from C. B. in April, but before he sold, an extent was delivered to the sheriff, tested 2d of May. A motion was made to amend his return to the extent. Bunbury makes this note, "N.B. It was taken for granted, that though the goods were levied by *fieri facias* three days before the *teste* of the extent, yet that was no bar to the Crown, but *quaere* had they been sold, for then execution had been executed." At no great distance of time, viz. 9th of June 1722, Gilbert was made a baron, and on the 1st of June 1725 chief baron; and his Treatise upon the Court of Exchequer will show what was his opinion upon this point. He had just been stating that the King's prerogative could not be less than the right of the subject, and that the *levari* or *fieri facias* of the subject bound his debtor's goods from the *teste* of the writ. This, he says, was found inconvenient, and occasioned the provision in 29 Car. 2, that no execution should bind the property in goods but from the delivery of the writ to the sheriff. "But this act," he continues, "seems not to extend to the King, for an extent of a later *teste* supersedes an execution of the goods by a former writ, because, by the king's

prerogative at common law, if there had been an execution at the subject's suit, and afterwards an extent, the execution was superseded till the extent was executed, because the public ought to be preferred to the private property, and the rather, because the King is supposed, by public business, not to be able to take care of every private affair relating to his revenue, and therefore **[193]** no time occurs to (*i.e.* hinders or obstructs) the King; and if he was to be prevented from his execution by another person, laches must be imputed to him, which the law does not allow." Here, therefore, you have the deliberate opinion of a man of great industry and research upon a point it was peculiarly his duty to investigate, relative to what was the course of proceeding in his own Court, and likely to be of frequent occurrence; and he speaks of it without the least degree of doubt, and gives what has the appearance of a satisfactory reason for the prerogative priority. In a few lines afterwards he puts the case where the subject has a statute staple or a judgment prior to the debt of the King, and seizes the debtor's lands before any seizure by the King, and considers the question what shall be the effect of a subsequent extent by the Crown; and he lays down this distinction, that if the subject has the possession delivered to him by a *liberate* before the extent from the Crown, the subject shall hold the land discharged from the King's debt; but if the King's extent comes before the possession by *liberate*, the King's debt shall be preferred, and the subject wait till the King's debt is satisfied. In *Rex* v. *Cotton*, in the able and elaborate judgment Lord Chief Baron Parker there delivers (in which he treats *Stringefellow's* case [Dyer, 67, *b*] as good law, and considers, as the line of distinction in those cases, whether the property remains in or is divested out of the King's debtor,) he says, upon the point now under consideration, "goods taken in execution and remaining unsold are liable to seizure upon an extent."

I now come chronologically to the cases of *Uppom* v. *Sumner* [2 W. Bl. 1251, 1294], in the Common Pleas, in 1779; and of *Rorke* v. *Dayrell* [4 T. R. 406], 18 years afterwards, 1797, in the King's Bench. They are both in point; and if they be law, **[194]** the judgment in this case ought to be against the Crown. I am of opinion they are *not* law. When *Uppom* v. *Sumner* first came before the Court, the counsel for the execution creditor (Serjeant Walker,) declared he could not support the case, and gave it up. He afterwards desired to argue it, and put it (upon what it had never before been put) the statute of Hen. 8, and said (with what truth the authorities I have just been mentioning will show) it had always been understood that an extent was to be postponed to a judgment. Serjeant Grose, on the other side, does not appear to have brought under the notice of the Court any of the direct authorities I have mentioned, but contented himself with relying on *Rex* v. *Cotton* [Parker, 112], and the dictum it contained; and upon *Rex* v. *Badin*, (Show. P. C. 72,) in which I can find nothing bearing upon the present case; the Court took time to consider, and then decided for the execution creditor, upon the construction they put upon the 33 Hen. 8, c. 39, s. 74, and upon the authorities of *Lechmere* v. *Thorowgood*, (Comb. 123; 3 Mod. 236; 2 Vent. 169; 1 Show. 12, 146.) *The Attorney-general* v. *Andrew*, (Hardr. 23; 2 Comyns' Digest, 538;) and *Rex.* v. *Dickinson*, (Parker, 262,) all of which I shall consider by and bye. In *Rorke* v. *Dayrell*, the counsel for the execution creditor again put the case upon the statute 33 Hen. 8, c. 39, s. 74, and relied upon *The Attorney-general* v. *Andrew*; *Lechmere* v. *Thorowgood*; *Uppom* v. *Sumner*, and the passage in Comyns' Digest. The counsel for the Crown brought forward many authorities not noticed in *Uppom* v. *Sumner*, viz. Gilbert's Exch. 90; Doddridge's dictum in *Sir Edward Cooke's* case; the dictum in *Petit* v. *Benson*, Comb. 452; the dictum in 2 Show. 481; and the decision in *Rex* v. *Peck* [Burr. 1. 8]. It cannot be said, therefore, that the bulk of the authori-**[195]**-ties were brought before the court, in *Uppom* v. *Sumner*. Lord Kenyon lays it down, "that wherever the property in goods remains in the King's debtor at the time, and one execution comes at the suit of the King, and another at the suit of the subject, the former will prevail." But he proceeds on the ground (now generally admitted to be erroneous) that by the delivery of the writ to the sheriff the property in the goods was bound and altered, so that there remained no property in the debtor upon which the King's prerogative could attach. The other three judges founded their judgment upon 33 Hen. 8 [c. 39], and *Uppom* v. *Sumner* [2 W. Bl. 1251, 1294], but did not notice or discuss any of the authorities cited for the Crown. After these two decisions, the point came again

under consideration in *Rex* v. *Peckham* (or *Rex* v. *Wells and Allnutt* [see 16 East. 278]) in the Exchequer, in 1805; and after full consideration of all the authorities, the Court adopted the principle laid down in earlier cases, and overruled the cases of *Uppom* v. *Sumner*, and *Rorke* v. *Dayrell* [4 T. R. 406]. This is mentioned in 2 Wms. Saund. 70, e.; and the Minutes of Lord C. B. Macdonald's judgment are to be found in 16 East 278. This decision was adhered to in *Rex* v. *Sloper and Allen*, (6 Price, 114,) in the Exchequer, in 1818, *dubitante* Wood, B. This being the state of the authorities upon the direct point, I shall not trespass further on the patience of the House, except to show that the cases relied upon in *Uppom* v. *Sumner* (with the exception of the passage in Comyns) will not support the judgment; and to state it as my opinion, that the stat. 33 Hen. 8 [c. 39] applies only to cases in which the subject's execution was complete before the Crown extent is issued, not to cases where it was in progress only. In *The Attorney-general* v. *Andrew* (Hardr. 23,) it is obvious, upon an attentive consideration of the report, that the execu-**[196]**-tion was completed before the teste of the King's extent, that the land was not in the King's hands, as in *Stringefellow's* case, but in Andrew, the execution creditor. The form of proceeding implies it. It is stated as a fact that Andrew had taken the land; Steel, B. says distinctly, the subject's title was prior to the King's, and executed, and he and the other judges could not have relied upon *Stringefellow's* case, as they did, as an authority against the Crown, unless the land had been delivered over to the execution creditor, and the execution been completed; but for that fact, *Stringefellow's* case would have been an authority the other way. *The Attorney-general* v. *Andrew*, therefore, does not bear upon the question now under consideration, viz. the right of the Crown against an incomplete execution, an execution which is in progress only and not perfected. *Lechmere* v. *Thorowgood*, (Comb. 123,) was trespass by the assignees of a bankrupt against the sheriffs of London, for seizing the goods after the bankruptcy before the commission. The sheriffs seized under a *fi. fa.* on the 29th of April, and on the 4th of May an extent issued. The question therefore was not between the execution creditor and the Crown, but between the assignees and both; for if either the *fi. fa.* or the extent were good against the assignees, it was an answer to the action. Whatever fell from the Court, therefore, was wholly extra-judicial, and its weight may be appreciated by what Comberbach represents to have fallen from Lord Chief Justice Holt, "The property of the goods is vested by the delivery of the *fi. fa.*, and the extent afterwards for the King comes too late, and that on the statute of frauds." Now that the statute of frauds does not in this respect bind the Crown is clear beyond all doubt, and a reliance upon this as one of **[197]** the grounds of decision, in *Uppom* v. *Sumner* [2 W. Bl. 1251, 1294], materially diminishes the authority of that judgment. *Rex* v. *Dickinson* (Parker, 262,) was a case not between conflicting executions, but between the claim of the Crown as assignee of a simple contract debt on the one hand, and the claim of a judgment creditor upon the other. The testator was indebted by judgment to A., and by simple contract to B., and died: B. caused the debt to him to be seized into the King's hands, and upon a *scire facias* against the executors, one question was, whether the judgment should be preferred to the simple contract debt the King had seized, and the opinion was that it should, upon the words of the statute 33 Hen. 8 [c. 39], "so always that the King's suit should be taken and commenced, or process awarded, for the King's debt, before judgment given for the other persons;" but how this bears upon the question between concurrent and conflicting executions, I do not see. Now this was an old case, in 1692; Lord Chief Baron Parker's Reports begin in 1743. This brings me to the statute 33 Hen. 8, c. 39, s. 74. The provision in that statute is, "that if any suit be commenced or taken, or any process be hereafter awarded, for the King, for the recovery of any of the King's debts, that then the same suit and process shall be preferred before the suit of any person or persons, and that our said Sovereign Lord, his heirs and successors, shall have first execution against any defendant or defendants of and for his said debts before any other person or persons, so always that the said King's suit be taken and commenced, or process awarded, for the said debt, at the suit of the King, his heirs and successors, before judgment given for the said other person or persons." To form judgment what construction is to be put upon this **[198]** provision, it is necessary to see how the law stood when this statute passed. At the Common Law, the King could protect his debtor so that he could

not be sued at all. By 25 Ed. 3, c. 19, a creditor might sue his debtor notwithstanding the King's protection, as far as to obtain judgment: and, if he would undertake for the King's debt, he might sue out execution, but without such undertaking the execution of the judgment was to be put in suspense till *gree* were made to the King of his debt. The provision, then, in 33 Hen. 8, c. 39, s. 74, seems to me merely to narrow the prerogative, that whereas before the creditor might be restrained from suing out execution till the King's debt was agreed for, whether the King was suing for his debt or not, that from thenceforth the right of restraining the creditor from suing out execution should be confined to those cases in which the King was suing or had process awarded for his debt, but that that right should nevertheless continue if the King was suing or had process awarded. This construction appears to me to satisfy all the words of the clause, and is consistent with all the early authorities upon the point in question, and leaves untouched the Common Law prerogative of the Crown over an execution whilst it is in progress.

Upon the whole, therefore, considering that the property in goods is not altered merely by a seizure under a *fieri facias;* considering that 33 Hen. 8, c. 39, s. 74, does not apply to the case of conflicting executions between the Crown and a subject, where the Crown's extent is issued while the goods are in the hands of the sheriff under a *fieri facias*, at the suit of a subject; considering, according to Lord Chief Justice Treby's note in Dyer, 67, b., this very point is described as acted upon in 24 Eliz. (1582); considering **[199]** that Doddridge, J. lays it down as clear law, 20 Jac. 1, (1624); and that it is noticed as such in 1686 and 1697, in *The Attorney-general* v. *Capell*, (2 Show. 481), and *Smallcombe* v. *Buckingham*, (5 Mod. 376); considering Bunbury's note upon the point, 1716, in *Rex* v. *Peck;* that Lord Chief Baron Gilbert refers to it as settled and indisputable, in his Exchequer Treatise; that Lord Chief Baron Parker considers it as law in his elaborate judgment in *Rex* v. *Cotton* [Parker, 112]; and that it has since been solemnly decided in *Rex* v. *Peckham*, or *Rex* v. *Wells* and *Allnutt* [see 16 East. 278], and acted upon in *Rex* v. *Sloper* and *Allen* [6 Price, 114]; considering that 33 Hen. 8 [c. 39] is never mentioned as bearing upon the point until *Uppom* v. *Sumner*, and is shown to be inapplicable by *Rex* v. *Pechham;* considering the analogy furnished by *Stringefellow's* case [Dyer, 67 b.], by *Rex* v. *Dale*, and *Rex* v. *Cotton* [Parker, 112], in cases of distress; and by *The Attorney-general* v. *Capel* [2 Show. 480], and *The Attorney-general* v. *Hanbury*, and *Brassey* v. *Dawson*, in cases of bankruptcy: I am of opinion, that if the sheriff seizes goods under a *fieri facias* at the suit of a subject, and if, while the goods he seized remains in his hands, an extent issues at the suit of the Crown, those goods are liable to the Crown's extent. Upon the second question, " does it make any difference whether the writ of extent was in chief or in aid?" I am of opinion, it does not. *The Attorney-general* v. *Capel* was an extent in aid.

Lord Chief Justice Tindal: The questions proposed by your Lordships have been so often adverted to by the learned Judges who have preceded me in delivering their opinions, that it is altogether unnecessary to refer to them. I shall content myself therefore with saying that, upon the first question proposed by your Lordships, I agree in opinion with the **[200]** majority of the Judges, that the extent in aid, tested and delivered to the sheriff after the seizure by the sheriff under the *fi. fa.*, but before the sale under such writ, is, by law, to be first executed by the sheriff, without regard to the writ of *fi. fa.*

It appears to me, my Lords, that the whole question depends upon the determination of two points, and two points only: first, whether the property of the Crown debtor is altered by the seizure of the sheriff under the *fi. fa.:* and, secondly, supposing such property to remain unaltered, whether the statute 33 Hen. 8 applies to the present case, by restraining that which before the statute was the undisputed prerogative of the Crown, namely, the preference of the Crown where the execution of the Crown comes in competition with that of the subject; for if the property in the goods seized under the *fi. fa.* remains still in the debtor unaltered by such seizure, then the execution of the subject's writ is begun only, not completed, at the time of the issuing the Crown process; both the writs are then in conflict and competition together, and the goods of the subject are then within the exigency of the writ of extent, which calls upon the sheriff " to take and seize into the King's hands all the goods and chattels which the defendant then has (that is, at the time of the teste

and issuing of the extent,) to satisfy the King's debt," unless indeed the statute of Henry the 8th has interposed a restriction applicable to the present case.

That the determination of these two points does in fact involve the whole of the present inquiry, appears from this, that the only two direct authorities for the preference of the subject's execution are grounded on those two points alone: the case of *Uppom* v. *Sumner* resting on the application of the statute 33 Hen. 8, [201] and the case of *Rorke* v. *Dayrell* being decided by Lord Kenyon, on the alteration of the property in the goods; and by the other three judges, on the authority of the above-mentioned statute. And, upon the first of these points, it appears to me, that the property in the goods seized under the *fi. fa.* is not in any manner altered by the seizure, but that it still continues in the debtor until the actual transfer thereof by the sheriff's sale under the writ to a stranger. If the property is changed by the seizure, it must be transferred either to the judgment creditor or to the sheriff, but there are no words in the writ to give it to either. The sheriff is directed by the writ of *fi. fa.* "to cause to be made of the goods and chattels of the defendant the debt or damages recovered by the plaintiff;" in this respect the language of the *fi. fa.* differing from that of the *elegit*, by which he is directed "to deliver to the plaintiff all the chattels of the debtor, and a moiety of the land, until the debt be levied." So far indeed is the property in the goods from being transferred to the plaintiff in the suit, that the sheriff cannot deliver the goods to the plaintiff in satisfaction of the debt; *Thomson* v. *Clerk*, (Cro. Eliz. 504). Again, if the defendant in the action, after seizure of his goods under the *fi. fa.*, pay the debt to the sheriff, he retains his goods, and is discharged from his execution; and any further remedy of the plaintiff is against the sheriff only; Cro. Eliz. 209. But if the property in the goods had been altered, if it had vested either in the plaintiff himself or the sheriff, or had become an actual pledge or security for the payment of the debt, it is difficult to see upon what principle the defendant should hold his goods again discharged of the debt, before actual payment thereof has been made to the plaintiff. Again, if the goods, after seizure under the [202] writ, but before sale, are destroyed by any unavoidable means without the sheriff's default, the loss does not fall either upon the plaintiff or upon the sheriff, but upon the debtor, on whose goods a second levy may be made; Hob. Rep. 60: but if the property in the goods had been altered by the seizure, why is not the loss to fall upon the party whose property they have become, as undoubtedly, after the sale, the loss would be that of the purchaser. Again, if the sheriff, having received two writs of *fi. fa.* sell under that which is last delivered to him, although he make himself liable to the plaintiff who delivered the first writ, the property of the goods is bound by the sale under the second writ, and the party cannot sell them by virtue of his execution first delivered; *Smallcombe* v. *Cross*, (1 Ld. Raym. 252): and yet, if the property was altered by the delivery of the first writ to the sheriff, upon what principle can the sale under the second convey the property to a stranger. The case of *Hutchinson* v. *Johnston*, (1 T. R. 729,) decides the converse of this last proposition, viz. that if the sheriff seizes under the writ last delivered to him, but before sale discovers that another writ has been delivered to him at an earlier time, and sells under the writ first delivered, and satisfies the debt of the plaintiff in the earlier writ, he is justified in so doing, though if he had sold under the second writ he could not have done so. These two authorities seem decisive that it is the sale, not the seizure, which alters the property. It has, however, been argued, that the rule of the Common Law, by which the property in the goods is bound by the award of the writ of execution, altered as it has since been by the statute of frauds, so as to become bound only by the delivery of the writ to the sheriff, implies that the property is divested out of the debtor by such [203] delivery of the writ. But the meaning of those words have been explained and defined by various decisions. It will be sufficient to cite the case of *Payne* v. *Drewe*, (4 East. 523,) in which all the former cases are considered, and in which Lord Ellenborough, C. J. lays down the rule to be, that "the goods are bound by the delivery of the writ to the sheriff as against the party himself, and all claiming by assignment from or representation through or under him." In this sense, and to this extent, therefore, may the goods of the defendant be bound by the delivery of the writ to the sheriff, without the consequence contended for, that the property of the goods is in any manner altered thereby. It has further been contended, that as the sheriff

may maintain an action of trespass or trover against any wrong-doer for taking goods which he has seized, it therefore follows, that he, and not the defendant, has the property in the goods so seized. But to this argument it appears sufficient to answer, that any person who has the legal possession of goods, though not the property, may maintain this action against a wrong-doer, for a mere wrong-doer cannot dispute the title of the party who is in the possession of the goods with any colour of legal title. The sheriff, no doubt, has the legal custody and possession of the goods after seizure, he has a special property in them for that purpose, for the law has directed him to seize and make sale thereof. But this affords no argument that the absolute property in the goods is altered and divested from the defendant, for the very same action is maintainable by the finder of goods against the person who wrongfully takes them from him, or by the carrier of goods for hire, or by bailee of goods, against a trespasser; and yet in the three cases last put, the absolute property is not divested from, but still remains, **[204]** in the true owner. But it is argued at the Bar, and that appears to be the main ground of argument, that the sheriff having such special property, the extent can only take the goods of the debtor subject to such special property, just as goods in pawn can only be taken subject to the pledge, and lands mortgaged can only be taken subject to the claims, both legal and equitable, of the mortgagee. In those cases, however, the property has actually been altered by the act of the debtor himself, under an express contract made between himself and the other party, for the benefit of such other contracting party. It is a contract complete and consummate before the seizure under the extent. It is alienation of the property, which amounts, *pro tanto*, to a sale. As therefore the Crown process could not seize upon property actually parted with and sold, so neither can it seize property so partially sold, except subject to the rights of the partial purchaser. But in the case under consideration, no property has been parted with by the Crown debtor under any contract previously made; the goods are not sold; they are only in the way to be sold. It would be a better definition of the sheriff's relation to these goods to say, he has them in his custody under a power to sell them, than any actual interest or property in them. His situation, indeed, cannot be better defined than by saying the goods are in *custodiâ legis*, a phrase which plainly distinguishes a mere custody and guardianship in the goods from a change in the property. So far therefore as a special property in the goods is necessary for their safe custody against wrong-doers, and to render the execution of his public duty useful to the judgment creditor, so far he may be said to have the property; but beyond this, and as against the rights of adverse claimants, there is no authority that he has any **[205]** property at all. The only question can be, has the property passed from the debtor to any other person?

It has been further contended, that the decisions which have taken place under the statute 21 Jac. c. 29, s. 9, are an authority to show that the execution is executed upon the mere act of seizure by the sheriff, and that the subsequent sale is no more than a formal completion of the execution. By that statute it is enacted, "that the creditors who have security for their debts, whether by judgment, statute, etc. whereof there is no execution, or extent served and executed, upon the lands and tenements, goods and chattels of the bankrupt, shall come in rateably with the other creditors." And it must be admitted, that under that statute various decisions have determined, that if the sheriff has once entered and seized, a subsequent act of bankruptcy before sale comes too late to vest the property in the assignees. It is contended, therefore, that by the seizure of the sheriff the execution is executed. And undoubtedly for the objects and purposes of that statute, the seizure must be taken to be a complete execution of that writ. That statute was passed before the statute of frauds, at a time when the property in the goods was bound as against the bankrupt himself, and all claiming under him, by the mere suing out and teste of execution. In order, therefore, to obviate the manifest inconvenience which would result if plaintiffs were to lie by and conceal their writs, and afterwards bring them forward when the effects of the bankrupt had been disposed of by the assignees under the commission, by which means they would give a false credit to the trader, which it is the direct object of the 11th section of that statute to prevent, that statute did, for that purpose, compel the plaintiff to put his writ into immediate operation, by making the sei-**[206]**-zure under the writ the utmost limit of any preference which he could give.

But this affords no argument for the general position, that the seizure of the goods, and not the sale, does generally, and in all cases and for all purposes, alter the property. It was a particular provision made to obviate a particular inconvenience. It has further been contended, that the seizure under the writ is the completion of the execution, because it has been held that an execution is an entire thing, and cannot be superseded after it has once begun, and therefore if a writ of error is allowed after seizure, but before sale, it is no supersedeas of the execution, but the sheriff must, notwithstanding, sell the goods levied under the execution, and return the money into Court to abide the event of the writ of error; *Meriton* v. *Stevens* (Willes, 271.) It seems, however, to me, that this rule of practice in the courts affords no grounds for such conclusion. In some of the old cases the judges appear to have doubted whether the defendant should not have his goods again when the writ of error was allowed after seizure, but before sale, and the reason assigned for the affirmative of that proposition was, "for that before sale the property remains in the defendant;" *Shelton's* case, (Dyer, 67, b. in margin.) But in later cases, the courts have thought it a better exercise of discretion to allow the money to be made under the writ, and brought into Court, to abide the event of the writ of error. In this case it is to be observed, the suing of the writ of error is the act of the defendant himself, and the object is to deprive the plaintiff of the fruits of his execution, and it is the laches of the defendant himself that he did not bring his writ of error before the seizure, circumstances which make a manifest distinction between this case and that of persons who claim under any conflicting rights.

[207] That the actual sale of property seized under the writ issued at the suit of the subject forms the dividing line, so that where the sale is complete before the awarding of the Crown process the property is protected therefrom, but where it is not completed, the property may be seized thereunder, appears from Fleetwood's case, where the sale of a lease belonging to a Crown debtor, *bonâ fide*, and without covin, before the award of execution for the King's debt, which is analogous to the *teste* of the writ of extent, was held to be good against the Crown, and that the Crown could not take it in execution; 8 Rep. 171; 2 Roll. Abr. 153. In this case no argument is offered that the seizure alters the property; the whole argument, and the judgment of the Court, rests on the fact of the actual sale. But independently of any argument upon principle, a very long series of cases, from the earliest time down to the present, with the exception of the two cases only which have been so often referred to, viz. *Uppom* v. *Sumner* [2 W. Bli. 1251, 1294], and *Rorke* v. *Dayrell* [4 T.R. 406], established the position, that if the subject seizes his debtor's property, either under a writ of execution, a distress, or any other mode which the law allows, for the satisfaction of a debt or demand, and an extent issues at the suit of the Crown while the goods remain in specie, and before any thing is done to change the ownership, it is part of the prerogative of the Crown to treat this seizure as a nullity, and to proceed to the satisfaction of the Crown debt out of the goods so seized. The first authority is Stringefellow's case ([Dyer, 67 b.] 3 Ed. 6,) the more valuable because it took place but little more than six years after the passing of the statute 33 Hen. 8, at a time, consequently, when the object and intent of that statute, and the meaning of its provisions, must have been familiar to all the judges who were present at the decision. In that case, **[208]** the four Barons of the Exchequer, and two of the Judges, viz. Bromley, one of the Justices of the King's Bench, and Hales, one of the Justices of the Common Pleas, were of opinion, that the actual taking of the goods of Brownesoppe, the debtor, by the sheriff, under an *extendi facias* out of Chancery, upon a statute staple, and the seizing them into the hands of the King, but without delivering them to the plaintiff, was no answer to a prerogative writ at the suit of the Crown out of the Exchequer, but that the sheriff was bound out of such goods to satisfy the King's debt. And the reason assigned by the reporter for the opinion of the Judges is, "because the property in goods and lands was not in Stringefellow before they were delivered to him by the *liberate*." It has been said, however, that this case is to be considered as subject to doubt on account of the *quaere* subjoined to it by the reporter. But it is to be observed, on the other hand, that Rolle inserts the case in his Abridgment (2 Roll. Abr. 158) without the *quaere*, expressly stating, "that the sheriff ought to execute the extent for the King's debt, because the property of the goods and lands was not in

Stringefellow before they were delivered to him by a writ of *liberate*, and therefore liable to the King's extent;" and that Lord Hobart, in *Sheffield* v. *Radcliffe* (Hob. 339,) affirms the case to be law. Again, Treby, C. J., in a marginal note to the report, states, that the Barons of the Exchequer agree that this case is law; and the case itself is cited, and relied upon as law in *The King* v. *Cotton* (Parker, 112,) where the Chief Baron, in the very elaborate and able judgment upon that case, states, "that he will show Stringefellow's case to be undoubtedly law." And amongst other instances in which he states it to be recognized, he mentions, that Lord Hardwicke, when [209] Chief Justice, in delivering the resolution of the Court of King's Bench in *Brassey* v. *Dawson*, Mich., 6 G. 2, cited and relied upon Stringefellow's case as clear law, and said it was grounded on the general rule of preference allowed by law to the King's debts. The case itself last referred to of *The King* v. *Cotton*, which was decided in 1751, was determined on the very same principle which applies to the present case. In that case the goods of Chapman, the King's debtor, were seized under the distress for rent on the 12th of October. On the 14th of October, after the seizure, but before the sale, the extent issued. The Court of Exchequer held that the property in the goods was not altered by the distress, but until the time of actual sale remained in the King's debtor, and was liable to the operation of the writ of extent. How can any real distinction be made between the landlord seizing the goods for the purpose of making his rent by a subsequent sale, and a sheriff seizing under a *fi. fa.* for the purpose of making the plaintiff's debt by a subsequent sale? Or if there is any distinction, is it not stronger in favour of the landlord, who might reasonably be supposed to have acquired a special property when he seized for his own benefit. Indeed, both the argument and judgment in that case proceed on the assumption that the present case is in favour of the Crown, and that it could not be disputed but that the extent would operate upon goods seized by the sheriff, but not yet sold. Again, in *The Attorney-general* v. *Capel*, determined in the Exchequer in 1686 (2 Show. 481,) where the extent was tested the 24th of December: after a commission of bankrupt had issued against the debtor, but before the assignment made by the commissioners, it was held by the Court, that if the extent comes before the assignment, it shall and must be pre-[210]-ferred; and the case of *The King* v. *Crump and Hanbury* is cited and relied upon as an authority in point, to which the reporter adds this observation, "Extents have been held good that have been made upon goods actually levied by virtue of a *fieri facias*, and in the sheriff's custody, the extent coming before a bill of sale, made so as the property was not altered."

These two cases, therefore, are direct authorities; the one, that in the case of a distress, where goods are in *custodia legis* after the seizure, but before the sale; and again, in the case of a bankrupt, where goods are also in *custodia legis*, between the seizure by the messenger and the actual assignment by the commissioners; still the goods of the King's debtor are subject to an extent at the suit of the Crown, tested before the actual sale under the distress, or before the actual assignment to the assignees; and the just inference would seem to be, that in the case of a seizure by the sheriff under a *fi. fa.*, where the goods are also in *custodia legis*, an extent tested before the sale ought to be entitled to the same operation. But Stringefellow's case, acknowledged as it has been in various and repeated instances, and by the most eminent judges, is a direct authority upon the very point now under discussion. And since that decision various other cases have been decided in the same way, and after great argument by the Court of Exchequer: I refer particularly to *The King* v. *Wells and Allnutt* (16 East, 278, in a note,) in 1805, and to the case of *Rex* v. *Sloper and Allen* (6 Price, 114,) where the Exchequer acted on the authority of the latter case.

The only two cases which have received a contrary decision are those before referred to, viz. *Uppom* v. *Sumner* (2 W. Bl. 1251,) in Easter Term, 1779, by the Court of Common Pleas; and *Rorke* v. *Dayrell*, [211] (4 T. R. 402,) in 1793, by the Court of King's Bench; cases undoubtedly entitled to great respect when the authority of the eminent persons by whom they were adjudged is taken into consideration. I say these two cases only have received a contrary decision, for I cannot consider the case of *Lechmere* v. *Thorowgood* and another (3 Mod. 236,) which is sometimes cited, to be an authority upon the present question between the Crown and the subject. That was an action of trover by the assignees of a bankrupt against the sheriff, who had entered under a *fi. fa.;* and upon a special verdict one of the questions was, whether

the *fi. fa.* was well executed, the sheriff having seized, though not sold, under the writ before the commission of bankrupt had issued? and upon that question, it was held that the *fi. fa.* was well executed; so that the assignees of the bankrupt's estate could not have a title to those goods which were before taken in execution, and therefore in *custodia legis*. So far, undoubtedly, the case is an authority. But it was further stated in the special verdict, that after seizure under the *fi. fa.*, and before any *venditioni exponas*, viz. the 4th of May, an extent in aid issued, whereupon parcel of the goods mentioned in the declaration was seized by the sheriff upon the same extent, and sold, and the money paid to the creditor. And one question stated by the reporter is, whether the extent did not come too late, and he says it was held that it did. Now upon this point the case cannot be an authority, for the priority between the extent and the *fi. fa.* was perfectly immaterial to the plaintiffs in that action; they were out of Court upon the title of the judgment creditor. All further discussion was *res inter alios acta*. No one appeared for the Crown; no argument took place before the Court on behalf of the Crown. The only inference to be drawn from that [212] case is, that the plaintiffs, the assignees, had no right against the judgment creditor; but whether the Crown, who had received payment out of part of the goods seized, had such right or not, is left undetermined, and indeed untouched. The question, therefore, is, whether the two cases above referred to are of such authority as to overturn the decisions which, both before and since, have been given by the Court of Exchequer. These two cases, as I have already observed, are decided partly upon the ground that the property in the goods is altered by the seizure under the *fi. fa.*, and partly upon the ground that, by the statute 33 Hen. 8, c. 3, such restriction was put upon the King's prerogative that the preference now contended for ceased to exist. And these are the only grounds upon which these cases are rested.

As I have already stated the reasons for the opinion which I have formed, that no alteration takes place until the actual sale under the *fi. fa.*, I shall confine my remaining observations to the considerations of the second point in this case, viz. the statute of Hen. 8. By the 33 H. 8, c. 39, s. 74, it is enacted, "That if any suit be commenced or taken, or any process be hereafter awarded, for the King, for the recovery of any of the King's debts, the same suit and process shall be preferred before the suit of any person; and the King shall have first execution against any defendant of and for his said debts before any other person; so always that the King's said suit be taken and commenced, or process awarded, for the said debt, at the suit of the King, before judgment given for the other person." That this clause of the statute is not to be interpreted according to the strict letter of it has been at all times admitted. Taken literally, it would give the subject a greater advantage [213] against the execution at the suit of the Crown than he possessed against that of any subject. If the subject has obtained judgment before the *teste* of an extent, such judgment, according to the letter of the statute, would postpone the Crown's remedy under the extent to an unlimited time, whereas the same judgment would have no operation whatever against an execution at the suit of a subject, even though issued in a suit which was commenced after such judgment was signed. In the case of the Crown, the subject's judgment would give him the preference, though his execution were last in point of time.

In the case of a subject, the first execution against the goods must be preferred. The exact literal sense of the statute must therefore be departed from; and, if that sense is once given up, we are at liberty to adopt that which appears to be the nearest to the letter of the statute, and at the same time which best carries into effect the object and intention of the Legislature. For this purpose, it should be considered, what the exact state of the prerogative of the Crown was at the time this statute was passed, in order that we may be the better able to judge how much of it was intended to be abolished by the statute. By the ancient prerogative of the Crown, as stated by Lord Coke, in 1 Inst. 131, b., "The King was to be preferred in payment of his duty or debts by his debtor before any subject, although the King's debt or duty be the latter; and the reason hereof is, for that *thesaurus regis est fundamentum belli et firmamentum pacis*. And, thereupon, the law gave the King remedy by writ of protection to protect his debtor, that he should not be sued or attached until he paid the King's debt." So the law remained until the statute 25 Ed. 3, c. 19, which was introduced, as Lord [214] Coke says, "from the inconvenience that grew, that for to delay other men of their debts, the King's debts were the more slowly paid." By that

statute it was enacted, "That notwithstanding such protections, the parties which have actions against their debtors shall be answered in the King's Court by their debtors; and if judgment be thereupon given for the plaintiff or demandant, the execution of the same judgment shall be put in suspense till *gree* be made to the King of his debt; and if the creditors will undertake for the King's debt, they shall be thereunto received, and shall have execution against the debtors of the debt due and adjudged to them, and also shall recover against them as much as they shall pay to the King for them." The law, therefore, at the time of passing the statute Hen. 8, was, that although the King granted his protection to his debtors, the subject might nevertheless sue his debtor, and continue his suit to judgment; but still the execution was suspended until the King's debt was paid. The Crown, therefore, might still postpone the execution of the subject to an unlimited time, simply by delaying to take out execution in its own suit; but by the statute of [33] Hen. 8 [c. 39], this power of the Crown to postpone the execution of the subject's judgment to an unlimited time is taken away, except in one single case, viz. where the suit of the Crown is commenced before the judgment has been obtained by the subject. In that case, I consider the old prerogative still remains. Since the statute, therefore, where the Crown has commenced its suit before the subject's judgment, there can be no race between the Crown and the subject which shall sue out the first execution; the debt of the Crown must be first satisfied before the subject can execute his writ. But where the Crown has not **[215]** commenced its suit, or awarded its process, before the subjects judgment is signed, there the field is open both to the Crown and the subject; and if the subject can first complete his execution before the Crown issues its writ, he may enjoy the fruit of it. Still, however, even in this case, if the execution of the Crown is concurrent with that of the subject, if it is actually issued before the subject's execution is complete, the statute of [33] Hen. 8 [c. 39] does not provide for the case, but leaves the old common law rule to operate, "*quando jus domini regis et subditi concurrunt, jus domini regis preferri debet.*" The rule of law has always been, that the prerogative of the Crown cannot be taken away except by express and unambiguous words; but it is difficult to find any words in the statute which apply to two writs of execution in competition with each other, one at the suit of the Crown, the other at the suit of the subject. It is enough, however, to say it is left in doubt: for at the time in which this statute passed it is impossible to believe such a prerogative was abandoned by the Crown if there are no express words to show the intention. After all, the important point is, that the line should be distinctly drawn, and well defined, which forms the boundary between the right of the Crown and the right of the subject, with respect to executions of the subject's judgments. It is admitted on all hands, that if the extent issues before the seizure, it is entitled to the preference. Suppose the sheriff actually seizes, and the extent then issues, and the law says, that as it issued before the sale, it is to be preferred, the expense of the entry and execution will not fall upon the plaintiff in the action, for his debt has not been levied; those expenses will be allowed by the Exchequer upon payment of the King's debt. The only consequence **[216]** is, that the subject discovers, a very few days later, that his execution cannot be satisfied until the Crown debt is paid. For these reasons, the opinion which I have formed upon the first question proposed to us is, that the actual sale under the *fi. fa.* forms the dividing line between the right of the Crown and the right of the subject; and, consequently, that the extent is, in the present case, to be preferred to the writ of *fi. fa.* issued at the suit of the subject.

Upon the second question proposed by your Lordships, I shall say no more than that it appears to me to make no difference whether the extent is an extent in aid or an immediate extent at the suit of the Crown; all the authorities agreeing that the same privileges extend to the one which belong to the other.

I have the authority of Mr. Justice Park, who is unavoidably absent on this occasion, to express his entire concurrence with the opinion formed by the majority of His Majesty's Judges.

Lord Tenterden: My Lords, in the case between Daniel Giles, the late sheriff of the county of Hertford, Plaintiff in Error, and Harry Grover and James Pollard, Defendants in Error, which was argued some time ago before your Lordships, the learned Judges have given their answers to certain questions that were proposed to them by the House. By these answers a very great majority of the Judges coincided in that

opinion upon which I propose to submit to your Lordships that the judgment of the Court of Exchequer should be affirmed, two only being of a different opinion. The case may be shortly stated thus: An execution having issued at the suit of a subject, the sheriff took possession of the goods of the debtor, but before he made any disposition of those [217] goods by bill of sale to the creditor, or in any other way, an extent came at the suit of the Crown; and the question is, whether an extent thus coming at the suit of the Crown, while the goods remain in the hands of the sheriff, is to be preferred to the execution taken out by the subject. The majority of the Judges on the question proposed are of opinion in the affirmative, namely, that the Crown's extent should be preferred. It is in conformity with that opinion, in which I most heartily concur, and have long entertained—for the subject is by no means new in the courts of justice—that I shall take the liberty of delivering my opinion, that the judgment of the Court of Exchequer should be affirmed.

As I have already stated, the question has arisen more than once in courts of law: and there are two recorded decisions, in two cases so often alluded to, upon the subject, one, the case of *Uppom* v. *Sumner* [2 W. Bl. 1251, 1294], decided in the Common Pleas several years ago; and the other, the case of *Rorke* v. *Dayrell* [4 T.R. 402], decided in the Court of King's Bench, after the determination of the other case. Not to notice the prior decisions in the Court of Exchequer, it may be sufficient for the present to say, that there have, since the last of them, namely, the decision of *Rorke* v. *Dayrell*, by the Court of King's Bench, been two or three in the Court of Exchequer to the contrary of those two prior decisions.

Your Lordships well know that the Barons of the Court of Exchequer are very peculiarly conversant with the revenue of the Crown. It is their peculiar duty to attend to and enforce the rights of the Crown against the subject as connected with that revenue.

The two cases which are reported, and which are against the rights of the Crown, appear to have pro-[218]-ceeded upon two grounds; one ground was, that by the seizure of the sheriff the property of the goods was divested out of the debtor; another ground was, that, according to the true interpretation of the statute passed in the time of Henry 8 [33 Hen. 8, c. 39], the execution of the Crown was not to be preferred.

Now, with regard to the first point, namely, the supposition that the property was divested out of the debtor by the seizure of the goods, by the act of the sheriff in seizing the goods, it appears to me, upon due consideration, and so the majority of the Judges thought, that the proposition could not be maintained. Property cannot be divested out of one person without being vested in another; and it is impossible to say in whom the property does become vested, if the investment be taken out of the debtor. It has been argued that the property is vested in the sheriff, because there are authorities to show that the sheriff, if the property be taken out of his hands, may maintain an action of trover against the wrong-doer. These actions are maintainable upon a ground perfectly distinct from the right of property, they are maintainable upon the ground of possession; any man in possession of goods, whether as the bailee or otherwise, may in his own name maintain an action against any party who shall deprive him of the possession. The power, therefore, of bringing an action of this kind does by no means prove that the property is in the sheriff.

It has been supposed by some that the property is in the judgment-creditor; but it is perfectly clear, upon consideration of the subject, that the judgment-creditor has no property in the goods while they remain in the hands of the sheriff. If the sheriff executes the process of the Court, and makes a bill of sale to the plaintiff in the action, then the judgment-[219]-creditor obtains the property; but until that is done, while the goods are in the possession of the sheriff, they are in the custody of the law, but still remain the property of the debtor to whom they originally belonged. If the property were divested some ceremony would be necessary to revest it; but there is no such ceremony. If the debtor pays the money to the sheriff, the sheriff withdraws; he executes no conveyance; he does not even go through any ceremony; but all he does is to withdraw, and leave the goods where they were. It appears to me, therefore, that putting the case shortly upon that ground of a supposed divesting of the property, it can by no means sustain the two cases which I have referred to, and which were decided against the right of the Crown.

It remains to consider the effect of the statute upon which so much reliance was

placed. That was the statute passed in the reign of Henry 8 [33 Hen. 8, c. 39]; and upon the first view of it, considering that statute by itself, and without regard to the state of the law as it previously existed, it might seem that the argument founded upon it was correct. By that statute it is enacted, "That if any suit be commenced, or any process be hereafter awarded, for the recovery of any of the King's debts, the same suit and process shall be preferred before the suit of any person or persons, and the King, his heirs and successors, shall have first execution against any defendant or defendants of and for his said debts, before any other person or persons; so always that the King's suit be taken and commenced, or process awarded, for the said debt, at the King's suit, before judgment given for the said other person or persons."

As I have already intimated, if that statute were read without regard to the state of the law as it existed [220] at that time, it certainly would furnish an argument against the right of the Crown; but that Act of Parliament, like every other, is to be construed with regard to the state of the law as it previously existed; and so construing that statute, it will be found not to apply to a case like the present.

By the Common Law, the King had a right of preventing any subject from suing any of his debtors; it was the practice, and it was a right which was sometimes exercised, of granting to those who were his debtors a protection, which prevented any of his subjects from bringing any suit against them. Thus the law stood until an Act of Parliament passed, which I shall draw your Lordships' attention to, namely, the statute of the 25 Ed. 3, c. 19. That statute shows what the law was before it was passed, and introduces an alteration in favour of the suitor; and it is in these terms: "Forasmuch as our Lord the King hath made before this time protections to divers people which were bounden to him in some manner of debt, that they should not be impleaded of the debts which they owed to others till they had made satisfaction to our Lord the King of that which to him was due by them by reason of his prerogative; and so during such protections no man hath dared to implead such debtors." Your Lordships will observe that the preamble recites the law to be as I have stated it, namely, that the King by his protection was in the practice and had a right to prevent any person from commencing any suit against his debtor; then it goes on to enact, "It is accorded and assented, that notwithstanding such protections, the parties which have actions against their debtors shall be answered in the King's Court by the debtors; and if judgment be thereupon given for the plaintiff or demandant, the execution [221] of the same judgment shall be put in suspense till satisfaction be made to the King of his debt. And if the creditors will undertake for the King's debt, they shall be thereunto received, and moreover shall have execution against their debtors of the debt due to them, and also shall recover against them as much as they shall pay to the King for them." This statute therefore so altered the law as that it enables the subject to bring an action against his debtor, although he be a debtor to the Crown, which before he could not do; but nevertheless it prevents him from taking out execution unless he first satisfies the debt of the Crown. This was the state of the law before the passing of the statute to which I have referred, namely, the statute of 33 Hen. 8 [c. 39]. The subject might commence an action, and might have proceeded even to judgment, but could have no execution without satisfying the King's debt. All, therefore, that the statute [33] of Hen. 8 [c. 39] does, is to allow a party to have execution without satisfying that debt; it authorizes him to take out his writ, but does not apply to a case in which there are conflicting executions, which is the case in question. If it should be taken literally, that the King should not have execution unless his suit were commenced before a judgment given for the subject, the consequence would be, that the subject might obtain judgment against the King's debtor, and forbear taking out execution for a considerable length of time, and during all that time prevent the Crown from recovering its debt by taking out execution; that would be open to collusion on the part of the subject, and operate to the great prejudice of the King's revenue and his rights. I am therefore of opinion, that the true effect of this statute is to allow the subject to obtain [222] judgment, and even to sue out execution, without first making satisfaction to the King; but, nevertheless, to leave the law in all other respects as it stood before: namely, if the King's execution comes while the goods remain the property of the debtor—and, as I have already stated, my opinion is, that they do remain the pro-

perty of the debtor, although they be taken possession of by the sheriff—the King's execution shall prevail. The contrary of that has been decided in the two cases of *Uppom* v. *Sumner* [2 W. Bl. 1251, 1294], and *Rorke* v. *Dayrell* [4 T.R. 402]; but there are two or three decisions of the Court of Exchequer in accordance with my view of the subject. I do not know that it is necessary to trouble your Lordships with referring to these cases; they were very much considered in the Court of Exchequer, and the decision in one of them afterwards became the subject of inquiry in the Court of King's Bench. The case is reported by the name of *Thurston* v. *Mills* [16 East, 278]; the point of law, which is the question in the present case, was twice argued before that Court, and a third time upon a question preliminary to the question argued on the two first occasions, and which was really the question in the cause. Upon that preliminary question, which regarded only the form of the action, the Court of King's Bench decided against the plaintiff. The main question was there left untouched; but I think it may be collected, though not very clearly, that the opinion at least of some of the judges who sat in the Court at that time, Lord Ellenborough being at the head of them, and Mr. Justice Le Blanc being one of them, was in favour of the Crown. I cannot assert positively that it was so; but in reading the report of the case, and from my own recollection of the questions introduced into the argument of it, I am strongly in-**[223]**-clined to think that it was so, and I formed that opinion at the time.

The ground upon which those two decisions of *Uppom* v. *Sumner*, and *Rorke* v. *Dayrell*, have proceeded, as to the divesting of the property out of the debtor and vesting it in another, failing, in my opinion, and the argument also that was founded upon the construction of the statute of Hen. 8, failing, on a due consideration of that statute with regard to the law as it existed before, my opinion is, that the Crown has a right of priority in this case before the subject; and, consequently, that the judgment of the Court of Exchequer must be affirmed. I should further say, that, according to the practice at the time, although the law has since been altered, the judgment of the Court of Exchequer in this case was removed by a writ of error, and argued before the chief justices of the King's Bench and of the Common Pleas, of whom I was one, and my Lord Wynford the other: we did not come to the same conclusion upon that occasion, and, therefore, we affirmed the judgment, understanding and meaning that the question, which was one of great importance, should be brought to this House: I have since conferred with my Lord Wynford upon the subject, and I have learned from him that he is now perfectly satisfied with the opinion which I have ventured to give to your Lordships, and by which I affirm the Judgment of the Court of Exchequer.

Lord Brougham, C., after reviewing the cases, said, I certainly entertain a strong opinion that the judgment of the Court of Exchequer in this case is right, and ought, by your Lordships, to be affirmed. I entirely go along with the opinions pronounced by the **[224]** majority of the learned Judges, in answer to the questions put to them. It is of much more importance that this question should be settled, than it is in which way it shall be settled.

Judgment affirmed.

WRIT OF ERROR

FROM THE COURT OF KING'S BENCH.

WILLIAM MELLISH,—*Plaintiff in Error;* GEORGE RICHARDSON,—*Defendant in Error.*

[Mews' Dig. i. 352; xi. 488, 602; S.C. 6 Bli. N.S. 70; and, in Courts below, 2 Bing. 229; 3 Bing. 334; 7 B. and C. 819. Cited with approval, on point as to amendments, in *Tetley* v. *Wanless*, 1867, L.R. 2 Ex. 279; and *Scott* v. *Bennett*, 1871, L.R. 5 H. L. 243. See also *Davies* v. *Davies*, 1887, 36 Ch. D. 364.]

This House will not postpone the hearing and decision of any Appeal on account of the absence of counsel, but will call on the counsel on either side in attendance to proceed with the argument.

A Court of Law has authority over its own record, which it may amend, even after error brought.

A Court of Error will not inquire into the propriety of amendments made in the Court below, but, though such amendments be made after error brought, will consider them as part of the original record subjected to their revision.

This was a writ of error brought by the Defendant below from a judgment of the Court of King's Bench at Westminster, affirming a judgment of the Court of Common Pleas at Westminster, in favour of the Plaintiff below.

The declaration was on a special contract, and contained four special counts and the money counts.

The Defendant pleaded the general issue. The cause was tried at the London Sittings after Hilary [225] Term, 1824, before the Right Hon. Lord Gifford, then Lord Chief Justice of the Court of Common Pleas, and a special jury, and a verdict was recorded for the plaintiff on all the counts, with £7500 damages.

Judgment was given for the Plaintiff by the Court of Common Pleas upon the whole declaration after a motion for a new trial or in arrest of judgment, for the damages, and £274 taxed costs.

A writ of error was brought in the Court of King's Bench; special errors were assigned, and the case was argued at the sitting before Michaelmas Term, 1825.

Before the Court of King's Bench gave any judgment, the Plaintiff below applied to the late Lord Gifford, then Master of the Rolls, to amend the *postea*, by entering the verdict for the Plaintiff on the first count only, but his Lordship declined to interfere, as he doubted whether he had any authority, having ceased to fill the office of Chief Justice, but he certified to the Court, that he should have made the amendment had he possessed the authority to do so. On the 10th of November 1825, a rule *nisi* was granted by the Court of Common Pleas for amending the *postea*.

On the 24th of November, the rule was made absolute, and the *nisi prius* record was amended accordingly: and on the next day a rule *nisi* was obtained from the Court of Common Pleas for amending the Judgment-roll, conformably to the amended *postea*, which rule was made absolute on the 26th of November, and the Judgment-roll remaining in the Common Pleas was amended accordingly.

While these proceedings were pending in the Common Pleas, namely, on the 25th of November, the Court of King's Bench gave judgment upon the ori-[226]-ginal transcript, reversed the judgment of the Court of Common Pleas, and directed a *venire de novo*, intimating an opinion, that the first and second counts of the declaration, which set forth the whole of the agreement between the parties, were good, but that there was not a sufficient consideration to support the third and fourth counts. That reversal was entered of record on the next day.

Upon the amendment being made by the Court of Common Pleas, an application was made to the Court of King's Bench to amend the transcript; and the Court of King's Bench, in the same Michaelmas Term, 1825, amended the transcript in the same way, and gave judgment for the Plaintiff below, affirming the judgment of the Court of Common Pleas, with £106, 10s. for the costs in error.

Upon this judgment the Defendant below brought the present writ of error.

Upon counsel being called to the bar (25 June), Mr. Campbell appeared on behalf of the Defendant in Error, and stated to their Lordships that there was no counsel present for the Plaintiff.

The Agent for the Plaintiff said that he had taken every possible means to ensure the attendance of counsel, but that he had been unable to do so, on account of their being engaged in very important business elsewhere, and he expressed a hope that their Lordships would allow the case to stand over.

Mr. Campbell could not consent to any further delay.

Lord Tenterden said, that it had never been the practice of that House to allow causes to stand over on account of the absence of counsel. Other Courts might do so for the convenience of that House, but that House could not do so for their convenience. He remembered an instance in which, when at the bar, [227] he had been engaged in a cause in the Court of King's Bench, and on the day appointed for the trial, an appeal, in which he had been retained as counsel, came on to be heard in that House: he mentioned the circumstance to Lord Ellenborough, who at once allowed him to quit

the Court of King's Bench, in order to proceed with the argument before that House. He did not however think it was fit to dismiss this appeal under the circumstances that now appeared, and he should therefore move their Lordships, that the counsel for the Defendant in Error should proceed with the argument.

The motion was agreed to.

Mr. Campbell, for the Defendant in Error: The House had no right to look beyond the amended judgment of the Court below, but were bound by the amended roll. If so, then the Plaintiff in Error must fail, for the unanimous opinion of both Courts below had been in favour of the original Plaintiff upon the first counts of the declaration. The argument for the Plaintiff in Error must be, that the Court of Common Pleas had no authority to amend the *postea*, for that the writ of error having removed the record from their Court, their power over it was gone. The Court of Common Pleas had the power to amend the *postea* and judgment, which still remained with them, as they only sent up the transcript of the record to the Court of King's Bench. When they had so amended their own record, and the Court of King's Bench had been informed of the amendment, the latter Court was bound, *ex debito justitiæ* to amend the roll there, and to give judgment for the Defendant in Error. The amendment of the *postea* was only an amendment of a misprision of the clerk, which was authorized by the 8 Hen. 6, c. 12. Under that and other similar statutes [228] the Courts had long since adopted the practice of amending the *postea* by the Judge's notes. To show that amendments of a *postea* and a judgment might be made after writ of error brought, he cited *Petrie* v. *Hannay*, 3 T. R. 659: *Doe* v. *Perkins*, 3 T. R. 749; *De Tastet* v. *Rucker*, 6 Moore, 135; 3 Brod. and Bing. 65, and 9 Price, 432: *Henley* v. *The Mayor of Lyme Regis*, 6 Bing. 100; *Doe* v. *Dyball*, 1 Moore and Payne, 330: *Friend* v. *The Duke of Richmond*, Hardr. 505; where Hale, Chief Baron, said it was the constant practice after error from that Court for the record to be amended there, and the same amendment to be afterwards made in the court of Error: *Wood* v. *Matthews*, Poph. 102, *Anonymous*, Sir W. Jones' Rep. 9; *Anonymous*, 2 Roll Rep. 471; *Grenville* v. *Smith*, Cro. Jac. 627; *Ann Healings* v. *The Mayor and Commonalty of the City of London*, Cro. Car. 574; *Anonymous*, Salk. 49; *Meredith* v. *Davies*, Salk. 269; *Frankland* v. *Reeve*, Cas. Temp. Hardw. 118; *Foster* v. *Black*, Barnes, 7; *Tully* v. *Sparkes*, Strange, 869; *Short* v. *Coffin*, 5 Burr. 2730; *Rees* v. *Morgan*, 3 T. R. 349; *Pickwood* v. *Wright*, 1 H. B. 642; *Usher* v. *Dansey*, 4 M. and S. 94; and *Free* v. *Burgoyne* [2 Bli. N.S., p. 65], in that House, (mentioned by Mr. Campbell as a case in which he had been concerned,) and which was a writ of error from the Court of King's Bench. In that case it did not appear that the party below had asked for costs. The Lord Chancellor (Lyndhurst) said, that the Court below would amend the record, and that House would afterwards amend the transcript accordingly. The counsel, in consequence of that intimation, did not press their objections. *Dunbar* v. *Hitchcock*, 3 M. and S. 591, was also a decisive authority for the Defendant in Error. There an amendment was made by the Court of King's Bench after the record had been [229] removed to that House, and an amendment too which the Court of Common Pleas, where the case was originally tried, had considered as one of substance, and not a mere misprision of the clerk. Even that Court, however, in at first refusing the amendment (5 Taunt. 820) had impliedly admitted that if the matter to be amended had been only a misprision of the clerk, they would have made it, though after error brought in the Court of King's Bench. There was no pretence for saying that there was any distinction between the Courts of King's Bench and Common Pleas as to the power they possessed over their own records. It had been said that on error from the Court of King's Bench into the Exchequer Chamber or House of Lords, only the transcript of the record was sent up, but that on error from the Common Pleas into the King's Bench, the original record itself was sent. That was not so in practice, for in all cases of error from any of the superior courts, the transcript only was sent to the court of error. The law too was the same as to both, for the 27 Eliz. c. 8, which gave the writ of error from the King's Bench to the Exchequer Chamber, required that the record itself should be removed. That statute enacted, that the party against whom judgment was given in the King's Bench, might "sue out of the Court of Chancery a special writ of error directed to the Chief Justice, commanding him to cause the record, and all things concerning the judgment, to be brought before the justices of

the Common Bench and Barons of the Exchequer ;" and according to the forms given in Tidd's Appendix, c. 44, ss. 10 and 15, the writs of error from the Common Pleas to the King's Bench, and from the latter Court to the House of Lords, were in the same words. The King's Bench always [230] possessed authority over its own records, and so did the Common Pleas, and the distinction now attempted to be set up was utterly without foundation. If the authority of the cases quoted was not denied, their Lordships had only to look at the first count of the declaration, which was fully proved, and on which the verdict and judgment were now entered, and against which there was no pretence for alleging error.

Lord Tenterden: My Lords, a great doubt has arisen in my mind, how far this House can take notice of the rules and orders of the Courts below. Your Lordships look only to their judgments, and not to any interlocutory matter that may be brought before them. That is the point on which, if it be your Lordships' pleasure, the Counsel for the Plaintiff in Error shall be heard. I entertain great doubts upon it. I have a strong opinion that no consent or agreement of the parties themselves can bind this House, nor can any agreement of the Judges in the Courts below have that effect. It appears that the Court of King's Bench (see the judgment of the Court of King's Bench, delivered by Mr. Justice Bayley, 7 B. and C. 835) have agreed to state the facts on the record, " in order that a court of error may have the opportunity of considering whether the amendment we have required to be made, ought to be made or not." If the Judges of the Court below think proper to do what they conceive will give jurisdiction to this House, they may do it, but that will not alter the real jurisdiction of the House, nor will it alter the nature of the question that arises on the circumstances submitted to your Lordships' consideration. That question seems to me properly to be, whether a court of error can inquire into the propriety of any amendment made by an inferior court in its own [231] record, and to which question I think the attention of Counsel ought to be directed.

The case was allowed to stand over for two days when it was argued by

Mr. Barnewall, for the Plaintiff in Error —There are two points in this case, first, whether the Court of Common Pleas had the power to amend the *postea*, after the signing of judgment, and also to amend the judgment-roll, by altering the verdict; secondly, whether, if that Court had that power, the Court of King's Bench was bound to make the like alterations. At common law no amendment could be made after final judgment, and entry thereof on the record; *Marriot* v. *Lister*, 2 Wilson, 147. The power, therefore, to amend the record, after judgment signed, is derived from the statute of Amendments, 8th Hen. 6, c. 12, and it is confined to the misprision of the clerk of the court. The question in this case, then, is this, were the errors on this record caused by the misprision of the clerk or by the acts of the parties? It was no misprision of the clerk, but the fault of the Plaintiff below, that bad counts were put on the record. It was no misprision of the clerk when he entered the verdict generally, or as he was directed. The errors here, therefore, being caused by the act or omission of the party, from which the misprision of the clerk was distinguished, *Green* v. *Rennet*, 1 T. R. 782, was not amendable by the statute of Hen. 6th; *Mason* v. *Fox*, Cro. Jac. 631; Vin Ab. tit. *Amendments;* and the cases there collected from Bro. Ab. These authorities were perfectly consistent with the cases cited on the other side, for every one of the latter applied to amendments of the record before judgment, or amendments for misprision of the clerk after judgment. The entry of the verdict found by the jury upon all the counts, was no misprision of the [232] clerk, but the fault of the Plaintiff below, who might have directed it to be entered on the first count only at the time it was given, or moved the Court of Common Pleas to order it to be so entered before judgment. The general rule, as to amending the *postea*, when the jury give general damages, on a declaration consisting of several counts, and one or more of them is defective, is established by the case of *Eddowes* v. *Hopkins*, Doug. 377-8; and by the rules of M. 1654, sect. 21, K. B. and 1654, C. P. Barnes, 478. Willes, 443, and 1 Term Reports, 542; and, by the particular cases determined according to the above rules, as *Grant* v. *Astle*, Doug. 722; *Spencer* v. *Goter*, 1 H. Blac. 79; *Cook* v. *Cox*, 3 M. and S. 110; *Dunbar* v. *Hitchcock*, 1 Marsh. 382; 5 Taunt. 820, S. C.; *Reece* v. *Lee*, 7 Moore, 269. Insufficient pleadings, or any act of the party, or of his counsel, or of the judge, or court, are not amendable after judgment; Blackamore's case, 8 Rep. 310; *Mason* v. *Fox*, Cro. Jac. 631; and *Green* v. *Miller*, 2 B. and Adol

781; in which last case the Court said that they could not amend after judgment, except for misprision of the clerk. If their Lordships should affirm the amendments in this case, every Court in Westminster-Hall will be at liberty henceforward to repeal the statute of Amendments. But it is contended that this House is to look only at the record as it is brought before them in its amended form, and that the Appellant is estopped from showing how it stood originally in the Court of Common Pleas. There was no ground for such an argument: the amendments were made without the consent of the Plaintiff in Error, and therefore there was no estoppel, which is where a person is concluded by his own act or acceptance; Co. Lit. 352. *a.*, Com. Dig. tit. *Estoppel*. The truth appeared by this record to be, that these amendments of the *postea* and judgment-roll were made by the Court of Common Pleas, not only **[233]** after final judgment was entered up, but also after the record of the judgment had been removed by writ of error to the Court of King's Bench, and while the same remained in that Court. By the statute 8 Hen. 6, c. 1, amendments are to be made by the judges of the courts in which the record is, by way of error or otherwise, according to their discretion. The judges of the Court of Error were bound to exercise their judgment, whether the error sought to be amended arose from the misprision of the clerk. There was a distinction between proceedings on writs of error in these Courts: when a writ of error was brought in the King's Bench, on a judgment in the Common Pleas, the record itself, and not merely a transcript of it, was removed into the former court, except in the case of a fine; Year Books, 40 Ass. 29, 22 Ed. 3, 6 pl. 24; Fitz. Nat. Brev. tit. Writ of Error, 20 F. 1 Rol. Abr. tit. Error, 752-3. 3 D'Anv. Abr. tit. Error, P. a; Vin. Abr. tit. Error, P. Bac. Abr. tit. Error, B. 2. and Com. Dig. tit. Pleader, 3, B. 13; the case of *Andrews* v. *Lord Cromwell*, Cro. Eliz. 891; the Dean of Carlisle's case, Godb. 375, and *Coot* v. *Linch*, 1 Lord Raym. 427, Cowp. 843. The record, therefore, according to those authorities, could not be in the Court of Common Pleas, where the amendments were made. The judgment which had been entered upon that record was reversed by the Court of King's Bench, and that reversal was entered of record in that Court before the judgment-roll was amended in the Court of Common Pleas, which amendment was not made until after a lapse of several terms, contrary to the case of *Harrison* v. *King*, 1 Barn. and Ald. 161. It appears by the record, that two different and inconsistent judgments were given by the Court of King's Bench, one by which the judgment of the Court of Common Pleas was ordered to be reversed, the other by which it was affirmed, and the latter was given after **[234]** the first was entered up; all which was contrary to the authorities before referred to. The Court of King's Bench was not bound to follow the amendments made by the Court of Common Pleas, and the judgment of the former Court, reversing that of the latter, ought to be affirmed.

Lord Tenterden: This case appears to me to resolve itself into this question, whether it is competent for a court of error to examine the propriety of an amendment of the record of the court below, on the order for the amendment being sent up as part of the record? If the Judges shall be of opinion that it is not competent for a court of error so to do, the judgment of the Court below must be affirmed without further discussion, but, if they doubt upon that point, then they will consider, whether, supposing it to be competent for a court of error to inquire into these amendments, that which has been made in the Court of Common Pleas in this case is right.

The Lord Chancellor put these questions in form to the Judges. The House then adjourned for some time, during which their Lordships went up to present an address to the King on his escape from the attack made on His Majesty at Ascot-Heath. On the return of their Lordships, Lord Tenterden, in the absence of the Lord Chancellor, sat as Deputy Speaker.

Mr Baron Bayley delivered the following judgment:—In the absence of my Lord Chief Justice Tindal, it devolves on me to give the answer of the Judges to your Lordships' questions, which are these: First, whether it is competent to a court of error to examine the propriety of an amendment of the record made by the Court below, being a court of record, the order for the amendment being sent up as part of the record? Secondly, whether, supposing it to be **[235]** competent, an amendment made by the court of record in which the action was originally brought, in the

manner and under circumstances similar to those stated in the case of *Mellish* v. *Richardson*, would be lawfully made?

Upon the first of these questions, His Majesty's Judges are of opinion, that it is not competent to a court of error to examine the propriety of an amendment of the record made by the court below, being a court of record, although the order for the amendment is sent up as part of the record. The proper object of a writ of error is to remove the final judgment of the court below, for the revision of the superior court, in order that such court, from the premises contained in the record of the inferior court, may either affirm or reverse the judgment, as they draw the same or a different conclusion from that which has been pronounced by the court below. These premises are, the pleadings between the parties; the proper continuances of the suit and process; the finding of the jury upon an issue in fact, if any such has been joined; and, lastly, the judgment of the inferior court. All these premises, from which such judgment has been derived, the parties to the suit below have the right, *ex debito justitiae*, to have upon the record.

But the orders or rules for amendments of proceedings made by a court in the progress of a suit therein depending, do not fall within the description of any part of the record; but such orders are strictly and properly matters of practice in the progress of the cause, regulated by the power of amendment which the courts of law possess, either by the common law, or by the statutes of amendments which have been from time to time enacted by the Legislature for that purpose.

The practice of the courts below is a matter which **[236]** belongs by law to the exclusive discretion of the court itself; it being presumed that such practice will be controlled by a sound legal discretion. It is, therefore, left to their own government alone, without any appeal to, or revision by, a superior court. And we cannot but observe, that no precedent has been cited at the bar in which an entry similar to that contended for by the Plaintiff in Error is to be found. So strictly has the law considered that the pleadings in the suit, and the judgment proceeding thereon, shall form the only grounds of the record, that when it was found expedient that the opinion, in point of law, of the Judge who tried the cause, should be made the subject of revision by a superior court, the statute of Westminster the second (13 Ed. 1) expressly gave authority for that purpose by a bill of exceptions.

We think, therefore, that it is not competent for the superior court to examine into the propriety of the amendment, which is left to the sole discretion of the court by which it has been made. And, if this be so, then the circumstances for the orders for the amendment being put upon the record in this instance, cannot have the effect of giving competency to the superior court to revise the propriety of such amendment. For if the grounds of the amendment are not in themselves removable by the writ of error, and if the parties to the suit have not, *ex debito justitiae*, the right to put the rules and orders for the amendments upon record, then the superior court would have, or would not have, authority to inquire into the propriety of the amendments, according as the inferior courts did or did not return, in the particular instance, the order by which the amendment is made.

One of His Majesty's Judges has felt some doubt and difficulty in acceding to this opinion; but, upon the whole, acquiesces in its propriety.

[237] Such being the opinion of the Judges on the first question submitted to them by your Lordships, it becomes unnecessary for them to offer any upon the second.

Lord Tenterden: My Lords, Agreeing, as I do, with the opinion that has just been delivered, it is not necessary for me to trouble your Lordships at any length. It may be some satisfaction for your Lordships to know, that the Lord Chancellor is of the opinion you have just heard, and so is the noble and learned lord, the Chief Baron, who has read the case, and so is the noble and learned Earl (Eldon), who was present when the case was first argued. If the House could entertain an inquiry into the propriety of amendments made in courts of record, any other court sitting as a court of error might do so; yet this is the first instance in which any attempt has been made to place on the record, for the sake of the revision of a court of error, any thing more than the pleadings and judgment of the court below. If a court of error could have the right to inquire into the propriety of any interlineations made in the judgment of a court below, we should, before this time,

have had some instances of that sort. But, as I have before observed, there are none. And if once the precedent is introduced of inquiring into the propriety of interlocutory matters, I am afraid that courts of error will grant no writs of error that may not be made the means of delaying the interests of justice, and putting the parties to needless expense. It is with great satisfaction that I have heard the opinions of His Majesty's Judges on this occasion, and that I now move your Lordships to affirm the judgment of the Court below. Another question might arise on the subject of costs, but as the Court of King's Bench has put the question on the record, I shall submit that this judgment be affirmed without costs.

Judgment affirmed accordingly.

[238]

APPEAL.

From the Court of Session.

Baillie *v.* Grant.

[Mews' Dig. ii. 144. S.C. 9 Bing. 121; 2 Moo. and Scott, 193.]

A. contracted a debt, and afterwards became a trader: the debt remained unpaid: he went out of trade, and then committed an act of bankruptcy. Held that a commission of bankruptcy could be maintained upon such debt and act of bankruptcy.

Lord Chief Justice Tindal (June 25): The question proposed by your Lordships to his Majesty's Judges, is this: A. not a trader, becomes indebted to B. to the amount of £100. A. afterwards becomes a trader, and ceases to be a trader, never having paid his debt to B. After ceasing to be a trader he commits an act of bankruptcy: can B. support a commission against him upon his debt and that act of bankruptcy?

Upon this question, the Judges, who have heard the argument at your Lordships' bar, are of opinion, that a commission may be supported against A. upon the debt and act of bankruptcy above supposed. It has been decided, and has long been considered as law, that a debt contracted before a man enters into trade, but continuing unpaid at and after the time he is in trade, is a sufficient debt to support a commission taken out against him upon an act of bankruptcy committed whilst he is a trader. See the case of *Butcher* v. *Easto*, Doug. 295. It has also been established beyond dispute, that a petitioning creditor's debt, contracted during the trading of the debtor, will support a commission taken out against him on an act of bankruptcy committed after the trading has ceased. This point has been settled to be the law by various decisions, commencing with that of [239] *Heylor* v. *Hall*, Palmer's Reports, 325, and ending with that of *Ex parte Bamford*, 15 Ves. 449. But it is contended, that although each of these propositions be true separately, yet that no inference can be drawn from them that the debt contracted *before* the trading, but subsisting during its continuance, and the act of bankruptcy committed *after* the trading, will support a commission. We think, however, that no valid or substantial distinction, in this respect, can be drawn between the debt contracted before, and that contracted during the trading. The debt contracted before trade, but remaining unpaid at and after the time the debtor enters into trade, appears to us to be a subsisting debt for every purpose, and subject to every consequence which belongs to a debt originally contracted during trade. It is the same with respect to the trader's ability to carry on his trade. The money lent to the person who afterwards commences trade, may be, and often is, the capital upon which the trade itself is carried on. At all events, the credit given to the trader, by the forbearing to demand repayment, is one of the sources from which such capital is derived, and is the same in effect as a new loan. Again, the debt is attended in both cases with the same consequences as to the trader's ability to repay it, for in each the power of repayment is equally affected by the success or failure of the trader. No one would contend, that a debt contracted during the period of trading, though not a trade debt, but contracted for private purposes, and applied to private occasions perfectly distinct from the trade, is to be considered as differing in any respect from a debt contracted in the course of the

trade itself. It seems, therefore, rather an artificial distinction, than a substantial difference, to hold that the debt contracted after the trading has commenced shall support the [240] commission taken out upon an act of bankruptcy, committed after the trading has ceased, but that the debt contracted before the trading, though continuing afterwards, shall not be attended with the same consequences. If a commission cannot be supported under these circumstances, a trader, by giving up his trade, which is a voluntary act on his part, would have the power of depriving his former creditors of the benefit of enforcing an equal distribution of his effects amongst all his creditors, and would be enabled to pay his subsequent creditors out of the very funds furnished or increased by those who were his creditors before he began trade. And upon referring to the bankrupt acts, there does not appear to be any distinction between these two classes of creditors, as to the right to petition for a commission. The first statute which mentions a commission, is the 13 Eliz. c. 7, s. 2, which states, in the most general terms, that "the Lord Chancellor for the time being, upon *every complaint* made in writing against such person or persons being bankrupt, as is before defined, shall have full power, by commission under the great seal, to name, assign, and appoint the persons therein described;" and all the subsequent statutes contain an enactment similar in effect to that in the 6 Geo. 4, (the present Bankrupt Act), that the Lord Chancellor shall have power, upon petition made to him in writing against any trader committing an act of bankruptcy "by *any creditor or creditors* of such trader," to issue his commission: words which comprehend equally all creditors for debts existing during the trading, whether contracted before or after the commencement of the trading. The principal stress of the argument at your Lordships' bar was placed, first, upon the precise language used by the judges in the cases above referred to, wherein they [241] assigned the reason for their opinion, that the debt grew during the trading. But in those cases, the Judges speak with reference to the particular facts of the cases immediately before them, and such expressions afford no necessary inference, that if the cases then under discussion had, like the present, been cases of a debt remaining and continuing during the trading, their conclusion drawn from the other facts would not have been precisely the same. Again, it has been argued, that the statutes only authorize the suing out a commission against a person "using" the trade of merchandise, by buying and selling, etc. and that the ground on which a commission is allowed to be sued out on an act of bankruptcy, committed by the debtor after he has ceased to trade, is, that he cannot be considered as having left off trade whilst any of the debts that he contracted during trade are still unpaid. But if the debts contracted before, but continuing after, are virtually and substantially the debts of the trader whilst a trader, as we think they are, the words of the statutes, which are allowed to extend to the one, ought, in reason, to be held to include the other also. Upon the whole, we think, that both upon the reasonableness of the thing, and also upon the proper construction of the bankrupt acts, a commission may well be supported under the circumstances supposed in the case submitted to us by this House.

The Lord Chancellor: My Lords, the only point in this case is that which has been submitted to the Judges. It appeared to me that it should be argued before them, and that it was necessary the question should be decided by them, as it turned upon a principle equally applicable to English as to Scotch bankruptcies, and also because no previous decision could be found entirely in point. As the Judges have now given their [242] opinion, an opinion with which I fully concur, I shall move that the interlocutor be affirmed; but, in consideration that this is a case of the first impression, that it be affirmed without costs.

Interlocutor affirmed, without Costs.

APPEAL

FROM THE COURT OF SESSION.

Sir GEORGE CLERK, of Pennycuik, Bart. and others,—*Appellants*: Dr. WALTER ADAM, and the LORD PROVOST and MAGISTRATES of the City of Edinburgh,—*Respondents*.

[Mews' Dig. xiv. 285.]

While the right of property in a chattel is admitted to be in one person, the right of possession of that chattel cannot be absolutely and adversely in another.

The terms in which a man puts a request are not to be considered as conditions binding on him and his issue to all time to use the subject matter of that request in a certain manner and in no other.

This was an appeal from a decision of the Court of Session made under the following circumstances:

Many years ago a number of gentlemen instituted a club, denominated the High School Club, the object of which was to perpetuate the recollections connected with that institution, where the members had received the early part of their education. They were generally persons of the first respectability, and displayed [243] much zeal for the honour of the establishment alluded to. One of the favourite objects of the club, at an early period, was to offer a mark of respect and gratitude to the talents and exertions of the late Dr. Adam, who had long held the office of Rector of the High School. With that view, at a meeting of the club in March, 1808, a resolution was adopted to request Dr. Adam to allow his portrait to be painted by the late Sir Henry Raeburn, the most eminent portrait-painter of Scotland at that time, in order, and for the special purpose, that the picture might be placed in the High School.

Accordingly, on March 21, 1808, the following letter of request was addressed to Dr Adam, by three members of the club:

"Dear Sir: At a meeting of the High School Club some days ago, for the purpose of consulting how the members could best show you some mark of their regard, we are appointed a committee for carrying the resolutions into effect. In pursuance of these resolutions, we now beg leave to request, in the name of the club, that you will do us the favour to sit to Mr. Raeburn for your picture. We are anxious to place it in the school as a memorial of our gratitude—of the high sense we entertain of the advantages the public has derived for so many years from your useful and important labours. We flatter ourselves you will not be disposed to refuse this favour, when you reflect that we can ask it from no other motive but those of the most sincere regard and esteem; and that it may serve as an inducement to those who shall come after you, to emulate the able and conscientious discharge of your official duties, by [244] which you have contributed so much to extend the fame of our flourishing seminary. (signed) *H. Home Drummond.*
Robert Graeme.
James Campbell."

Dr. Adam assented to the request; his portrait was accordingly painted by the late Sir Henry, then Mr. Raeburn, and placed in a suitable frame; and on the 9th of August he wrote a letter to one of the club, part of which was in the following terms: "I feel my desire of prosecuting this work [his Dictionary] increased by the conspicuous manner in which you and your friends have been pleased to exhibit me to public view. I went yesterday to Mr. Raeburn's, with a gentleman who was desirous to see the picture, and found it decorated with a very splendid frame, very different indeed from what it was in at the public exhibition. You have ordered every thing concerning it with so much propriety, and so far beyond my expectation, that whatever you determine with respect to the placing of it, and the inscription, will be quite agreeable to me. I have only to request that the names of those gentlemen who have done me so great honour may be recorded; and that their reasons for doing

so, which you so handsomely expressed in your first letter to me on the subject, may be shortly mentioned. The shorter and the more simple the inscription is made, the better."

But before any measure had been adopted for placing the portrait in the situation for which it was intended, Dr. Adam died. The members of the club afterwards applied to the Magistrates of Edinburgh, by petition, for authority to place the painting in the [245] High School. Their petition to the Magistrates was thus expressed:

"Unto the Right Honourable the Lord Provost and Magistrates of Edinburgh, the Petition of Sir George Clerk, Baronet, (Pennycuik), John Brougham, and others therein named,

"Showeth, That your petitioners, in the year 1808, having requested the late Dr. Adam, rector of the High School of Edinburgh, to allow his portrait to be drawn at their expense, as a mark of their gratitude and respect for his meritorious discharge of his official duties, Mr. Raeburn of this city was accordingly employed for this purpose: that a personal application having been made to Donald Smith, Esquire, then Lord Provost of Edinurgh, for leave to place this portrait in the High School library, that gentleman was pleased to express himself favourable to their wishes.

"That the petitioners were not then fully prepared to avail themselves of the chief magistrate's permission; but that their portrait being now framed, with a suitable inscription, is ready to be placed in the library as soon as leave shall be obtained to that effect.

"May it therefore please your lordship and honours to grant leave, by a regular act of council, to the petitioners, to place the said portrait of Dr. Adam, acknowledging, in your deliverance hereon, that the property of the said portrait remains in the petitioners, and that they, or the majority of the survivors of them, may at any time hereafter dispose of the same as they shall think fit; and that the said portrait shall not be at the disposal of the said Magistrates of Edinburgh [246] during the survivance of any of the petitioners; and that, failing them and all provision of theirs to the contrary, the Magistrates shall then preserve the same *in perpetuam rei memoriam*. Signed in our name and by our appointment.

H. Home Drummond."

The Magistrates did not cause the petition to be intimated to the present claimant, the son of Dr. Adam, and accordingly he was no party to the proceedings. An act of council was passed in the following terms:

"Edinburgh, 25th April 1810.—Read petition for Sir George Clerk, baronet, etc.; which petition having been considered by the Magistrates and Council, they granted liberty to the petitioners to place the said portrait of Dr. Adam in the High School library, on the terms and conditions before mentioned."

The portrait was shortly afterwards placed in the High School library. It remained there till a new and more elegant building was erected on the Calton Hill, as the High School of Edinburgh. Along with the teachers, and scholars, and library, the portrait of Dr. Adam was removed to the new apartments from the old premises.

On June 12, 1829, a letter was sent to the Lord Provost, referring him to the Minute on the record of the Town Council's proceedings of the 25th April 1810, for the conditions on which the picture was placed in the High School. This letter was written by Mr. R. Graeme, one of the Appellants, on behalf of the rest, and was sent for the purpose of obtaining an order from the Town Council for placing the picture at the disposal of the club.

Shortly afterwards, a petition was presented to the [247] Magistrates, by Mr. H. Home Drummond, setting forth, that, in the year 1810, a picture of the late Dr. Adam, rector of the High School, the property of the petitioner, and of certain other persons whose names are inscribed on the frame of the said picture, in consequence of Dr. Adam's request, was placed in the High School library, with consent of the Lord Provost and Magistrates, but under the express condition and reservation, that the said portrait should not be at the disposal of the said Magistrates during the survivance of any of the said parties, all as more particularly set forth in a petition by them presented to the Lord Provost and Magistrates in the year aforesaid; which petition was considered by the said Lord Provost and Magistrates, and liberty given,

by Act of Council of date April 25, 1810, to place the said portrait in the library, on the terms and conditions mentioned in the said petition; and praying, that as the High School library was now disused, the petitioner, and those for whom he applied, should resume possession of the picture.

The Respondent, the son of the late Dr. Adam, having learnt what was going on, immediately instituted an inquiry into the nature of the original transaction between his father and the club; and about the 16th or 17th of December 1829, discovered the letter of 21st March 1808.

The Lord Provost, on January 9, 1830, wrote upon the subject to Mr. Graeme, and afterwards a meeting of the members of the club was held, when the following resolution passed:

"Edinburgh, 18th January 1830.—At a meeting this day of the proprietors of Dr. Adam's picture, the Lord Provost's note of the 9th January to Mr. Graeme was laid before them.

[248] "Mr. Graeme was requested to return thanks to the Lord Provost for his polite communication, and to express the regret of the proprietors that they cannot comply with the wishes of the committee of council, by allowing the picture to be put up in the hall of the New High School, until it should descend to the survivor of the subscribers.

"Mr. Graeme was farther requested, on the part of the proprietors of the picture, to renew his application to the Lord Provost, to give the necessary instructions for sending the picture, as soon as convenient, to Mr. Colvin Smith's house, York-place, Edinburgh."

In reply to this resolution, and an accompanying letter of the same import, the Respondent, Dr. Walter Adam, wrote a letter to the Lord Provost, in which, among other things, he observed, that his claim could not be affected by the act of the town council of the 25th April 1810, as his father was then dead, and his representatives had not been consulted on the occasion, for if they had, he felt assured they would never have consented to any such conditions as were at that time obtained by the gentlemen of the club.

Further communications took place on both sides, and to put an end to the dispute, the Magistrates and Town Council of the city of Edinburgh raised the present action of multiplepoinding.

The present claimant demanded and insisted that his father's portrait should, in the terms of its original destination, remain in the High School of Edinburgh, under the protection of the Magistrates and Council of the city, who are patrons of the seminary.

The Lord Ordinary (Corehouse), on 2d March 1831, pronounced an interlocutor in favour of the Appellants, finding that the picture was their property, and that the [249] intention expressed by them of placing it in the library of the High School was not a condition stipulated. Against this interlocutor, Dr. Adam appealed to the First Division of the Court of Session. The Judges of that Court, with the exception of Lord Gillies, pronounced the following judgment: "They adhere to the interlocutor reclaimed against, in so far as it finds that the picture in question is the property of the claimants, the members of the High School Club: but, *quoad ultra*, they alter the said interlocutor, and find that it was an implied condition in the treaty betwixt the Club and the late Dr. Alexander Adam, when he sat for his picture to the late Mr. Henry Raeburn, that the portrait was to be placed in the High School of Edinburgh, as a memorial of the high sense the claimants entertained of the advantages the public derived from his useful and important labours, and as an inducement to those who might come after him to emulate the able and conscientious discharge of his official duties, by which he had contributed so much to extend the fame of the High School; and they accordingly decern and declare, that the said picture shall remain in the High School of Edinburgh *in perpetuam rei memoriam*, and that the Magistrates and Council of the city of Edinburgh, as the patrons of that seminary, shall be answerable that it is properly placed therein, agreeably to the object in view, and carefully protected from all injury: Find no expenses due by either of the parties."

The Appellants now appealed against that part of the decree which ordered the picture to remain for ever in the High School of Edinburgh.

The Lord Advocate and Mr. Serjeant Spankie were heard on the part of the Appellants, and Dr. Lushington on the part of the Respondents. It was contended [250] for the latter, that Dr. Walter Adam, being the natural as well as legal representative of his father, was entitled not only to enforce all contracts made with his father, but to take care that whatever would contribute to the fame or honour of his father was duly preserved; that Dr. Alexander Adam had only sat for his picture upon condition of its being placed in the High School of Edinburgh; and that to preserve and perpetuate his fame, as well as to be an incitement to exertion among his successors, it was right that the picture should be placed there, and that such had been the original intention of the parties, who were not released from their contract by the mere circumstance of the change of the room in which the High School was held. For the Appellants it was insisted, that no such contract had been entered into; and, on the contrary, that Dr. Alexander Adam had, by the letter of the 10th of August, left the whole matter entirely at the discretion of the members of the Club; that the property in the picture was in them; and that property, without the right of possession, and without the means of enjoyment, (for they could only enter the High School by favour), was a thing unknown to the law: and further, that admitting the right of a son, as representative of his father, to be such as it was claimed, there was no ground whatever made out for the exercise of that right in the present instance, as there was not the slightest pretence for saying that the Appellants wished to dispose of the picture in any manner derogatory to the fame of Dr. Alexander Adam, for whose memory they still entertained the highest respect.

The Lord Chancellor (July 16), after stating the circumstances under which the case came before the House, said that he entirely agreed with the interlocutor of the [251] Lord Ordinary, and of course, therefore, dissented from the judgment of the Court of Session, who, though they had admitted the question of property, had held that Dr. Alexander Adam had sat for his picture upon a certain condition, and decreed the performance of it. Now, what kind of property in a personal chattel could a man be said to have, if, at the same time, it was affirmed with respect to the same chattel, that there was in other persons a right inconsistent with any one incident of property. So new and extraordinary a species of right required the strongest proof to support its existence. What was the proof here? The Respondents say that Dr. Alexander Adam sat for his picture on an implied condition that it was to be used only in a certain way. It is not said that that condition vested a joint property in the picture in him and his family with the members of the Club at whose request it was taken; but the judgment, referring to the point of property, says that it is in the Appellants alone. The letter of the 21st March, the sitting in consequence of that letter, and the letter of the 9th August, were all of them evidence on the point of property in favour of the claimants. It was impossible to say that the terms in which a man put a request, were to be considered as conditions that were to bind him and his issue to all time to use the thing which was the subject of that request in a certain manner, and in no other. These were merely matters of courtesy and feeling, with which the law could not interfere. The letter of the 9th of August was important to be considered. The representatives of Dr. Adam could not stand in a better situation than he himself did. That letter gave the Doctor no such right as that which was now claimed by the Respondent, Dr. Walter Adam. The right of property in these [252] gentlemen was admitted. Of what use was that right when totally severed from the means of the enjoyment of that property. These gentlemen, in consequence of the picture, which was their property, being in the school-room, could not possess any right whatever over the school, which belonged to the Magistrates alone, and could not even go in to see their own picture except as a matter of grace and favour. The doctrine put forward by the Court of Session could not be supported. The interlocutor of the Lord Ordinary must therefore remain, and the judgment of the Court of Session be partly reversed. He had no doubt that this picture would be dealt with most properly by the Appellants, and the property would be as safe in their hands from any neglect whatever, as it would in the hands of any other persons. He believed, too, that the costs of these proceedings would not be borne by Dr. Walter Adam.

Judgment of the Court of Session reversed as to that part which directed that the picture should for ever remain in the High School of Edinburgh.

[253] APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

CORNELIUS DUFFY,—*Appellant*; ROBERT ORR and Others,—*Respondents*.*

[Mews' Dig. ii. 1344; x. 527. S.C. 5 Bli. N.S. 620. See *Lee* v. *Lockhart*, 1837, 3 My. and Cr. 302.]

A., a creditor of a firm, held securities from one of its members for monies advanced by him, at different times, to the firm, but claimed a balance beyond what those securities would cover. All the creditors of the firm agreed to accept a composition "of 7s. for every 20s. due to the said creditors respectively." A. was the first to sign this deed; but added to his signature the words, "without prejudice to any securities whatever that I hold." The other creditors signed, in their respective order, under A.'s signature. Held, that such a composition, thus accepted, did not affect the rights of A. upon his previous securities, but only related to the balance beyond the sum they would cover, and that he might afterwards enforce those securities in equity.

A commercial partnership, consisting of John Duffy, senior, Cornelius Duffy, the Appellant, and John Duffy, junior, was formed, in the year 1812, for the purpose of carrying on the business of calico printers, at Balls-bridge, near the city of Dublin, and at Bridge-street, in that city.

Soon after its formation, the firm became embarrassed, and the Respondent, Robert Orr, being connected by marriage with the members of it, and being possessed of considerable property, was applied to, in [254] the years 1812, 1813, and 1814, by the partners in the firm, but particularly by the Appellant, who exclusively managed the money concerns of the firm, for pecuniary assistance. He assisted the firm with advances of money and credits, up to the year 1814, to the amount of upwards of £30,000. About the middle of that year, the embarrassments of the firm increased, and Orr, having declined to advance to them further sums, without security, it was proposed by Cornelius Duffy, that Orr should accept, as some security for his then advances, and for the further advances which he was solicited by the Appellant to make, a mortgage of a part of the property of the firm, called the Balls-bridge concerns, for the sum of £10,000; a mortgage of another property, called the Bridge-street concerns, for a sum of £5000; and a mortgage of an estate in the county of Galway, belonging to the Appellant, for the sum of £10,000. The Respondent, Orr, agreed to comply with those proposals; and, accordingly, by three indentures, two bearing date the 2d of August 1814, and the third bearing date the 28th of September 1814, the Balls-bridge concerns, and the Bridge-street concerns, were mortgaged to him.

The Galway estate was afterwards mortgaged to him, on the 5th of November in that year, for £10,000; and, as a further security, a bond with warrant of attorney, in the penalty of £20,000, was executed by Cornelius Duffy, conditioned for the payment of £10,000 in February 1816. After the date of this mortgage, Orr advanced further sums to the firm, which, however, became more embarrassed, and in the beginning of 1816 proposed a composition of 15s. in the pound, which was accepted by the creditors, and a composition deed was accordingly executed in June of that year. In the beginning of 1817, a docket was [255] struck against them. In that year, John Duffy the elder died insolvent. Up to the 31st of July 1817, there was a balance due to Orr of £7830 over and above the three sums secured by mortgage. On the 14th of August in that year, Cornelius Duffy wrote to John Duffy, junior, his partner, a letter, containing these words: "The Galway property certainly has nothing to do with the creditors; that part only concerns him and I," [me.]

In August and September, 1817, various meetings of the creditors of the firm were convened, at which the accounts were investigated, and Orr was pressed by the creditors, and by Appellant and John Duffy, to accept a conveyance of the equity of redemption of the mortgaged properties in Dublin, in full satisfaction of the sums

* This case was decided in the Session 1831, but was accidentally omitted.

for which they were respectively mortgaged, leaving him a creditor upon the general funds of the firm for £7830; and it was further proposed, by Cornelius and John Duffy, junior, that Orr and the other creditors should accept a composition of 7s. in the pound; Orr receiving such composition on the said sum of £7830, the balance due after deducting the sums for which he had agreed to accept satisfaction and security as aforesaid. The creditors, however, before they acceded to a composition, insisted on Appellant's retiring from the firm; and it was proposed and agreed that Appellant, upon retiring, should be released from all demands in respect of the debts then due. These proposals being agreed to, the arrangement was carried into execution, by an indenture, bearing date the 18th September 1817, made between Cornelius Duffy of the first part, the creditors of the firm of Duffy and Sons of the second part, and John Duffy the younger of the third part, reciting the composition concluded in 1816, and that Cornelius [256] Duffy and John Duffy, as surviving partners of the firm, were, from sundry misfortunes in trade lately sustained by them, unable to discharge the said composition, and reciting that the creditors, parties thereto, after due examination into the affairs of the partnership, had agreed to accept a composition from them of 7s. in the pound, to be secured by the promissory notes of the said John Duffy alone, in full satisfaction and discharge of their several debts; which composition was to be divided into five equal shares, payable in six, nine, twelve, fifteen, and eighteen months. And that it was further agreed between Cornelius and John Duffy, that the said co-partnership should be forthwith dissolved; and that the stock, debts, etc. should be vested in and made over to John Duffy, to enable him to pay the composition notes, so to be executed by him as aforesaid. The indenture witnessed that the several persons who had subscribed it, being creditors of the original firm of John Duffy and Sons, or of Cornelius and John Duffy, so continuing to trade under the said firm as aforesaid, thereby covenanted to accept the sum of 7s. so secured as aforesaid, in full discharge and satisfaction of the debts due from the original firm of John Duffy and Sons, or from the said Cornelius and John Duffy, so continuing to trade under the said firm as aforesaid, or for which they were in any manner responsible. And Cornelius Duffy was absolutely released from any debt due on account of the firm of Duffy and Sons, or that of Cornelius and John Duffy.

This deed was executed by the Respondent, Robert Orr, as one of the creditors of the firm of Duffy and Sons, but expressly without prejudice to any securities whatever that he held.

Promissory notes were accordingly given by John Duffy, junior, to the several creditors for the amount [257] of the composition on their respective debts, and were indorsed by the Respondent, Robert Orr; and it was on the faith of his credit alone that the creditors accepted such compromise.

In further pursuance of the said arrangement, by two several indentures respectively bearing date the 6th Nov. 1817, the equity of redemption in the said premises at Ball's-bridge, and in the said premises at Bridge-street, was conveyed to the Respondent, Robert Orr, in discharge of the said sums of £10,000 and £5000 respectively, making together the sum of £15,000, part of his demand against the said firm.

Appellant for several years acquiesced in the deeds, and conformed thereto and acted thereon; but in August 1822 declined to pay Orr any further interest. Orr, therefore, in 1824, filed a Bill in the High Court of Chancery, in Ireland, against Appellant and others, for a foreclosure of the mortgage on the Galway estate; and also prayed the appointment of a receiver, and an inquiry into prior incumbrances, and the execution of the trusts of the deed of the 6th Nov. 1817.

Defendants appeared and answered, and witnesses were examined; but before hearing of the cause, in 1826, the Appellant filed a Bill in the Court of Chancery in Ireland, against Respondent, Orr, John Duffy, and others, alleging that the Ball's-bridge and the Bridge-street concerns were much more valuable than the Respondent, Orr, admitted; that no accounts had been settled, so as to ascertain the amount due; and that Appellant had been compelled to act under the fear of a threat of bankruptcy. The cross Bill insisted that the mortgages on the separate property of the Appellant ought to be considered as auxiliary only in case of the deficiency of the joint property, and that Orr ought to be deemed to have accepted the sum of [258] 7s. in the pound as a composition upon his whole debt. It prayed that Orr might

be compelled to elect between the joint property of the firm and the separate property of Cornelius Duffy; but if he should insist on a right to resort to the separate property, as well as to the joint property, for payment of his demands on the firm, that the several deeds of the 6th of November 1817 might be declared void, and the premises called the Ball's-bridge concern, and the Bridge-street concern, might, as well as the Galway estate, be declared to be still in mortgage to the Respondent, Robert Orr, to secure the balance due to him from the firm; but that the joint property might be declared to be the fund principally liable to the payment thereof; and that the separate property of the Appellant might be resorted to only in the event of the joint property of the Appellant proving insufficient to pay the balance; and that the balance might be ascertained, and that various accounts therein particularly mentioned might be taken, and that upon payment of the sum ascertained to be due, the Respondent, Robert Orr, might be decreed to reconvey the mortgaged property.

The Defendants to this Bill appeared and answered, and witnesses were examined on both sides.

The evidence offered by the Appellant in support of his Bill consisted, in great part, of the testimony of different individuals on the subject of the money expended in the buildings and machinery in the Ball's-bridge concern, and of the estimated value of that property for sale in the year 1817, some of the witnesses examined on the part of the Appellant representing that in their opinion it was then worth, to be sold, £20,000 or £25,000, while the witnesses examined on the part of the Defendants estimated it as then worth not more than £7000 or £8000.

[259] Both causes came on to be heard on the 22d day of June 1829, before Sir Anthony Hart, Lord Chancellor of Ireland, and on the 25th of June 1829, his Lordship pronounced a decree in the cause of "*Orr* v. *Duffy and Others*," that it be referred to the Master, to take an account of what was due to Orr, for principal and interest, on the foot of the deed of mortgage of the Galway property, having reference to the indenture of agreement of the 6th day of November 1817. And it was further ordered, that all persons having debts, charges, and incumbrances affecting the mortgaged lands and premises in the said indentures mentioned, prior to the said indenture of the 5th day of November 1814, should be at liberty to go in before the Master to prove and ascertain their demands; and that a receiver should be appointed to receive the rents and profits of the mortgaged lands and premises in the said indentures mentioned.

On the same day his Lordship pronounced a decree in the second cause, "*Duffy* v. *Orr and Others*," whereby he directed the Bill filed by the Appellant to be dismissed with costs.

From these decrees Cornelius Duffy appealed, praying that the same might be reversed.

The Respondent, Robert Orr, contended that the said decrees should be affirmed, and the said Appeal dismissed with costs.

Sir Edward Sugden and Mr. Lynch were heard on behalf of the Appellant.—After going through the circumstances stated in the case, they argued that the Appellant stood merely in the relation of a surety to Robert Orr; that the composition which the latter had agreed to accept was a composition in respect of his whole demand; and that all the partnership property ought first to be brought into use before the private **[260]** property of the Appellant was resorted to. The deed of 1817 ought only to stand for what was justly due, and the account of what was due ought to be taken on all the property of which Robert Orr was possessed, and consequently on all the partnership property, which ought to be first employed, and the private property of the Appellant ought only then to stand as a security for the balance. All the mortgages had the common object of securing to Robert Orr the fluctuating balance. Now the composition deed subsequently entered into was a discharge of the principal debtor; and the principal being discharged, the surety was also released. That was the rule adopted in the case of *Ex parte Glendinning*, Buck's Cases in Bankruptcy, 517, where the Court held, that if a creditor executed a deed of compromise with the principal debtor, the surety was discharged, unless the remedies against him were specially reserved. In the judgment of that case it was said, "Ever since Mr. Richard Burke's case, the law has been clearly settled, and it

is now perfectly understood, that unless the creditor reserves his remedies, he discharges the surety by compounding with the principal, and the reservation must be upon the face of the instrument by which the parties make the compromise." The securities still claimed by Robert Orr, after having entered into the composition deed, could not be enforced, for otherwise that deed would be a fraud upon the other creditors. In the case of *Ex parte Sadler*, 15 Vesey 52, it was held, that upon a composition, a private agreement by some creditors for an additional security, though for no greater sum, is void. The Lord Chancellor there said, "I was not aware of the last decision in the Court of King's Bench, that where the security is for the same sum which is secured by the general com-[261]-position, it is a fraud upon the creditors; but I am much struck with it, and I think there is much principle in it. If it is competent for six out of seven creditors to obtain sureties, even for the same amount, the seventh is imposed upon; as, instead of having the evidence of the other six that the act which he is about to do is reasonable, proved by the same act on their part, he is circumvented by their obtaining, as against him, from their debtor, an advantage which they will not give him as against themselves. They mislead the creditor into a situation in which their own acts show they think it unreasonable that he should be placed."

Mr. Pepys and Mr. Swanston for the Respondents:—The Appellant had no right on which he could claim to be heard against the validity of these transactions in a court of justice, for he had assigned all right and interest in the business, and in every thing connected with it, to J. Duffy. In consideration of his doing so, the creditors had consented to take 7s. in the pound, and J. Duffy had alone become answerable for the payment of that composition. It was clear that the composition was not fraudulent as against the creditors, for Mr. Orr had been the first creditor to sign the agreement for a composition, and the composition deed itself; and to his name he had affixed the declaration, that his signature of that deed was not to affect the other securities that he then held. That declaration was in itself a special reservation, on the face of the instrument, according to the authority of the case cited, and was a notice to the other creditors, who, by signing the deed after him, admitted his right to that additional advantage.

Decree affirmed, and Appeal dismissed with Costs.

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[262]

WRIT OF ERROR

From the Exchequer Chamber.

THE COMPANY OF PROPRIETORS OF THE GLAMORGANSHIRE CANAL NAVIGATION,—*Plaintiffs in Error:* RICHARD BLAKEMORE,—*Defendant in Error.*

[Mews' Dig. xiv. 1933, 1934; S.C. 5 Bli. N.S. 547; and, in Ex. Ch., 2 C. M. and R. 133; 1 Gale 78; 5 Tyr. 603; 4 L.J. Ex. 146; in Ex. 3 Y. and J. 60; and see 1 My. and K. 154.]

Where a Canal Act gave to the proprietors of the navigation a power of making a canal, and of using the waters of a river for supplying it, but provided, at the same time, for securing to the owners of certain works the use of the surplus waters of that river, the making of the canal ascertained and fixed the rights of the parties, and the canal proprietors had no right afterwards to enlarge the canal, and draw a much larger quantity of water from the river, so as injuriously to affect the works in question. A declaration charging it to have been the duty of the canal proprietors to abstain from thus enlarging their canal, and alleging a breach of that duty, sets forth a sufficient cause of action against them.

A clause in a second Act of Parliament relating to the same canal, declared that

the works thereby authorized should be completed within two years from the time of its passing, and that the money to be raised by it should not be applied to defray the expenses of any of the works not made within that time. Held, that this clause not only limited the application of the money to works completed within that time, but that no works should be carried on, adversely to the interests of individuals, after the expiration of the two years. A declaration framed on such a clause, and alleging for breach that works were so adversely carried on after the expiration of the two years, was held to contain a sufficient legal statement of a cause of action.

Mr. Blakemore, in Hilary Term 1827, brought an action on the case, against the Glamorganshire [263] Canal Company, for an illegal abstraction of water from certain works belonging to him, and known by the names of the Melin Griffith Works, and the Pentyrch Works. The declaration contained 38 counts, divided into two sets of 19 counts each. The first set related to the Melin Griffith, and the second to the Pentyrch Works. In the first six counts of the first set, the Plaintiff complained of the Company for not properly erecting a weir, as directed by the Act of Parliament, 30 Geo. 3, c. 82, under the authority of which they had made their canal; for afterwards making another weir not directed by the Act of Parliament, which caused the water that would otherwise have been conveyed to the Plaintiff's works by means of the Parliamentary weir, to run off from the said works: for leaving open the stop gates and flood gates, and for not properly puddling and lining the canal. The question now in dispute chiefly arose upon the sufficiency of the counts from the 7th to the 14th, both inclusive.

The seventh count stated, that before the passing of the said Act, and until the taking and carrying away of the water by the Defendants, large quantities of the water of the river Taff ran and flowed, through the cut or watercourse in the said Act mentioned, to the Melin Griffith Works. And whereas by a certain other Act of Parliament, passed in the 36th year of King George the Third, "to amend an Act of the 30th year of His Majesty, for making and maintaining a navigable canal from Merthyr Tidvil, to and through a place called the Bank, near the town of Cardiff, in the county of Glamorgan, and for extending the said canal to a place called the Lower Layer, below the said town," it was enacted that the several works therein mentioned, and all other works whatsoever incident to the said canal, [264] and extension to be made by virtue of these Acts, should in all things be finished and completed within the space of two years next after the passing of the last-mentioned Act. By reason of which premises it became the duty of the Defendants not only to make and continue such weir, as was directed by the said Act, for the use of the Melin Griffith Works, but also, after the expiration of the said two years, to abstain from enlarging, widening, deepening, varying, or altering the canal, or the works thereof, or by such ways and means lessening the quantity of surplus water, or such as should not be necessary for the use of the said canal, and in all respects to allow and give to the proprietors of the said works the reasonable and just benefit, use and enjoyment of the said weir so directed to be made as aforesaid: and although the Defendants did make a certain weir, for the purpose of letting off the surplus water, or such as should not be necessary for the use of the said canal, into the said cut or watercourse for the benefit of the works, yet they did not, after the expiration of the said two years, abstain from enlarging, widening, deepening, varying, and altering the said canal, but on the contrary, had greatly enlarged, widened, deepened, varied, and altered the canal, whereby a much greater quantity of water became necessary for the use of the said canal, and whereby large quantities of water being in the said canal, which otherwise would have been surplus water, or not necessary for the use of the said canal, and which ought to have been, and otherwise would have been, let off and conveyed by and over the said last-mentioned weir out of the canal into the said cut or watercourse of the said Plaintiff, for the benefit of the said works, became necessary for the use of the said canal so wrongfully [265] enlarged, widened, deepened, varied, and altered as aforesaid, and ceased to be surplus water, and were prevented from running and flowing by and over the said weir in this count mentioned, unto the works of the Plaintiff, and ran and flowed away from the works, whereby the said Plaintiff lost great part of the use of the said weir so directed to be made as aforesaid, and large

quantities of the water of the said canal, of which he ought to have had the use. The eighth count was for continuing the grievances mentioned in the seventh. The ninth count was for continuing an enlargement of the sea lock, made more than two years after 36th G. 3, whereby more water was required for the use of the canal. The tenth count recited that before the passing of the Acts 30 Geo. 3, c. 82, and 36 Geo. 3, c. 69, the waters of the Taff flowed through the Plaintiff's cut or watercourse to his works, and that by the authority of these Acts the Defendants were required to finish the said canal, and all the works and extension of the same, within two years after the passing of the last of these Acts, and alleged that it thereupon became their duty to abstain from afterwards making any engine to carry off the surplus waters of the Taff from the Plaintiff's works, yet the said Defendants, not regarding their duty, after the expiration of the said two years from the passing of the last-mentioned Act, made or erected a certain steam-engine, for the purpose of pumping and conveying the water of the said river into the canal, whereby large quantities of the water of the said river, which otherwise would and ought to have run and flowed through the said cut or watercourse to the said works, were pumped by the engine out of the river into the canal, and flowed away from the works. The eleventh count was for continuing the injuries mentioned in the tenth count. The twelfth count recited [266] matters similar to those in the tenth count, alleged that it was the duty of the Defendants to make a weir to carry off the surplus waters into the Plaintiff's watercourse, and complained that although they did make the weir, yet they did not abstain from enlarging, widening, deepening, varying, and altering the said canal, but on the contrary thereof, had greatly enlarged widened, deepened, varied, and altered the said canal, whereby a much greater quantity of water became necessary for its use, and the surplus water was diminished. The thirteenth count was for continuing the grievances mentioned in the twelfth count. The fourteenth count stated the grievance to be the keeping and maintaining an enlargement of the sea lock, which had been wrongfully made after the making of the weir directed by the first Act. The fifteenth count stated that the Defendants improperly used the water of the canal for the purpose of working a corn-mill. The sixteenth count stated that the Defendants improperly used the water for the working of steam-engines. The seventeenth count stated that the Defendants improperly used the water for a graving-dock. The eighteenth count stated that the Defendants improperly used the water for the purpose of making iron: and the nineteenth count stated the Plaintiff's possession of Melin Griffith Works, and that the Defendants wrongfully diverted the water which ought to flow to them, without stating the Acts of Parliament or the mode of diversion.

Each of the counts stated general and special damage to the Plaintiff, as proprietor of the Melin Griffith Works.

The other counts, from the 20th to the 38th inclusively, complained of injuries to the Pentyrch Works, of the same description as those stated in the corres-[267]-ponding counts of the first set, with respect to the Melin Griffith Works.

The Defendants pleaded the general issue and the statute of limitations.

The cause was tried before Mr. Justice Littledale, at the Hereford Summer Assizes, 1827.

The Jury found a verdict for the Defendants on the 15th, 16th, and 18th, and on the 34th, 35th, and 37th counts, being the corresponding counts of the two sets: and a verdict for the Plaintiff, on both issues, on all the other counts of the declaration, for £172 damages; the damages were entire. The Plaintiff afterwards had judgment on that verdict.

This judgment the Company carried by Writ of Error into the Exchequer Chamber, where,, in Hilary Term 1830, the judgment was affirmed: on which they brought their Writ of Error in Parliament, and prayed the reversal of the judgment on the following grounds: The counts, from the 7th to the 11th inclusively, were bad, inasmuch as they assumed that by the 36 Geo. 3, c. 69, s. 3; * the powers of the Com-

* Enacting, "that the said works, and the said extension, and all other works whatsoever incident to the canal and extension, to be made by virtue of the said recited Act, and this Act, shall in all things be finished and completed within two years next after the passing of this Act, and no part of the sum to be raised as aforesaid shall be applied in or towards defraying the expenses of performing any of the works aforesaid which shall not be made or done within the space of two years."

pany were taken away after two years. That Act only restricted the application of the funds thereby raised to works finished within that time. The powers of the Company were given in the first Act by express words, and could only be taken away by express words. That 12th, 13th and 14th counts were [268] bad, as they assumed that the Company, after making the canal under the first Act, and the weir directed by that Act, were bound to abstain from making any alteration that might cause it to require more water, and stated no cause of action except a violation of that supposed duty. The Defendant in Error insisted that the judgments of the Courts below ought to be affirmed, because by the two Acts a contract had been established between the Company and the proprietor of the Melin Griffith and Pentyrch Works, by which, upon the completion of the canal, he acquired a vested right and interest in the surplus water of the canal, and the waters of the Taff, in such manner, and to such extent, as the canal, with its engines and machinery then made and existing, afforded to his works. That such had been the construction put upon the two Acts by several learned Judges, both at law and in equity. That if the Company had a right to diminish the supply of water, by the deepening or widening of the canal, or by the erection of new engines, they had a right to take it away entirely, a right which the Legislature never could have intended to give them. That the counts objected to were, therefore, not bad in law, and it was properly assumed in those counts that the Company were prohibited, by the contract contained in the two Acts, from exercising the powers given them after the expiration of two years from the passing of the last of those Acts. And that those counts stated a sufficient cause of action in showing that contract to have been broken by the Company.

Mr. Maule, for the Plaintiffs in Error: The ground of appeal was, that some of the counts on which the Plaintiff below had judgment, were bad in law. Where a joint judgment was given on different counts in a declaration, if one of the counts was [269] bad, the judgment could not be sustained. That proposition was too clear to be disputed. All the counts in this declaration, from the 6th to the 14th, were bad. One objection applied equally to all of them, and a second objection applied to the 12th, 13th and 14th counts alone. The general scope of the declaration was, that the Company had used the canal in such a manner as to prejudice Mr. Blakemore in the occupation of certain works. The first Act on the subject of this canal was 30 Geo. 3, by some of the sections of which the Company were allowed to take water from watercourses, and by others they were directed to erect a certain weir: then followed the 36 Geo. 3, c. 39, by which the Company were empowered to raise sums of money to defray the expense of works therein directed to be done. The 10th count charged no other grievance than this, that at the expiration of two years after the passing of the 36 Geo. 3, the Canal Company had pumped into the canal, by means of a steam-engine, a certain quantity of water. It was intended to state on the face of that count, that it was not competent for the Company to make a steam-engine after the expiration of the two years. That question, if it could be raised at all, must depend on the construction of the 3d section of the 36 Geo. 3. The 12th, 13th and 14th counts made no mention whatever of the Act. They alleged that it became the duty of the Company to make a weir, and also, after the making and erection of the said weir, to abstain from enlarging the canal, so as to lessen the quantity of surplus water that flowed from it into the watercourse, and they alleged a breach of this supposed duty. The result of this was, that Mr. Blakemore must contend, that after the canal had been once made, there was an end of the powers of the Company. Such a construction of the [270] Act was clearly wrong. The two Acts were said to establish a contract between the parties. There was no such contract. An action had lately been tried on these very Acts, in which the Defendant defended himself from a claim of tolls made on him by the Company, on the ground that the Company had contracted and agreed with him to charge him no more than the lowest amount of toll. That case was tried before Mr. Justice Patteson, who held that the Acts established no such contract. In like manner it was impossible to contend that there was any contract in them that the works on the canal should be finally completed within the space of two years, and that no others should ever afterwards be begun. No man of sense could ever pretend to say that a canal could be made complete in the first instance. The Act of the 36 Geo. 3 was passed avowedly for the purpose of enlarging the powers of the Canal Company; yet it was contended, on the part of

the Defendant in Error, that this very Act had for its object the limitation of the rights of the Canal Company. Powers, when once given, could not be taken away, except by express words used for that purpose. In the case of *The King* v. *The Glamorganshire Canal Company*, 12 East, 157, the Court expressly declared, on the construction of these two statutes, that "the Company might erect new works, in furtherance of the purposes of the old line of navigation, for though the works might be new in specie, yet being for the maintenance of the old canal and works, the Company were authorized to make them." It might be said that that was a case between a freighter and the Canal Company, and that the freighter there stood in a different situation from the present Defendant in Error. Admitting that observation to be true, still the opinion of the Court, as to the construction of the Acts, was the same, and must [271] be taken materially to affect the present case. After that came the case of *The King* v. *The Justices of Glamorganshire*, 7 Barn. and Cres. 722. That was the case of an application by the present Defendant in Error to compel the Justices to disallow certain expenses which had been incurred on the canal, upon the ground that the powers of the Canal Company had expired. It was there contended that the 36 Geo. 3 did not intend to authorize the Company to make new works, but Lord Tenterden said, that as far as the question then before the Court went, that Act was wholly immaterial, and he afterwards declared that in his judgment the widening and deepening of the canal was an expense necessarily attendant on the using of the canal and was for the public benefit. Mr. Justice Littledale too, when the question had come before him on the construction of this Act of Parliament, had treated the two years' clause as a limitation relating only to the application of the £10,000.

Lord Lyndhurst: Suppose the Company complete the canal, and it remains in that state for 20 years, and Mr. Blakemore has the use of the surplus water during that time. You say you have a right to alter and improve it; but may you do it so as to injure him in the possession of that right, which he has enjoyed for 20 years? You having declared the canal complete, can you at the end of 20 years say, that under the term improvement, you can deprive him of the water, the use of which he has enjoyed during that time?

Mr. Maule: The words of the Act, giving the Company power to make improvements, were not restricted by any express words following them, and without such words of restriction, the Company could not be prevented from making improvements at any [272] length of time after they had first declared the canal completed.

Mr. Serjeant Ludlow and Mr. Serjeant Russell for the Defendant in Error: There was no doubt that if part of the declaration in this case was bad, the present judgment could not be sustained. The question was, whether the counts from the 7th to the 14th inclusive did not state a sufficient cause of action. The 12th, 13th and 14th counts stood on the first Act of Parliament, and all of them complained of an enlargement of the canal, or the making a sea-lock. These counts simply amounted to this, that Plaintiff being possessed of a certain watercourse, and of a right to water to supply the same, the Company injured him in the possession of that right. Another question involved in that was, how far the Company were restrained from making such improvements, after the expiration of a limited period? It was not meant to be contended, that after the canal had once been declared to be completed, they were absolutely restrained from making any alterations whatever; but it was submitted that they were restrained from making such alterations as would injure the Plaintiff's works; and the powers given them under one or both of the Acts must be construed with reference to Mr. Blakemore's rights. The two Acts formed a contract on the part of the Company, and were subjected to this rule of construction, that they must be taken strictly as against a public Company. That rule was acted on in the case of *Scales* v. *Pickering*, 4 Bing. 448. That was a question arising on an Act of Parliament for supplying a part of the neighbourhood of London with water. By sec. 32 of that Act, a Water Company was empowered to break up the soil and pavement of roads, highways, foot-[273]-ways, commons, streets, lanes, alleys, passages, and public places, provided (s. 34) that they should not enter any private lands without the consent of the owner. It was held that the Company had no authority, without the consent of the Plaintiff, to enter a field of his, over which there was a public footpath. When the case came before the Court,

on motion to set aside the verdict for the Plaintiff, Chief Justice Best said, "They who enter in such cases must clearly show their authority, and if the words of the statute on which they rely be ambiguous, every presumption is to be made against the Company, and in favour of private property." And Mr. J. Park afterwards observed, "It is a wise rule, in the construction of private Acts of Parliament, that they should be construed strictly." The effect of the construction contended for, on the other side, was in direct contradiction to that of these two learned Judges. The question now was, whether Mr. Blakemore, having obtained at a certain time, a right to the use of a quantity of water, that right could be taken away afterwards at the pleasure of the Company. The case of *Duncombe* v. *Sir E. Randall*, Hetley's Reports, 34, was an authority on this point. The fact of the case, and the opinion of the Court, were thus stated, "In an action upon the case between Duncombe and Sir E. Randall, for diversion and stopping of a river, it was agreed by the Court, that if one had anciently ponds, which are replenished out of a river, he cannot change the channels, if any prejudice accrue to another by that, and yet the effect by perfluxions is to have the ponds fed out of the river. But *sic utere tuo ut ne laedas alieno*." That case was commented on and approved of in *Brown* v. *Best*, 1 Wilson, 174. The case of *Bealey* v. *Shaw*, 6 East, 208, determined that **[274]** the owner of land through which a river runs cannot, by enlarging a channel of certain dimensions, through which the water had been used to flow before any appropriation of it by another, divert more of it to the prejudice of any other landowner lower down the river, who had at any time before such enlargement appropriated to himself the surplus water that did not escape by the former channel. The question, therefore, would be, what was surplus water, and whether it could shift and vary, according to the pleasure of the Glamorganshire Canal Company, or by any other means. In all the counts objected to, the breach of duty complained of, was a breach of duty not resting on an absolute restriction upon the Company not to take any more water than they had taken at first, but on a restriction against taking water which, under the circumstances, would and ought to have flowed to Mr. Blakemore's works. It was the common case of the obstruction of a watercourse by one of two parties, each of whom was entitled to take the water to a certain extent.—[Lord Lyndhurst: In the 10th count the complaint is, that the Company have altered the canal, and the matter of the count is stated as if they had no right to alter the canal at all after the expiration of the two years.]—The 10th count stated both the Acts of Parliament, and would be good upon either of them.—[Lord Lyndhurst: That is on the supposition, that after making the canal, there was an immediate prohibition against the Company making any alteration.]—The canal being once finished, the surplus water vested in the owner of the works, and no right could afterwards accrue to the Canal Company to diminish his supply at their pleasure.

Mr. Maule, in reply: It had been said that the **[275]** Company might do what was necessary, provided they did not injure anybody by doing it. But that extent of privilege was secured to them, as it was to every body else, without requiring an Act of Parliament to be passed for the purpose. These Acts enable the Company to do more, and decreed a mode of compensation for those who were injured. Unless they had been passed for the purpose of extending the common law privilege admitted on the other side, they need not have been passed at all.

The case stood over till the 30th of August, when Judgment was moved for and delivered.

Lord Lyndhurst: My Lords, there was a case argued, not a long time since, in which I have to move your Lordships for judgment. It was an action upon the case brought by Mr. Blakemore, to recover compensation in damages for injuries which he alleged he had sustained in consequence of certain works that had been carried on by the proprietors of the Glamorganshire Canal Navigation, the effect of which had been to diminish the usual supply of water to two mills of which he was and is the occupier. The declaration consisted of a great number of counts, one-half of which applied to certain works known by the name of the Melin Griffith Works; the other half applied to works called the Pentyrch Works. The counts, with respect to the Melin Griffith Works, are substantially the same as those that relate to the Pentyrch Works. It is not necessary, therefore, that I should trouble your Lordships by going over all of them, as the same objections apply to both. The jury found a verdict in

favour of Mr. Blakemore, on many of the counts, and in pursuance of that verdict, judgment was entered up in the Court of Exchequer upon those counts, both as [276] they related to the Melin Griffith Works and to the Pentyrch Works. A Writ of Error was brought from that judgment into the Court of Exchequer Chamber, and after argument there, the judgment was affirmed. From that judgment a Writ of Error was brought here, and it is for your Lordships now to say, whether the judgment of the Court of Exchequer Chamber, preceded by the judgment of the Court of Exchequer, was, or was not, erroneous. The verdict and the judgment were general, and it follows, therefore, that if any one count is defective, of course the judgment cannot be sustained. The objections that are made on the part of the Defendants are made to some of the counts, and if those objections are valid, if any one of them, indeed, is valid, the judgment ought to be reversed. In order to simplify the case, we must class the counts, and the objections to them. There is one set of objections which apply to the seven first counts: there is another set which apply to the counts from the 7th to and including the 11th: there is another set which apply to the 12th, to the 13th, and to the 14th: and similar objections apply to the corresponding counts that relate to the Pentyrch Works. I shall begin by considering the objections as far as they apply to the 12th count, and after I have stated the observations I have to make regarding that count, it will be unnecessary for me to trouble your Lordships with any thing as to the 13th and 14th counts, for the principle which is applicable to the 12th count will equally apply to them. I shall afterwards direct the attention of your Lordships to the 7th count, and then again it will be unnecessary for me to go into the 8th, 9th, 10th, and 11th: for the principle that applies to the 7th, will equally apply to them. In order to understand the 12th count, which refers to a certain [277] Act of Parliament, I must state the facts as they appear in that count, and in the Act, for that is the true way in which to present the case to your Lordships' consideration. It appears that previously to the passing of an Act of Parliament, as far back as the year 1790, the parties under whom Mr. Blakemore holds the Melin Griffith Works were in possession of the same works in the same state; and it is alleged in the declaration, and must be taken now after the verdict to have been proved, that at that time they were entitled to the benefit of the water from the river Taff, which passes through a certain cut or watercourse from the Taff, for the use of those works. The works, in fact, were carried on by the water from the Taff, communicating with them through a certain cut or watercourse. They were entitled to that water at that time. At that period an Act of Parliament was passed establishing a Company, the object of which was to form a navigable canal from Merthyr-Tydvil to a place called the Bank, near Cardiff. The canal so formed was to be supplied with water from the river Taff, and from other sources in the neighbourhood. It is quite obvious, therefore, that the water so drawn from the river Taff, considering the situation of the canal, would be water drawn from that source which supplied the works of Melin Griffith. When the Act of Parliament, therefore, was passed, a provision was made for securing and protecting the interests of the owners of those works. It was provided in the Act of Parliament, that there should be a weir in the canal on that side of the canal communicating with the cut or watercourse to which I have referred, and that care should be taken that the locks and the gates immediately below the weir should be kept in good repair; a very effectual provision for that purpose was put into the Act. The effect of this arrange-[278]-ment was this, that the water passing into the Taff would, with the exception of that which was necessary for the purposes of the canal, pass over the weir into the watercourse as before, and be made use of for the Melin Griffith Works. This was an arrangement made under the authority of the Legislature, and probably with the consent of the parties,—certainly with the authority of the Legislature. After this Act of Parliament was passed, the canal was completed, and the weir constructed. The Act did not point out any particular dimensions for the canal; it seems to have been considered that the parties at the time understood what species of canal, and what size and what form of canal was intended to be made. The canal, as the declaration states, was actually formed according to the provisions of that Act, and by the forming of that canal, an apportionment of the water was made under the authority of the Legislature. It was competent for the Company of proprietors at the time to have made a larger canal, as

there are no limits in the Act of Parliament to which the canal was to be confined. They made that canal under the authority of the Act, an Act containing a provision for the purpose of securing the benefit of the waters of the Taff to the owners of the Melin Griffith Works; and under it they apportioned the water as between themselves, the proprietors of the canal and the owners of those works. I conceive that having done so, the rights of the parties were fixed and ascertained. The Legislature gave the Company of proprietors a power to do this; a power to make the canal, and to construct the watercourse in the manner I have described. The question is, whether, after these works have been so made and so completed under the authority of the Act of Parliament, after the water for the Melin [279] Griffith Works had been provided for as I have stated, after the apportionment of the water had been made, as it was made in pursuance of the provision in the Act of Parliament, the rights of the parties were not fixed, ascertained, and determined from that moment? My Lords, I am of opinion that they were, and I think your Lordships will be of that opinion also, and that the Company of proprietors of the Glamorganshire Canal Navigation had no right afterwards to enlarge and extend, and widen and deepen their canal, so as to draw a much larger quantity of water from the river Taff, and thus to interfere with the water which had been so apportioned to the Melin Griffith Works, and so as injuriously to affect their use. The declaration goes on to allege, after stating the facts I have mentioned in the 7th count, that after the weir had been constructed, and after the canal had been completed, it was the duty of the Company of proprietors of the canal to abstain from enlarging, widening, deepening, varying and altering the canal, and that it was their duty to allow the proprietors of the Melin Griffith Works the fair and reasonable use of the weir that had been made as I have stated;—But that, not regarding their duty in that respect, they had, at a subsequent period, varied, enlarged, widened and deepened the canal, and drawn off thereby very large quantities of water, and had, in a great measure, thereby deprived the Plaintiff of the full benefit of the water which had been secured to him under the authority of the Act of Parliament. I conceive that such a case proved, is a just case for entitling Mr. Blakemore to damages against the Company of proprietors, and if your Lordships are also of that opinion, then as far as relates to the 12th count, your Lordships will be pleased to affirm the judgment of the Court below.

[280] I have already stated that the 13th and 14th counts depend upon the same principle. It is unnecessary, therefore, that I should trouble your Lordships with any observations on those counts, or on the corresponding counts relating to the works known by the name of the Pentyrch Works; the question there is, and the counts are precisely, the same. As to the 7th count, that is in substance the same as the 12th count, which I have stated: but, in addition to what I have stated, it contains a most important fact, rendering the case stronger, if possible, than it is upon the 12th count. It states that in the year 1796, six years after the passing of the Act to which I have referred, another Act of Parliament was passed, relating to the same subject. That Act declared, that the money which had been raised under the former Act of Parliament was not sufficient to enable the Company of proprietors of the Canal Navigation to complete all the works, and that it was desirable the limits of the canal should be extended to a point beyond the original point, and it gave authority to raise the additional sum of £10,000, and a further sum of another £10,000 under other circumstances, for the purpose of completing the works authorized under the original Act, and for the purpose of making the extension which I have adverted to. But then that Act of Parliament ordained, by way of proviso, that all those works began under the former Act, or under this Act, should be completed in two years, and that no part of the money should be applied to any of those works that should not be completed within the two years. Now it is said that the meaning of that Act is merely this, not to prohibit the carrying on of the works after the expiration of the two years, but that if any of the works remain, at the expiration of the two years, unfinished, the further works shall not be paid for out [281] of the £10,000 which was to be so raised. I am not of that opinion: I think the Act of Parliament means to say, that no part of the £10,000 shall be applied to any works that should not be completed, and that were not finished, within the two years: and further, that it means to say, that no works should be carried on adversely

to the interests of any individual after the expiration of those two years. Six years had already been occupied at the passing of this Act in the carrying on of these works, and it was its object to fix a time to which the parties adverse to the interests of the proprietors should be able to confine them in the prosecution of their further works. That is the reasonable and safe construction of the Act of Parliament, and is the clear and intelligible meaning of it. The 7th count alleges that the canal was completed at the expiration of the two years, and it states that it was the duty of the Company of proprietors of the Canal Navigation, after the expiration of the two years, to abstain from making any enlargement to the canal which should interfere with the interests of Mr. Blakemore, and that notwithstanding that, after the expiration of the two years, they enlarged, widened and deepened the canal, and thereby took great additional quantities of water from the Melin Griffith Works, to the great injury of Mr. Blakemore: and the question is, whether that 7th count contains a sufficient legal statement of the cause of action. I think your Lordships will entertain no doubt that that count to which I have just referred states even a stronger case than the 12th count, and that it does contain a sufficient legal statement of the cause of action. The rights, as I have before stated, of Mr. Blakemore, were fixed, in the first instance, by the previous Act of Parliament. The second Act gives a certain further time to the Com-[282]-pany of proprietors of the canal to carry on and alter, and make their works: it must, therefore, reasonably be said that it was intended that within the two years any alteration that was to be made should be made by the Company of proprietors, and that no body could say that any alteration was to be made after the expiration of the two years. Taking into consideration the language of the clause, and the construction of the Act, which I have considered to apply to it, can we conceive, in justice and propriety, that after the expiration of the two years, the canal could be enlarged by the Company of proprietors, in a manner injurious to Mr. Blakemore? I think not. I should recommend to your Lordships, therefore, upon this 7th count, to affirm the Judgment of the Court below. The judgment then upon the 8th, 9th, 10th and 11th counts will also be affirmed; and the judgment on the corresponding counts, applying to the Pentyrch Works, will likewise be affirmed. The consequence on the whole will be, that I shall move your Lordships that in this case the Judgment of the Court below be affirmed.

Judgment affirmed accordingly.

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[283]

WRIT OF ERROR

FROM THE COURT OF EXCHEQUER CHAMBER.

DAVID COLVIN and Others,—*Plaintiffs in Error;* NICHOLAS NEWBERRY and T. S. BENSON,—*Defendants in Error.*

[Mews' Dig. xiii. 238, 296; S.C. 6 Bli. N.S. 167; in K.B., 8 B. and C. 166: 2 Man. and Ry. 47: in Ex. Ch., 7 Bing. 190: 1 C. and J. 192: 1 Tyr. 55. Discussed in *Sandeman* v. *Scurr* 1866, L.R. 2 Q.B. 96; and *Wagstaff* v. *Anderson* 1879-80, 5 C.P.D. 177. Distinguished from *Baumvoll Manufactur* v. *Furness* (1893), A.C. 8, in *Manchester Trust* v. *Furness* (1895), 2 Q.B. 546.]

Where the owner of a ship appointed G. B. to the command, and agreed that he should proceed to Calcutta and return to London, and that he might make intermediate voyages, paying a certain sum in consideration thereof; and the owner further agreed to supply the ship with stores, in consideration of which G. B. agreed to take the command, and receive the ship into his service, for twelve months certain, or for such time as would be necessary to complete the voyage, paying at a certain rate per ton per month for the ship. Held, that although G. B. was further bound by the agreement to remit the freight bills to London as security, and that such bills were to be vested in trustees who were to receive the freight, and hand over the surplus to him, and although the owner was to have an agent on board, who was to have the sole management of the stores, and to have power to displace G. B. for breach of any covenant in the charterparty, and appoint another commander, G. B. was the owner of the vessel during the continuance of the charterparty, and was as such

alone liable to persons who, knowing its provisions, had shipped goods on board the vessel for the homeward voyage.

This was a Writ of Error upon a judgment of the Court of Exchequer Chamber, reversing a judgment of the Court of King's Bench given in favour of the Plaintiffs.

The first count of the declaration stated, that the [284] Defendants below, on the 11th day of March 1817, were owners of a certain ship or vessel called "*The Benson*," whereof one George Betham then was master, and which said vessel was then riding at anchor in the river Hooghly, in the East Indies, and bound on a voyage from thence to the port of London; that the Defendants, so being owners of the said vessel, the said Plaintiffs, on the day and year aforesaid, shipped and loaded, and caused to be shipped and loaded, on board of the said vessel, divers goods and merchandizes (to wit), etc. of them the Plaintiffs, to be taken care of and safely carried and conveyed, on board of the said ship or vessel, from the river Hooghly aforesaid to the port of London, and there to be safely delivered, in good order and well-conditioned, to certain persons commonly called and known by the names and using the style and firm of Messrs. Bazett, Farquhar, Crawford and Company, or to their assigns, *for certain freight and reward payable by bills in that behalf*, and although the said goods and merchandizes were then and there had and received by the said George Betham, *so being master of the said ship or vessel* as aforesaid, in and on board of the said ship or vessel in the river Hooghly aforesaid, to be carried, conveyed and delivered as aforesaid, yet the said Defendants so being owners of the said ship or vessel as aforesaid, not regarding their duty as such owners, but neglecting the same, and contriving, etc., did not nor would safely or securely deliver the same, or cause the same to be delivered, to the said Messrs. Bazett, Farquhar, Crawford and Company, or to their assigns: but on the contrary thereof, the said Defendants so being owners, etc. so improperly behaved and conducted themselves, that a great part of the said goods, etc. was wholly lost to [285] the said Plaintiffs, and the residue damaged. The Defendants pleaded the general issue—not guilty.

The cause was tried at the London sittings after Hilary Term 1820, before Lord Chief Justice Abbott, and it being admitted that the case depended upon the question whether the Defendants were liable to the Plaintiffs as carriers of the goods, and the Chief Justice stating it as his opinion, upon the facts then disclosed that as there was a charterparty, of which the Plaintiffs had notice, there was no contract between the parties, nor anything upon which a duty could arise, the Plaintiffs submitted to be nonsuited. A rule was afterwards obtained to set aside the nonsuit, when it was agreed to put the question into the form of a case, which being argued in Trinity Term 1821, the Court ordered a new trial to be had, that the *bona fides* of the transaction might be inquired into, and that the question of law might be put upon the record. The cause was again tried at the sittings after Michaelmas Term 1826, before Lord Tenterden and a special jury, and a special verdict was found on the first count of the declaration only, the jury being discharged from giving a verdict on the other counts.

The special verdict found, that on the 11th day of March 1817, the said Plaintiffs shipped on board the said ship *Benson*, near Calcutta, in the East Indies, then riding at anchor in the river Hooghly, two thousand one hundred and seventy-one bags of sugar, and one hundred and ninety-one chests of indigo; that a bill of lading thereof was signed by George Betham, then being the master of the said ship under the circumstances thereinafter mentioned, and that the said George Betham received the said goods on board the said ship, to be carried and conveyed according to the said bill of lading: that before and at that time the [286] Defendants were owners of the ship, and that before she sailed to the East Indies, and whilst they were such owners, the charterparty for the said ship of the 7th June 1816, also set forth by them, was executed by the Defendant Benson, then managing owner acting on behalf of himself and the other part owners of the one part, and the said George Betham of the other part; *and that the said charterparty was made and executed bonâ fide*. The verdict further found and set forth a memorandum, signed and agreed to on the 25th day of July 1816, by Benson and George Betham; and that one Samuel Oviatt went as agent on board the ship under the charterparty, and carried out letters of introduction from Buckles, Bagster, and Buchanan, merchants in London, on behalf of the said Defendants, to the Plaintiffs, by which he was

directed to apply to them in case of necessity, and he did apply to them, and they acted as agents at Calcutta, both for the Defendants and George Betham, as hereinafter mentioned; that the said Samuel Oviatt acted under a power of attorney, executed by Benson, and which was set forth in the verdict; that Oviatt carried out with him the said charterparty, and communicated it to the Plaintiffs as soon as he arrived at Calcutta, and before the shipping of the said goods, and the Plaintiffs read the charterparty, and received a copy thereof, and that for the freight of the sugar and indigo, in the bill of lading mentioned, the Plaintiffs drew bills upon certain other persons payable sixty days after the ship's arrival in London, to the order of the firm of Buckles, Bagster, and Buchanan, which bills they delivered to Oviatt, to be remitted to them pursuant to the stipulations in the charterparty, and the bills were so remitted; that the said George Betham employed the said Plaintiffs as his agents at Calcutta, who acted as such, and [287] collected and paid over to him the freight of the goods carried in the ship on the voyage from London to Calcutta, and procured freight for him on the voyage from Calcutta to London, and they had a commission from him for so doing; that the said ship sailed from the river Hooghly to London with the sugar and indigo on board, but that they never were delivered to the said Plaintiffs or their assigns pursuant to the said bill of lading, but that part was lost and the rest damaged.

The special verdict came on for argument before the Court of King's Bench in Easter Term 1828, and the Court gave judgment for the Plaintiffs.

A Writ of Error was thereupon brought by the Defendants to the Court of Exchequer Chamber, when that Court unanimously reversed the judgment of the Court of King's Bench.

Mr. Serjeant Taddy for the Plaintiffs in Error: The judgment of the Court of Exchequer Chamber ought to be reversed. What was the general law on subjects of this nature? The principle relied on by the Defendants was, that there was no privity of contract between the Plaintiffs and them. The answer to that was, that the law merchant raised a privity of contract by force of the relationship between them. Wherever there was an agreement to carry goods, there must be a consideration for doing so; and whoever was the owner of the vessel was necessarily entitled to freight. It was asked, on the other side, whether it would be possible for the Defendants in Error to maintain an action for freight, and it was said that if the Plaintiffs could maintain an action against them for the loss of the goods, they must be able to maintain an action against the Plaintiffs for the freight of carrying those goods. That proposition, however, did not necessarily follow the other. The rule on both points [288] was thus stated by Roccus, in his work De Navibus et Naulo, n. 27: "*Contrahentes cum magistro navis habent electionem agendi, vel contra magistrum vel contra dominum navis in solidum, et solutione unius liberatur alter*," and "*Dominus autem navis nullam habet actionem contra illos qui cum magistro contraxerunt, sed contra magistrum per ipsum electum.*" This was a proper rule, because persons who were in a foreign port, wishing to ship goods to this country, were often necessarily ignorant as to who were the owners of the ship; but if they came to know afterwards, it was right that they should have the privilege of following up the ownership wherever it should be found to be vested. The owner's remedy was against the master whom he had selected; that was a clear rule. There were many cases in which the duties of a party and his rights were not equivalent. Where a person held himself out as a partner in any trading company, he became liable to all the world as a partner, but he was not equally able to maintain an action against those to whom he thus became liable; for to do that, he must prove that he was in reality a partner. That was the case of *Kell* v. *Nainby*, (10 Barn. and Cres. 20.) The law raised a consideration from the situation of the master of the vessel on one side, and that of the owner on the other. There was no difference between the law of England and the general common law of Europe in that respect. *Boson* v. *Sandford*, (3 Levinz. 258, and 2 Salk. 439,) had established, that the owners of a vessel were liable on the contract of the master, on two grounds; first, the receipt of the freight; and secondly, the possession of the vessel. It was necessary to be divested of the right of ownership in order to be divested of responsibility. In like manner they were liable if they had a command over the [289] freight; so that to save themselves from responsibility, they must show two things: that they had been divested of the possession, so as to cease to be considered owners, and that they had no connexion with the freight. The case

of *Boucher* v. *Lawson* (Cas. Temp. Hardw. 85 and 194) was a strong authority on this point. There the master did not account to the owners for the freight; and yet it was held that if he refused to deliver the goods to the consignee, an action for non-delivery would lie against the owners on the general custom.

The charterparty in this case was peculiar. Freight bills were in the first instance delivered to the owners' agents: that showed that they were to receive the freight; so that it was impossible to contend, upon that ground, that there was no privity of contract between the Plaintiffs and Defendants. It was true that the freight was, in the first instance, to be put into the hands of trustees; but then it was to be applied by them for the benefit of the Defendants. How then could they deny their interest in it, or their liability on account of that interest? The Courts of King's Bench and Exchequer Chamber had differed in opinion on this case. In the Court of Exchequer Chamber it was supposed that the charterparty was a mere security, out of which the owners might or might not receive payment of the freight. The words of the Judgment were, (7 Bing. 210; 1 Tyrr. 83; 1 Crom. and Jerv. 218) "As to the third objection, the charterparty gives the owners a security upon freight bills received by the freighter, but gives them no direct nor immediate interest in the freight earned." It was true that the owners had a special security for the freight, but that made no difference in the case; for at the same time they had a general interest in the freight earned, and that was sufficient to constitute a liability on their part. The [290] public had nothing to do with the mode in which the owners and the captain settled their accounts; if the owner received a benefit from the freight, he was in the ordinary condition of owner. A shipper of goods in a foreign port was not to be obliged to exercise his judgment on the particular terms of a charterparty between the master and the owner. The possession of the ship was the next ground of liability of the owner. It was to be lamented that in the law of England there was a difference in the rule relating to this part of the subject from the law of other countries. The general rule of marine law declared that he that was the owner was liable for the acts of the master; but here the Courts departed from that general rule, and introduced confusion into the subject, from their wish to apply the rules to particular cases. It was usual here for the owner of a chartered vessel to be the master, and in that way he was liable in a double character, as master and charterer. It was clear that in this case the freighter and the master were the same person. That was found on the face of the special verdict, where an express contract for wages was stated, "wages £10, say £10 per month, no primage or privilege of tonnage whatever." It was said that he might also be the owner; and it was then asked what the effect of that would be? Why, this: he would bind himself by the bill of lading, and the shipper would lose one of his two securities. The Defendants here claimed the benefit of ownership; for 100 tons of goods were to be carried for their benefit. Betham undertook to navigate the ship on these conditions, and take it into his service. It was said that he was the owner of the ship, because he had taken it into his service; but there was nothing here equivalent to the demise of the ship: and even if there had been, still the owner might [291] not have parted with all his privileges, nor released himself from all his liabilities. The case of *Christie* v. *Lewis* (2 Brod. and Bing. 410) showed that an owner, who had not parted with the whole possession of the vessel, retained his lien for freight, though the words "granted and to freight let and accepted, and to freight taken," were inserted in the charterparty. In cases, however, where there was an actual demise, it was held that the owners still retained their lien for the freight. The cases on this subject were all collected in Abbott on Shipping, book i. chap. i., where those of *Parish* v. *Crawford* and *James* v. *Jones*, the latter of which was in some measure at variance with the former, were both considered. It might be admitted, that where the charterparty was so executed as to divest the owner of all proprietorship for the time, so as to leave him no agent on board to control the captain or to receive the freight, the result with respect to his liability would be changed. In *Mackenzie* v. *Rowe*, (2 Camp. 482.) such a case occurred; and in *James* v. *Jones* the owner did not receive freight at all. The first general rule of the common law made the owner liable on the signing of the bill of lading, and the second declared that he only ceased to be liable if he was divested of the ownership, or of his interest in the receipt of the freight.

Mr. Campbell and Mr. V. Richards, for the Defendants in Error:—As to the facts

of this case, notice was taken that the Plaintiffs were informed of the nature of the contract. The master and crew were appointed by the absolute owners, who thus remained in possession as between the master and themselves. An action for running down might therefore have been brought in the name of the absolute owners, but that did not make them liable to the shipper of goods, for [292] they did not receive the freight. The master paid them for the *hire* of the ship, and he was entitled to the freight. That was the case of *Christie* v. *Lewis* [2 Br. and B. 410]. This was, in fact, an action on the contract, and it made no real difference whether it was laid in the form of tort or of assumpsit. Both were actions on the case. One arose on a promise, the other on a duty; but the duty itself only arose upon a contract. The action was not framed on the custom of the realm. In the case of *Marzetti* v. *Williams*, 1 Barn. and Adol. 415, the Court of King's Bench held that where a contract was the foundation of an action, it made no difference, as to the rights and liabilities of the parties, whether the declaration was framed in tort or in assumpsit. The Plaintiffs here were consequently in the same situation as if they had declared, that in consideration of receiving freight, the Defendants had undertaken to carry the goods. That being an action of contract, the question would have been, who were the contracting parties. On that question, the Plaintiffs must have been out of court. The Court of King's Bench had recognized the general principle, that where there was a charterparty, the freighter was *pro hac vice* owner, but they took a distinction between a common charterparty and the present. It was, however, broadly stated, on the other side, that the owner was not divested of his liability unless he parted with his interest in the ship. But a charterparty in the common form was one where the absolute owner gave up his ship to another person for the use of that other. That relieved him from responsibility as against all persons who knew of the contract. The Plaintiffs here knew of it; they contracted with the freighter, and not with the absolute owner. His situation would be the same whether the ship was in ballast, or whether she had a [293] full cargo. It was the same as with a lease and sub-lease. The lessee might sublet, but the absolute landlord had no benefit, and suffered no loss from that; and it was the same with the shipper of goods and the absolute owner. If freight was payable, the freighter alone was liable, for it was he who made the promises, and he ought to be responsible if they were broken. It made no difference that Betham was both the freighter and the master. The general rule was, that where there was a charterparty, the freighter was the carrier of the goods. The case of *Boucher* v. *Lawson* [Ca. F. Hard. 85, 194] did not aid the argument on the other side, for, in the first place, the declaration there was defective in not properly stating the custom of the realm, but merely alleging the duty of the Defendant; and in the next, it was the common case of a ship sold for the account of the absolute owners, the master receiving freight instead of wages. There were two cases that expressly determined, that where there was a charterparty, the absolute owners were exempt. They were the cases of *James* v. *Jones*, and *Mackenzie* v. *Rowe*, (Abbott on Shipping, 20 and 21, 5 edit.) *Parish* v. *Crawford* was by these cases declared not to be law. The liberty reserved to the owners to ship 100 tons of goods for their own benefit was a strong circumstance to show that Betham was the owner *pro hac vice*, for without that reservation they would not have been entitled to ship a single bale of goods. The profit or loss of the voyage was to be borne by Betham alone, and the owners only had a lien as against the freighter to recover the freight. It was true that the word "demise" was not in this charterparty, but Lord Chief Justice Tindal had said, in the judgment in the Exchequer Chamber, that "even in a lease of lands no such words were absolutely necessary." Whatever showed the intention of [294] a party to give to another the use of the profits would amount to a demise. In this case Betham was described as the freighter of the said ship, and then came the reservation, that it was to be in the service of Betham till it returned to London. In the case of *Vallejo* v. *Wheeler* [1 Cowp. 482], it was held that a deviation committed by the master, with the knowledge of the absolute owner, was an act of barratry with respect to a third person who had hired the ship by a charterparty, and was therefore considered the owner for the particular voyage. There was an agreement for payment to the owners for the hire of the ship of a fixed and certain recompense, which was not to be affected by the loss of the ship. The freight bills were for that reason

only to be considered as securities. If the freight bills fell short of the sum due for the hire of the ship, the freighter was to make up the difference; if they exceeded it, he was to be entitled to the surplus. The circumstance of Oviatt going with the ship made no alteration in the character of Betham as freighter, for the charter-party could not be put an end to by Oviatt, he could only displace Betham as captain, if Betham acted improperly in that character. His removal would not exonerate him from paying for the hire of the vessel, nor the party who contracted with him from paying him the freight. The case which had been put relating to partnerships, was a case where there had been concealment of the facts, for if the facts were known to both parties, there must be a reciprocity of action. There was nothing, even in the declaration itself, to distinguish this case from that of a common charterparty, for in the declaration it was alleged, that the Plaintiffs caused goods "to be loaded on board the ship for a certain freight, payable by bills in that behalf." That was the foundation of the supposed [295] duty. For that duty there must be a consideration, and the consideration on the general demurrer would appear to be these freight bills, which, instead of being payable to the owners, would, at the trial, be proved to be payable to Betham, on whom alone the duty attached, and who alone was responsible for the breach of it.

Mr. Sergeant Taddy, in reply: *Dewell* v. *Moxon*, (1 Taunt. 391.) showed that the Defendants here could maintain an action against the shippers for the freight, but even if they could not, still they would be liable. Charterparties were not always in the same form, but at all times it would appear that, as between the shippers of goods and the owners, the latter were held liable, as being in possession of the ship; *Seville* v. *Campion*, 2 B. and A. 503. It was said that Oviatt's duty was only applicable to the rights which Betham derived as captain, but what the Plaintiffs laid stress on was his being there at all, and receiving the freight bills on behalf of the owners. These bills were more than a mere security; but even if they were not, that alone would be sufficient to make the owners liable. If they could be connected with the receipt of freight, or the possession of the vessel, the question was entire, and they were responsible to the shipper of goods. The pleadings were immaterial if the facts were as they were in favour of the Plaintiffs.

Lord Tenterden, who sat as Deputy Speaker, said, that the question depended on the construction of the charterparty, and he should wish for time to frame questions to be put before the Judges for their opinion.

The case stood over until the 11th of July, when Judgment was moved as follows:—

[296] Lord Tenterden: My Lords, there is a case of Colvin and others against Newberry and another, very lately argued before your Lordships, and in the absence of my noble and learned friend, who has just left the House, it falls to my lot to supply his place on the woolsack. The case was argued before several of the Judges, and I have had an opportunity of collecting from them their opinions, and it did not appear to me to be necessary to put to them any formal question, they being all of opinion that the judgment from which the Writ of Error is brought to this House, namely, the Judgment of the Court of Exchequer Chamber, should be affirmed. The Judges of that Court reversed the judgment which had been given in the Court of King's Bench. At the time it was given, I was present in the situation which I now have the honour to fill, and among the Judges who were present at the argument in this House was one of the learned Judges, I mean my learned brother Baron Bayley, who was a Judge of the Court of King's Bench at the time this case was decided there, and he, upon reflection, has changed his opinion, and is one of the Judges upon whose unanimous opinion I shall take the liberty to move your Lordships to affirm the judgment of the Court of Exchequer Chamber. Some other of the learned Judges, who were present on that occasion, had not been members of either of the Courts at the time the case was argued. The matter, therefore, to them was new. Having stated shortly to your Lordships the manner in which the case proceeded, I shall, with your Lordships' permission, direct your attention to the point in dispute, what the case really was, and upon what grounds the judgment of the Court below should be affirmed. My Lords, it was the case of an action brought by the present [297] Plaintiffs in Error, against the Defendants, as the owners of a ship called the *Benson*. The action was upon a bill of lading of goods shipped on board that ship at Calcutta, for which a person of the name of Betham, who was then

master of that ship, had signed the bill of lading for the right delivery of the goods in London; but the goods were not delivered. Two propositions of law are clear, as applicable to a case like this: the first is, that in the common case of goods shipped on board a vessel belonging to a person, of which the shipment is acknowledged by a bill of lading signed by the master, if the goods are not delivered, the shipper has a right to maintain an action against the owner of the ship; the other, which is equally clear, is this, that if the person in whom the absolute property of the ship is vested charters that ship to another for a particular voyage, although the absolute owner provides the master, crew, provisions and every thing else, and is to receive from the charterer of the ship a certain sum of money for the use and hire of the ship, an action can be brought only against the person to whom the absolute owner has chartered the ship, and who is considered the owner *pro tempore*, during the voyage for which the ship is chartered. It cannot be maintained against the person who has let out the ship on charter, namely, the absolute owner. Those two propositions being clear, the question is, whether the instrument, to which I am about to direct your Lordships' attention, is to be considered as a charter of the ship to Betham, who went out as master, or whether the true legal effect of the instrument is only this, that the owners of the ship, the Defendants, consented to allow Betham to go out as master of the ship, and to receive from him a certain sum, and to allow him to take all the profits? A contract of that kind [298] certainly can be made between the owner of the ship and the master, but it would be open, if there were nothing more in the case, to very great objection, because it would afford an opportunity to the owners of the vessel, in a great many cases, to relieve themselves from the responsibility which attaches upon their character as owners, and leave the shipper of the goods to his remedy against the master alone, who, in many cases, is a person by no means sufficient to answer the demand which might be made upon him in case of loss or injury done. Now the instrument in question is one of a very peculiar character, and I will presently direct your Lordships' attention to such parts of it as appear to be material. The instrument is a contract made between the owners of the ship, the persons whom I have mentioned, and Mr. Betham, and it begins by alleging that the owners of the ship agree to appoint, and do by this instrument appoint him the commander of the ship, subject to the condition therein mentioned, which is, that in case of his misconduct in the character of master, the person whom they have a right to send out to represent them shall have the power of dismissing him from the command. Now, if this instrument had contained nothing more the case would be one of the kind which I have first mentioned to your Lordships, but it contains a great deal more, for it then goes on to state that Mr. Betham, the master, shall be allowed and permitted to take on board the ship all such goods as he may think proper, and proceed therewith to Calcutta in the East Indies, there to unload and reload the ship, and to return thence to the port of London; and upon her arrival there, and final discharge of her cargo, the intended voyage and service are to end. The owner further agrees that the ship shall be, before her departure, furnished with [299] proper water casks, and provisions, and every thing of that kind; and he agrees also to provide the ship with coals and wood for cooking and dressing the passengers' provisions, for which the freighter is to pay the owner. The person who is, in the first instance, called the master of the ship, is now called the freighter, the term freighter applying to a person who takes the ship under a charter. The owner then stipulates that Betham shall pay him, the owner, freight for the use or hire of the ship, at a certain rate per ton here specified; and it is agreed that that shall not be paid until the ship's return into the port of London. Then he further agrees that the bills that may be drawn in Calcutta, in part payment of the freight of the goods that may be laid in there, shall be sent over to certain persons in this kingdom, who are to be trustees, and who are to apply the proceeds of those bills towards the payment to the owner of the balance of freight which may be due to him. There is also another provision. The ship being, in the first instance, intended to go from London to Calcutta, there is a provision that the freighter shall have the liberty and privilege of employing the ship in the East Indies, for any intermediate voyage he may think fit, paying a certain sum. Then comes the proviso to which I have already adverted, namely, that if he misconducts himself as master, the agent for the owner, who is on board the ship,

shall appoint another commander, without any injury to the rights of the owner upon the charter. That being the character of the instrument, the special verdict also sets out a memorandum of an agreement that was made between the owner and the same person, which specifies the sum he was to receive as wages, he having been previously appointed as master. The special verdict then proceeds to state the power of attorney, **[300]** which was given to a person who went as agent in the ship, upon the particulars of which it does not appear that any thing turns: it is therefore unnecessary for me to draw your Lordships' attention to it. Then the jury find as a fact, that this instrument was made *bonâ fide*, by which I understand them to mean, that the contract was really such as it purported and professed to be, that is, that it was a letting of the ship to the master for the voyage mentioned; and they further find, that the person who went out as agent on behalf of the owner carried with him the charterparty, and communicated it to the Plaintiffs, who were the shippers of the goods. As soon as he arrived at Calcutta, he communicated to them the nature of the charterparty. They had already received a copy of it; so that they knew, before the ship arrived, the state in which the ship had come out, and were acquainted with the contract made between the Defendants as owners of the ship, and Betham as the master. Now, the Court of King's Bench were of opinion that this instrument was nothing more than a contract between the owners of the ship and the master, the owners agreeing on their part, if he would pay a certain sum to them, that he should have for his own use all the profits over and above that sum; but, on the other hand, when the case came before the Court of Exchequer Chamber, it was argued more at length, and more elaborate judgments given, than in the Court of King's Bench; and that Court was of opinion that this instrument, although it did not contain in terms any words by which the owners let or chartered the ship out to Betham, still it was in effect, and in point of law, and in legal effect, a letting of the ship to him for that voyage, and he was therefore in the situation of the person whom I mentioned to your Lordships in the second proposition; **[301]** namely, that he was to all intents and purposes the charterer of the ship, and consequently that any contract made with him for shipping goods may be considered as a contract made with him as the owner *pro tempore* of the ship, and could not be considered as a contract made by the Plaintiffs with the Defendants, against whom the action was brought. I have already intimated to your Lordships that in this opinion of the Court of Exchequer Chamber, and in the reasons given by that Court upon the subject, all the Judges who were here upon the argument concurred.

For myself, I should say I am inclined to think that the judgment of the Court of Exchequer Chamber is right; and I shall have no hesitation on this occasion, and I hope I never shall have any hesitation, in acknowledging any error which I may have committed in the seat of justice, and in endeavouring, as far as I can, to correct that error. I shall therefore advise your Lordships to confirm the judgment of the Court of Exchequer Chamber, and reverse the judgment which I myself, together with the other Judges of the Court of King's Bench, have given in this case, thinking as I do, that, upon the whole, that is the soundest judgment, and knowing, as I have already mentioned, that that is the opinion of almost every Judge in Westminster Hall.

Judgment of the Exchequer Chamber affirmed.

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[303] APPEAL

FROM THE COURT OF CHANCERY.

JOHN JOSEPH DILLON, Esq.—*Appellant*: Sir WILLIAM PARKER, Bart.,—*Respondent.*

[Mews' Dig. i. 351, 354; v. 1545, 1546: S.C. 7 Bli. N.S. 325: and in Ch. 1 Swan. 359. See *Douglas* v. *Douglas*, 1871, L.R. 12 Eq. 637.]

In order to raise a case of election on a testamentary instrument, the intention

of the testator must clearly impose an obligation to elect; and in order to hold a party to have made election, his acts must be conformable to the instrument imposing the obligation to elect, and not adverse thereto.

Where parties may elect between two titles, either as tenants for life or tenants in fee-simple, and continue in possession for near forty-four years executing in the mean time various deeds, reciting that they took under the former title; HELD, that they have elected to take under that title, and their heir-at-law is precluded from claiming the fee under the latter.

Semble, the House of Lords will, under peculiar circumstances, hear two counsel for a Respondent, although to hear but one on each side may be part of the order made on advancing the Appeal, on the petition of the Appellant.

[304] *Semble* also, that although it is usual, according to the orders of the House, to insert in the printed cases all the documents that are to be relied on, except the parties, to save expense, come to an understanding to refer only to some, yet the House will hear the documents so referred to read at length at the table of the House or by counsel at the bar; the opposite counsel being at liberty to examine and observe upon them.

The suit, in which this appeal originated, was instituted in 1814. The statements in the Appellant's several bills, and the Respondent's answers, together with the judgment and decree pronounced by the Master of the Rolls, are already reported (1 Swanst. 359). That decree was affirmed upon appeal to the Lord Chancellor, by an order made on the 4th of May 1822 (Jacob, 505).

The Appellant appealed from that decision to this House, and was heard in support of his appeal in 1830, but being seized with sudden indisposition before he concluded his arguments, the further hearing was postponed. He next petitioned to be heard by counsel, and his petition having been granted, the case now came on for hearing, Lord Lyndhurst, before whom, as Lord Chancellor, it had been partly argued in 1830, presiding for the Lord Chancellor.

Sir Edward Sugden, for the Appellant: The power of devising the estates which were the subject of the settlement in 1741, and are now claimed by the Appellant, was derived from an agreement entered into in 1766, between Sir Henry John Parker and John Parker, his son. The Respondent, admitting that agreement, says, there was contained in it a proviso for making it [305] void, in the event of the death of John Parker in the lifetime of Sir Henry John Parker. Such a proviso is unreasonable and inconsistent with the acts of ownership exercised by the son over all this property. The son was in actual possession of the estates from that time, and expended considerable sums of money, both on the house in Salisbury-court and on the mansion at Talton, where he resided. The dominion exercised by him over the house in Salisbury-court fully entitles your Lordships to presume an unconditional conveyance, from the father, of the whole interest in that house. The son, in the year 1768, constituted Mr. Stephens his attorney and agent, "to view and survey" (in the words of the power of attorney) "*my* messuage or tenement situate in Salisbury-court, Fleet-street, etc.: and also for *me* and in *my* name to receive and take all the rents, etc. of *my* said messuage, etc.; and upon payment of the said rents, etc. for *me* and in *my* name, the monies so by him received to pay over unto *me*, my executors or administrators." This power of attorney was drawn by Mr. Hunt, the solicitor of Sir Henry John Parker, by direction of Sir Henry, as appears from a letter found among the papers of Mr. Hunt, in which Sir Henry John Parker says, "You will fill up a proper authority for Mr. Stephens to act for Mr. Parker, in regard to the house in Salisbury-court." An agreement for a lease of the house in Salisbury-court, entered into by John Parker, could not have any validity, but on the presumption that there had been a previous conveyance of the whole interest in it from the father to him. A jury would, upon those facts in evidence, presume a conveyance. Your Lordships, therefore, cannot come to any other conclusion than that the son was seized in fee of the Salisbury-court estate, and that it passed by his will to his sisters. [306] Margaret and Ann Parker, in fee. In that will, after giving his father a life interest in all his freehold and leasehold estates, and after disposing of the remainder of the estates, derived from his grandfather Page, to his sisters of the whole blood, he says, "Also I give and devise the manor and capital messuage,

called Talton, with the estates thereto belonging; the farm called Tredington Farm and Knowland's Farm, in the parish of Tredington, and all other my manors and estates in Worcestershire and Warwickshire, my house in Salisbury-court, Fleet-street, London, the other moiety of my estates at Hatch, and all other estates whatsoever and wheresoever which descended or came to me, or which shall descend or come to me from my father, unto my two sisters, Margaret and Ann Parker, their heirs, executors, administrators and assigns for ever, as tenants in common." After bequeathing some pecuniary legacies, he gives all the residue of his personal estate to his father, and appointed him executor of his will, if he should be living at the time of his own decease. By a codicil to this will, confirming all the benefits given thereby to his father, he devises to him his newly-purchased estate, and directs the cancelling of a bond for £1000, due from his father. It is impossible, in looking at the will, to say it was not an absolute devise of the whole of the estates named in it.

The next point is, as to whether a case of election arose on this will and codicil. Looking to the rental of the estates, your Lordships may see that it was the interest of Sir Henry John Parker to make an election under this will. The settled estates now claimed by the Appellant, as the heir of Ann Parker, and under the will of John Parker, consisted of the house in Salisbury-court, let for £100 a year; the Talton estate, [307] bringing an income of about £150 a year; and the Tredington leasehold premises, worth £100 a year. Sir Henry John Parker, if he elected to confirm the devise of these in his son's will, still remained, under that will, entitled to the enjoyment of them during his life, relinquishing to his daughters the power of further disposing of them. What were the benefits offered to Sir Henry's acceptance, on the other hand, by the will and codicil? He got the newly-purchased estate in fee, which was afterwards sold for £1350. He took a life interest in the estates of Hatch and Shorter's-court, which had undoubtedly belonged to the son, under the will of his grandfather, and were worth £660 a year. These devises, together with the residue of the son's personal estate, which was of considerable amount, offered to Sir Henry John Parker immediate relief from the difficulties which were then pressing on him. It was, therefore, the interest of Sir Henry John Parker to take under the son's will, and he did make an election, by taking all these benefits under it. If, then, it has been shown that a question of election was raised on the son's will, and that the father elected to take under it, (and that he made such election is proved by various undeniable acts of ownership), the estates now claimed must have passed to Margaret and Ann Parker, and to the Appellant, as heir of the latter, by the lapse of her devise of them to Harry Parker.

But it is alleged that there is another question of election raised on the will of Sir H. J. Parker. Now circumstances in which an election arises are as if A. by will gave his estate to B., and gave to another an estate which belonged to B., then B. has a choice whether he will take A.'s estate or keep his own: he cannot take under the will and retain his own estate in opposition to it. But there cannot be a case of election [308] where a testator gave to a person an estate, or part of an estate, which belonged to that person. This was the case with respect to the life interest given by Sir H. J. Parker to Margaret and Ann Parker, to whom they had belonged in fee under the will of their brother. No matter what acts they have done, the fee remained in them until they had actually divested it out of themselves. They sold or mortgaged their own estates to pay their father's debts; there is no election in that. They took no benefit under his will; and such was the state of his affairs at the time of his death, and long before, that upon the sound construction of his will no case of election was raised as against the daughters. They neither relinquished, nor bound themselves by any act of theirs to relinquish, their right to the estates in question. On the contrary, Ann Parker, by her will, made with the privity of the Respondent, and without objection on his part, expressly asserted her right to them in fee. Upon the whole, therefore, it is submitted, that the decree of the Court below ought to be reversed, and the Appellant declared entitled to these estates.

The Attorney-General, for the Respondent: The will of John Parker contained no words descriptive of his title to those estates. There was no authority for those devises, adverse to the rights of Sir Henry John Parker, and no case of election could arise as against him on this general devise. We have the opinion of Sir Thomas Plumer, at the Rolls (1 Swanst. 359), and of Lord Eldon, upon appeal (Jac. 505) to

him, that no case of election was raised in the son's will. His description of this property in his will was as if it was to come to [309] him from his father—a very natural description, if he survived his father. The father in his will considered the property to be his own, not as taking it from the son, but in his old title, which was never renounced by him. The father's will, made after the son's death, contained assertions directly contrary to the supposition that he took these estates from his son. If the will of John Parker has raised a case of election as against Sir H. J. Parker, his daughters, Margaret and Ann, were interested in the question of election, and might call on Sir Henry to elect; but they never did so call on him; on the contrary, Margaret and Ann took large benefits under their father's will, by which he disposed of the property claimed by the Appellant. They took possession of all Sir Henry John Parker's property by virtue of his will; and describing themselves as his devisees, they made titles to trustees, and by repeated acts done by them in the character of devisees, confirmed the dispositions made by the will, and elected to take under it. Was it, therefore, now competent to the Appellant, claiming under these ladies, to dispute the dispositions of that will? The equity under which the Appellant claims, if it ever existed, arose upwards of 43 years before he filed his bill, and was never asserted by the parties through whom he makes claim. The length of time during which this claim lay dormant is an additional argument against the assertion of it, as was observed by Lord Eldon, who compared it to the case of *Cholmondeley* v. *Clinton* (2 Jacob and Walk. 1), and suggested that the claim was barred by time, as not kept alive by continued claim (Jacob, 505).

Mr. Pepys rose to follow on the same side.

[310] Sir Edward Sugden objected: The order of the House was, to hear one counsel only on each side. The appeal was advanced upon the Appellant's petition, on that condition.

Mr. Pepys: The Respondent was no party to that petition, and no order was made upon it to the effect of precluding him from being heard by two counsel.

Lord Lyndhurst: The Appellant's case was argued before at the bar of this House, by the Appellant himself, with great ability. His counsel has been now heard, and he will also have a reply. It is but fair, notwithstanding any order that may have been made, that two be heard on the other side; that will still be only two to three.

Sir Edward Sugden thought himself at all times bound to submit to the orders of the House; but for the future, in like circumstances, he should feel it to be his duty on behalf of his clients, to claim a hearing for two counsel.

Mr. Pepys then proceeded: There cannot be a case of election unless there are words in the will, showing the testator's intention to dispose of property which was not his own. No such words are found in John Parker's will. The strength of the Appellant's case rests on presumptions of a conveyance of these estates in fee to the son; but there was no evidence of the fact, and the only conveyance of which any knowledge was obtained, was that of 1766, which was accompanied by a proviso, that the estates therein named were to revert to the father on the son's marrying without consent, or dying in the lifetime of his father. [311] But it was not of the least consequence here to show, that a question of election arose on the son's will, if no election was made by the father. In order to election, he must be apprised of the value of the different rights, and of the obligation to choose between them. The mortgage of the son's estate by the father is no proof of election by the latter, and beyond that there is no ground for even alleging that he ever did any act implying election.

But, on the other hand, no one can doubt that there was a case of election raised on the father's will; and that the daughters, Margaret and Ann, did make such election, was manifest from the deeds executed by them, and their letters to trustees and agents, in which they described themselves as devisees under their father's will. I now beg to direct your Lordships' attention to those documents.

Sir Edward Sugden: These documents are not in the printed case, and no copies of them were furnished to the Appellant, although he says he applied for them.

Mr. Pepys: The Respondent printed all that he relied upon. It is not the practice of this House to print all, but merely to refer to them; and the object of that is to save expense.

Lord Lyndhurst: It is usual here to print all documents that the parties rely

upon, except on an understanding between themselves, and for the purpose of saving the expense of printing, they content themselves with references. Any matter of evidence that is not printed may now be read by the reading clerk at the table here, or by counsel at the bar, where the other side may look into the matter and observe upon it.

[312] Mr. Pepys then read extracts from a series of deeds executed by Margaret and Ann Parker from the year 1772 to 1798, and from letters written by them during that time, and also from letters written by Ann Parker subsequently, from all which he concluded that it was the clear intention of those ladies to take the property in dispute under the will of their father, inasmuch as they uniformly described themselves as devisees under it, and never made or claimed title under the will of their brother.

Sir Edward Sugden, in reply: There is no point of resemblance in this case to that of *Cholmondeley* v. *Clinton* (2 Jac. and Walk. 1), and it is absurd to talk of time running against Margaret and Ann Parker, or of the necessity of continual claims on their behalf. They were in possession of their estate in fee under their brother's will, during the life of Sir Henry John Parker. They never parted with the fee. How could their own possession raise an adverse claim against them? The Appellant's title did not accrue until after the death of Ann, the survivor of the two. The enjoyment of these estates, from the death of Sir Henry John Parker in 1771 to the death of Ann Parker in 1811, was consistent with the title of the Appellant. At the death of Ann Parker he claimed the house in Salisbury-court by virtue of her will, and the other estates as her heir, the devise of them to Sir Harry Parker having lapsed by reason of his death in the lifetime of the testatrix. The Appellant's title to these estates, especially to the Salisbury-court estate, is fixed on grounds perfectly immoveable. What is the fair presumption of John Parker's dealing with this property? Expending large sums of money on it, and making a lease for 21 years of the house **[313]** in Salisbury-court? All his acts evidence a conveyance to him. The Judgment of Sir Thomas Plumer, so much relied on, is more an argument than a judgment; and Lord Eldon, in affirming it, decided without his usual consideration of the case, as was evident from his comparing it with *Cholmondeley* v. *Clinton* [2 Jac. and W.1]. There is a case of *Edwards* v. *Morgan* (13 Price, 785), in the Court of Exchequer, where Sir William Alexander, C. B., whose decision was afterwards affirmed on appeal to this House, lays down the law as to questions of equitable election, in words that are applicable to the present case, and in favour of the Appellant. Sir Henry John Parker's first mortgaging and then devising away the estate given him by the son's will were distinct recognitions of that will, and confirmed it in every part.

The question being postponed for consideration,

Lord Lyndhurst, on a subsequent day (August 19), moved the judgment of the House as follows:—My Lords, this is an appeal from a decree of Lord Chancellor Eldon, who affirmed a previous decision of the Master of the Rolls, Sir T. Plumer. The question relates to certain property that formed the subject of the marriage settlement of Sir Henry John Parker, in the year 1741. There is no question that the title at law to the property belongs to Sir William Parker, the Respondent. It is admitted that the title at law belongs to him, but it is contended that circumstances of equity, arising several years ago, so far back as the year 1769 or 1771, gave to the Appellant an equitable right to control the legal title of the Respondent. Where the legal title is admitted, the party claiming under an equitable title, as circumscribing and controlling the legal title, must make out a clear, distinct and satisfactory case. The **[314]** question is then, whether you are of opinion that upon the arguments at the bar such a satisfactory case of equity has been made out, as ought to induce you to give judgment in favour of the equitable title, so as to displace the legal title of the Respondent.

The first question is raised upon the will of John Parker, the son of Sir Henry John Parker. It was argued on the part of the Appellant that this will raised a case of election as against Sir Henry John Parker. The Master of the Rolls was certainly of opinion that no case of election was raised; but when the case came before him, the agreement between the father and son, by which it is presumed by the Appellant that the father parted with the fee in the settled estates, was not in

evidence. Some attempt was made to introduce it, but it failed. Afterwards, however, when the case came before Lord Chancellor Eldon, some evidence of the agreement was given, by the Appellant reading the agreement out of the answer. Taking the facts stated in it to be true, and taking the rights and situation of the parties to be consequent on it, and connecting it with the obscure and inaccurate terms contained in the will of John Parker, the noble and learned Lord who preceded me on the woolsack said, that it was difficult, if not impossible, to come to a satisfactory conclusion as to what the intention of the testator was, as expressed in his will. I have read it over and over, and attended anxiously to it since I have heard the able arguments that have been urged upon it, and at this moment I doubt whether it is possible to come to a sound conclusion as to the meaning of the testator: whether he intended in the event of his dying in the lifetime of his father, to dispose of that property is the question we have to consider, and unless I can see what the meaning of the testator was, the foundation of the case of election has altogether failed.

[315] But assuming, for the sake of the argument, that it was the intention of John Parker to raise a case of election; that is, to dispose of what he was not entitled to dispose of; the next point which the plaintiff must establish is, that Sir Henry John Parker chose to take under that will, and not in opposition to it. In the evidence I find nothing clear or satisfactory to my mind to show that he had any intention to take under the will. Looking at the will itself, I am not satisfied that he knew he was bound to take under it, or that a case of election was raised. There is nothing to satisfy me that he thought he was bound to elect, or that he did elect. I find he took benefits under the will, but at the same time he acted in opposition to it. That fact is as strong to show that he did not elect to take under the will, as his acting in conformity to it would have shown the reverse. I agree with Sir Thomas Plumer that Sir Henry John Parker acted as much in opposition as in conformity with the will. That he took considerable benefit under the will, and more benefit by adopting it than by rejecting it, would be an argument to show that he had elected, if there was anything to show that he had been called on to elect. I find that within a few weeks after the death of John Parker, the son, Sir Henry John Parker made a disposition of the property entirely at variance with John Parker's will: instead, therefore, of coming to the conclusion that he did elect to take under the will, I should say that the evidence not only did not show a case of that sort, but that there was manifested as strong an intention to take adversely to, as under, the will, and therefore no case of election was made out.

Much of the argument has been employed at the bar with respect to the language of the agreement, and the proviso said to be contained in it. That was made evi- **[316]**-dence by the pleadings, for it was read from the defendant's answer, and there is nothing to show that it was not an existing agreement between the parties. It was said that the proviso was not sufficiently set forth, but I think that it was, sufficiently at least to lead to that conclusion. It is stated also that the proviso is altogether unreasonable, and that the agreement, taken in connexion with it, is one that cannot be enforced. I agree with the noble and learned Earl (Eldon) who decided this case, that it is quite impossible for us at this distance of time, 60 years from the transaction, to say whether the agreement was reasonable or not; something must depend on the character, situation, and circumstances of the parties, on the sort of stipulations made between them, and on the state of the family at that time. It was argued, that by some subsequently executed instrument this proviso or condition was discharged; but that is mere conjecture, mere probability, or rather possibility. I certainly can find no evidence of such a circumstance. It was further argued, with respect to a part of the property, namely, that in Salisbury-court, that that was disposed of by the father in fee to the son. I cannot find any evidence to satisfy me of that: the son took an interest in the property sufficient, as he thought, to authorize him to grant a lease for 21 years; but there is no further evidence to satisfy me what the nature of that interest was. As to the first part of the case, in consequence of the lapse of time and death of witnesses perhaps, the Appellant has not succeeded in establishing a clear case of equity; yet that is necessary for him to do before he has any right to ask for your Lordships' judgment, to displace the legal title of Sir W. Parker.

But this is not all. The Appellant has another difficulty, arising from the will of Sir Henry John Parker: **[317]** that will has opened a case of election. There can be no doubt if that will offered a case of election, that these ladies did elect to take according to it. The deeds executed in the lifetime of Margaret and Ann, show, to my satisfaction, that they did intend to take under their father's will and not under the will of their brother. They described themselves as devisees for life, and as being so under that will, and as holding under it. In addition to that, after the death of Margaret, letters were found, in which she also described herself as holding this property under the will of her father. As far, therefore, as the declaration of the parties is evidence of intention we have it, for the purpose of showing that these ladies intended to take under the will of their father, and not under the will of their brother. We are asked what motive they had for preferring the will of their father, for they gained no advantage by doing so; that the estate itself was mortgaged, and with respect to the personal property, that it was not equal to the debts and legacies. I repeat, that at this distance of time it is impossible to say what was the motive that influenced their conduct. They might think that the settlement of the property under that will was rightly made. Many other reasons might operate on their minds to induce them to take under their father's will; but it is sufficient for us to see that they did so, without, at this distance of time, attempting to discover and explain their motives. It was said that they were misled by their law-agents, and reference was made to a case which was put for the opinion of Mr. Maddox, in which this question of election was not raised. That seems to mean that the trustees and the law agents were induced to mislead them for the sake of a small pecuniary benefit to themselves, a legacy of £50. I admit, that on the statement of the case, Mr. **[318]** Maddox made no reference to the question of election; but Mr. Hunt, who was their law adviser, lived near them, and had opportunity enough to inform them of the real state of the matter. It is too much for us at this distance of time to deal in conjectures of this sort, or to suppose that they were ignorant of the facts in which they were so deeply interested. Independently of these considerations, there is a question of time, and the learned counsel admits that he does not understand how that has been passed by. Here the equity was raised in 1769. The persons under whom the Plaintiff claims had an opportunity of raising that question at that time; they had an opportunity of calling on the father to make his election; they did not do so, but allowed the question to lie dormant 40 years; and from the principles of equity it follows, that that alone should be a bar to the Plaintiff's claim. I beg leave to move that this judgment be affirmed without costs.

Judgment affirmed without costs.

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[319]

APPEAL

From the Court of Session.

WILLIAM, EARL OF MANSFIELD,—*Appellant;* RALPH SCOTT,—*Respondent.*

[Mews' Dig. ix. 813.]

A master having admitted that, by his factor's agreement, he promised to his servant, in addition to his ordinary wages, a present of £20, the service to be at all events till the end of one year; and that sum not having been paid at the expiration of the year, and the service having continued for several years; Held, that the contract was renewed in all its parts from year to year; and, nothing being said to the contrary by either party, that £20 was due for every year of the service.

This was an appeal against interlocutors pronounced in an action raised by the Respondent in the Sheriff's Court of Perthshire, for making good an allowance of £20 a year, from the year 1810 to 1829, under a contract of service, and removed by bill of advocation into the Court of Session, at the instance of the Appellant. The alleged contract was contained in the following instruments:—

"*Memorandum.*—It is hereby agreed, and finally understood, that Ralph Scott, from the 26th May 1810, is to take and fulfil the office of hedger and ditcher on the farm and estate of Scone, in a good and workmanlike manner, whereof the same conditions as his predecessors hath * already been paid, [320] is still to become his wages from the superintendent and tenants of the said farms: and, as conscious of his assiduity towards the work, as addition to the above, the Earl of Mansfield is to make him an allowance of £20 per annum. Done by us at Kenwood, 20th April 1810. (signed) Andw. Middlemiss, for Lord Mansfield.
R. Scott."

The other minute (which was executed soon after) was in these terms:—"It is agreed between Andrew Middlemiss, for Lord Mansfield, and Ralph Scott, That Ralph Scott is to go to Scone; is to superintend the hay harvest; is to bind hay, and instruct others in that process: That he is also to be employed as hedger, to have the care of the fences upon Lord Mansfield's farm, and of the fences of such tenants as do not choose to keep them in order by their own labourers. He is to receive the same wages as were paid to the hedger who was lately employed; and when at hay harvest or other work, he will receive the wages of the country. But in addition to these, as an encouragement for his greater assiduity, Lord Mansfield is to make him a present of £20; and it is also understood that Scott is to continue in Lord Mansfield's service at all events till Whitsunday 1811; and until this agreement shall be terminated by the demise of either party.

(signed) Andw. Middlemiss, for Lord Mansfield.
"Kenwood, 14th May 1810." Ralph Scott."

The Respondent, in pursuance of this agreement, left London in May 1810 for Scotland, and there entered upon the employment of hedger and ditcher on the [321] Appellant's estate of Scone, taking charge also of the Appellant's hay-harvest, and continued in these employments down to 1829. He admitted payment from time to time by the Appellant and the tenants on the said estate, of the price of the work performed by him thereon, according to the extent of the particular work. This claim of the additional allowance of £20 a year for 19 years, amounting to £380, with interest on each year's allowance, was resisted by the Appellant, on the ground that the allowance was to be for one year only. The Respondent, in aid of his construction of the minutes of agreement, produced two letters written to him by Middlemiss (since deceased); one of them, dated Caen-Wood, 3d August 1810, and franked by the Earl of Mansfield, had these words: "I have to request your answer to this, and say how you are getting on with the haymaking, the people, the quantity of hay per acre, and your opinion of the dykes; and be very particular in anything in the sort, but say nothing more than you wish to his Lordship to know, as this letter is by his directions, and I shall show him your answer." The other, dated from the same place, 9th of May 1812, in answer, as the Respondent alleged, to a former letter of his own, asking for explanation of the contract, contained these words: "I was happy to hear you so much recommended by Lord Mansfield the other day; wherein I strongly urged the loss I sustained by parting with you. What you mentioned in your last letter as Lord Mansfield's present, I consider it as *per annum.*"

The Sheriff-substitute of Perthshire, after due consideration of the pleadings and evidence, pronounced the following interlocutor, to which the Sheriff-depute, upon appeal to him, adhered, and decreed accordingly—

"The Sheriff-substitute having advised the closed [322] record, finds it admitted by the defender, that previous to the pursuer's leaving England, he received employment under his Lordship at Caen-Wood, as a hedger and ditcher, and in haymaking; and that it was agreed that he should go to Scone in this country, where he was to be employed in similar operations on that estate; and, as an inducement, he was promised a present of £20, in addition to the ordinary wages in the place: that the only evidence in process of the terms agreed upon, is contained in two minutes of bargain, dated Caen-Wood, 20th April 1810, and 14th May that year, by 'Andrew Middlemiss, for Lord Mansfield,' and by the pursuer: finds it admitted by the defender, that Middlemiss had charge of hiring farm servants for him at Caen-Wood, but had no

* Other breaches of concord, and many mis-spellings appeared in the minutes of the original agreements.

such charge relative to his Scotch estates; and in anything that Middlemiss may occasionally have done in relation to these estates, he always acted on special instructions; and the letter by Middlemiss to the pursuer, dated 3d August 1810, desiring particular information how he was getting on, to be communicated to his Lordship, appears to have been addressed and franked by the defender: finds that the minute of the 20th April bears, that an allowance of £20 was to be made to the pursuer *per annum*, in addition to his wages, as conscious of his assiduity towards the work; and that the subsequent minute of 14th May bears, that, as an encouragement for his greater assiduity, the defender was to make him a present of £20; and it was understood that the pursuer should, at all events, continue in his service till Whitsunday 1811: finds, that no subsequent alteration having been made on the terms of the bargain, the pursuer is entitled to the said allowance *yearly*, during the time he re-**[323]**-mained in the defender's service at Scone, but that not having demanded payment as it fell due, he is only entitled to interest at the rate current at the bank in Perth, where the defender's business was transacted: and decerns, with £8 1s. of expenses, and the expense of extract."

The Appellant having afterwards removed the cause by bill of advocation into the Court of Session, the Lord Ordinary, after hearing the parties' procurators, "repelled the reasons of advocation; remitted *simpliciter* to the Sheriff, and decerned; finding the advocator liable in expenses." To which interlocutor his lordship added this note: "The case is not without difficulty, but the Lord Ordinary sees nothing sufficient to induce him to alter the judgment of the Sheriff. He is of opinion that the question must be regulated by the minute of 14th May 1810; and that its terms, when *clear*, cannot be controlled by anything in the previous minute of 20th April. But it does not appear certain, looking at these alone, that the £20 though denominated *a present*, was not meant as a part of the *wages*, or *allowance*, which the pursuer was to receive for his services during the year for which he was engaged by the minute. It is stated to be *in addition* to the wages which the pursuer's predecessor had been in use to receive; and, considering the circumstances of the parties, it does not seem unreasonable that an addition to this extent should have been made. Besides, the cause assigned for giving it is one no less applicable to the services for subsequent years, than to those of the first. It is not to be given because the pursuer might be put to expense in removing to Scotland, or for any reason exclusively connected with the year to which the missive relates, but as an **[324]** encouragement for his greater assiduity, as a remuneration for his expected services during the year for which he is engaged. Of consequence, it may be not unreasonably inferred, that if the pursuer, without any further bargain, continued his services, which the defender, by suffering him to do, must be presumed to have approved of, he was entitled, under tacit relocation, to the continuance of the same emoluments. Now, if the minute can bear this interpretation, or, if its meaning is in so far *doubtful*, the Lord Ordinary thinks it not incompetent to look to the previous minute *for explanation*. This document, which does not specify any particular period of service, expressly states the £20 to be an *annual* addition, and assigns the pursuer's expected assiduity as the reason. There seems no ground to presume that Middlemiss, who had no authority from his situation to hire servants for Scotland, would have entered into such a bargain for the noble defender without some communication with him; and the much more ample and distinct specification of the nature of the work to be performed, contained in the second minute, may sufficiently account for its existence, without supposing that Middlemiss had exceeded his instructions in the first. Indeed, had he acted so improperly, it is not likely that he would have been retained as the person to make the second bargain.

"It was argued, as proving the pursuer's *mala fides*, that, having doubts as to the amount of his wages, as appears from the letter of Middlemiss to him of 9th May 1812, he did not apply to Lord Mansfield for an explanation. But the Lord Ordinary is not satisfied that this is a fair inference. It is not stated whether Lord Mansfield was or was not at Scone in spring 1812. But if he was not, it was natural for **[325]** the pursuer, when his service for the second year drew near a close, to apply for an explanation to Middlemiss, the person who had made the agreement with him on the part of his Lordship; and having learnt from him that he considered the £20 to be an annual payment, to conclude that this was the case. The pursuer's accounts and

receipts produced have no relation to his annual wages, and contain no general discharge of what might be due to him. The accounts relate entirely to specific pieces of work, mostly drains and dressing of ground, executed in great measure by labourers employed under the pursuer; and his receipts are just for the sums specified in the accounts. It is, no doubt, somewhat strange, that he should have allowed so many years to pass without any settlement of his wages; but £20 was undoubtedly due to him; and there is just as little the appearance of his having asked for, or been paid, this sum, as there is in regard to any of the subsequent sums sued for."

Against this interlocutor the Appellant presented a reclaiming note to the Lords of the first division of the Court, and they having advised the same, pronounced the following interlocutor on the 21st June 1831:—

"The Lords having advised this reclaiming note, and heard the counsel for the parties; in respect it appears to be the *bona fide* meaning of the parties, that the allowance or present of £20 was to be annual, adhere to the interlocutor reclaimed against. Of new, find the defender liable in the pursuer's expenses, appoint an account to be given in, and remit it to the auditor to tax, and to report."

From these several interlocutors the noble Appellant now appealed to this House.

[326] Mr. Knight and Mr. Murray, for the Appellant:—This claim of £20 a year from the year 1810 was never heard of by the Appellant until the Respondent was about leaving his service, in 1829. For nineteen years he went on receiving from time to time the price of his wages from the noble Appellant's factors in Scotland, and giving regular discharges for the same, without complaint or objection. The Appellant admitted, from the commencement of this action, that a present of £20 was promised to the Respondent, as an inducement to go to Scotland, and to bear the expense of his removal; but it was never intended that £20 should be paid him annually, in addition to his ordinary wages. Middlemiss had authority to hire farm servants for Caen-Wood, but not for the Appellant's farms in Scotland, which were under the management of the factors there. The minutes of agreement founded on, were wholly unauthorized and never homologated by the Appellant, in so far, at least, as respects the payment of this £20 a year, in addition to the Respondent's ordinary wages. But even, if it were to be held that these instruments were obligatory on the Appellant, the last must be held to supersede the first, and in that there is no stipulation that the Respondent was to have £20 a year, but a present of £20. It is probable that the factor in Scotland paid that present at the end of the first year, but as he cannot now be brought forward to prove such payment, the Appellant has been willing and offered to pay it, although a stale and suspicious demand. As to interest, none can be due in any event; none is stipulated for in the alleged agreement, and none could accrue upon the nature of this claim, which was not made until 1829, although the Respondent well knew that in 1827 an advertisement was published in the newspapers in Scotland, calling on all persons who had **[327]** claims on the Appellant to produce them, upon the change of the Appellant's factor. The Respondent's silence then, and for two years after, as well as for the 17 years before, coupled with his having granted annual discharges for the wages of all work done by him, for the noble Appellant, imply a discharge from all previous demands, in the same way as a factor, after having settled accounts, has been held not entitled to demand a salary, as in *Graham* v. *Roughead* (Morr. 6534). The inference from this long silence is not to be removed by saying that the Respondent did not call for payment of this claim, because he had no occasion for the money then, and wished it to accumulate as a fund for his old age. Lord Mansfield was not a banker for his hedgers, to be liable to them for interest at the rate of 5 per cent., when 2½ per cent. is all he could himself get for his money. There was no place in the circumstances of this case for the doctrine of tacit relocation. The second minute had the express words, "a present of £20," and beyond that the Respondent could not claim; and that he had not received that present long ago was entirely his own fault. His regular wages were duly paid to the Respondent during every year that the service continued. They submitted that for these reasons the interlocutors ought to be reversed.

The Lord Advocate and Mr. Kaye for the Respondent:—The interlocutors finding the Respondent entitled to £20 a year, over and above his ordinary wages for labour, during every year he continued in the noble Appellant's employment, are in all re-

spects well-founded. It was useless to deny that Middlemiss was the avowed [328] agent of Lord Mansfield to hire farm servants, and make contracts of this sort with them; it was his duty, and not the duty of the factor in Scotland, to contract with this man. Middlemiss is admitted to have had authority to make contracts with farm servants in England. This was an English contract. The £20 was not a mere gratuity, or bounty, or present, but part of the wages agreed upon for the first year, of which agreement the writing of April 1810 was evidence; and the service not terminating with that year, the contract ran on with the service by tacit relocation: *Baird* v. *Don* (Morr. 9183). This doctrine is applied in every-day practice in Scotland, and though taken from the Roman law, *Heinec. ad Pandect*, lib. 19, tit. 2, s. 319, it belongs to universal jurisprudence. The contract is to be expounded according to the *bona fide* intentions of the parties engaging in it. Is it reasonable that the Respondent would give up the high wages of Highgate and Caen-Wood, where he had full employment, for the comparatively low and uncertain wages of Scotland? No; he was to have the same wages as his predecessor, and, "as conscious of his assiduity towards the work, in addition thereto, the Earl of Mansfield was to make him an allowance of £20 *per annum*." That was the literal interpretation of the first minute, and the only object of the second was, to define the Respondent's duties, and add the employment of haymaking and superintendence of the harvest, which were not in the first instrument; both writings are consistent, and make up the contract. The Respondent having completed the first year of the service, was then fully entitled to the allowance of £20. After he entered upon the second year, the agreement became, according [329] to established principles, renewed in all its parts, nothing being said by either party to the contrary. If any doubt could be entertained upon that, it was removed by the letter of Middlemiss, saying that he considered the allowance to be "*per annum*." The noble Appellant was, therefore, bound to pay this man the same additional allowance for every year that he remained in his service. It is true these instruments are not formally executed, and, therefore, not probative, but they are not the less binding on the Appellant; implement followed on them on both sides; the Appellant accepted the service rendered by the Respondent in pursuance of these contracts, and his acquiescence in it amounts to a homologation, which supplies the defect in form (Tait on Evi. 123). The objection to the Respondent's claim, on the ground of delay, goes for nothing; for the allowance for the first year, which is admitted to be due, was longer than any in being claimed. The Respondent, not wanting it for immediate use, thought fit to let the sum accumulate in his employer's hands, for support in his old age.

To show that the Respondent was also entitled to interest on the yearly sums remaining due to him, the learned counsel cited 1 Bell Comm. 557.

The Lord Chancellor (June 17), in moving the judgment of the House, said:—I will not trouble your Lordships to go over the whole of this cause. The Court below confined itself exclusively to the two documents of April and May, 1810, and no question was raised as to their admissibility or authenticity. Although great doubts appear to me as to the admissibility of these instruments in evidence, and as to the authority said to be [330] given by Lord Mansfield to Middlemiss to make this contract, yet, if your Lordships will look into the defence to the action in the Court below, you will find the Court there, confining itself to the construction of the instruments, passed over the question of their admissibility, which to me appears to be the only or principal question in the case. The Judges below proceeded upon the ground that the defence set up entitled them to look only to the construction of the instruments: "The defender does not admit that he is bound by the writing signed by Middlemiss, founded on in the present summons; and, in particular, it is denied that Middlemiss had any power to enter into the alleged agreement." The Appellant goes on to say, "the defender supposed the pursuer had got the money in his account for work done in the first year of his engagement; and that he has not got payment is entirely his own fault." It is clear from this that he did not get the £20, and the passage amounts to an admission that the defender was bound by Middlemiss's agreement to pay so much. If that £20 had been paid, the case for the Respondent would be very different. The Appellant, in his defence, submitted the following pleas: "No agreement was ever made or authorized by the defender, under which the pursuer was to have £20 a year, in addition to his ordinary wages, as libelled. The writings

founded on in the summons are not obligatory on the defender, by whom they are not signed, by whom they were not authorized, and by whom they have never been homologated or confirmed, in so far at least as respects the alleged agreement to pay the pursuer £20 a year in addition to his ordinary wages." If the defender stopped there, it would be something like a denial, but the defence goes on: "Supposing the [331] writings mentioned in plea second were held to be obligatory on the defender, the last (in so far as the two are inconsistent) must be held to be the regulating document, and to supersede the first." This is not a denial, but an admission that there was some agreement; and as the defender makes mention of an agreement, and none but this is suggested, your Lordships will be of opinion that the Sheriff's interlocutor was well founded. The question is not what would have been done by the Sheriff, had a different course of defence been adopted. If the Sheriff had not been satisfied by the admissions, he would probably have ordered the case to be heard upon issues. I am not quite satisfied with the evidence, but whatever difficulty I have on that first and fundamental part of the case, a difficulty which arose from the manner in which it was presented to the Sheriff, who was prevented by the admissions from sending issues to a jury court; yet, under all the circumstances, I am not disposed to recommend to your Lordships to take a view of the case different from the Sheriff, but to affirm his judgment, which I think the remainder of the case justifies. The whole contract applies to a hiring for a continued time, and the present mentioned must mean a yearly present. Scott was to continue in the service at all events for one year, and till the agreement terminated by the demise of either party. If Scott left at the end of the first year, he was to have the £20, and the words "at all events" imply a contemplated continuance of the service. The delay in asking for this allowance was matter for consideration, but not so strong as to prevail against the claim, for the Respondent had an undeniable right to £20, and it being admitted that he has a right to that sum for one year, he has an equal, or some, right to the like sum for all the years of his ser-[332]-vice. I think the judgment ought to be affirmed with simple interest, and without costs.

Lord Wynford concurred, and, after referring to several passages of the printed cases on both sides, from which he drew the same conclusions, his Lordship said, "As to costs, I agree that the Respondent ought not to have costs of the appeal, on account of the doubts and difficulties which the Lord Ordinary said attended the case; for when the Judge below expresses his doubts, that is an encouragement to parties to appeal."

The interlocutors were affirmed accordingly, with simple interest, as at the bank in Scotland, and without costs.

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[333]

APPEAL

From the Court of Chancery.

The KING OF SPAIN,—*Appellant:* HULLET and WIDDER,—*Respondents.*

[Mews' Dig. viii. 179, 181; S.C. 7 Bli. N.S. 359. See *Hullett* v. *Spain (King of)*, 1828, 1 Dow and Cl. 169, and notes thereto. See *Prioleau* v. *U.S.* 1866, L.R. 2 Eq. 664: *U.S. of America* v. *Wagner* 1867, L.R. 3 Eq. 730: *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* (1898), 1 Ch. 190.]

A foreign sovereign prince, being declared entitled to sue in the Court of Chancery here in his political capacity, claims the privilege of putting in an answer, by his agent, or without oath or signature, to a cross-bill, filed against him by the Defendants to his original bill; Held, that he stands on the same footing with ordinary suitors as to the rules and practice of the Court, and is bound, like them, to answer a cross-bill personally and upon oath.

The Plaintiffs in the cross-bill having put in a full and sufficient answer to the original bill, which is subsequently amended, obtain an order for a month's time to plead, answer or demur to the amended bill after the Plaintiff therein

should have answered their cross-bill, that order is held good, and is accordingly affirmed.

The material allegations and prayer of the Appellant's original bill are stated in the report of a former appeal (1 Dow and Clark, 169,) brought by the Respondents against an order of the then Lord Chancellor, over-ruling their demurrer to that bill. The House of Lords dismissed that appeal and affirmed the order of the Court below, on the 18th of June 1828, thereby establishing the Appellant's right to sue in our Courts of equity as a foreign sovereign, and in his political capacity. The Respondents, on the 3d of July following, filed their cross-bill in the Court of Chancery against the Appellant, and Don Justo de Machado, who had also been made Defendant to the Appellant's bill, but remained out of the jurisdiction.

[334] The cross-bill, after reciting the material parts, and the prayer of the original bill, stated and charged in circumstantial detail, that many of the allegations in respect of which the Respondents were made parties to the said original bill were not according to the truth, and that the Appellant had in his power, and in the power of his agents, servants and ministers, various documents and statements, by which, if produced, it would appear that many of the allegations in said bill were not according to the truth, and by which also the truth of many other circumstances would appear, whereby it would be shown that Appellant had no title to relief against these Respondents in respect of any of the matters in said bill mentioned: that the Appellant had no right to the fund provided by the treaties in the said original bill mentioned; and that the claims of Spanish subjects on that fund had been adjudicated in Paris, and openly, and with the knowledge of the Appellant, sold, and by such sales became the property of French and British subjects: that his Catholic Majesty had unduly got possession of a considerable portion of the trust or indemnity fund, and misapplied it, and that he intended to apply to the general purposes of his government the money alleged in his bill to be deposited with the Respondents; and that, as evidence of such intention, his Catholic Majesty and the Assembly of the Cortes, in the year 1823, enacted that the said fund should be applied to the exigencies of the Executive Government; and the Spanish Finance Minister accordingly assigned the said fund to divers persons, by drawing bills of exchange against it, whereby any right assumed by the Appellant and Government of Spain, of further dealing with it, was wholly extinguished: That by the laws of Spain, the monies in the said original bill mentioned did not belong to his Catholic Majesty, nor was he en-**[335]**-titled to sue for the same; and that so it would appear, if his said Majesty would set forth the law of Spain by which he claimed to have any interest in the said monies, or any right to sue for the same: That various despatches, communications and orders had been transmitted by the orders and with the privity of his said Catholic Majesty to the said Justo de Machado, in which it was admitted, or stated, that his Catholic Majesty had no right, or interest, or title in or to any monies in possession of the said Justo de Machado; and that so it would appear, if all communications or despatches made or sent to the said Justo de Machado, by, or by the orders of, or with the privity of, his said Catholic Majesty, or any of his ministers or council, were set forth: That the said monies, by certain agreements entered into by his Catholic Majesty, or with his authority, did, as against him, and all persons claiming under him, belong exclusively to certain persons having claims under a certain convention concluded in May 1823, by which his Catholic Majesty became bound to make full compensation to all British subjects for property or vessels belonging to them, which had been detained or seized by Spanish vessels or Spanish authorities, at any time after the 4th of July 1808, down to the date of the said convention; and in particular, that a great part of the said monies did belong to Respondents, for that the said Spanish Government seized, or caused to be seized, subsequently to the 4th of July 1808, two ships, called the *Scorpion* and the *Vulture*, with their cargoes, which belonged to these Respondents; and that the same were sold by the authority of the King of Spain; and that the whole of the proceeds thereof, amounting to upwards of one million of Spanish dollars, were paid into the royal treasury, and applied to the use of his Catholic Majesty; and that these Respondents had a good and **[336]** valid claim against him, to the amount of more than £200,000, which they were prevented from enforcing against him merely by his royal character.

The cross-bill further charged, that there was a special necessity that the Appellant should be compelled to answer upon oath all the matters thereinbefore mentioned, inasmuch as the same were material to the Respondents' defence in the original suit, and to produce all writings, papers and documents in any way relating to any of the matters therein mentioned, which then were in the possession of him, or of any of his agents, ministers or servants: That his Catholic Majesty had knowledge, remembrance or belief with respect to all or many of the matters thereinbefore mentioned, and had documents and writings, and other means of full and perfect knowledge as to the same within his power; and that he was bound to use such means, in order to give the Respondents the aforesaid discovery: and that, without the production of the said documents, and the discovery of all the matters by the said cross-bill inquired after, these Respondents could not have justice in the said original suit, the more especially as his said Catholic Majesty intended to amend his said original bill, and materially to alter the case stated in it, which these Respondents submitted he ought not be allowed to do till he should have fully answered their said cross-bill; the discovery thereby prayed being such as, besides being essential to their defence to the original bill, would show the untruth of the allegations which the Appellant intended to introduce by amendment into his said original bill.

The cross-bill then prayed, amongst other things, that the Appellant might be ordered to make to these Respondents the discovery thereby sought, and that his said Catholic Majesty might also be restrained from proceeding in the said original suit until he should [337] have granted a full discovery of all the matters of which a discovery was thereby prayed, and of all the writings, papers and documents therein mentioned.

The Respondents, in the same month of July 1828, put in their joint and several answer to the Appellant's original bill. And the Appellant having amended (1 Russ. and Myl. 7) his bill in March 1830, an order was made in both causes by the Vice-Chancellor, bearing date the 8th day of May 1830, upon the application of the Respondents, that they should have a month's time to plead, answer, or demur to the amended bill, after the Appellant should have answered the bill of the Respondents. An application, made on behalf of the Appellant to the then Lord Chancellor to discharge that order, was refused on the 6th day of July following.

The Respondents were subsequently served with two notices of motions to be made on behalf of the Appellant before the present Lord Chancellor. One, bearing date 15th January 1831, was to the effect, "That Don Juan Escudero, residing in Weymouth-street, in the county of Middlesex, might be permitted, on behalf, and in the name of the Appellant, to put in an answer to the bill of the Respondents, the Appellant thereby undertaking that the answer so to be put in, and all proceedings consequent upon it, should be as valid and effectual for the purposes of the said causes, in such manner as the Court should direct, as if such answer had been put in personally by the Appellant in the ordinary course; or that the said Court would be pleased, under the peculiar circumstances of the case, to accept the answer of the Appellant without oath or signature."

An affidavit of Don Juan Escudero, filed in support of that intended motion, stated, amongst other things, [338] that he was one of the Appellant's subjects, and appointed by him a commissioner in this country, for the purpose of recovering from the Respondents and others the indemnity funds mentioned in the pleadings: That deponent had perused, and carefully considered the said bill filed by the Respondents, purporting to be a cross-bill, and believed that the Appellant had personally little or no knowledge of the matters contained therein: That, believing it would be impossible to procure an answer to the said cross-bill from the Appellant personally, inasmuch as deponent conceived it would be, and as he was instructed by authority, would be considered, both by the Appellant and the Spanish Government, inconsistent with the rank and dignity of the Appellant as a Sovereign Prince, to put in an answer personally and upon oath in the said Court of Chancery, or in any of the courts or tribunals of this or any other country, he, this deponent, upon advice of counsel and after communication with the Appellant, was authorized by him to put in, on behalf and in representation of the Appellant, an answer to the said cross-bill, and also to consent, on the part of the Appellant, that such answer, and all proceedings in the said causes consequent thereupon, should be as valid and

effectual for the object and result of both the said suits, as if the Appellant himself had put in the answer in the ordinary way: and that from the knowledge deponent possessed as to the several matters contained in the said cross-bill, he had no doubt whatever but that he could give a full answer and discovery as to all the matters therein contained, if he were permitted so to do by the said Court of Chancery: and that he was willing, if the said Court should think fit so to direct, to put in a full and complete answer to the said cross-bill, in the place and in the name of the Appellant.

[339] The second notice of motion, bearing date the 10th September 1831, was to the effect that the aforesaid order of the Vice-Chancellor, of the 8th day of May 1830, affirmed, on appeal, by the Lord Chancellor the 6th day of July 1830, might, with the said order of the 6th day of July, be discharged.

An affidavit of Mr. Thomas Browning, filed on the 15th of November 1831, in aid of both motions, stated, amongst other things, that deponent was the solicitor employed in the said causes on behalf of the Appellant; and that on the 30th day of August 1831, an order was made by the Court of Chancery, in a cause still pending, in which Juan Alvarez y Mendizabel was Complainant, and the said Machado, the Respondents, the Appellant, and others were Defendants, whereby these Respondents were ordered to pay into the Bank of England, to the credit of that cause, the sum of £24,020, and to deposit certain mining shares, part of the indemnity fund or of the produce thereof, alleged in the Appellant's bill to have come into the Respondents' hands under the circumstances therein stated. The deponent, after setting forth in his affidavit several communications between himself and the solicitors to the said Mendizabel, as to a proposed co-operation to enforce the last-mentioned order, stated that, the bill of Mendizabel was dismissed as against Messrs. Hullet and Widder without previous intimation to deponent: that, in consequence of such dismissal, the said order, of the 30th day of August, had not been in any manner acted upon: and that deponent had good reason for believing that the said Mendizabel had been induced to dismiss his bill as against the Respondents, either in consequence of some bribe given or promised to him by the Respondents for that purpose, or in consequence of some fraudulent **[340]** concert, compromise, or agreement subsisting between the said Mendizabel and the Respondents.

The Respondents excepted to this last affidavit for impertinence, and their exceptions being referred to the Master, he certified that the whole of that affidavit was impertinent. The Master's report was subsequently confirmed by two orders made by the Lord Chancellor, one bearing date the 15th of March 1832, referring back to the Master, to expunge the said impertinence from the affidavit: the second, bearing date on the 14th of May following, disallowing exceptions, filed by the Appellant against the report.

By another order of the same 14th of May 1832, his Lordship, having previously heard the two motions, of which the notices are above stated, was pleased to declare that he did not think fit to make any order upon them.

The King of Spain now, by his appeal to this House, prayed for the reversal of all these orders, viz. the order of the Vice-Chancellor of the 8th of May 1830, the order of the then Lord Chancellor of the 6th of July 1830, affirming the same, and the said three orders of the present Lord Chancellor, of the 15th of March and 14th of May 1832.

The Attorney-General and Sir C. Wetherell, in support of the appeal: This is a case of first impression. This is the first time a foreign potentate has been called upon as a defendant to put in an answer upon oath. None of the Judges before whom this case came, none of the counsel who argued it on either side in the Court below, or who argue it now here, have been able to find one precedent. The Respondents have already questioned, by their demurrer, the right of the Appellant to sue as a foreign **[341]** sovereign in our Court of Chancery. But your Lordships decided against them, and by that decision it is now established, that a foreign sovereign may sue on behalf of his subjects in our Courts, and is entitled to be considered as a sovereign prince to all intents and purposes (1 Dow and Clark, 179); the individual is merged in the sovereign, and he cannot be called on to put in an answer upon oath as a natural person. By that decision upon the demurrer it was declared that the King of Spain was entitled to an answer to his bill from these Respondents. The Respondents, baffled in their first manoeuvre, next filed a cross-bill, before they put

in an answer to the original bill, with the view, that, knowing their answer would render it necessary for the original bill to be amended, they might have an answer to their cross-bill before they answered the amended bill. The order of the Vice-Chancellor, that now first appealed from, was what they anticipated; that order is wrong. For, in the first place, this is not a cross-bill, according to the definition of a cross-bill as generally understood, or according to the real principle upon which alone a Court of Equity allows the right to file a cross-bill, namely, that the defendant to an original bill may have an answer on oath to his cross-bill, in order to enable him to make out a complete defence to the original bill. This House decided that the original bill was the bill of the King of Spain, as King. But the bill of the Respondents is not against the King of Spain, but against "a certain individual claiming the appellation and title of his Catholic Majesty, Ferdinand the 7th, residing at the palace of the Escurial, near Madrid," etc. A cross-bill should be filed against the same plaintiff who sued by the original bill—

[342] Lord Wynford: Has he demurred to the cross-bill?

Lord Plunkett: The proper way to try that question would be by demurrer.

Counsel for the Appellant: We feel a difficulty on that point. We are now showing that this is not a cross-bill; but if your Lordships decide against us on that point, then our difficulties will be multiplied. There may be a good defence to a cross-bill, without demurring. It we demurred, we should thereby have admitted the allegations of facts in the cross-bill, which we do not admit, and therefore we could not demur; for there is no ground for the allegation therein made, that the King of Spain is misdealing with the indemnity funds. The practical purpose of a cross-bill is admitted by all the authorities on the subject, to be for protecting a defendant from any unjust claim, and many cases may be put, in which a defendant could not put in a complete answer to the original bill, essential to his defence, until he had first obtained an answer to the cross-bill filed by himself. The Respondents' bill is not for that purpose; we call their cross-bill a mockery: it charges that British subjects, and, among them, the defendants, had claims on Spain for piratical attacks on the *Scorpion* and *Vulture* ships, in 1808. This is an imposition on the Court of Chancery. Compensation has been already made for such claims by a convention with Spain. If your Lordships decide this to be a cross-bill, we must submit; but we rely on this part of the case for the Appellant, and intreat your Lordships to look at the whole of the record before you come to that decision, which may be of dangerous consequence, inasmuch as fraudulent parties may hereafter take advan-**[343]**-tage of the form. With respect to the rule of practice in the Court of Chancery, namely, that the identical plaintiff in the original bill must himself swear to his answer to a cross-bill, we maintain that that is not a universal nor an inflexible rule. The Court of Chancery dispenses with it in the cases of peers, corporations, infants, lunatics, married women, and other persons in the like situations, and these cases furnish an analogy important to be kept in view in the present case. Granting the existence of the rule, we say there is nothing in the generality of the practice, nor in the special nature of this case, to require the application of it here. Why is exception made in case of a peer? It is because he is a hereditary legislator, and it is part of our municipal policy to accept his word of honour instead of his oath. Will your Lordships require of the King of Spain, suing here on behalf of his subjects, to do that which you dispense with in a petty baron of twenty-four hours creation, in a simple controversy with one of his fellow-subjects? A peer can, and does take an oath in some cases, but the Court of Chancery dispenses with his oath in an answer to a cross-bill. Why cannot this House institute a like rule in the case of a king? In cross-bills against corporations, the town clerk swears to the answer for them—

The Lord Chancellor: Both Lord Redesdale and Lord Lyndhurst, in their judgment on the demurrer, said, that the King of Spain was on the same footing here as his adversary, when he came to sue here, and the Court of Chancery had complete control over him (1 Dow and Clark, 174).

The Counsel for the Appellant: Those learned Lords said nothing in the course of the argument, or in the judgment on the demurrer, as to the King of Spain **[344]** being obliged to put in an answer on oath. The Court of Chancery did not require an oath from Quakers, Moravians or Hindoos.*

* In the several parts of this case in which Quakers are mentioned, their partial

[345] Lord Chancellor: Yes; in their cases an oath is required, in their own form; and the question always was, what was the ceremonial that amounted to an oath. Here the King of Spain declines an oath, or a ceremonial equivalent to it.

Lords Wynford and Plunket: Where is it laid down that a sovereign cannot take an oath? It is another case, whether he can be compelled to take it.

The Lord Chancellor: A sovereign can take an oath; our's takes his coronation oath.

Counsel for the Appellant: But he does not take an oath in cases of controversy in our Courts, nor in matters external to his kingdom. It is impossible for the Appellant to do so consistently with his independent sovereign character, according to the principles of the law of nations, as practised between all European states, and his admitted relation to this country as head of the kingdom of Spain. The Appellant tenders an equivalent, as a corporation does.

An infant cannot put in an answer; it is put in for him. So with a lunatic, who answers by his committee; so with a married woman, who answers by another. All these rules are of the creation of the Court of Chancery, which, even in the case of a person who was not a lunatic, controlled its own practice, and appointed a person to put in an answer for him. The case of corporations is the most analogous to the present case, which is new, and in which therefore this House can lay down a rule of practice.

But it is impossible, after examining the history and circumstances of this case, and the position in which the Respondents are placed, to contend that an answer [346] from the King of Spain, upon oath, to the Respondents' bill, is in any degree whatsoever necessary, in order to give them the means and opportunity of defence.

Lord Chancellor: You are not to assume that the King of Spain has no knowledge of the matters, of which a discovery is sought by the bill; suppose he has something in *graemio*, which no one else can disclose.

Counsel for the Appellant: Our impression is, that he cannot take an oath; the law of nations will not allow the independence of a sovereign to be lost by taking

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exemption from the necessity of taking an oath is spoken of as an exemption from the obligation of making a solemn appeal to God in affirmance of their statement; this seems to be a mistake. In the case of *Atcheson* v. *Everett*, Lord Mansfield says, (Cowp. 390,) "It is objected that the Quakers are the only people in the world who ever refused to *swear;* but in *substance* their affirmation is the same thing, the *form* only is different, for an affirmation is a most solemn appeal and attestation to God of the truth." The Act of the last session (3 and 4 W. 4, c. 49), which allows Quakers and Moravians to make an affirmation on all occasions where an oath would be required from other persons, may therefore be said to have done no more than put them on an equality with other men.

The subject may be truly considered in this point of view: Quakers believe that any use of the name of God in merely human transactions is impious, and is in itself a sin. Other men do not think the solemn use of that name is a sin, unless it be so used to sanctify a falsehood. To compel Quakers, therefore, to take an oath, (if they could be compelled) would be to oblige them, in their opinion, to offer a gratuitous offence to God, since they were ready to authenticate in another, but still in a very solemn manner, the truth of their statements. The Legislature have wisely ceased to insist upon a form which in many cases prevented Quakers from performing their duties towards their fellow-subjects by the fear that in doing so they should be violating their duty towards God.

The case of the Hindoo is also incorrectly put in the argument. His mode of verifying a statement not only is, but has been treated in our Courts as an oath (1 Atk. 21-50; Str. 1104; 1 Wils. 84). It is a solemn invocation of the Deity, though not made in the English form. Such invocations have always been admissible in our Courts, for as Lord Mansfield, in *Atcheson* v. *Everett*, Cowp. 389, said, by the principles of the common law, no particular form of oath was required, but that every man was allowed to swear in that form which he thought most binding on his conscience. With respect to all the persons, therefore, the answer of the Lord Chancellor was in conformity with the leading authorities, "in their cases an oath is required in their own form."

such oath. The Appellant is ready to comply with all the forms of an answer, except the oath. Being allowed to file a bill as a sovereign prince, and in a public character, as trustee for his subjects, he ought not, and cannot now sink the sovereign in the individual, and put in an answer on oath to what the Respondents call a cross-bill. There is no instance of a foreign sovereign being made a defendant to a cross-bill, and therefore the Court of Chancery or this House is free to lay down the rule for the first time, being quite unfettered by practice, by law, or by Act of Parliament. A corporation supplies an officer who can put in an answer upon oath; Appellant is ready to do the same. He tenders M. Escudero, or any other officer, on his behalf that the Court of Chancery pleases to call for. The King of Spain is a foreign corporation, and offers an individual who is within the jurisdiction, who is competent to give all the requisite information, and who can be dealt with in every way as liable to all the consequences. He states by his affidavit that he has more knowledge of these matters than the Appellant can have.

[347] The Lord Chancellor: Have you any case in which a sole corporation is allowed to put in an answer to a cross-bill without oath?

Counsel for the Appellant: We have not. The King of Spain was allowed to sue as a sovereign; but now, if your Lordships say he must swear to an answer, you batter down the right which you raised, and you nullify the judgment which you formerly gave, for he cannot swear to the answer, were the sum in dispute as many millions as it is thousands. If the practical rule to be laid down in the Court of Chancery is, that an accountable agent, trustee, or party resident in England shall not be compelled to answer until the foreign sovereign, who has appointed him, has answered upon oath what may be ordinarily called a cross-bill (however useless and unnecessary for the purposes of his defence), the Court of Chancery would in effect be shut against a foreign prince, and the grossest frauds may be practised against him with impunity, by his own, or the accountable agents or parties resident in this kingdom, and within the jurisdiction of this Court.

Sir Edward Sugden and Mr. James Russell, for the Respondents: The Appellant has no right to complain that he is kept to the practice of the Court. It was by very sharp practice he obtained the order to amend his bill. That order was first discharged for irregularity, but the Respondents' clerk in Court had incautiously accepted the 20s. costs for the amendment, and the Appellant, discovering that it was then recently decided that such acceptance was held a waiver of the irregularity, again moved the Vice-Chancellor, who, feeling himself tied down by the order of the Lord Chancellor **[348]** in *Tarleton* v. *Dyer* (1 Russ. and Myl. 1-7), restored the order. That is not, however, now the subject of dispute. The first of the orders here appealed from is according to the practice of the Court of Chancery, which is, that if a man files a bill and after answer amends it, and the defendant to it files a cross-bill in the mean time, the plaintiff is bound to answer that cross-bill, before he can compel an answer to his amended bill; and the liability to answer his amended bill depends upon his answering the cross-bill. This order is to that effect, and it has been twice confirmed, first by Lord Lyndhurst and again by the present Lord Chancellor.

But it is asserted for the Appellant that this is not a cross-bill, because the Appellant is described as a certain individual claiming and using the title of "His Catholic Majesty, Ferdinand the 7th, King of Spain, residing at the palace of the Escurial." Why, the Appellant's own bill describes him so. All that is required for the cross-bill is, that he be described by his higher title, to entitle us to ask of him to do the same justice to us which he asks for himself. The rule of practice is laid down in *Calvin's* case (7 Co. Rep. 30). If the Appellant was not described by his higher title, he might demur or plead. There is no authority to show that a foreign sovereign sues in any other way than as an individual; only he must have his higher name. But if this be not a cross-bill, why did they not demur, as one of your Lordships observed? We cannot now go into the question, whether this is or is not a cross-bill? or whether we can support the allegations contained in it, or have good grounds of defence to this suit? When the cause comes to be heard on the merits, our clients will absolve themselves before the Court.

[349] The chief question here is, whether the King of Spain can take an oath? What prevents him? Because the King of England cannot take an oath to matters in our Courts, so, it is argued, cannot the King of Spain. But he is to take an oath, if

he puts himself into that state in which an oath is required. The counsel for the Appellant say, that the law of nations forbids it, and they offer a representative for his Majesty, to swear to the answer. But our Courts require the oath of the individual who answers. In the case of *The Columbian Government* v. *Rothschild* (1 Simons, 94), the like difficulty arose; the plaintiffs there were described as the "Columbian Government," and their counsel being desired to show who they were, and not being able to do so, the demurrer to the bill was allowed, on the principle that the plaintiff must describe himself so that the defendant might come against him by a bill or cross-bill. The King of Spain is bound by the same rule that binds others; there is no distinction between suitors. If he came here for justice, what is there to entitle him to an exemption from the rules of justice? The cases of infants or married women have nothing to do with this case. As to corporations aggregate, the officer who has the care of the corporation's documents is to give the information called for, and the practice is, to make him a party to the bill with the corporation; but the King of Spain is not within that class of cases. One of your Lordships asked if there was any instance of a corporation sole being exempted from the general rule of practice? No answer was given, because no instance of the sort could be found. The King of Spain tried to maintain a suit by his agent; he failed; can he defend a suit by his agent? He is bound to **[350]** defend as other suitors do, and the law of England recognizes no difference of rank amongst them. The law of nations lays down a doctrine to the same effect, where it says that "the promises, the conventions, all the private contracts of the sovereign are naturally subject to the same rules as those of private persons" (Vattel, b. 2, c. 14, s. 213, and p. 209, of edit. 1793). But the dignity of the King of Spain, it is said, prevents him from taking an oath. He may have such dignity and rank in Spain; but when he leaves his own kingdom and comes for justice into this his pre-eminences do not accompany him. There is nothing more inconsistent with royal rank than to be sued at all; but if a king be sued, he must act like any other individual. The law is so laid down in *Calvin's* case, before referred to. *The Columbian Government* v. *Rothschild* [1 Sim. 94] is a decision quite in point, and that decision was sanctioned by Lords Eldon and Redesdale.

As to the orders confirming the Master's report on Mr. Browning's affidavit, although the counsel for the Appellant seems to have abandoned that part of the appeal, we confidently submit that these orders also were right, and that the affidavit was wholly impertinent, being obviously filed in the hopes of exciting a prejudice against the Respondents, by introducing, in the form of a statement upon oath, the conjectures of the Appellant's solicitor as to matters irrelevant to this cause. We submit, therefore, that all the orders appealed from are just in principle, and are in conformity with the established law and practice of the Court of Chancery.

The Lord Chancellor: What prevents the King of Spain from transferring his interest in the subject-matter of the suit to a person who can put in an answer on oath?

[351] Mr. Russell: Nothing; his assignee might then file his bill against the Respondents, and make the assignor a party defendant, which would certainly place the Respondents in some difficulty.

The Attorney-General, in reply: The Appellant did not assign his rights, because he could not foresee that this objection would be raised; nor could he properly assign these funds, in consequence of the convention and arrangements with the Government of France, to appoint commissioners in Spain for the distribution of them. The decision in the case of *The Columbian Government* v. *Rothschild* [1 Sim. 94] is not in point; for that was given on the ground that no such Government was known in this country at the time of the contract there mentioned, and the Judge could not acknowledge in our Courts a Government which was not recognized by the Government of our own country.

Mr. Russell denied that that was the ground of the decision of the Vice-Chancellor.

The Attorney-General: We took that view of the case. This is the time to try whether this is a cross-bill, and not at the hearing on the merits; can this be a cross-bill which states as a set-off to our demand the capture of the *Scorpion* and *Vulture*?

Lord Plunkett: Suppose the cross-bill ever so absurd, is that a reason for not answering it on oath?

Attorney-General: It is not a cross-bill, and if it is not, there is an end to the

argument. But if it is a cross-bill, then we say, do not compel us to answer on oath, for that will be mockery, as by our original bill we [352] were allowed to sue as sovereign prince, and your Lordships cannot now strip the Appellant of that character. This is like the case of a bishop suing in right of his see, and the difference between a bishop suing in that right and in his private right is the same as that between the King of Spain and Ferdinand Bourbon in this Court.

The Lord Chancellor: Is there any instance to show that *ex comitate* in any court, in this or any other country, a party shall import with him the modes of proceeding in the courts of a foreign country? In the Court of Common Pleas a foreign prince was so far recognized as to be discharged from arrest, on giving common bail, by Mr. Justice Heath, and Lord Ellenborough afterwards said he thought that was wrong. That went to the very verge of privilege, but yet not so far as the Appellant asks us to go. Suppose a subject of Spain is suitor in our courts, and says he does not like his cause to be tried by a jury upon oral testimony, etc.; can he claim the course of trial of his own country? Is it not the fair course to submit to the laws of the country where he sues?

The Attorney-General: The rules of the Court of Chancery are of its own creation, and the question is, whether in this case of novelty and difficulty it may not dispense with an oath. It is a moral impossibility that the King of Spain can answer on oath before a commissioner from our Court of Chancery, in the face of his subjects; that would be stripping himself of his sovereignty, as it would be acknowledging a superior. It would be also unreasonable, as your Lordships allowed him to sue as a foreign prince. We have not abandoned our objections to any of the orders appealed from, but [353] we submit that the affidavit of Mr. Browning was material, and pertinent to the motion in support of which it was made; and that therefore the orders upon that, as well as the other orders, ought to be reversed, and the Appellant allowed to prosecute his suit, and the Respondents compelled to put in their answer to his amended bill. We again repeat, on behalf of the Appellant, the offer made in the Court below, by which he conceives that he submits to every rule of justice required by the doctrines and jurisdiction of the Court of Chancery in his case.

Lord Plunkett: My Lords; it is not my intention to go into the reasons upon which I found my opinion that the orders appealed from in this case ought to be affirmed; that I will leave to my noble and learned friend, with whom I agree, and who will state the grounds of his opinion. I now move that the orders appealed from be affirmed.

The Lord Chancellor: My Lords; I do not see any occasion for postponing the consideration of the judgment to which I think your Lordships ought to come in this case. The more I see of it, the more I am inclined to affirm the orders of the Courts below. I took occasion, during the argument at the bar, to throw out my opinion, that though the King of Spain sues here as a sovereign prince, and is justly allowed so to sue, yet, beyond that, he brings with him no privileges that can displace the practice as applying to other suitors in our courts. The practice of the Court is part of the law of the Court; if any instance could be adduced in which the Court deviated from the general practice, or by which the Court was divested of the power of applying the universal rule, I should concede to that, and it would assist me in [354] giving the Plaintiff relief. Your Lordships' decision upon the demurrer did not dispose of this point; but it is clear to my mind, that if the present question had been then mooted before your Lordships, it would have been disposed of in the same way. One of the grounds of Lord Lyndhurst's decision is, that the Appellant should be on the same footing with his adversary, subject to the control of the Court, and liable to the rules of practice. It was impossible to read the judgment in the case of *The Columbian Government* against *Rothschild* [1 Sim. 94], without seeing that the present Master of the Rolls, in giving that judgment, proceeded on the same view of the matter. The noble and learned Lord who assisted yesterday at the argument, authorized me to say that he concurred in the decision of the Court below. The reluctance which the Court below had in coming to that decision was, that there was an appearance of an advantage being taken by one party. But it would be improper to state that in this stage of the proceedings. I concur in the proposition of my noble and learned friend.

The question was then put, and the orders of the Courts below affirmed with costs.

[355]

APPEAL

FROM THE COURT OF SESSION.

WILLIAM TAYLOR.—*Appellant:* Sir WILLIAM CUNINGHAM FAIRLIE, Baronet, and Others, Trustees for his Creditors,—*Respondents.*

A bankrupt is made defender to an action with the trustee under the sequestration, and a decree is pronounced against him in his absence. He is afterwards allowed to come in without the trustee, and lodge defences to the action; after which the pursuers apply and obtain from the Court an order, that he give security for the expenses of process before he shall be further heard; Held, that the order, in that advanced stage of the proceedings, is not well founded, and it is accordingly reversed.

Sir William Cuningham Fairlie, by tack or lease, dated August 1812, let to the Appellant and his two brothers, John and George Taylor, and their heirs, but secluding assignees and sub-tenants, under whatever denomination, legal or voluntary, without the concurrence of the said Sir W. C. Fairlie, in writing, all the coal in the estate of Fairlie, with certain reservations and powers as to working, for 24 years, and during the life-time of the said George Taylor, if he should survive that period, at a rent of £500 a year after the first year, payable by equal quarterly payments. It was provided, that on failure of the regular quarterly payment of the rent, so as that two quarters should be at any time due when a third became current, the tack should be void, without any process of declarator for that effect, [356] and it should be in the power of Sir W. C. Fairlie, his heirs and successors, to enter and dispose of the premises, as if the said tack had never been made.

The lessees entered into possession, and worked the colliery until the year 1814, when John and George Taylor assigned their interest to the Appellant, who, falling into embarrassments in the year 1816, assigned the lease, with other subjects, to Messrs. Fulton and Neilson, in trust for the benefit of his creditors. The landlord did not assent to nor recognise either of these assignments. The trustees withdrew from the colliery in 1818, upon which John and George Taylor, during the Appellant's absence from Scotland, petitioned the sheriff of Ayrshire, in which county the colliery was situated, to be put in possession of the same, and they were accordingly admitted. The Appellant, on his return to Scotland, applied to the sheriff for possession of the colliery, and called before him, as parties, both the brothers and the landlord, who appeared and resisted the application. The further litigation was then suspended, in consequence of the bankruptcy and sequestration of the estate and effects of the Appellant, in 1819; and Mr. Kerr, appointed trustee under that sequestration, which still continued, did not take any steps in respect of this subject.* John Taylor died in 1823, and George Taylor became involved in difficulties. The Respondent, Sir W. C. Fairlie, having also become embarrassed in the same year, executed a trust conveyance of his estates to the other Respondents, for the benefit of his creditors.

On the 10th of March 1825 the Respondents raised [357] summons of declarator of irritancy against George Taylor, John Taylor, jun. heir of the former lessee, and his curators (he being a minor), the Appellant and his trustees, Messrs. Neilson and Fulton, and Mr. Kerr, narrating the contract between Sir Wm. C. Fairlie and the lessees, the failure to pay the rent at the stipulated terms, and that "besides former rents, there was due at the term of Martinmas 1824, on account of the said colliery, rent for four quarters, whereby the irritancy declared in the aforesaid tack had been incurred, and the said tack had become void and extinct." And thereon it concluded, that it "should be found that the foresaid rents were due, at least, that there were owing and resting due to the pursuers two quarterly payments of the foresaid yearly rent, while a third had become current; and that the said defenders have

* The Appellant presented a second petition to the sheriff in 1825, praying possession, which was resisted by the landlord, and refused by the sheriff, whose judgment was adhered to by the Court and affirmed on appeal to the House of Lords in 1826.

thereby contravened the terms of the said tack, and incurred the irritancy foresaid;" and that they should be decerned to remove from the occupation of the subject. Defences were lodged for Messrs. Neilson, Fulton, and Kerr, objecting to any decree going out against them personally, for rents due from the colliery, on the ground that they had nothing to do with the subject during the time for which the rents mentioned in the premises had fallen due, but stating no objection to the declaratory conclusions of the summons, or the consequent conclusion for removing. No defences were at first lodged for the Appellant. The Lord Ordinary assoilzied Neilson, Fulton, and Kerr from any claim for the rent, and found them entitled to their expenses, *quoad ultra*, decerned in the terms of the libel.

The Appellant having afterwards represented against that interlocutor, was allowed, upon paying two guineas of expenses to the Respondents, to lodge defences. A record was made up, and a debate took place, when the [358] Lord Ordinary, by an interlocutor, of the date of the 18th December 1827, decerned against the Appellant in the terms of the libel, finding him liable to the Respondents in expenses. A reclaiming note having been presented against this interlocutor, the case came on for advising, before the Second Division of the Court, when the Appellant insisted, among other things, that on a balancing of accounts between himself and his colessees, and the landlord, it would be found that the rent and arrears libelled for were not due when the summons was brought. The Respondents objected to any investigation of the accounts then, contending that such investigation, if necessary, should have been offered while the case was in the Outer House; they urged, that the Appellant, being a sequestrated bankrupt, and having obtained no retrocession from his trustee, should not be allowed to litigate further in this matter, without his finding caution for the expenses of process. The Lords of the Second Division, after advising on the further pleadings, by an interlocutor of the date of the 4th December 1829, ordained the Appellant, before further proceedings, to find sufficient caution for the whole expenses of process. A petition for leave to appeal against that interlocutor was afterwards presented by the Appellant, but refused; and, he having still failed to find caution, the Court, having heard counsel for the Respondents in respect of no appearance for the Appellant, and of the former procedure, refused the desire of the reclaiming note, and adhered to the interlocutor submitted to review.

From these interlocutors an appeal was lodged before this House, but the point, to which the arguments at the bar, and the judgment of the House chiefly applied, was the order on the Appellant to find caution for the expenses of process before he should be further heard.

[359] The Lord Advocate and Dr. Lushington, for the Appellant: This is the first time that a defender is called upon to find caution for the costs of the pursuer. There is no rule in law which renders it necessary for a party called as defender to find such caution, although he may have been rendered bankrupt previous to the institution of the action; if any such rule did exist in ordinary cases, it would be inapplicable in the present. The privilege of defending rights in a court of law, is one of paramount value and importance. The defender must, in ordinary cases, be entitled to defend effectually; and though one may have suffered the misfortune of bankruptcy, he is not to be held as *ipso facto* excluded from the right. The principle is the same as to whether the defender is prohibited absolutely from stating his defence, or has such conditions attached to the exercise of his right, as render it difficult or impossible. In the case of a bankrupt it is very nearly the same, whether he shall be prohibited absolutely, or prohibited indirectly by being subjected to the necessity of finding security for expenses, as a bankrupt cannot, in almost any case, be expected to obtain solvent securities. So serious and severe a disability cannot be presumed; and its existence as an established principle of law, must be shown before it can be permitted to operate to the disadvantage of parties. But the slightest inquiry proves that this disability is not imposed by statute nor by common law, nor is it recommended by any principle of expediency. By statute various restraints are laid upon bankrupts, or persons who are in a state of insolvency; but in no statute is there to be found anything which, directly or remotely, encroaches upon their right of effectually defending themselves in proceedings directed against their persons, or against those rights which the sequestration has left in their persons; neither can we [360]

discover any rule in common law by which any such disability is established, and the principles of justice are directly opposed to the existence of such disability.

The operation of the principle which the Respondents assert, precludes all investigation into the merits of the claim preferred in an action; for before defences are received, the pursuer must, according to their principle, be held entitled to crave that an order for finding security should be issued; and in default of its being obeyed, that the defences should not be received, far less considered. The absurd conclusion to which this principle leads, proves its unsoundness. If a bankrupt defender is not to be listened to in stating defences to any action brought against him, he must be at the mercy of any one who drags him into Court, as to no action instituted against him, on grounds however frivolous, can he state available objections, and the party pursuer must be successful in obtaining decree; and as decreets are followed by the diligence of the law, the personal liberty of the subject is thus indirectly compromised through the forms of law. There are many cases in which parties are compelled to litigate with adversaries who are in no condition to pay expenses if unsuccessful; the successful party has it always in his power to do diligence for the recovery of those expenses, and he may proceed to the incarceration of his opponent, if payment shall not be made. But there was no example, until this case was decided, in which any other than the ordinary penalties attending rash litigations were attached to bankrupt defenders. The practice of the Court has, indeed, rendered it imperative on bankrupt pursuers to find security for expenses of actions, instituted for the purpose of making effectual claims, which, having been transferred by the sequestration to trustees, are given up by the trustees to them. The reason is, first, because if such actions were **[361]** favoured, trustees would, in doubtful cases, make deceptive assignations to the bankrupt, on mutual understanding, and subject the parties, against whom the claim lay, to the necessity of contesting with an insolvent; and, secondly, since the trustee must make available for creditors all the rights vested in the bankrupt, and cannot, consistently with his duty to them, part with any right of value, there is a plain and strong presumption against the validity of the claim. But the right which is attempted to be cut down in this case, was all along in the person of the Appellant, and never vested in the trustee, and the Appellant is not suing for the establishment of any claim, but maintaining his right of possession against a claim preferred against himself. The lease was granted to the Appellant and his brothers, on condition that assignees and sub-tenants, legal or voluntary, without consent of the landlord, should be excluded. The trustee was never recognized by the landlord; the assignation was null, in so far as it attempted to convey any right to the lease; and accordingly the trustee gave up possession, only because he had no right to maintain it. The right was personal and intransmissible. There is no reason here for any imputation of fraud or arrangement, in relation to the trustee's abandonment, as his surrender confessedly does not arise from any inclination of his, but from his inability to get the right effectually vested in his own person. In the case of *Barry* v. *Geddes* (5 Shaw and Dunlop, 727), the slender presumption in favour of a bankrupt pursuer, arising from his having succeeded in persuading the agents for the poor that he had *probabilis causa*, was held to have justified the Court in departing from the requirement of caution. The present case is stronger, for the right was never in the trustee, and the Appellant is defender. The principle acted upon by the **[362]** Court of Session in this case, is pregnant with consequences extensively injurious, and in contradiction with the actual practice of the Court. It has been expressly found, in the case of *Clerk* v. *Ewing* (May 20th, 1813, Fac. Coll.), that a bankrupt has a title to appear and resist an attempted encroachment, through the forms of law, on his personal liberty. In like manner, it cannot be doubted that a bankrupt is permitted, without restriction, to defend his *status*. He can, for example, defend in a declarator for bastardy, or even pursue one. If these points may be considered as fixed in practice, what line of distinction can be drawn between those cases and others in which the fate of rights, strictly personal and intransmissible, is to be determined. The Respondents, in any view of the law, as affecting the right of pursuers to obtain security for expenses, were barred by their own acts from pleading that right in the circumstances of this case. A plea that the Appellant was not entitled to be heard upon the merits of the cause without finding security, if good at all, should be stated *in limine*. It was a

plea that went to deprive the Appellant of a right to appear, or at least to attach severe conditions to such appearance. Nothing has been more settled in the law than that a defender, by stating defences upon the merits of the case, virtually abandons all the dilatory defences which might have been competently pleaded by him. No one can be allowed in equity to lead his adversary into the expenses of litigation, which would have been stopped at the outset by a statement of the proper defence (Ersk. b. 4, tit. 1, s. 67). The principle applies equally in the case of a pursuer, who joins issue with the party whom he calls as defender, upon the merits. The Respondents in this case did not, at the first calling of the cause, demand security for costs; **[363]** they took an order for a condescendence, revised it, consented to close the record, debated on the closed record before the Lord Ordinary, and debated again before the Inner House: but at no stage of these proceedings did they except to the title of the defender, or make that demand for security which they subsequently preferred. It was only after issue had been joined on the merits, after a great expense had been incurred, that the plea was resorted to.

Sir C. Wetherell and Mr. Wilson, for the Respondents: The Appellant, being a bankrupt under sequestration and defending the action, not only without the concurrence of his trustee, but after decree of irritancy obtained against the trustee, and after decree has been pronounced against himself on a closed record, and now craving a new investigation, cannot be allowed to be further heard, without finding caution for expenses of process. The appointment on him to find such caution is consistent with the practice of the Court and the equity of the case. Where a sequestrated bankrupt attempts to pursue an action in which his trustee refuses to concur, it may be said that his residuary interest in the trust funds gives him a sufficient title; but as it would be unjust to compel a party to litigate with him who had no means of paying the expenses, the rule has been in such cases to compel the bankrupt pursuer to find caution for expenses; and on finding such caution there is no bar to his action (2 Bell's Commentaries, 401). The same rule applies to the case of a bankrupt defender under sequestration. The sequestration vests the trustee directly with the effects of the bankrupt, and gives him the immediate interest to defend the estate. The bankrupt **[364]** has a reversionary interest in the funds, which renders it sometimes proper that he should also be called in an action directed against the trustee, and also gives him, under certain conditions, a right to take up the case abandoned by the trustee. If the trustee had litigated, the pursuer would have had the security of the funds in the sequestration; but if he declines, and a party sists himself who is divested of all his funds, security for expenses must be found by him, as a necessary preliminary to his being allowed to plead (*Lyall* v. *Mudie*, 8 Shaw and D. 153). But it is said there is a circumstance that takes this case out of the general rule. That the right to the lease, which was by the contract declared not to be assignable, could not pass to the trustee under the sequestration, but still remains a subject vested in the person of William Taylor, and therefore it is inferred that William Taylor ought to be allowed to defend exactly as if he had not been sequestrated at all. This supposed distinction is without foundation. The Appellant was vested with a right to the lease of the colliery of Fairlie, and had the power of conveying it, subject only to the risk of the conveyance being objected to and voidable by the landlord. The conveyance was not objected to by the landlord, but, on the contrary, the effect of the judicial assignation of it was admitted by him, by his calling the trustee into the suit. The circumstance that the bankrupt was called in the declarator of irritancy as well as the trustee, can make no difference. He was called only for his interest, if he had any. If he had none; if the divestiture in favour of the trustee was complete; no right was conferred on the Appellant of new by merely making him a party to the action. Being made a party to the action, he was bound to sue out diligence; instead **[365]** of which, he let judgment go against him. It is law in Scotland that a party litigating with a bankrupt defender, has a right to put him under conditions before he goes before a jury; and it is upon that principle that the Court below acted, in calling upon this Appellant for security for costs.

The Lord Chancellor: Sir Charles Wetherell; why was not this objection taken before the Lord Ordinary made the interlocutor, admitting the Appellant to lodge defences?

Sir Charles Wetherell: If I had been in the Court below, I would have made the objection there in the first instance; but although we waived it there, we are not bound not to take it now. This summons of declarator was not perhaps necessary at all to secure to the Respondents the possession of the colliery, but it was resorted to *ex majori cautela*, and William Tayor might be properly left out of it altogether as a defender. I know of no rule in the Scotch or English courts by which the Court may not, under circumstances, call on the defender to give security for costs.

The Lord Chancellor: I recognize that position as to a plaintiff, but the question here respects a defendant. You, in his absence, get a decree against him, and he, on appearing and paying two guineas to the plaintiffs, is allowed to come in to contest that decree. Do you know of any case, in law or in equity, in which a bankrupt, or person in circumstances of insolvency, was compelled to find security for costs, he being compelled to be a party to the suit?

Sir Charles Wetherell: I ask my Lord Advocate for **[366]** any case in which a bankrupt was allowed to sue without giving such security?

The Lord Advocate: The only time to raise this question was, when the Appellant first claimed to be let in.

The Lord Chancellor: But here you, the plaintiff in the Court below, say to this defendant, Come you in to defend or not? If you do not come in, a decree shall be made against you; if you do come in, you must give me security for all my costs. Is there any decided case to that effect?

Sir C. Wetherell: The Defendant was an unnecessary party to the suit. He came in to litigate a new point after decree against him. If a bankrupt be made a party to a bill, together with his assignees, the Court will not allow a point to be raised in his favour after the assignees have abandoned the contest, without his giving security for the costs. It is an indulgence to permit a *cestui que trust* to litigate a point which his trustees did not. This is a decree of irritancy of a lease for non-payment of rent, and we would grant indulgence upon terms. It is said that we are now precluded from requiring this caution because the order of the Court below let the Appellant in to litigate after decree, and without requiring caution. No Court can give up its own discretion, nor can it, because it has made an order *incuria*, be prevented from requiring, in the progress of the suit, what it ought to have done *in limine*. Is the Court, because it consented in mercy to hear the party, compelled afterwards to continue the hearing? The first proposition is, that the Court below was bound, in the first instance, to order security for costs. We **[367]** answer, if the Court had refused that in the beginning, and an appeal was brought here, your Lordships would not allow this gentleman to raise a question, which all the other parties gave up, without giving the security. The second proposition is, that we have given up our right to the security, because we did not at first require it. We say, the Court, by its first indulgence, has not given up all future right to security for the costs.

Lord Wynford: It strikes me that the Court below was not in a condition satisfactory to itself to give judgment in the matter, and therefore let in the Appellant to give explanation. The Appellant was not deprived of all interest in the lease by the appeal decided against him in this House in 1826.

The Lord Chancellor (Feb. 14) moved the judgment: This case came before your Lordships upon points of practice. Three persons were made defendants to an action, as trustees of William Taylor. He was represented by his trustees, and he was himself made a defender by the election of the pursuers. When the defences for the co-defenders were lodged, it was found that they had no interest in the subject in dispute, and the Lord Ordinary, after considering the cause, pronounced an interlocutor, by which he assoilzied the trustees from any claim for the rent of the year 1824, finding them entitled to their expenses. Now let us consider in what situation this interlocutor left William Taylor, who was made defender, be it recollected, by the pursuers themselves. There was a judgment, giving the other defenders their expenses as against the pursuers. There was a question whether it did not give Taylor also his expenses; and that was a point of practice disputed by the parties. All that was to be done was to apply to **[368]** tax the expenses; but the other party contended that it was not to fix them with expenses, and this difference of opinion made me inquire into the practice. Though the decree is in terms of the libel, that

is still to imply expenses. But that point is not material, for a subsequent interlocutor finds the Appellant liable to the pursuers in expenses. Here Taylor, in his absence, had a decree against him in the terms of the libel with expenses. Now is it consistent with reason to find a decree against him in his absence, saddling him with the costs, and not let him in to dispute that decree? It is said, that he had no right to be there; but I agree with my noble friend, that he had an interest. Whether he had or had not an interest, it was material whether he should have these terms imposed on him, that is, that he, being a bankrupt, could not go on at all without giving security for the costs of the pursuers. Having been let in, the Lord Ordinary found against him in terms of the libel. He reclaimed to the Second Division of the Court against that interlocutor, and the Second Division made an order by which he was let in without any terms. That induced Taylor to go to further expenses, and he was called on to give in a revised condescendence, which he did. Then comes the next interlocutor, by which the Lords ordained him to find sufficient caution for the whole of the expenses of process. The Court afterwards, in advising the case, pronounced judgment: "Having heard the counsel for the Respondents in respect of no appearance for the defender, William Taylor, and of the former procedure, refuse the desire of the reclaiming note, etc." Now see in what situation that put Taylor. If any case occurred in Scotland which showed the practice to warrant this course, if any avowed practice of this sort was shown, I would not advise your Lordships to go against it. [369] But no such practice exists; the practice is, to call on bankrupts pursuers for caution; no such practice exists as to defenders, and this is the first disputed case of practice in respect to them; and there is only one case at all like it, which is that of *Lyall* v. *Mudie* (8 Shaw and Dunlop, 153), and which still materially differs from this, inasmuch as Lyall was not drawn in by the Court nor by the parties. This is a point of authority too slender to require of the defender to give security for costs. But the case of *Lyall* v. *Mudie* varies in other respects from this case; Lyall was there the charger, though not stated so in the report, in the origin of the suit, and was substantially the pursuer. It furnishes no authority in point for this case; it was made a subject of discussion before the Law Commissioners, whether the provision to get security for costs, from plaintiffs even, was expedient, inasmuch as it would prevent a poor man from bringing his suit; but it was never discussed whether a defendant is to find such security, as he is brought reluctantly before the Court. I am clear on this point; I see no room for doubt on it; and I think your Lordships ought to reverse the interlocutor of the 4th of December, and thereby enable the Appellant to proceed without complying with that order. I do not say that there may not be a case in which security for costs could not and ought not be required from a defender. There may be a case in which a bankrupt may take the conduct of the defence out of the hands of the assignees; in such case it may be proper to compel him, *in limine*, to give sufficient security for the costs of the pursuer. My strong impression is, that whatever way your Lordships decide, it would be useful to both these parties to have the case settled out of Court.

[370] Lord Wynford: The pursuer here says the defender had no right to appear; the defender insists that he had a right, and he was in fact allowed to come in, on payment of two guineas. After two years of litigation, the pursuer applies for, and obtains from the Court, an order on the defender to find security for his costs. I am astonished that the Court ever granted such an order, or that such a law should exist in any part of the kingdom. After you compel a man into Court, then you tell him he cannot go on with the suit, or be heard, until he gives security for your costs. I feel as anxious as any man, that parties should, in certain cases, give security for costs before they proceed; and although I agree with my noble and learned friend that the Law Commissioners would not recommend any law to that effect, I have myself, in a Bill which I brought into the House of Lords last night,* included a provision for that purpose. But I would not arm any Court with such a power, unless in the case of a vexatious plaintiff. It was said in the argument, that this case is decided by the case of *Taylor* v. *Fairlie* in this House, and that this Appellant has no interest in the lease. I looked into the report of that case (4 Shaw and D. 450; and 2 Wilson and Sh. 101), and no such thing is decided by it. This

* This Bill did not pass into a law.

loan has still an interest But suppose he has not, the pursuers brought him into Court as a defender, and the Court allowed him to go on for two years, without imposing any conditions on him. The case would be different if they imposed these terms on the Appellant when he first appeared to the suit. In this country, if a party wants security for costs, he must apply for it in the first instance. The decisions in Scotland are not governed by what passes in this coun-[371]-try; our practice is more consistent with equity than this decision. I agree with my noble and learned friend as to the distinction he took between this case and that of *Lyall* v. *Mudie* [8 Shaw and Dunlop, 153]. It appears to me impossible to support the judgment appealed from; and although the decision of this House upon it will open the litigation anew, even so I think it ought to be reversed.

The interlocutor of 4th December was reversed accordingly, and the cause remitted.

[372]

APPEAL

From the Court of Chancery.

THOMAS CADELL,—*Appellant;* ARTHUR PALMER, CHARLES CADELL EDRIDGE, HENRY BENGOUGH, HENRY RICKETTS, the younger, RICHARD RICKETTS, the younger, WILLIAM IGNATIUS OKELY and ANN ELIZABETH, his wife, late ANN ELIZABETH BENGOUGH, spinster, and ANN RICKETTS, the younger, WILLIAM PETER LUNELL, JOHN EVANS LUNELL, GEORGE LUNELL, SARAH BENGOUGH, and GEORGE BENGOUGH,—*Respondents.*

[Mews' Dig. x. 958, 965; xiv. 1575. S.C. 7 Bli. N.S. 202; and in Ch., *sub nom. Bengough* v. *Edridge*, 1 Sim. 173; 5 L.J. (O.S.) Ch. 113. See Tudor L. C. 4th ed. 578; 21 Rul. Cas. 100; and notes to both these reports; also *Stuart* v. *Cockerell*, 1869, L.R. 7 Eq. 369; *Whitby* v. *Mitchell*, 1890, 44 Ch. D. 85, 87.]

A limitation, by way of executory devise, which is not to take effect until after the determination of a life or lives in being, and a term of 21 years, as a term in gross and without reference to the infancy of any person, is a valid limitation. *Secus*, if to the term in gross of 21 years be added the number of months equal to the longest or ordinary period of gestation.

This being held to be the established rule, a decree of the Court below, declaring that a limitation by way of executory devise, which was not to vest until after the expiration of a term in gross of 20 years from the decease of the survivor of 28 persons, who were living at the testator's decease, and of whom seven only were to take interests under the devise, is a valid limitation, was affirmed accordingly.

Henry Bengough, Esq., by his will, dated the 9th of April 1818, gave and devised, from and after the decease of his wife, Joanna Bengough, his mes-[373]-suage with the gardens, stables, and other appurtenances belonging thereto, situate in St. James's-square, Bristol, to the Rev. Charles Lucas Edridge, Arthur Palmer, the Rev. Cadell Edridge, and George Wright, their heirs and assigns for ever, upon trust, for sale; and directed the proceeds to sink into and become part of his personal estate. He further gave and devised to the said trustees, their heirs and assigns, certain other real estates, upon Trust, to permit his wife to occupy a part thereof during her life, and, after her decease, to pay out of the rents and profits an annuity of £300 to his nephew, George Bengough, for life, and an annuity of £200 to his nephew, Henry Bengough, for life; and subject to the payment of the said annuities, and otherwise subject, as in the said will mentioned, upon Trust, from time to time, during the term of 21 years, to be computed from the day of the testator's decease, to collect and receive the rents and profits of all his real estates so devised to them (except the house in St. James's-square); and from time to time during the continuance of the said term, to lay out the monies to arise from such rents and profits in the purchase of freehold estates of inheritance, in England, when and as often as there should be a surplus in hand amounting to the sum of £1500. And he directed the estates so to be purchased, to be conveyed to the trustees, upon the

same trusts and conditions as were thereinafter * limited concerning his estates thereinbefore devised; and that the trustees should not permit more than £500 to remain in bankers' hands, but should invest the same in the three per cent. consolidated Bank [374] Annuities until a convenient purchase could be found, and add the interest to the principal, to accumulate during the said term in the same manner as the rents and profits of the real estates were before directed to accumulate; And as to all the said trust estates and hereditaments so by him thereby devised, (except his said messuage in St. James's-square), upon Trust, that the trustees for the time being should retain and stand possessed of the same during the term of 120 years, to commence from his death, if his said nephews, George Bengough and Henry Bengough, his nephew, James Bengough, his great nephews, Henry Ricketts the younger, and Richard Ricketts the younger, his niece, Ann Elizabeth Bengough, his great niece, Ann Ricketts the younger, the 10 children then living of the said Charles Lucas Edridge, (for whose names a blank was left in the will), and the 11 children then living of the said Arthur Palmer, (whose names were mentioned), or any or either of his said nephews and niece, and great nephews and great niece, or any or either of the said several children of the said Charles Lucas Edridge and Arthur Palmer, should so long live; and also during the term of 20 years, to be computed from the expiration or other sooner determination of the said term of 120 years determinable as aforesaid, Nevertheless upon Trust for his said nephew, George Bengough, for a term of 99 years, if he should so long live, and the said terms of 120 years and 20 years, or either of them, should so long continue; and from and after the expiration or other sooner determination of the said term of 99 years, then in trust for the first, second, third, fourth, fifth, sixth, and all and every other and subsequent born son of the same George Bengough, severally and successively, according to the priority of their births: And after the determination of the estate [375] and interest of each of the same sons respectively, and also, as the circumstances of the case should require, after the determination of the estate of any person taking from time to time under, or as answering the description of heir male of his body, in Trust for the person who for the time being and from time to time should answer the description of heir male of his body, or who in case of the death of his parent, if such death had taken place, would be heir male of his body, under an estate tail limited to the same son and the heirs male of his body, to hold to the same son or person respectively for a term of 99 years, if the same son or person respectively should so long live; and the said terms of 120 years and 20 years, or either of them, should so long continue, every elder of the same sons, and the person who for the time being and from time to time should answer, or who in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body, to be preferred before every younger of the same sons, and the person who for the time being should answer, or in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body.

The testator then declared several successive trusts of the said estates during the said terms of 120 years and 20 years, in favour of his nephews, Henry Bengough and James Bengough, his great nephews, Henry Ricketts the younger and Richard Ricketts the younger, his niece, Ann Elizabeth Bengough, and his great niece, Ann Ricketts the younger, respectively, and their respective first and other subsequent born sons, and of the persons who for the time being should be, or who in case of the death of their respective parents would be heirs male of such sons respectively, similar to the trusts before stated to have been declared in favour of [376] the said George Bengough, and his first and other subsequent born sons, and of the person who for the time being should be, or who in case of the death of his parent would be, heir male of the body of each of the same sons respectively, except that he directed that the estates of the said Henry Ricketts and Richard Ricketts, and of their respective sons, and of the person or persons answering the description of heirs male or heir male of their respective bodies; and also the estates of the said Ann Elizabeth Bengough, and Ann Ricketts, and of their respective husbands, and of their first and other sons, and of the persons answering the description of heirs male of their

* See the report of this case, under the title of *Bengough* v. *Edridge*, 1 Sim. 273, where the Vice-Chancellor ordered "hereinbefore" to be substituted for "hereinafter." That part of the decree is not appealed from.

respective bodies, should respectively cease, if he or they for the time being should refuse to take the sirname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the income of the said trust estates: And from and after the determination of the said respective estates and interests, then in trust for the person or persons respectively who for the time being and from time to time should answer the description of the testator's heir or right heirs-at-law; and if there should be more than one, in the same proportions, as they would be entitled to a real estate descending from the testator as the first purchaser, and vesting in him or them as his right heirs, to hold to the same person or persons respectively, if more than one, as tenants in common, as to each of the same persons respectively, for a term of 99 years, if the same person should so long live, and the said terms of 120 years and 20 years, or either of them, should so long continue.

The testator further directed that each of the said terms of 99 years should be computed from the time when the person or persons respectively to whom the same were limited should become entitled to the in-[377]-come of all or any part of the said trust estates, under the limitations thereinbefore contained; and that in case the said limitations in favour of persons unborn could not take effect precisely in the order in which they were directed, and there should consequently be any suspension of the beneficial ownership, by reason that the persons entitled to take under the same limitations or trusts should not be then born, in that case the income of his said devised trust estates should, during such suspension of ownership, belong to and be enjoyed by the person or persons for the time being entitled, or who, in case there had not been such suspension of ownership, would for the time being have been entitled to the next estate in remainder, subject nevertheless to the right of any person or persons to be afterwards born, and who would have been entitled, under any prior limitation, to receive the income of his said trust estates from his, her or their actual birth, or respective births.

The testator then directed, that after the expiration or sooner determination of the said terms of 120 years and 20 years, his said trust estates should be conveyed and assured by his then trustee or trustees thereof to such person or persons as would at that time be entitled to the same, either by purchase or by descent, for the first or immediate estate or estates for life, in tail, or in fee in them, if the same had by his will been devised, settled, or assured to the use of his nephew, the said George Bengough, and his assigns for his life, with remainder to his first and other sons successively, according to the priority of their births in tail male, with remainder in similar estates for life, and remainders in succession to the said Henry Bengough, James Bengough, Henry Ricketts, Richard Ricketts, Ann Elizabeth Bengough, Ann Ricketts, and their sons respectively, with a proviso for the cesser of the estates of the said Henry Ricketts and [378] Richard Ricketts, and their respective first and other sons, and the heirs male of their respective bodies, who for the time being should refuse to take the sirname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the said income; and also for the cesser of the estate of the said Ann Elizabeth Bengough and Ann Ricketts, and their respective husbands, and their first and other sons, and the heirs male of their respective bodies, who for the time being should make a like refusal, with reversion to the testator's own right heirs. And he further directed, that the person or persons to whom such conveyances should be made, should have such estate in the said trust estates as he or they would at that time be entitled to take under the said limitations, if the same had been actually made by his will, with the same or the like remainders over as if the said trust estates had been devised by his will in manner aforesaid, or as near thereto as might be, and the circumstances of the case and the rules of law and equity would permit; yet, nevertheless, that no such person should have or be entitled to a vested estate or any other than a contingent interest until the expiration or sooner determination of the terms of 120 years and 20 years; and he declared that such limitations were introduced into his will only for the purpose of ascertaining the objects to whom such conveyances should be made, and not for the purpose of making any immediate devise or gift to, or raising any immediate or present estate by way of trust or otherwise for them; on the contrary thereof, he directed that during the said terms of 120 years and 20 years, no person or persons should be entitled, at law or in equity, to any beneficial estate in his said trust

estates, or the income thereof, by way of vested interest, for any longer period than 99 years, determinable as before [379] mentioned, and that, in the events and in the mode before expressed, heirs or heirs of the body should be entitled to take in the first instance, and as purchasers in their own right. And he directed, that if at any time during the said terms of 120 years and 20 years, each of the male persons who for the time being should be entitled to the income of his said trust estates should require the same, it should be lawful for his trustees to convey to each or any person making such request the said trust estates, or part thereof, as he should be entitled to under the limitations thereinbefore contained, for an estate of freehold for the life of the same person, so as to give him or her an estate of freehold instead of an estate for 99 years.

The testator, after giving various other directions and powers concerning the said trust estates, and after bequeathing several legacies and annuities, gave and bequeathed to the said trustees, their executors and administrators, all the residue of his personal estate whatsoever, upon trust, that they should either continue his monies upon the securities upon which they should be invested at his decease, or call in the same, and sell all such parts of his residuary estate and effects as should not consist of money, or securities for money. And he directed that, during the term of 21 years, to be computed from the day of his decease, the trustees for the time being of his will should receive the dividends, interest and annual income of all his residuary estate, and from time to time during such term invest all such dividends, interest and income, and the accumulations of the same, in their names, either in the Three per Cent. Consolidated Bank Annuities, or upon mortgages of freehold hereditaments in Great Britain, as they should think proper, as an accumulating fund, in order to increase the principal of his residuary estate [380] during such term of 21 years; and should, with all convenient speed, from time to time during that term, lay out and invest all his residuary estate and effects, and all accumulations thereof, in purchases of freehold hereditaments of an estate of inheritance in fee-simple, in England or Wales, when eligible purchases should arise; which estates, so to be purchased, should be conveyed unto and to the use of the trustees, in fee, upon the same trusts, and under and subject to the same and the like powers, provisoes and limitations as were by him thereinbefore declared, concerning his said estates devised to them in trust as thereinbefore mentioned, or as near thereto as the death of parties, the change of interests, and other contingencies would admit; and he appointed his said trustees to be executors of his said will.

The testator died in April 1818, and his three first-named trustees and executors shortly afterwards proved his will, and became his legal personal representatives, George Wright having renounced probate, and executed a deed of disclaimer to them as to the trust estates.

Ann Ricketts, the testator's only sister, and next of kin at the time of his death, died in the month of October 1819, having by her will appointed the Respondents, W. P. Lunell, J. E. Lunell, and George Lunell executors thereof; and they proved the same, and became her legal personal respresentatives.

Mrs. Bengough, the testator's widow, died on the 10th of June 1821, having duly made and published her will, and appointed as executors thereof the said Rev. Charles Lucas Edridge (since deceased), and Thomas Cadell, the Appellant, who duly proved the same, and thereby became her legal personal representatives.

George Bengough, the testator's nephew, and first taker of an estate under the limitations in the will, filed [381] his bill in Chancery in the year 1821, (amended in 1823,) against the acting trustees and executors, and against the said Henry and James Bengough, Henry and Richard Ricketts, Ann Bengough and Ann Ricketts, the younger, and also against the said personal representatives of Joanna Bengough, the widow, and of Ann Ricketts, the sister, of the testator; and after stating the said will and his own rights under it, and as heir-at-law and one of the then next of kin of the testator, he prayed (amongst other things) that the will might be declared to be well proved, and that the trusts thereof, so far as the same were good in law, might be decreed to be carried into execution, and that an account might be taken of the personal estate and effects of the testator, and of his funeral and testamentary expenses, and debts and legacies; and that the clear residue of the personal estate might be applied upon the trusts of the will, so far as the same were effectual in law; and

as far as the same were ineffectual in law, then to such person or persons as would, in such case, by law be entitled thereto: and that an account might be taken of the testator's real estates, and of the rents received by the trustees: and that what should be found due from them on taking that account might be applied upon the trusts of the will, as far as the same were good in law: and that the Court would be pleased to declare how far the trusts of the real and personal estate were good; and as far as the trusts were declared to be void, that the plaintiff might be declared to be entitled to the real estate: but, in case the trusts of the will should be considered valid, then that such of the rents and profits of the estates devised to the trustees in possession, as accrued during the life of Mrs. Bengough, might be applied in the purchase of freehold estates of inheritance in England or Wales, [382] and that the annuities of the plaintiff and Henry Bengough might be paid out of the rents and profits that had accrued, and should accrue after her death; and that the residue thereof might, during the remainder of the term of 21 years, be also applied in the purchase of freehold estates of inheritance in England or Wales; and that such estates, when purchased, might be conveyed to the trustees upon the trusts declared of the estates so to be purchased; and that, as often as there should be the sum of £1500 arising from the rents and profits of the devised estates, it might be laid out in such purchases of freehold estates as aforesaid; and that the plaintiff might be declared to be entitled to the immediate possession and enjoyment of the said estates so to be purchased, for the term of 99 years, if the plaintiff should so long live, such term to be computed from the death of the testator; and that in case the said rents and profits should not, as soon as they amounted to £1500 be so laid out, the plaintiff might be declared entitled to the interest and dividends thereof from the time the same amounted to £1500, until the same should be laid out in the purchase of freehold estates; or that, in case the said trusts were partly valid and partly invalid, then that proper directions might be given for effectuating such of the trusts as were valid, and for declaring and effectuating the rights of the persons entitled, so far as the trusts were invalid.

The defendants having put in their answer to the bill, the cause came on to be heard before the Vice-Chancellor in 1823, when an order of reference was made to the Master, who, in pursuance thereof, reported that the plaintiff was, at the time of the death of the testator, and then was, the heir-at-law of the said testator, and that the said Ann Ricketts, deceased, the [383] sister of the said testator, was his only next of kin at the time of his death, and that William P. Lunell, J. E. Lunell, and George Lunell, were then her legal personal representatives, and the only persons, who, together with the plaintiff, and the said Henry Bengough, James Bengough and Ann Elizabeth Bengough, (the children of the said testator's late brother, George Bengough,) and the said Charles Lucas Edridge, and the Appellant, the executors of Joanna Bengough, the widow of the said testator, would in case of intestacy have been entitled to distributive shares of the personal estate of the testator.

Upon the death of James Bengough, the suit was revived against Sarah Bengough, his widow and personal representative; and William Ignatius Oakley, having married Ann Elizabeth Bengough, was subsequently made a party to the suit.

The cause having come on to be heard, on further directions, before the Vice-Chancellor, his Honor, by a decree, bearing date the 24th day of January 1827, ordered it to be declared (amongst other things) that the testator's said will ought to be established, and the trusts thereof carried into execution, etc. His Honor, in giving his judgment in respect of that part of his decree, said, "that although the rule of law be framed by analogy to the case of a strict settlement, where the 21 years were allowed in respect of the infancy of a tenant in tail, yet he considered it to be fully settled, that limitations by way of devise or springing use might be made to depend upon an absolute term of 21 years after lives in being" (*Bengough* v. *Edridge*, 1 Sim. 267).

From this part of the decree the personal representative of the testator's widow appealed to the House of [384] Lords, and the appeal came on for hearing in February 1832.

Sir Edward Sugden and Mr. Lynch, for the Appellant, argued to the following effect: The testator in this case had two objects in view; first, to suspend the vesting of the inheritance for a period of 120 years, determinable upon 28 lives, and for an

absolute term of 20 years from the death of the survivor of them, being, as he conceived, within the rule of law against perpetuity. His second object was, during this period of suspension of the inheritance, (after a period of 21 years allotted for accumulation), to confer the enjoyment of the estate upon, 1st, his nephew, G. Bengough, for a period of 99 years, determinable on his life, and the said terms of 120 years and 20 years, with remainder to his son, (not born at the testator's decease), for a like period of 99 years, determinable on his life, etc., with remainder to the grandson of his said nephew for a like period, determinable on his life, etc., with remainder to the great grandson of his said nephew for a like period, determinable on his life, etc.; and so on, in respect of all the heirs male of the body of his nephew, George, all taking as purchasers, and all taking estates only for 99 years, determinable on their lives respectively, and on the terms of 120 years and 20 years. And he conferred similar limitations on his nephew Henry, and the heirs male of his body, etc., and on his third nephew, and the heirs male of his body, etc.; these being the persons that would take in case the inheritance was not suspended, and being the persons to whom the inheritance is to be conveyed when the suspension is to cease, and to whom at any time the trustees may limit an estate of freehold. We submit that the whole machinery of this will is a fraud on the rule of law against perpetuity. **[385]** The accumulation is taken for the whole term of 21 years, allowed by the Thellusson Act (39 and 40 Geo. 3, c. 98), and without reference to any minority or any legitimate object of settlement; and it is not until the expiration of that term that the limitations are made to commence. Accumulation and executory limitations were, by the law as it stood before the Thellusson Act, co-extensive; but a testator could not first accumulate for lives in being and 21 years, and then postpone the vesting for a like further period. The limitation of the estates for 120 years, if 28 persons, or any or either of them, shall so long live, taken by itself, is not objected to; but there is added a term in gross of 20 years upon the same trusts. The 21 years allowed by the rule after lives in being were admitted for the purposes of gestation and infancy, and were never allowed as an absolute term. Here the 20 years are taken as an independent term, merely because that term falls within the words of the rule, altogether disregarding the principles upon which it was founded. After every rule has been separately resorted to, and the time allowed by it exhausted, then comes a trust for the very persons who would be entitled to the freehold and inheritance under the previous trusts, if regular trusts had been declared for life and in tail, according to the usual form of settlements. All this machinery is a vain attempt at a perpetuity, and the consequences are obviously mischievous. Sir Joseph Jekyll, in the case of *Stanley* v. *Leigh* [2 P. Wms. 687], defines a perpetuity, and Chief Baron Gilbert, in his Treatise on Uses, tells us what tends to it. "All limitations," he says, "that tend to the provision of a family, and to secure against contingencies that are within the parties' own immediate prospect are to be favoured; but all limitations **[386]** that perpetuate, or tend to a perpetuity, are in themselves void, and repugnant to the policy of the law" (Gilb. on Uses, 359). When Lord Nottingham was asked, in the Duke of Norfolk's case [3 Ch. C. 1], where he would stop, he answered, "I will stop everywhere, when any inconvenience appears; nowhere before; for whensoever the bounds of reason or convenience are exceeded, the law will quickly be known." Now the time to stop has arrived; the bounds of reason are exceeded, and the inconvenience is manifest. The conclusion to which it is desired to bring your Lordships is, that the trusts declared of the personal estate and effects of the testator should be declared void, and the residue of such personal estate divided among the parties entitled to distributive shares thereof, as if the testator had died intestate.

In former cases the question has been, who, at a limited period after the testator's death, was to take the estate? And in the meantime either a different set of persons or the heir-at-law was to take it; but here the testator meant, that from his death there shall be taken devises under his will during the existence of the fictitious terms of 120 and 20 years. The persons are to take, not for accumulation, not for anything collateral to the testator's general object, but as devisees; and after the expiration of 120 and 20 years a new taker is not to be sought for, but the person then to take is precisely the same person who has taken and then is in possession under the previous limitations. Terms of years are introduced into marriage settle-

ments and wills, for the purpose of raising portions, charges or other sums of money, in order to provide for the necessities of families. These terms are not introduced into this will for any such purpose; and the legal estate [387] for these terms is not conferred on trustees, distinct from the holders of the inheritance, in order that they may raise a sum of money for the necessities of a family. The whole legal fee-simple is vested in the trustees, and they are merely directed to stand possessed of a portion of the inheritance for the terms of 120 and 20 years. But they have no duty to perform, and the only purpose for which these terms are created is to evade the law. The law says, that a succession of life estates cannot be given to unborn issue; and yet if the limitations of this will are to be supported, there is a contrivance by which any testator may evade the law. The trusts of a term can be no otherwise limited in equity than the estate may be limited at law. It is quite clear, that the testator could not have attempted to carry his two objects into effect without the machinery of the term of 120 years, determinable on the 28 lives, and of the term of 20 years. Now if this machinery can be displaced, if part only be taken away, the whole fabric must fall. If we take away this absolute term of 20 years, the whole machinery must give way.

We shall, therefore, first apply ourselves to this objection, that the testator has taken an absolute term of 20 years after lives in being, which is not allowed by the law. Every executory devise being, as far as it goes, a perpetuity, and being of late origin, introduced, or rather allowed, for the purpose of indulging testators in the distribution of their property, but within certain limits, it is incumbent on a party whose title depends on it, to show that it does not exceed the limit allowed. It will be for the other side to do this. What it is proposed now to do is, to state to your Lordships the several leading cases on the subject of executory devises, and the *dicta* of the several Judges; and to show your Lordships that in no one of these cases has an absolute term [388] of 20 years been allowed. If there be no case in which an absolute term has been allowed, then, with submission to your Lordships, we contend that the Appellant's case is proved, and that the testator has exceeded the bounds allowed by law.

The earliest case which can be usefully cited, relating to executory devises, is the case of *Matthew Manning* (8 Rep. 187). Lord Coke alludes to a few earlier cases in the Year Books, and some of them before the Statute of Wills, relating to lands which might be devised by custom, but they were all cases of executory devises, after a life in being. The case of *Manning* was an executory bequest of a term after a life in being, and Lord Coke justified and supported it on the ground that an executory devise after a life in being was good, the utmost limit then allowed being a life in being. There is an earlier case of *Hinde* v. *Lyon* (2 Leonard, 11), which ought perhaps to be noticed, but is an executory devise after one life only. *Lampet's* case (10 Rep. 46) may also be mentioned as confirming, but only as confirming, *Manning's* case. The case of *Child* v. *Bailey* (Cro. Ja. 459), which was decided immediately after Lord Coke's time, is an authority the other way, and although the judges endeavoured to distinguish it from *Manning's* and *Lampet's* cases, it is clear that the cases were not distinguishable. It was affirmed in the Exchequer Chamber by six of the Judges (Sir W. Jones, 15), and they said they would not question *Manning's* and *Lampet's* cases, but that they would not extend the doctrine, and would not apply the doctrine therein laid down, except in cases exactly similar. The next case is that of *Pells* v. *Brown* (Cro. Ja. 590), called by Lord Kenyon the *Magna Charta* of this [389] branch of the law; but all that was decided there was the legality of an executory devise on a contingency not exceeding a life in being, and even this case was doubted by Chief Baron Montague, in the *Duke of Norfolk's* case [3 Ch. C. 1], to which we shall advert immediately. The next case is *Sanders* v. *Cornish* (Cro. Car. 230). It was a case of a term of years, and we refer to it to show that the Judges there endeavoured to revive the old doctrine, that a possibility could not be limited after a possibility. The next case is that of *Pearse* v. *Reeve* (Pollexfen, 29), in which the Judges also stated their determination not to go further than *Manning's* case. The case of *Goring* v. *Bickerstaff* (Ibid. 31) is the next case, and the first case wherein the opinion of the Judges was called for respecting several lives, all in existence at the same time; and the case that comes next is that of *Snow* v. *Cuttler* (1 Levinz. 135). There the Court seems rather to have retrograded, and again confined the rule to one life, for in that case

they would not allow 14 years after a life in being, even in reference to minority. However, in *Love* v. *Windham* (2 Keble, 637. 1 Mod. 50), which is the next case, the Judges again allowed of several lives. In the same year the case of *Wood* v. *Saunders* (Poll. 35. 2 Swans. 467) was decided, the case so much relied on in the *Duke of Norfolk's* case by Chief Baron Montague. The important case of *Taylor* v. *Biddal* (2 Mod. 289) is the next in point of date, and it is the first authority that an executory devise might be limited after a life in being, and 21 years, in reference to minority.

The *Duke of Norfolk's* case, called the case of perpetuity, is the next (3 Chan. Ca. 1. 2 Freeman, 72. Pollexfen, 223). The Lord Chancellor Notting-**[390]**-ham was assisted by the two Chief Justices and Chief Baron, who were against the executory devise; the Lord Chancellor was in favour of it; and Lord Chief Justice North, who decided *Taylor* v. *Biddal* [2 Mod. 289], was one of the three Chiefs. This case was reversed, after Lord Nottingham's death, by Lord North, then Lord Keeper, but was afterwards affirmed by the House of Lords, reversing Lord Keeper North's decree. The next in order is that of *Massenburgh* v. *Ashe* (1 Vern. 234 and 304); and the next case in point of date is that of *Lloyd* v. *Carew* (Pre. in Chan. 72, and Shower's Cases in Parl. 137). Upon what ground was that case decided? On the ground of 21 years being allowed? No; but on the ground that a reasonable time was necessary to be allowed to perform the condition, which could not have been executed in the life of the donor. The bill was in the first instance dismissed, but that decision was reversed in the House of Lords. After the case of *Luddington* v. *Kime* (Ld. Raym. 203-7), next in date came a very important case, which clearly shows that the utmost then allowed was a life or lives in being. That was the case of *Scatterwood* v. *Edge* (2 Salkeld, 229). The Court held that 20 or 30 years was the probable result of taking lives in being, and in the general use made of taking lives in a family settlement, limiting one remainder after another, that might be a fair calculation; but when you come to talk of 28 lives, the calculation must be, not 20 or 30 years, but 50 or 70 years, thereby substituting years for lives.

The cases that come next, are *Marks* v. *Marks* (10 Mod. 419), and *Gore* v. *Gore* (2 P. Williams, 28. 63), and *Maddox* v. *Staines* (Ibid. 422), and *Stephens* v. *Stephens* (Ca. Temp. Talb. 228), which last was decided by Lord Hardwicke, as Chief Justice, and Lord Talbot, as Lord **[391]** Chancellor; and which Lord Talbot hoped would be a leading case in the decision of all questions of this kind. *Gurnell* v. *Wood* (Willes, 213) is the next case, and in that it is quite clear what Lord Chief Justice Willes meant, taking the whole of his judgment together, for when the cases alluded to by him are *Stephens* v. *Stephens*, and *Taylor* v. *Biddal*, and we have the authority of Lord Hardwicke that before *Stephens* v. *Stephens*, *Taylor* v. *Biddal* was the only case, it is clear he must have intended the 21 years in reference to minority: and he says, executory devises are in wills what contingent remainders are in settlements; and, by what he says in another part of his judgment, he means that in respect of a contingent remainder, when the contingency happens, it vests in the remainder-man, but he cannot alienate until he attains 21. But in respect of executory devises, which were taken from contingent remainders, the vesting, as well as the power of alienation, may be suspended until the devisee attains 21. From the case of *Sheffield* v. *Lord Orrery* (3 Atkins, 282), another case decided by Lord Hardwicke as Lord Chancellor, it appears that Lord Hardwicke thought that the 21 years must be in reference to minority, which was the exact point which he decided in *Stephens* v. *Stephens*. In the same year (1745) the case of *Gulliver* v. *Wicket* was decided in the King's Bench (1 Wilson, 105). The limitation there, no doubt, was a contingent remainder, and in reference to the devise, and taking the whole of what is said by the Chief Justice, it must be intended, that speaking of 21 years, he referred such time to minority; but at all events, the most that can be said, is, that this case left the question the same as it was before. Then came the **[392]** case of *Bullock* v. *Stones* (2 Vesey, sen., 521), a very important case, as it shows that Lord Hardwicke retained the same opinion which he entertained in the preceding cases. *Goodman* v. *Goodright* (2 Burr. 874), is the next case, in the Court of King's Bench: it is unnecessary to state the facts, but merely to refer your Lordships to what Lord Mansfield said. In Michaelmas Term in the same year was decided the important case of *The Duke of Marlborough* v. *Godolphin* (1 Eden's Reports, 404, and 418), by which it appears that Lord Northington entertained the same opinion as Lord Talbot and Lord Hard-

wicke did, that a term of 21 years was not a term in gross. That case came before this House, and the same doctrine is laid down in the printed case for the Respondent, signed by Mr. York and other eminent counsel, and is not contradicted by the reasons on the other side (3 Bro. Parl. Cases, 245). The next case that occurred, after that of *Doe* v. *Fonnereau* (Douglas, 470 and 490), is the case of *Heath* v. *Heath* (1 Bro. Ch. Ca. 147), decided by Lord Thurlow. Is not that an actual case of minority? Is it anything more than what might be effected by legal limitations? A limitation to Edward Heath for life, with remainder to his son in tail, with remainder to William Heath in fee. It is in effect that it is a devise to Edward Heath in fee, but if he should die without leaving a son at his death, capable of alienating, it should then go over. Our proposition is, that the term is not an absolute term of 21 years; that it has in all cases reference to infancy, and all that that case decides is, that it is not necessary that the infancy or minority should be that of the party to take, or the party from whom it is taken. The case of *Jee* v. *Audley* (1 Cox, 324), decided by Lord Kenyon, as Master of the Rolls, **[393]** must have been erroneously decided, if this term of 21 years be an absolute term, and so must have been the case of *Routledge* v. *Dorrell* (2 Ves. jun., 357), before Lord Alvanley, as Master of the Rolls; because if there may be an absolute term of 21 years, the testator's daughter might have appointed to issue born within the 21 years after her death, but it was decided otherwise. The next case of *Long* v. *Blackall* (7 Term. Rep. 102), is most important, as it contains the opinion of Lord Kenyon, distinctly laid down, as to the length to which executory devises can extend. That case is also important, as being the first that allowed the time for periods of gestation at both ends of the term. Two years afterwards the case *Thellusson* v. *Woodford* (4 Ves. 319), came on to be heard before Lord Loughborough in the Court of Chancery, assisted by the Master of the Rolls (Lord Alvanley), and Justices Lawrence and Buller. In that case the exact question did not arise, for there was no term of 21 years; it was merely a case of lives in being. But Lord Alvanley being afraid, from what Mr. Justice Buller had said, that it might be inferred that the 21 years might be an absolute term, without reference to minority, in giving judgment, expressed himself decidedly to the contrary (see 4 Ves. 319, 326 and 337). When that case came afterwards before this House, the Judges attended, and Lord Chief Baron Macdonald delivered their opinion, and in expressing that opinion, and referring to Lord Nottingham's judgment in the *Duke of Norfolk's* case [3 Ch. C. 1], he says, "With an easy interpretation, we find from Lord Nottingham what that tendency to a perpetuity is, which the policy of the law has considered as a public inconvenience, namely, where an executory devise would have the effect of making lands unalienable beyond the **[394]** time at which one in remainder would attain his age of 21 years, if he were not born when the limitations were executed" (11 Ves. 135.) And again, he says, (p. 143), "The established length of time during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of such posthumous child." And Lord Eldon, in the same case (p. 146), expresses himself to the like effect, all strongly implying, that if there be a term added after lives in being, it must be with reference to minority.

But your Lordships may see the opinion of Lord Eldon more clearly expressed in the case of *Griffiths* v. *Vere* (9 Vesey, 131); that opinion most clearly implies that the term of 21 years is not an absolute term, but qualified and referable to infancy. In the case of *Crook* v. *Devands* (Ibid. 197), also before Lord Eldon, it was decided that a limitation, to take effect at the expiration of 30 years from the testator's decease, was too remote; and in the case of *Lade* v. *Holford* (Amb. 479) the suspense of property for 26 years was held too remote; and in *Proctor* v. *The Bishop of Bath and Wells* (2 H. Black. 358), the possible suspense of property for 24 years was held too remote.

Let us next proceed to the important case of *Beard* v. *Westcott* (5 Barn. and Ald. 801). That case came on before Sir W. Grant, Master of the Rolls; he sent it to the Judges of the Court of Common Pleas, who returned a certificate in 1810. The effect of that certificate, if not over-ruled, was to allow an absolute term of 21 years. Sir W. Grant was not satisfied with that certificate, and entertaining the same opinion as his predecessor, Lord Alvanley, as to the absolute term of 21 years, he sent the case back to the Court of Common Pleas, particularly **[395]** putting the question

to the Judges. They returned a certificate (5 Taunton, 392. 406) in 1813, confirming their former determination, and thereby establishing the validity of an absolute term of 21 years. Between these two certificates the point was most ably discussed by a very learned and able writer, who was against the validity of the absolute term of 21 years. The case came on afterwards before Lord Eldon, Chancellor, who not being satisfied with the certificates, sent the case to the Judges of the Court of King's Bench for their opinion. The Judges of the Court of King's Bench differed from the Judges of the Court of Common Pleas, and returned a certificate (5 Barn. and Ald. 814) that the devises over were void, thereby confirming the opinions of Lords Talbot, Hardwicke, Northington, Mansfield, Kenyon and Alvanley, that the term was not an absolute term, but referred to minority. The case came on again upon that certificate (1 Turn. and Russ. 25) before Lord Eldon, and it was objected to the certificate, that it did not contain a sufficient answer to the case, and that it could not be collected from it, whether the circumstance, that the limitations were to take effect at the end of a term of 21 years, without reference to the infancy of the person intended to take, created such a suspense in the vesting as to render the limitations void. But Lord Eldon said it was impossible that the Court of King's Bench should not have considered that point. The certificate afforded a substantial answer to the questions put, and the inclination of his own opinion was, that the Court of King's Bench was right. The question therefore, as it appears to us, is decided by all these cases. There is not a single case that can be adduced where an absolute term has been allowed after a life or lives. These decisions, and the *dicta* of all the learned Judges to whom we have referred, **[396]** establish the contrary, and that the term must be referable to minority.

Now with respect to the text writers, and first in respect of Mr. Fearne, the passage in his book may probably be cited to induce your Lordships to think that it was his opinion that an absolute term of 21 years was allowed (Con. Rem. and Ex. Dev. 431). But we submit, that the whole of his reasoning on the point, and the cases which he refers to as illustrations, warrant the contrary inference, which is, that the period of 21 years, which he states to be the utmost limit after a life or lives in being, for deferring the vesting of the estate, has reference to infancy. The late Mr. Cruise, in the sixth volume (445) of his Digest, and Mr. Justice Blackstone, in the second volume (174) of his Commentaries, have also laid down, that the utmost length that has been allowed for the contingency of an executory devise, is that of a life or lives in being, and 21 years afterwards. From the reasoning of these writers, and the cases cited by them, we are entitled to conclude, that they did not mean the 21 years as an absolute term. Now if the term of 20 years cannot be an absolute term, if the testator has exceeded the limits allowed by taking this term, then the whole machinery must, as we conceive, fall to the ground. In *Lade* v. *Holford* (Amb. 479) the whole was considered bad, and there was no modelling of it; so also it was held in *Crooke* v. *Devands*, already cited, in *Ware* v. *Polhill* (11 Vesey, 257. 283), in *Lord Southampton* v. *The Marquis of Hertford* (2 V. and B. 54), and in *Marshall* v. *Holloway* (2 Swanston, 432). If, then, the term of 20 years be cut off, the consequence will be, that there will be persons *in esse*, and willing to take if they could be allowed to do so by law, during the term of 20 years. But they cannot take during that term, because it is **[397]** void, and yet the gift over cannot be accelerated, because the testator has said that no person shall take the estate as purchaser until the expiration of that term, and your Lordships would not violate the testator's intentions. There is one period of time, composed of both terms, upon which the testator says, certain trusts are to arise. That period exceeds the boundary allowed by the law, and therefore all the trusts must fail. After the cases of *Goring* v. *Bickerstaff* [Pollexfen, 31] and *Thelluson* v. *Woodford* [4 Ves. 319], there can be no doubt that the vesting of the property can be suspended for any number of lives, with this qualification annexed by Lord Chief Baron Macdonald and Lord Eldon, that they are not to exceed that number to which testimony can be applied to determine when the survivor of the lives dropped. Is that the case here? Of the 28 lives, 21 are altogether unconnected with the parties or the testator, all young and unsettled in life. These 21 persons may go all over the world, to the East and West Indies, to North and South America, and how could it be possible in such a case to determine when the survivor dropped. But the

purposes also for which the lives are taken must be legal. In *Thellusson* v. *Woodford*, they were taken for the purpose of accumulation, such purposes being then legal. But what are the lives here taken for? For the purpose of supporting limitations void at law. The testator is guilty of a fraud upon the rule of law by the use he has made of the 28 lives; for it is a maxim of law, that that which cannot be done directly, cannot be done indirectly. But it is said that the exility of the interests, viz. 120 years, determinable on lives and 20 years afterwards, out of which the trusts are to arise, privileges the trusts declared at this period of time; but in referring to perpetuity, limitations are to be considered according to their legal effect, and not by the quantity of interests out of which they are **[398]** to arise; otherwise limitations held good in one case would be considered bad in another.

The term of 120 years is as vicious as the term of 20 years is illegal, and the trusts declared of both are void; and so also are the ulterior trusts;—the direction to convey the inheritance from and after the expiration of the terms. All the limitations therefore being void, why should the trust for accumulation be retained? The accumulation was directed for purposes not allowed by the law, then why continue the accumulation? The heir-at-law and next of kin have a right to determine it. The point which arises between them is this; the personal estate is directed to be laid out in the purchase of lands, to be settled to certain uses, which we hold to be illegal. The purpose and object the testator had in view is not, and it cannot be, accomplished. Then what superior right or equity has the heir-at-law over the next of kin to ask the Court that the property legally belonging to the next of kin, dedicated by the testator for purposes which cannot be effected, should belong to him? Where, in the will, has the testator shown a preference to his heir-at-law over his next of kin? The case of *Tregonwell* v. *Sydenham* (3 Dow, 194), is in point of principle in favour of the next of kin. It was decided there that the heir-at-law was entitled to all that was viciously given. Why? Because his right must be defeated by a valid disposition. Is not the same principle to be applied in case of personal estate and next of kin. Every thing belongs to the next of kin in like manner as to the heir at law, that is not taken away by valid disposition; here nothing is taken away by valid disposition. The personal estate must therefore be considered as undisposed of, and therefore belongs to the next of kin.

[399] The further consideration of the case was then adjourned, and not resumed until the session of 1833, when Mr. Preston and Mr. Wilbraham, for the Respondents, argued to the following effect, in support of the decree below:—

The most eminent conveyancers and text writers never doubted, as appeared from their drafts of settlement and published writings, that 21 years after a life or any number of lives in being, might be taken as an absolute term. If any man studied this subject more diligently than another, it was Mr. Fearne, who, on account of his profound study and knowledge of it, was more consulted than any man of his time. In his book on Executory Devises, he says, "this privilege of executory devises, which exempts them from being barred or destroyed, is the foundation of an invariable rule with respect to the contingency upon which an estate of this sort is permitted to take effect, which is, that such contingency must happen within a short space of time, such as a life in being, and some few years after (p. 429)." Having then stated some decided cases, and among them the cases of *Lloyd* v. *Carew* [Show. P. C. 137], and *Marks* v. *Marks* [10 Mod. 419], in illustration of the rule, Mr. Fearne adds, "the limitations in the last two cited cases, were confined to vest within a certain number of months after the end of a life in being. But these are not the utmost limits for executory devises, for the Courts have gone so far as to admit of executory devises, limited to vest within a compass of 21 years after the period of a life in being (p. 431)," and again he says, (p. 438), "more instances of the established limits of executory devises will be given in the sequel, etc., only I shall observe, in this place, that the law appears to be now settled, that an execu-**[400]**-tory devise, either of a real or personal estate, which must, in the nature of the limitation, vest within 21 years after the period of a life in being, is good, and this appears to be the longest period yet allowed for the vesting of such estates." Mr. Butler, in his notes to these passages, examines recent decisions in support of the doctrines laid down: and it may be taken as a proof of his agreeing with Mr. Fearne, that he, after citing the words of Lord Alvanley, in *Thellusson* v. *Woodford*, adds, "But in the subsequent case of *Beard* v. *Westcott* (5 Taunt. 393),

it was held, that an executory devise was good, though it was not to take effect till the end of an absolute term of 21 years after a life in being, at the death of the testator, without reference to the infancy of the person who was to take." In his and Mr. Hargrave's edition of Coke upon Littleton, in commenting upon the *Duke of Norfolk's* case, he says (327 a. n. 2.), "the next advance in limitations of this nature was, to extend them to a period within the compass of one or more life or lives in being, and 21 years after." That was the opinion of Mr. Butler, writing to the public; he also was much consulted in this branch of legal learning, and he had the largest collection of manuscript precedents of any man living, some of which contained limitations to the same effect. The same opinion was expressed by Mr. Sanders, in his book on Uses (p. 194. 4th edit.), by Mr. Justice Blackstone (2 Comm. 174), Mr. Wooddeson (2 Wood. 229), and Mr. Cruise (6 Dig. 409-19-37), without any restriction or qualification as to the minority of any one. All the text-books have been examined, and not one passage is found in any one of them containing a contrary doctrine.

The Judges, the sages of the law, are as uniform as [401] the text writers, in the assertion of the principles on which the decree of the Court below is founded. In the case of *Stanley* v. *Leigh* (2 P. Wms. 687), Sir Joseph Jekyll enters into the doctrine of perpetuities, and what he there says is a sufficient answer to more than one of the objections made to the limitations in the present case. "Let us see," he says, "what a perpetuity is. A perpetuity, as it is a legal word, or term of art, is the limiting an estate, either of inheritance or for years, in such manner as would render it unalienable longer than for a life or lives in being at the same time, and some short or reasonable time after," etc. After showing the mischiefs arising from estates remaining a long time unalienable, he goes on to repudiate the old distinction in the doctrine of perpetuities between limitations of fee-simple and of terms of years, and cites, with approbation, what Lord Nottingham said on the same subject in the *Duke of Norfolk's* case (3 Ch. c. 1): "It is objected," he says, (p. 690), "that the devisor intended a perpetuity, and such intention will make the limitations void. Supposing the devisor did intend a perpetuity, it would be very strange, if, for that reason only, the law should make those limitations void; for if they do not really tend to a perpetuity, the bounds which the law has set to devises or limitations for years are not transgressed, nor any of its rules violated; so that the intention is vain, and ought to have no operation at all." Most, if not all, of the cases cited and examined by the counsel for the Appellant support the limitations of the will in the present case, and it, therefore, becomes material to examine them once more, and see what was the foundation of the decisions in them. Lord Chief Justice Willes, in the case of *Goodtitle* v. [402] *Wood*, says, that "of late years the doctrine of executory devises has been settled; they have been considered, not as possibilities, but as certain estates and interests, and resembled to contingent remainders in all other respects, only they have been put under restraints, to prevent perpetuities; as first, it was held that the contingency must happen within a life in being, etc.; and the rule has in many instances been extended to 21 years after the death of a person in being, as in that case, likewise, there is no danger of a perpetuity" (Willes, 213). In the case of *Blandford* v. *Thackerall* (2 Ves. jun. 241), Lord Loughborough, then Chancellor, in his judgment, says, that the wisdom of the law has fixed the time (of suspension), which is 21 years after lives in being; up to that time you may have as many springing uses as you please. You may give a legacy to the grandson of A. born in the life of A. It is a good description of the legatee, and he would take within 21 years after the life of the person in being. The rule of law admits of 14 years (the period of suspension in that case) after the termination of lives in being, and goes to 21 years. The rule continued to be so understood in Mr. Justice Buller's time; and he, in the case of *Thellusson* v. *Woodford* (4 Ves. 319), says the rule, allowing any number of lives in being, a reasonable time of gestation, and 21 years, is now the clear law, that has been settled and followed for ages, and we cannot shake that rule without shaking the foundation of the law. The same learned Judge, in another part of his judgment in the same case, observes (Ibid. p. 326), that "the number of contingencies is not material, if they are to happen within the limits allowed by law, etc. The 21 years are allowed because the law considers that time [403] reasonable." Lord Alvanley, in deliver-

ing his opinion in the same case (4 Ves. 331), says that "by the *Duke of Norfolk's* case (3 Ch. C. 1) it was clearly decided that every executory devise is good, that does not tend to a perpetuity, the meaning of which is, that every executory devise is good, that does not tend to make an estate unalienable beyond the period allowed by law as to legal estates, which could not be protected beyond the time at which the remainder-man, who was not in existence at the time of the limitation of the estate, would arrive at the age of maturity." A little further on is the passage on which so much reliance is placed on the other side. It is this: "As to the period of 21 years, etc., nor, with submission to the learned Judge (Buller), who immediately preceded me, has it ever been considered as a term that may at all events be added to such executory devise or trust. I have only found this *dictum*, that estates may be unalienable for lives in being, and 21 years, merely because a life may be an infant, or *en ventre sa mere*." Was it fair in that learned Judge to utter such a statement in the face of so many authorities to the contrary? Could he have read Mr. Butler's or Mr. Fearne's books? The reporter ought not to have taken notice of such a *dictum*.—(The Lord Chancellor: Do you think, Mr. Preston, that a reporter has a right to supply or suppress any part of a judgment?—Mr. Preston: I think a reporter has a discreet duty to perform; and if I were the reporter of that case, I would not give that part of Lord Alvanley's opinion).

The next case cited against us is that of *Jee* v. *Audley* (1 Cox, 324), which was decided by Lord Kenyon, then Master of the Rolls, and the most profound property **[404]** lawyer of his time. He and Lord Ashburton used to compare notes of cases and decisions. They were both bred in the same way, one with his father, a solicitor at Ashburton, the other also in a solicitor's office. He observes, in his judgment in that case, that "the limitations of personal estates are void, unless they necessarily vest within a life or lives in being, and 21 years, or 9 or 10 months afterwards. This has been sanctioned by the opinion of Judges of all times, from the time of the *Duke of Norfolk's* case [3 Ch. C. 1] to the present. It is grown reverend by age, and is not to be broken in upon." Next comes the case of *Roe* v *Jeffery* (7 T. Rep. 589), in which Lord Kenyon, then Lord Chief Justice, in delivering the opinion of the Court of King's Bench, says, "Nothing can be clearer in point of law, than that, if an estate be given to A. in fee, and, by way of executory devise, an estate be given over, which may take place within a life or lives in being, and 21 years, and the portion of a year afterwards, the latter is good by way of executory devise." Lord Eldon, in the case of *The Countess of Lincoln* v. *The Duke of Newcastle* (12 Ves. 232), on appeal in the House of Lords, says, "If the limitation had been to such son, at the age of 21, as would be entitled to the trust in possession of the real estates, as the son must attain the age of 21 within 21 years after the expiration of the life of his father, allowing the period of gestation, that limitation would be within the limits permitted to executory devise." His Lordship, giving his judgment as Lord Chancellor, in the case of *Griffiths* v. *Vere* (9 Ves. 132, 134), more than once expresses himself to the effect, that by executory devise an estate may be prevented from vesting for a life or lives in being and 21 years, with an addition at the end **[405]** for the period of gestation. That was the settled law before the case of *Long* v. *Blackall* [7 T.R. 102], in which it was settled, that a period for gestation might be allowed, both at the beginning and end of the term. In no case has Lord Eldon, or any other Judge, except Lord Alvanley, said that the term was to be taken with reference to infancy. The next case of authority was that of *Beard* v. *Westcott* (5 Taunt. 394; and 5 B. and Ald. 801). The marginal note to the report of that case may mislead, and therefore the case itself, and the certificates from the Courts of Common Pleas and King's Bench must be looked to. The Judges of the Court of Common Pleas, who certified in the first argument, were Sir James Mansfield, Mr. Justice Lawrence (both complete on this subject), Mr. Justice Heath, who had been a conveyancing counsel, and answered numbers of cases, and Mr. Justice Chambre. Sir Vicary Gibbs, who succeeded Mr. Justice Lawrence on the Bench, heard the second argument, and signed the second certificate. Lord Eldon sent the case afterwards to the Court of King's Bench, and the certificate of the Judges there is reconcileable with those sent by the Court of Common Pleas, and with all the authorities, and with the principle for which we contend in this case. The unprepared expression of Lord Alvanley has not availed to discourage conveyancers from inserting in devises a term of 21 years, without reference to infancy. Upon the authority of the cases already cited, and of several others, equally applicable,

it is submitted, that no estate or interest, given by this will, is open to the objection of transgressing the rules of law against perpetuities. The period of accumulation is restricted to a term of 21 years, from the testator's death, and an accumulation during that period, is warranted by the rules of law, and is consistent with the provisions of the **[406]** statute (39 and 40 G. 3, c. 60). Every contingent or future interest given, is so limited, that it must vest, or fail of effect, within 20 years from the death of the survivor of the lives in being at the date of the will. The rule of law against perpetuities allows, as has been shown, of a suspense of the time of vesting for a life or lives in being, and a further period of 21 years, and in some cases for a period and even two periods of gestation, in addition. As the rule of law is not transgressed, but its limits are observed by the testator, no argument of fraud on the rule, or of inconvenience, from the application of the rule, is entitled to any weight in a court of justice. It is the province of the Legislature, and not of this House, sitting as a court of justice, to reform the law, if it admits of an inconvenience. If your Lordships were to legislate anew on this subject, no man could frame a new rule to be substituted for the one which is established by the wisdom of ages, which is a fair deduction from reason and authority, and productive of no mischief whatsoever.

The rules of law relating to property are simple, and may be easily learned, if they be adhered to, and not altered; it is when they are not adhered to that the difficulty in learning them arises. The argument against this will is, that it is a fraud on the rules of law; the same arguments were used against Mr. Thellusson's will. An Act of Parliament was passed to restrain accumulation to 21 years. The period for accumulation in that Act is adopted in this will. The limitations after that period for a number of lives in being, and 20 years afterwards, is no fraud on the law, because the law allows even 21 years. There can be no objection to the number of lives; and if the limitations were confined to them, there would be no question of their validity. The objection to Thellusson's will was not to the number of lives, which **[407]** were nine, but to the accumulation; so the objection here is not to the number of lives, but to the additional term of years. A testator may multiply lives as he pleases; may take all the lives of this House, and secure the certainty of a longer period for the suspension of the estate than the addition of 20 years to 28 lives. While *Heath* v. *Heath* [1 Bro. C.C. 147], and other cases already commented on, remain in the books unimpeached, it is absurd to say that the term must have reference to the minority of the person who is to succeed to the estate, or of any other person.

(Besides the cases mentioned, the learned counsel cited and commented on those of *Sommerville* v. *Gutteredge*, *King* v. *Cotton*, *Wilkinson* v. *South*, *Massenburgh* v. *Ashe*, *Kirby* v. *Fowler*, *Sheffield* v. *Lord Orrery*, *Gulliver* v. *Wickett*, *Goodtitle* v. *Wood*, and *Long* v. *Blackall*, all which were before referred to by the Appellant's counsel.)

Sir Edward Sugden, in reply: My learned friends have not removed my objection to this will, which is, that it is a fraud on the rules of law. The object of the testator was, to provide life estates for every member of his family; but he desired to attain that object by cutting down other estates, and substituting one which is unknown to the law of England. The interests first given are all chattel interests, depending upon the lives of 28 persons, who may be scattered all over the world, so that the person, who may take a vested interest in the freehold, cannot know when his estate arises. If any of your Lordships were to make his will, he would begin with a limitation for life, with which this testator ended. My friends are not correct in saying, that Mr. Butler considered this question, as to the term in gross, concluded. Your Lordships, on looking into Mr. **[408]** Butler's last edition of Mr. Fearne's book, will find several notes on what fell from Lord Alvanley, in the case of *Thellusson* v. *Woodford*, which show that Mr. Butler considered that point still open. The law raises no objection to estates granted in perpetuity, provided there be a power to bar or destroy them, so as to render them alienable, and of that nature were the leases and conveyances referred to by my learned friend. The authority of the late Mr. Cruise was cited in support of the validity of these limitations. I deny that his text can be so interpreted, but although I esteem his book, I must say that he never lays down a proposition in such a way as justifies any one to rely on it. I do not find fault with Mr. Justice Blackstone, who merely lays down a general rule, without adding

whether the term of 21 years is to be taken in gross, or with reference to minority. What Mr. Wooddeson says of the term of 21 years is equally vague and undefined. I have a better right to conclude from the text, that both these commentators contemplated the case with reference to minority, than my friends have to draw the contrary inference; for whenever you mention a life or lives, and 21 years, you speak of the years with reference to minority, and it is not only 21 years you mean, but 21 years and some uncertain number of months in addition, both for infancy and gestation. My friends have said, that in the case of *Long* v. *Blackall* (7 T. Rep. 100), Lord Kenyon, and Lord Eldon afterwards, in *Beard* v. *Westcott* [5 B. and Ald. 801], expressed themselves to the effect that the term may be taken absolutely. I cannot find any such opinions. The latter case, after it was argued in the King's Bench, came before Lord Eldon, Chancellor, on further directions, upon the certificate of that Court, **[409]** and what Lord Eldon there says, as stated in the report (1 Turn. and Russ. 25), is clearly in favour of my proposition. Lord Kenyon and Lord Mansfield are also with me, and so is Lord Alvanley. My friend says, that if he were the reporter, he would not report the *dictum* of Lord Alvanley. Then it is well for the laws of England, in more senses than one, that my friend was employed otherwise than in reporting. Is a reporter to set down his own reasons instead of those of the Judge, and set himself above all the Judges? Lord Alvanley, apprehensive that what Mr. Justice Buller said, in giving his judgment in *Thellusson* v. *Woodford* [4 Ves. 319], might be understood as having the deliberate concurrence of the Court, set himself right as to the rule of law, by saying, "As to the period of 21 years, it has never been considered as a term that may, at all events, be added to an executory devise or trust. I have only found this *dictum*, that estates may be unalienable for lives in being and 21 years, merely because a life may be an infant's, or *en ventre sa mere* (4 Ves. 337)." That is the doctrine that is laid down in *Routledge* v. *Dorrell* (2 Ves. jun. 207), the judgment in which was long delayed, and carefully considered. Lord Alvanley's opinion is entitled to the greatest respect and attention. My friends say that the rule, according to their interpretation, has been established since the Duke of Norfolk's case [3 Ch. C. 1]. But there was no suspense there except during a life in being; there was no term for years added.

Sir Edward Sugden again stated some of the cases already referred to, and more particularly those of *Lloyd* v. *Carew* [Show. P.C. 137], *Marks* v. *Marks* [10 Mod. 419], *Massenburgh* v. *Ash* [1 Vern. 234, 304], *Gore* v. *Gore* [2 P. Wms. 28, 63], *Heath* v. *Heath* [1 Bro. C.C. 147], and *Stanley* v. *Leigh* [2 P. Wms. 687], no one of which, he insisted, was against the **[410]** rule, as he understood it; some were within it; some did not try it at all, and from others of them no notion could be inferred that any number of years could be added; but the addition of some months only, for the period of gestation, was formerly considered by some Judges too much after the death of the parent. No case carried the indulgence farther than that of *Lloyd* v. *Carew* [Show. P.C. 137], and any attempt to extend it ought to be resisted. A period of not less than 90 years, on the most moderate calculation, must elapse after the death of the testator, before any estate can vest. Did any one ever think of such a suspension; whereas formerly a few months were considered too long? The suspension of these estates for so long a period is against the policy of the law, and the power given here to convert a chattel interest into an estate for life, shows clearly that this was an attempt to evade the rules of law, an attempt which ought not be favoured. Then, upon the assumption that this term of 20 years is against the law, the question arises, whether all the limitations are not void? I think they are; for part of them cannot be held good if part be bad. The rule laid down is this: where some of the limitations go beyond the period allowed by law, the whole are void; *Fox* v. *The Bishop of Bath and Wells* (2 Hy. Black), *Lake* v. *Robertson* (2 Merivale). You cannot remodel this estate. There was never such an attempt to establish a perpetuity; and I call on your Lordships, in the words of Lord Nottingham, to stop when so manifest an inconvenience arises.

The Lord Chancellor, after suggesting that he should be glad of the assistance of the counsel in framing questions for the learned Judges, in order to dispose effectually of this question, moved to postpone the further consideration of the case; which was agreed to.

[411] The learned Judges who attended, were Justices A. Park, Littledale, Gaselee,

Bosanquet, Alderson, J. Park and Taunton, Barons Bayley, Vaughan, Bolland and Gurney; and the following were the questions submitted to them:—

First, Whether a limitation, by way of executory devise, is void, as too remote, or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of 21 years afterwards, as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person.

Secondly, Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of 21 years afterwards, together with the number of months equal to the ordinary period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*.

Thirdly, Whether a limitation, by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of 21 years afterwards, together with the number of months equal to the longest period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*.

The learned Judges attended again on a subsequent day (June 25th), and Mr. Baron Bayley delivered their opinion as follows; first, in answer to the first question:—I am to return to your Lordships the unanimous opinion of the Judges who have heard the argument at your Lord-**[412]**-ships' bar, that such a limitation is not too remote, or otherwise void. Upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that the property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted. The cases of *Lloyd* v. *Carew* (1 Show. Parl. Cas. 137), in the year 1696, and *Marks* v. *Marks* (10 Mod. 419), in the year 1719, established the point, that for certain purposes, such time as, with reference to those purposes, might be deemed reasonable, beyond a life or lives in being, might be allowed. The purpose, in each of those cases, was, to give a third person an option, after the death of a particular tenant, to purchase the estate; and 12 months in the first case, and three months in the other, were held a reasonable time for that purpose. These cases, however, do not go the length for which they were pressed at your Lordships' bar; they do not necessarily warrant an inference that a term of 21 years, for which no special or reasonable purpose is assigned, would also be allowed; and I do not state them as the foundation upon which our opinion mainly depends. They are only important as establishing that a life or lives in being is not the limitation; that there are cases in which it may be exceeded. *Taylor* v. *Biddal* (2 Mod. 289), 1677, is the first instance we have met with in the books, in which so great an excess as 21 years after a life or lives in being was allowed, and that was a case of infancy. It was a limitation to the heirs of the body of Robert Warton, and their heirs, as they should attain the respective ages of 21; there might be an interval, therefore, of 21 years between the death of Robert, till which time no one could be heir of his **[413]** body, and the period when such heir should attain 21, till which time the estate was not to vest: and that limitation was held good by way of executory devise. That, however, was a case of infancy, and it was on account of that infancy that the vesting was postponed. This case was followed by, and was the foundation of, the decision in *Stephens* v. *Stephens* (Cas. temp. Talb. 232). That was a case of infancy also. The executory devise there was, "to such other son of the body of my daughter, Mary Stephens, by my son-in-law, Thomas Stephens, as shall happen to attain the age of 21 years, his heirs and assigns for ever;" and the Judges of the Court of King's Bench certified that the devise was good. The certificate in that case is peculiar; it refers to *Taylor* v. *Biddal* [2 Mod. 289], and says "that however unwilling they might be to extend the rules laid down for executory devises beyond the rules generally laid down by their predecessors, yet, upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years; and, considering that the power of alienation would not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity: and considering that such

construction would make the testator's whole disposition take effect, which otherwise would be defeated; they were of opinion that that devise was good by way of executory devise." This also was a case of infancy; it was on account of that infancy that the vesting of the estate was postponed; and though, under that limitation, the vesting of the estate might be delayed for 21 years after the deaths of Thomas and Mary Stephens, it did not follow of necessity that it would; and it might vest at a much earlier period. **[414]** These decisions, therefore, do not distinctly or necessarily establish the position, that a term in gross for 21 years, without any reference to infancy, after a life or lives *in esse*, will be good by way of executory devise; but there is nothing in them necessarily to confine it to cases of infancy; the contemporaneous understanding might have been, that it extended generally to any term of 21 years; and there are some authorities which lead to a belief that such was the case. In *Goodtitle* v. *Wood* (Willes, 213. S. C. 7 Term Rep. 103. n.), Lord Chief Justice Willes discusses shortly the doctrine of executory devises, and notices their progress of late years. He says, "the doctrine of executory devises has been settled; they have not been considered as bare possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been put under some restraints, to prevent perpetuities. At first it was held, that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, viz. to a child *en ventre sa mere*, at the time of the father's death; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience; and the rule has, in many instances, been extended to 21 years after the death of a person in being; as in that case, likewise, there is no danger of a perpetuity." And in citing this passage in *Thellusson* v. *Woodford* (1 N. R. 388), Lord Chief Baron Macdonald prefaces it by this eulogium: "The result of all the cases is thus summed up by Lord Chief Justice Willes, with his usual accuracy and **[415]** perspicuity." He does, indeed, afterwards say (1 N. R. 393), after noticing *Long* v. *Blackall* (7 Term Rep. 100), "The established length of time during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of the posthumous child;" and that rather implies that he thought the rule was confined to cases of minority. This opinion of Willes, C. J., though not published till 1797, was delivered in 1740; and in the minds of those who heard it, or of any who had the opportunity of seeing it, might raise a belief that there were instances in which a period of 21 years after the death of a person *in esse*, without reference to any minority, had been allowed; and, though there be no such case reported, it does not follow that none such was decided. In *Goodman* v. *Goodright* (2 Burr. 879), is this passage, "Lord C. J. Mansfield, says, 'it is a future devise, to take place after an indefinite failure of issue of the body of a former devisee, which far exceeds the allowed compass of a life or lives in being, and 21 years after,' which is the line now drawn, and very sensibly and rightly drawn." This was published in 1766; and, whether the last approving paragraph was the language of Lord Chief Justice Mansfield or the reporter, it was calculated to draw out some contradiction or explanation, if that were not generally understood by the profession as the correct limitation. In *Buckworth* v. *Thirkell* (3 Bos. and Pul. 654. n. S. C. 10 B. Moore, 238. n.), Lord Mansfield says, "I remember the introduction of the rule which prescribes the time in which executory devises must take effect, to be a life or lives in being, and 21 years afterwards." In *Jee* v. *Audley* (1 Cox, 325), Lord Kenyon, (Master of the Rolls) says, "The limitations of personal **[416]** estate are void, unless they necessarily vest, if at all, within a life or lives in being, and 21 years, or nine or ten months afterwards. This has been sanctioned by the opinion of Judges of all times, from the Duke of Norfolk's case (3 Chan. Ca. 1), to the present time; it is grown reverend by age, and is not now to be broken in upon." In *Long* v. *Blackall* (7 Term Rep. 102), the same learned Judge says, "The rules respecting executory devises, have conformed to the rules laid down in the construction of legal limitations; and the Courts have said that the estates shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common-law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail; and until the person, to

whom the last remainder is limited, is of age, the estate is unalienable. In conformity to that rule, the Courts have said, so far we will allow executory devises to be good." And, after referring to the Duke of Norfolk's case, he concludes, " It is an established rule, that an executory devise is good, if it must necessarily happen within a life or lives in being, and 21 years, and the fraction of another year, allowing for the time of gestation." In *Wilkinson* v. *South* (7 Term Rep. 558), Lord Kenyon says, " The rule respecting executory devises is extremely well settled, and a limitation, by way of executory devise, is good, if it may (I think it should be, *must*) take place after a life or lives in being, and within 21 years, and the fraction of another year afterwards." We would not wish the House to suppose, that there were not expressions in other cases about the same period, from which it might clearly be collected, that **[417]** minority was originally the foundation of the limit, and to raise some presumption that the limit of 21 years after a life in being was confined to cases in which there was such a minority; but the manner in which the rule was expressed in the instances to which I have referred, as well as in text writers, appears to us to justify the conclusion, that it was at length extended to the enlarged limit of a life or lives in being, and 21 years afterwards. It is difficult to suppose, that men of such discriminating minds, and so much in the habit of discrimination, should have laid down the rule, as they did, without expressing minority as a qualification of the limit, particularly when, in many of the instances, they had minority before their eyes, had it not been their clear understanding, that the rule of 21 years was general, without the qualification of minority. Mr. Justice Blackstone, in his Commentaries (2 Blackstone's Commentaries, 174; 16th edition), puts as the limits of executory devises, that the contingencies ought to be such as may happen within a reasonable time, as within one or more lives in being, or within a moderate term of years; for Courts of Justice will not indulge even wills, so as to create a perpetuity. The utmost length that has been hitherto allowed for the contingency of an executory devise, of either kind, to happen in is, that of a life or lives in being, and 21 years afterwards; as, when lands are devised to such unborn son of a *feme covert* as shall first attain 21, and his heirs, the utmost length of time that can happen before the estate can vest is, the life of the mother, and the subsequent infancy of her son; and this has been decreed to be a good executory devise. Mr. Fearne, in his elaborate work upon Executory Devises, lays down the rule in the same way; " An executory devise, to vest within a short time after the period of a life in being, is good;" as **[418]** in *Lloyd* v. *Carew* [Show. P. C. 137], which he states, and *Marks* v. *Marks* [10 Mod. 419]; and he says, " The Courts, indeed, have gone so far as to admit of executory devises, limited to vest within 21 years after the period of a life in being;" as in *Stephens* v. *Stephens* [Ca. t. Talb. 232], *Taylor* v. *Biddal, Sabbarton* v. *Sabbarton* (Cas. temp. Talb. 55. 245), all of which he states, and in all of which the vesting was postponed on account of minority only; and then he draws this conclusion, " That the law appears to be now settled, that an executory devise, either of a real or personal estate, which must, in the nature of the limitation, vest within 21 years after the period of a life in being, is good; and this appears to be the longest period yet allowed for the vesting of such estates." The instances put, all instances of minority, might certainly have suggested, that it was in cases of minority only that the 21 years were allowed; but, by stating it generally, as he did, he must have considered 21 years generally, independently of minority, as the rule. The same observation applies to Mr. Justice Blackstone. That such was Mr. Fearne's understanding, may be collected from many other passages in his book; but from none more distinctly than in the third division of his first chapter on executory devises (9th edit. 399. 401), where, after having mentioned as the second sort of executory devises, those where the devisor gives a future estate, to arise upon a contingency, without at present disposing of the fee, and after putting several instances, he then concludes the division thus: " And the case of a limitation to one for life, and, from and after the expiration of one day, (or any other supposed period, not exceeding 21 years, we may suppose), next ensuing his decease, then over to another, may be adduced as an instance of the call for the latter part of the extent to which I have opened the **[419]** second branch of the general distribution of executory devises." And in his third chapter (P. 470), he begins his eighth division with this position; " It is the same, (that is, that an execu-

tory devise is not too remote) if the dying without issue be confined to the compass of 21 years after the period of a life in being." And in the eighth division of the fourth chapter (P. 517) he says, "It seems now to be settled that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them that is so limited that it must take effect, if at all, within 21 years after the period of a life then in being, may be good in event, if no one of the preceding limitations which would carry the whole interest happens to vest." The opinion of Mr. Fearne is continued in the different editions, from the period when his work was first published, in 1773, down to the present time; but, upon that expression which occurs in *Thellusson* v. *Woodford* (4 Ves. 337), showing that a doubt existed in the mind of Lord Alvanley, that doubt is introduced into a subsequent edition, for the purpose of consideration; but it does not appear to me, from anything expressed by his great and experienced editor, or in any note of his, that he thought the rule laid down by Mr. Fearne was not the right and correct rule; but, instead of that, he seems to have intimated, that his opinion was in conformity with it; because he gives extracts from what Mr. Hargrave, who agrees with Mr. Fearne, had said upon the subject, as if the inclination of his opinion was that Mr. Fearne was right, and that the unqualified rule of 21 years was correct. At length, in *Beard* v. *Westcott* (5 Taunt. 393), the question, whether an executory devise was good, though it was **[420]** not to take effect till the end of an absolute term of 21 years after a life in being at the death of a testator, without reference to the infancy of the person intended to take, was distinctly and pointedly put by Sir W. Grant, the then Master of the Rolls; and the Court of Common Pleas certified that it was. The point, though necessarily involved in that will, was not prominently brought forward, either upon the will itself, or upon the first of the two cases that was stated; and, lest it might have escaped the notice and consideration of the Court of Common Pleas, it was made the subject of an additional statement to that Court. The first certificate was in November 1812; the next in November 1813; and the Judges who signed them were Sir James Mansfield, Mr. Justice Heath, Mr. Justice Lawrence, Mr. Justice Chambre, and Mr. Justice Gibbs, men of great experience, and some of them very familiar with the law of executory devises. Those certificates stood unimpeached until 1822, when the same case was sent by Lord Eldon to the Court of King's Bench, and that Court certified that the same limitations which the Common Pleas had held valid, were void, as being too remote; but the foundation of their certificate was, that a previous limitation, clearly too remote, and which was so considered by the Court of Common Pleas, made those limitations also void which the Common Pleas had held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves, but from the infirmity existing in the preceding limitation; and because that was a limitation too remote, the others were considered as being too remote also. Whether the Court of King's Bench gave any positive opinion on that, I am unable to say. I think the Court of King's Bench would have taken much more time to consider that point **[421]** than they did, and have given it greater consideration than it received, if they had intended to differ from the certificate that had been given by the Court of Common Pleas; but, when it became totally immaterial, in the construction they were putting upon the will, to consider whether they were or were not prepared to differ from the Court of Common Pleas, it is not to be wondered at, that that point was not so fully considered as it might otherwise have been. Upon the direct authority, therefore, of the decision of the Court of Common Pleas, in *Beard* v. *Westcott* [5 B. and Ald. 801], and the *dicta* by L. C. Justice Willes, Lord Mansfield and Lord Kenyon, and the rules laid down in Blackstone and Fearne, we consider ourselves warranted in saying that the limit is a life or lives in being, and 21 years afterwards, without reference to the infancy of any person whatever. This will certainly render the estate unalienable for 21 years after lives in being, but it will preserve in safety any limitations which may have been made upon authority of the *dicta* or text writers I have mentioned: and it will not tie up the alienation an unreasonable length of time.

Upon the second and third questions proposed by your Lordships, whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon

the expiration of a term of 21 years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*, the unanimous opinion of the Judges is, that such a limitation would be void, as too remote. They consider 21 years as the limit, and the period of ges-[422]-tation to be allowed in those cases only in which the gestation exists.

The Lord Chancellor: I shall move your Lordships to concur in the opinions expressed by the learned Baron, as the unanimous resolutions of the Judges. The two last questions were put with a view to comprehend more fully the question argued at the bar, and to see the origin of the rule. That rule was originally introduced in consequence of the infancy of parties; but whatever was its beginning, it is now to be taken as established by the *dicta* of the Judges from time to time. A decision of your Lordships in the last resort, assisted here by the then Chief Justice of the Common Pleas, in *Lloyd* v. *Carew* (1 Show. P. Cases, 137), settled the rule; for the whole question was there gone into. Some doubt has been expressed as to whether this principle was adopted as the uniform opinion of conveyancers. It is impossible to read the passages read by the learned Baron from Mr. Fearne's book, without seeing that it was the settled opinion of that eminent person, that 21 years might be taken absolutely. The able editor of his book was of the same opinion, and Mr. Justice Buller's opinion was stated by him and examined. Mr. Butler makes it a question of separate consideration, and treated the subject as Mr. Fearne had done. The opinion of Lord Mansfield was the same, and the doctrine is not weakened by what Lord Kenyon is stated to have said in *Long* v. *Blackall* (7 Term Rep. 100). In the opinion of all, the rule was clearly confined to 21 years, as the period now understood. It was, however, necessary to state the first question, for the opinion of the Judges, and they have not shrunk from the consideration of it. It was also right to have put the other two questions, [423] to which the learned Judges also applied themselves, and they have excluded the period of gestation beyond the term of 21 years, except where the gestation actually exists. If your Lordships be of the same opinion, you will affirm the judgment of the Court below, and dispose of this case. The rule will then be, that a limitation will not be too remote, if the vesting be suspended for 21 years beyond a life or lives in being; but that beyond that period it would.

The Judgment of the Court below was affirmed.

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[424]

APPEAL

FROM THE COURT OF SESSION.

Mrs. ELIZABETH RALSTON, or ALISON, and ROBERT PURDON,—*Appellants;* JOHN ROWAT,—*Respondent.*

A witness cannot be rejected unless he has a direct and immediate interest in the result of the case in which he is called to give evidence, nor unless the verdict in that case can be given in evidence for him in another suit.

The rules of law in England and Scotland are the same on this subject.

The Appellants, having procured themselves to be served as heirs portioners of one John Allan, of Ellsrickle, deceased, proceeded as pursuers, against the Respondent as defender, in the form of an action of reduction, the object of which was, to set aside a deed of settlement, executed by the deceased, that disposed of his estates in favour of the defender. The pursuers relied on the allegation, that at the date of the execution of the deed the deceased was on his death-bed, a circumstance which, by the law of Scotland, would render the deed void (Bell Dict. Art. *Death-bed*). An issue was directed, to try this question. The cause came on for trial before Lords Justices Clerk and Mackenzie, when Dr. Robert Buchanan, a surgeon of Dumbarton, was [425] tendered as a witness on the part of the pursuers, and was objected to by

the defender, on the ground of interest. This objection was raised when Dr. Buchanan had been examined on the *voire dire*, or, according to the terms of the Scotch law, *in initialibus*. When thus examined, Dr. Buchanan stated, that he had given notice to Mr. Rowat of his intention to dispute the deed; that he was a grandson of a Mrs. Macfarlane, a daughter of John Allan, and claimed through her; and that he considered himself the nearest heir to the deceased. The difficulty by which he had been stopped in making out his claim, arose from his not having been able to find the documentary evidence of John Allan's marriage; but Dr. Buchanan stated, that if he could supply that evidence, he considered he should have a better title than either of the pursuers, and that though he had not been served heir, he had not renounced his claim. It was insisted by the defender, that Dr. Buchanan had an interest in the reduction of this deed, because it would leave him free to contest the question with the present pursuers alone, instead of having both to defeat their claim, and then to reduce this deed; and that he could not be allowed to effect as a witness, what ought to be the matter of a separate suit between him and the defender. The Court sustained the objection, on which a bill of exceptions was, under the provisions of the 55 G. 3, c. 42, tendered by the pursuers. It was afterwards discussed before the Second Division of the Court, with the assistance of the Lord Chief Commissioner Adam (see cases decided in the Court of Session, Feb. 27, 1833, No. 194, p. 451). The judgment of the Court below was supported by the Lord Justice Clerk, Lord Glenlee, Lord Cringletie, and opposed by the Lord Chief Commissioner and Lord [426] Meadowbank. Against the judgment, thus affirmed, an appeal was brought into the House of Lords.

The Solicitor-General for the Appellants: The reason given for the rejection of this evidence was insufficient. It was supposed that if the pursuers obtained judgment for the reduction of the deed on the evidence of Dr. Buchanan, that judgment would be conclusive in his favour. That was a mistake. The judgment, under such circumstances, could not be set up as *res judicata*. Lord Cringletie, who was one of the Judges that affirmed the first judgment, did not proceed on that ground: he said distinctly that this judgment could not be set up by Dr. Buchanan in his own favour, but that it might be argued against him as a personal exception; that as he had admitted the title of others as heirs, and had come as a witness in their favour, he could not afterwards set himself up as the true heir, and so insist on reducing the death-bed deed. Now that point was totally beside that on which the Jury Court rested in rejecting the witness. The only thing that appeared to be a difficulty in the case was, that the reduction of a deed was by the law of Scotland a proceeding *in rem;* so that the deed, being once reduced, might perhaps be considered as for ever extinguished. There had, however, been no authority to show that such would be the effect of this proceeding, and it was impossible that the judgment in this case could be conclusive in favour of Dr. Buchanan in any suit afterwards brought by him against Rowat.

Mr. M'Neill and Mr. Follett, for the Respondent: This case did not depend on the rules of evidence, as administered in this country, but upon the question of those rules, as existing in the law of Scotland; upon the [427] character of the pursuers as the heirs of the deceased, and the consequent results of that character. This was an action for reducing and setting aside a deed executed by the late Mr. Allan. It was challenged on a ground peculiar to the law of Scotland, namely, that of death-bed. The party who was once served heir, was invested with that character till some nearer heir appeared. The defender could not dispute that character with the pursuers, because he did not claim to be heir-at-law; his title rested on a totally different ground. With regard to the admission of evidence, it was to be observed that there was a marked difference between the law of England and the law of Scotland on this point. The former tended to the admissibility of a witness, leaving him open to observations as to his credit; but that was not the law of Scotland. If the verdict was in favour of the pursuer, the deed would be reduced, and that deed would then be extinguished for ever. The interest of Dr. Buchanan then was manifest, for if he could extinguish the deed, he would only have to prove himself nearer heir, and would succeed to the property at once. The only difficulty in his way was the want of documentary proof to establish the legitimacy of his grandmother; but her illegitimacy was not to be presumed. Though the Respondent could not show any rule of

the law of Scotland by which a deed, when once reduced, was extinguished for ever; no instance had ever been known in which a deed once reduced had been allowed to be revived. The judgment here would be binding in any future suit. In the case of *Rutherford* v. *Sir J. Nesbitt's Trustees* ([11] Shaw and Dunlop, [123] 27th Nov. 1832), the Court held that a judgment against the trustees was binding upon Nesbitt. The same principle was recognized in *Badell* v. *Ogilvy* (Morrison, 14074). It was not necessary that the verdict should [428] be binding upon each of the two opposing parties. By the law of Scotland a party whose interests were injured by a murder, might maintain a civil action for damages, called an action of assythment, against the murderer. In such an action it had been held, that the verdict finding the prisoner guilty of the murder might be conclusive against him, but the verdict acquitting him of the murder would not be conclusive in his favour, as against the demand for reparation in damages. That was the case of *M'Harg* v. *Campbell* (24th Feb. 1767; Morrison, 12541). If a man was acquitted on a charge of arson, that verdict would not be conclusive against the insurers, but an opposite verdict would be conclusive against the claimant; *Carr* v. *Surr* (Morr. 14078). The reason for the distinction was, that in the latter case the party to be bound had been heard, in the other he had not. A judgment in favour of an executor or heir, on the question whether he was the representative of the deceased, in an action founded on a claim against the ancestor, would not be conclusive as against a second creditor; but an opposite judgment would be conclusive against the heir or executor. This was a deed set up against the interest of the heir-at-law; any person, therefore, who claimed as heir, had a direct interest in setting aside the deed. This action was brought by the only person at that time entitled to bring it. Dr. Buchanan could not bring it at that time, for he had not then been served as heir-at-law, but he asserted that he was the real heir, and that he intended to set up his claim as such for the recovery of the estate. That being the state of the facts, Dr. Buchanan was called as a witness, to give material evidence against the deed. He claimed the estate. Between him and the estate stood, first the persons who now [429] claimed as heirs, and next the deed. Before he could make good his claim, he must get rid of both. According to the English law, a witness was not incompetent unless he had a direct interest in the particular suit, and therefore the argument on the other side had proceeded in a great measure on the question, whether Dr. Buchanan could afterwards use this judgment in his favour. That, however, was not the law of Scotland. In England, in the case of commoners prescribing for rights, one commoner was a witness for another. Tait on Evidence (p. 363), showed that that was not so in Scotland. "Thus, if the tenant of a mill, having a right of thirlage, have raised processes for abstracted multures, against the different tenants of the barony, though in point of form these different actions are separate and independent, no one defender seems to be a competent witness for another, as far as their defences are connected, as he must see the influence which his deposition must have on his own cause." By the law of Scotland, relatives are sometimes not witnesses for each other; yet by the law of England they would be. Yet, although this case should be held to be governed by the law of England, still it was clear that Dr. Buchanan was not admissible, for he had a direct interest in the case. What would be the effect of the verdict? If it was for the pursuer, for whom Dr. Buchanan was called, it would put the pursuer into possession of the land. If Dr. Buchanan should afterwards be able to make out his pedigree, he would have an action against the party then in possession of the land, and he would have nothing to do but to prove that pedigree, and he must get the property. He need not again set aside this deed. A question might then arise, whether the present Respondent could not bring an [430] action against Dr. Buchanan; but, in the mean time the latter would have got possession of the estate. That was an interest which the law would recognise. In an action of ejectment here, the tenant in possession was not a witness for the defendant; and why? Because his possession might be disturbed by a verdict for the plaintiff. So that this mere contingent interest was admitted as a sufficient ground to disqualify him. The case of Dr. Buchanan was still stronger. This deed was one stop between him and his taking possession, and that stop he was by his own evidence to remove. Again, there were now two persons with whom he might have to contend upon different questions of title for the possession of this estate: if his evidence was admitted, he would for

ever get rid of the title of one of them. Could it be said that that was not an interest sufficient to make him an incompetent witness. In Phillips on Evidence (4th edit. vol. 1, p. 3202), the matter was thus stated, "The reason why a verdict is not evidence against a person who was neither a party to the former suit, nor claims under one of the parties, is, because he had no opportunity of calling witnesses, or cross-examining those on the other side, nor of appealing against the judgment. And the reason why the verdict would not be evidence for a stranger, even against a party who was engaged in the former suit, seems to be, because if he had been a party to that suit, instead of the person who gained the verdict, the result might have been different; for as the parties would, in that case, have been constituted differently, the evidence might have varied; part of the evidence might then have appeared inadmissible, or of a doubtful character, or perhaps other evidence might have been produced by the party who lost the verdict. Under such circum-[431]-stances to admit a verdict as evidence, would be giving a party indirectly the benefit of testimony, which he might be precluded from availing himself of directly in his own suit. But this reason, it is evident, only applies where the verdict is offered in evidence by a third person, against the party who failed in the former action, and not where it is produced against the party who succeeded." Here there was no distinction, so far as the Respondent was concerned, between the pursuer and the witness, for both desired to set aside the deed; they had a common interest in that respect. It was clear, therefore, that, having such an interest, the evidence of Dr. Buchanan was inadmissible.

The Solicitor-General, in reply, admitted that by the law of Scotland, parents and children, and brothers, were not witnesses for each other, and that the rule went on the ground of family affection, arising from ties of blood; but in other respects there was no difference between the law of evidence in England and Scotland. Dr. Buchanan had no immediate interest in the pursuer's getting possession of the estate. In any subsequent proceeding he must prove his pedigree and all other necessary things, before he entitled himself to the estate. The cases cited had no application. In *Rutherford* v. *Nisbet* (11 Shaw and Dunlop, 123), the man who sought to try the question over again, was the representative of him who had tried it before, and was therefore bound by the decision against the person under whom he claimed. The words of Lord Stair were therefore applicable to him, namely (Bk. iv. tit. 40, s. 16), "that *res judicata* is relevant not only being a decreet between the pursuer and defender, but it is [432] sufficient if it was between their predecessors and authorities." The same doctrine was laid down by Lord Bankton (Bk. iv. tit. 25, s. 7). The parties in this case, however, stood in no such relation to each other, and that reasoning, therefore, did not apply here. With regard to direct interest, the Lord President agreed, that if this proceeding could be set aside, the whole question of death-bed would immediately be raised anew, so that the effect would be, that the witness would neither gain nor lose by his evidence; and Lord Cringletie distinctly expressed himself that this proceeding could be set aside, for he said, that "as no man can reduce on the ground of death-bed, but the immediate heir, the proceedings in this case must necessarily fall, as having been at the instance of a party who had no right whatever to insist on them;" and for another cause he expressed his belief, that it would probably be better for Dr. Buchanan that things should remain as they were, adding, that the first thing he would have to do would be, to get himself served heir, and then reduce the deed. It was clear, therefore, even on the opinion of one of the Lords of Session who had supported the judgment of the Court below, that the witnesses could have no interest in reducing the deed, and consequently, his testimony should have been admitted, and the judgment rejecting it must be reversed.

Lord Wynford moved the judgment of the House (July 10):—This was what was called in the Scotch law, an action of reduction and improbation, for the purpose of setting aside a deed that had been executed in favour of the Respondent. The grounds for the reduction of the deed were two. First, that the deed was not executed [433] in the proper manner; and next, that at the time of the execution of the deed, John Allan was on his death-bed. For the purpose of proving these two facts, a witness, named Buchanan, was called; he was examined on the *voire dire*, as it was called in the English, or *in initialibus* as it was termed in the Scotch law. This was with the view of objecting to his testimony. Upon the statement he then made, it appeared

that he claimed the estate of John Allan, as the nearest heir of that person; but that his claim was suspended for the present in consequence of a difficulty in making out the title by proving the legitimacy of his grandmother; on this it was insisted that Dr. Buchanan could not be examined as a witness, because his statement showed he had an interest in the cause. It was clear that he could not proceed in any claim founded on his supposed nearness of relationship, till this difficulty about the legitimacy of his grandmother had been removed. Two learned Judges, however, sustained the objection; he was not examined; and the pursuer failed in his suit. Upon this, the counsel for the pursuer tendered, under the provisions of a statute which assimilated the laws of England and Scotland to each other, a bill of exceptions. The question then came to be considered before the Court of Session, and by that Court Dr. Buchanan was held not admissible as a witness. It was satisfactory to know that that judgment had not been unanimously given. The Lord Chief Commissioner Adam, whose opinion was taken though he had not a right to vote upon the subject, was opposed to it. Lord Meadowbank was also opposed to it. Thus stood the case in point of authority. The greatest respect was due to the learning and ability of the Judges in Scotland; but when they thus differed among themselves, he was inclined, on questions of the **[434]** admissibility of evidence, to prefer the authority of a lawyer like the Lord Commissioner, who had had the benefit of the experience afforded in such matters by a practice in the Courts of England, where questions of admissibility of evidence had been much more frequently discussed. If the question was to be settled entirely by English law, there was not a man in Westminster Hall who could entertain a doubt upon it. It had been a settled rule here since the case of *Walton* v. *Shelley* (1 T. R. 296), to incline against the doctrine of incompetency, and for that of admissibility, and that no objection of incompetency should be received unless the witness was directly interested; in other words, unless the record in the case in which he was called as a witness, could be used for him in another suit. A man who was heir-at-law to another, could be called to prove his father's right to an estate, though the instant the breath was out of his father's body he would enter as heir. On what principle was it that such a witness could be admitted? On the principle that he had no vested interest in the cause, which he could immediately use, for *nemo est haeres viventis*. That was a stronger case than the present, which was at most only one of a contingent interest. Had this been a question in an English court of justice, the witness would have been admitted, subject, of course, to any objections to his credit. The question here need not, however, be argued on the point of the existence of a contingent interest, for the judgment would not have been of the least use to the witness. There was no great difference in this respect between the laws of the two countries. The rule in both was, that interest in a cause made a witness inadmissible. **[435]** Could this judgment be used in favour of, or against the person? The rule in both countries was the same, that the judgment in a case could only be used between the same parties, and that rule was subject but to few exceptions. These consisted of cases where the persons to be affected were privies in estate, taking under the parties to the original suit. It was clear that the witness did not stand in this situation, for instead of being privy to the estate of the pursuer, or taking under the pursuer, he would, if he came in, treat the pursuer as an intruder. Lord Stair said, "The first and most common exception in all processes is, *exceptio rei judicatae*, that the controversy is already decided by a competent judge, which is relevant, albeit it would be a decreet of an inferior Court, which, if it have no evident nullity, is relevant till it be reduced. Neither is the nullity a reply, but an objection arising from what appears in the decreet: for if it be a nullity arising from the process and minutes, it cannot be insisted in till these be called for and produced in a reduction. *Res judicata* is relevant, not only being a decreet between the pursuer and the defender, but it is sufficient if it was between their predecessors and authors."

Lord Bankton also says, "This exception lies where the case that was formerly judged between the parties and their authors, is sought to be judged again, while that judgment remains unreversed, for it cannot be brought under cognizance again, the rule being, that *res judicata pro veritate habetur*, the judgment of a Court is held to be true and just."

The principle was the same in the English law, for both laws derived it from

the same source. Dr. Buchanan could not say that he had been a party to the case which had been already decided. It was said that **[436]** if the pursuer got possession and Dr. Buchanan afterwards claimed against him, and proved a descent from the grandmother, the present pursuer could not set up a deed which he had already reduced, and it had therefore been argued by Mr. Follett that this would have the effect of giving Dr. Buchanan instant possession. That would be so according to the English law. The difference between the two laws was on that very point. The reduction of the deed must be again effected, for, as Lord Cringletie observed, "That as no man can reduce on death-bed, but the immediate heir, the proceedings in this case would necessarily fall, as having been at the instance of a party who had no right to insist on them." A case had been supposed on this subject. It was said that if a man was indicted for murder, and was afterwards pardoned the record in the first case would be evidence in another to prove the title of one who founded on that murder a claim of assythment or compensation. If that would be so, it was certainly different from the law of England, for, in the first place, the parties were not the same, and the object of the indictment and of the action were not the same. Now it appeared from the case of *Rutherford* v. *Nisbet* [11 Shaw and Dunlop, 123], that in order that a record might be used as evidence in a second suit, such suit should appear to be instituted between the same parties, and for the same thing as the first. The case supposed, therefore, did not bear on the point in issue. In the present instance the pursuer was an utter stranger to Dr. Buchanan, who would treat him as such in any future contest as to the estate. This case must be governed by the general rule that no judgment in one cause could be given in evidence in another, except the second cause was between those who were privies in estate, or who claimed by descent from the parties in **[437]** the first suit. It did not come within the exceptions to that rule. Three of the Judges in this very case had admitted that the judgment could not be used for or against Dr. Buchanan; that it would not be considered as *res judicata* between him and the person against whom he gave evidence. Dr. Buchanan, therefore, had not such an interest in the event of the suit as would disqualify him from being called as a witness in it. Dr. Buchanan's interest was in fact of that uncertain and contingent kind that it would be impossible for any Court of Justice whatever to allow him afterwards to make use of this record. He should, therefore, move their Lordships that this judgment be reversed. He felt the less reluctance in coming to this conclusion, because, recollecting the opinions of the Scotch Judges, that this would not be *res judicata*, the balance of authority in the Court below was in principle against this judgment.

Judgment reversed accordingly.

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[438] ERROR,

IN THE HOUSE OF LORDS.

MATTHIAS PRIME LUCAS, Esquire, WILLIAM THOMPSON, Esquire, PHINEAS DAVIS, JOSEPH BULL, THOMAS LINGHAM, and CHARLES EICKE,—*Plaintiffs in Error:* CHRISTOPHER NOCKELLS,—*Defendant in Error.*

[Mews' Dig. xiii. 296, 440; S.C. 7 Bli. N.S. 140; 4 Bing. 729; 10 Bing. 157; 1 M. and P. 783; 2 Y. and J. 304. Distinguished in *Sinclair* v. *Broughton*, 1882, L.R. 9 Ind. App. 172; and commented on in *Allen* v. *Flood* (1898), A.C. 20.]

In an action of trespass, where the defendants justify under a *fi. fa.*, and the plaintiff replies *de injuria absque residuo causae*, and new assigns, that the defendant committed the trespasses on other occasions, and for other purposes than in the plea mentioned, the Judge may leave it to the jury to say whether the execution was *bonâ fide* or colourable.

This was a writ of error upon a judgment of the Court of Exchequer Chamber at Westminster, affirming a judgment of the Court of King's Bench in an action of

trespass brought in that Court, wherein the Defendant in error was Plaintiff, and the Plaintiffs in error were Defendants.

The Plaintiff was sole owner of a ship called the *Emerald*, on board of which certain goods, consisting of furs, oil, etc. had been shipped by one Thornton, at Van Diemen's Land, to be delivered in London to Messrs. Hopley and Lingham, or their assigns, they paying freight, as per charter.

[439] The first count of the declaration stated in substance, that the Defendants on the 1st of January 1823, with force and arms, etc. broke and entered a certain ship of the Plaintiff, then lying in the London Docks, and greatly damaged the same, and seized and took away divers goods and merchandizes then in the possession of the Plaintiff on board the said ship, and on which the Plaintiff had a lien for freight to the amount of £6000, and converted the goods to their own use. In the second count, the Defendants were stated to have taken possession of the ship, and carried off and converted the goods of the Plaintiff. In the third count, the Defendants were charged with carrying off both ship and goods, etc.: in other respects this count was similar to the second.

The Defendants pleaded separately: the pleas were in substance the same for all. First, the general issue, not guilty, on which issue was joined. Secondly, Davis and Bull, as bailiffs to Lucas and Thompson, then sheriffs of Middlesex, justified the taking of the goods, etc. by virtue of a writ of *fieri facias*, on a judgment obtained in the Court of King's Bench in Michaelmas Term, 3d Geo. 4, against Nathaniel Thornton in the sum of £20,000 and costs, by Randle Hopley, George Augustus Lingham and Thomas Lingham; that the goods, etc. so taken were the goods of the said Nathaniel Thornton, and were thereupon sold under the said writ; and that the proceeds thereof were paid to Randle Hopley, George Augustus Lingham and Thomas Lingham, in part satisfaction of their debt. The replication to the last plea, protesting that there was no such judgment or writ, stated, that the Defendants of their own wrong, and without the residue of the cause by them in the said last plea alleged, committed the trespasses in that plea named. On **[440]** which issue was joined. The plaintiff also newly assigned, that the Defendants committed the trespasses on other occasions, and for other purposes than those mentioned in the pleas; to which new assignment the Defendants pleaded not guilty. Whereupon issue was joined. The cause was tried before Lord Tenterden, when evidence was produced by the Plaintiff for the purpose of showing, that at the time of the trespass the possession of the ship was in him, and that the goods were not taken by virtue of the writ of execution; but that the writ was had recourse to merely as a colour, to enable Thomas Lingham and his partners, who were the consignees of the goods, to get possession of and land the goods, as importers, without subjecting themselves to the claim for freight, which would have arisen if they had accepted the goods under the bill of lading; and that the goods were not sold by the sheriff, but were sold by Thomas Lingham and his partners as the importers. The Lord Chief Justice directed the jury that, in his opinion, the ship remained in the possession of the plaintiff, and that the question for their consideration was, whether the said goods were really and *bonâ fide* taken by virtue of the said writ or not; according to which, they would find for the Defendants or Plaintiff. To this direction the counsel for the Defendants tendered a bill of exceptions, on the ground that the question left to the jury was not that which was raised on the face of the pleadings, for that if fraud was meant to be imputed it should have been specially replied, and could not be given in evidence under the replication in this case. The jury found a verdict for the plaintiff for £1950, and 40s. costs. Judgment having been given for the Plaintiff in the Court of King's Bench in Michaelmas Term, 7 Geo. 4, the Defendants brought a writ of error in the Court of **[441]** Exchequer Chamber. In Easter Term, 9 Geo. 4, the Court of Exchequer Chamber unanimously affirmed the judgment of the Court of King's Bench (2 Younge and Jervis, 304. 4 Bing. 729. S.C.). The Defendants then brought the present writ of error, praying that the judgments of the Courts of King's Bench and Exchequer Chamber might be reversed.

Mr. Martin for the Plaintiffs in error: The question left to the jury in this case did not arise upon the pleadings. The first point to which the attention of their Lordships should be directed was the clause in the charterparty as to the freight. It would be found by the charterparty that the cargo was to be delivered to the con-

signees on the arrival of the vessel, but the payment of the freight was not to take place till 10 days afterwards. A stipulation for delay in the payment was incompatible with the assertion of a right of lien. That right was one which might be altered by agreement between the parties; *Saville* v. *Campion*, per Abbott, C. J. (2 B. and A. 510); *Hutton* v. *Bragg* (7 Taunt. 14); and *Raitt* v. *Mitchell* (4 Camp. 146). There was therefore no lien, and it was clear that these goods were the property of the Defendant in the execution, and were liable to be seized at the suit of a third party. If they were Thornton's goods they were liable to an execution issued against him. Secondly, there was no evidence whatever applicable to the new assignment. The special plea had justified the acts of breaking and entering the ship and taking the goods, etc. On that point the evidence on both sides was the same, so that in fact the new assignment was out of the question. The new assignment was only applicable when the act justified by the Defendant in his plea was different from that which the Plaintiff relied on as his **[442]** cause of action. If the act stated by both parties was the same the Plaintiff should answer by a replication, but if the Defendant mistook the act, the Plaintiff should point out the mistake by the new assignment (1 Saund. 299. (n. 6); by the Court, *Cleasby* v. *Barnes*, 10 East, 80; 15 East, 236; and 16 East, 82). The question therefore which was to be left to the jury must arise, if at all, on the plea and replication. The effect of the replication was to traverse all the traversable matters contained in the plea except those protested. The case was therefore the same as if issue had been taken in the replication on the *virtute cujus*, and on a demurrer to it. A demurrer to that traverse would have been good. The pleadings in *Cleasby* v. *Barnes* were the same as here, and the facts alone were considered to be put in issue, the *virtute cujus* being treated as a mere inference of law. The first case on this point was in the 21 Hen. 6, p. 5. It was an action of false imprisonment: the defendant justified under a magistrate's warrant; the plaintiff replied *de son tort demesne sans tiel record;* that replication was held bad; then again that the trespass had been committed without the precept, but that was held bad too, as the Court thought it must be intended that the party was taken by virtue of the precept. That was the principle which ought to govern the present case. In *Beale* v. *Simpson* (1 Lord Raym. 408), which was an action for an escape, the defendant pleaded, that B being in his custody, a *habeas corpus* was delivered to him, upon which he took B out of prison and carried him to Westminster. The plaintiff traversed in this form, *absque hoc* that the prisoner had been taken out of prison by virtue of the former writ. It was held by Chief Justice Treby that the traverse was bad, but the other three **[443]** Judges held that it was good. Their Lordships' attention was directed to this case with reference to two notes of Mr. Serjeant Williams. The replication referred to in Mr. Justice Powell's second judgment was in fact one in confession and avoidance. It had been held lately in the Court of King's Bench, that a man who was in custody was so on the instant of the delivery of a second writ. In Wms. Saunders (1 Wms. Saund. 23 [n. 5]), it was said, "it is agreed that where the words *virtute praetextu per quod*, and the like, introduce a consequence or inference from the preceding matter they are not traversable." In *Greene* v. *Jones* (1 Wms. Saund. 298 (n. 3); S. C. Keble, 607), the same doctrine is asserted, and the report of that case in Keble is cited in support of it. In *Groenvelt* v. the *College of Physicians* (12 Mod. 386; the same case is reported in 1 Lord Raym. 454, where the pleadings are set out at length), the replication was *absque hoc*, that the act done was by virtue of the warrant. There was a demurrer to that replication. That case was put on the doctrine in 3 Coke, as to distraining for heriot service, where it was stated to be good law that if a man had authority to do a certain thing, and did it, he must be taken to have done it by virtue of that authority. In *Crowther* v. *Ramsbotham* (7 T. R. 654), which was an action of trespass for breaking into a cow-house, the defendant pleaded that he committed the trespass under a writ of *justicies*, and the plaintiff replied *de injuria*. That case was stronger than the present, and Lord Kenyon there said, "I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can show that he had a legal justification for what he did that is sufficient. A man may distrain for **[444]** rent and avow for heriot service. Now it here appears that the defendants were justified under the process of the County Court in entering upon the premises and taking his goods, in order to compel an appearance, and therefore the question ought not to have been left to the jury to say whether they entered for that or some other

cause." It would be difficult to do what Lord Kenyon there said might be done, if the mode of traverse here insisted on were allowed. An instance of this might be found in questions relating to incorporeal hereditaments, such as rights over land. Suppose the case of a man who had the right of shooting over lands: he would aver that he entered for the purpose of exercising that right. In 99 cases out of 100 it might be proved that he had said he would shoot over the land for the purpose of annoying his neighbour. If evidence of that sort could be admitted, the man would be subject to damages for shooting over the land, though he had a perfectly good right to do so. The same questions might be raised in cases where arrests, perfectly legal in themselves, were made; and the right of a magistrate to issue a warrant might be defeated in consequence of some hasty expression previously uttered. No question of right could properly arise on this replication. The point put in the Exchequer Chamber was, that the defendant had made himself a trespasser *ab initio*. The doctrine of a man making himself a trespasser *ab initio* was adopted for the purpose of preventing men from being guilty of the abuse of legal powers; the Six Carpenters' case (8 Rep. 290). In such a case the replication should show the fact of the abuse (1 Wms. Saund. 300, (n. *d.*); 2 Wilson, 313; 3 Wils. 20; 3 T. R. 292; and 1 H. B. 555. S. C.; 6 Com. Dig. Pleader, 563, pl. m. 43. tit. New Assignment). There was no evidence applicable to the new assignment; the case **[445]** therefore rested on the other pleadings, and the question left to the jury was erroneous. As to the question of lien, the first count stated that the plaintiff had a lien to a large amount on the goods. That was not the fact. If the plaintiff had no such lien, then Nockells was a wrong doer in refusing to deliver them. The Judge therefore ought to have told the jury that there was no lien. If the man who had a right to the goods was not justified in entering the ship, still it was a material question as to damages, whether the goods were or were not the property of the man who entered. That was the question which the counsel for the Defendant proposed to submit to the jury. The verdict was for the amount of the value of the goods, which showed that the jury did not give damages for any thing but the mere taking of the goods. Lastly, if there was no evidence to justify the verdict of the jury on the new assignment, the judgment being entered on the new assignment must necessarily be erroneous.

Lord Tenterden: You cannot affect the judgment by anything appearing merely in the bill of exceptions; the matters there set out are applicable only to the exceptions taken at the trial.

Mr. Campbell and Mr. Maule for the Respondent: The bill of exceptions proceeded on the ground that the action could not be maintained, for that the Plaintiff was out of possession of the ship. Now it was admitted, that in fact the plaintiff was not out of possession of the ship, but it was said that he had no lien upon the goods. As the Plaintiff had possession of the vessel, he had a qualified possession of the cargo. The only question was, whether the learned Judge was justified in leaving the question to the jury in the manner he had done. **[446]** The new assignment raised that very question. It stated, that the defendants had entered on other occasions, and for other purposes, and with excess had committed this trespass. The new assignment distinguished this case from all those which had been referred to. It was true, that if the Plaintiff and Defendants were agreed upon the act of trespass there could be no new assignment; but how was it to be ascertained that they were agreed? In the cases referred to, the new assignments were bad on demurrer; but could the new assignment have been demurred to in this case? For anything that appeared on this record, the Defendants might have entered by the writ, but have stayed and done many things for which that writ gave no excuse. This case was not to be distinguished from a case of trespass, *quare clausum fregit*. It was stated, that where the Defendant was a trespasser *ab initio*, he could not be shown to be so by denying what was stated in the plea; but then that was the very reason for the new assignment. Under this new assignment, the Plaintiff was justified in giving in evidence that the Defendants had abandoned the execution, and acted on the bill of lading. If that were so, then it was clear that they did not enter in the manner stated in the plea, but upon another occasion, and for another purpose. The replication denied everything that was not a mere conclusion of law, but was a material substantive traversable fact. Now the plea, after alleging the judgment and the writ, said that the Defendants entered by virtue of that writ, and seized the goods for the purpose of satisfying the exigency

of it. The evidence was, that the Defendants entered and pretended to take the goods under the writ, but that they took them as the property of Hopley and Lingham, to whom they were handed over, and who sold, as importers of the goods, [447] for their own benefit. That was the excess complained of. Hopley and Lingham swore that their sale was the first sale, thus negativing the pretended sale from the sheriff. That made them trespassers. That distinguished the case from *Crowther* v. *Ramsbottom* (7 T. R. 654), where nothing was done but under the writ of *justicies;* here something was done which the writ could not justify. Suppose goods thus seized had been thrown into the river, or wine drunk, could it not be said that the parties doing these things came in under a writ, but afterwards acted without authority? It had been said, that there was no evidence applicable to the new assignment; but no exception had been taken on that ground at the time of the trial. The only point then taken was, that a certain question did not arise on these pleadings. What was the nature and office of a new assignment, and when was it admissible? It was admissible where the declaration complained of something that had been done at an indefinite period of time, and one act of the kind was justified in the plea; so that it would not be inconsistent in the record showing what was the real act of trespass, and saying that the matter of the plea was a matter different from that which was stated in the declaration. The present case, however, was not properly a case of a new assignment. Suppose the party complained of an act of trespass, and the defendant justified under process, the defendant must admit that he had committed the identical trespass complained of. Suppose the plaintiff thought the defendant had exceeded the authority given him by that process, he ought not to new assign, though that was the term used in the former judgments in this case, but should reply the excess. That would admit and avoid the plea, and show that the plea was not justified in law; for it would show [448] that the defendant had acted without or against the law. A new assignment would, under such circumstances, be a departure. These considerations, as to the nature of the new assignment, got rid of the cases on the other side. With respect to the dictum of *virtute cujus* not being traversable, it was evident, on looking through the case in Lord Raymond, that according to the understanding of the Court, the *virtute cujus* merely stated the effect of the preceding allegations. In Dr. Grenville's case (12 Mod. 386; 1 Lord Raym. 454), there was a traverse of the *virtute cujus*. There was an admission, that the occasion mentioned in the declaration and the plea were the same, and there was no replication of excess. It was true that a matter of law could not be traversed; but they might traverse the question, whether a person acted under authority, or had been guilty of excess, and if he had, that excess should be stated in the replication. That was the effect of the resolution in the Six Carpenters' case (8 Rep. 290). In the Year Books (11 H. 4, 75, b), an action of trespass was brought, complaining of one act. The defendant pleaded that he was the lessor of the plaintiff, and entitled to view the waste, and had entered for that purpose; the plaintiff replied, that the defendant had stayed all night, and the plaintiff had judgment, for that replication showed excess. In the Year Books (28 H. 6, 5, b), there was an action of trespass for breaking into the plaintiff's close, and taking away his cattle. The defendants pleaded that the close was the freehold of A. B., and that by his command they took the cattle damage-feasant; replication, alleging that after the taking they converted the cattle to their own use.

These cases showed that the law would allow the question, *quo animo* the party entered. Several of these [449] cases were commented on in the judgment of the Chief Justice of the Court of Common Pleas, in the Exchequer Chamber. There was not the slightest ground for complaining of the manner in which the learned Judge who tried this cause left the case to the jury; for the question, whether the defendants had acted under the authority stated, or had exceeded it, was raised, and properly raised, by the plea and the new assignment.

Mr. Martin, in reply: The sale of the goods was regularly made by the sheriff, and the proceedings at the Custom-house were those that were necessary by the Custom-house regulations. The question, whether the execution was collusive or not, was not open for consideration upon the pleadings. By confining themselves chiefly to the new assignment, the other side seemed to admit, that but for that the question could not have been left to the jury. They had not, however, overthrown the authority of one of the cases already quoted. A distinction had been attempted to be taken

between cases where the trespass was single, and those where trespasses were alleged to have been committed an indefinite number of times. In the former case, a new assignment would be bad on demurrer; in the latter, it would not be bad on demurrer, but it might be defeated on the proof. That was the effect of the note in Saunders (1 Saund. 299. c). The case of throwing the cargo into the river, or drinking the wine, would clearly make the party a trespasser *ab initio;* but these things should be made the subject of a special replication. The plaintiff did not state the facts which went to constitute the excess; but if they existed, which they did not, they should have been replied specially. The liability of Hopley and Lingham to **[450]** pay the freight, if they had accepted the goods under the bill of lading, was not so clear as was supposed. The time when the objections were taken was the proper time for taking them. The replication was general: the pleadings were good in themselves; and the objections arose only when questions were put to the jury that ought not to have been submitted to their consideration.

Lord Tenterden (Deputy Speaker): This case has been very ably argued on both sides. The question that is raised on the record now before your Lordships turns principally on a matter of form. That question is, whether it was competent for the plaintiff on these pleadings to show, in maintenance of the action, that although a writ was issued to the sheriff, at the suit of the defendant, on a judgment obtained by the defendant against a third party, yet that all that was done under that writ was mere collusion, and that the writ was made use of, not for the purpose of levying the debt, but in order to get possession of the goods with another view. The question is not so much one of law as of form. His Lordship having stated the pleadings, and the facts as set out in the bill of exceptions, put a question to the Judges in the following form: "Was it competent in law, on these pleadings, for the plaintiff to show at the trial, in maintenance of his action, that the acts of the defendants were not really done under or in execution of the writ, but for another purpose, under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods?"

Questions were afterwards framed, formally stating the pleadings, the evidence, and the point raised by the bill of exceptions, and requiring the opinions of the Judges thereon.

[451] Their Lordships required time to consider.—Judgment was accordingly postponed.

On the 25th of June 1833, the Judges delivered their opinions in the following order:

Mr. Justice Bosanquet: In this case, it appears to me that the new assignment may be laid out of consideration. The question upon which my humble opinion turns is this, whether the evidence in the case supposed by your Lordships relates to a particular allegation contained in the plea and denied by the replication. The effect of the replication is to put in issue every material fact, except the judgment and the writ of *fi. fa.*, which constitutes any part of the cause for which the defendant alleges that he committed the acts professed to be justified. Whatever part the plaintiff might, consistently with the rules of law, have traversed separately, he denies by the general form of replication, which he is allowed to employ in such case as this. It may be assumed that in the action shortly described in your Lordships' question, the declaration would state that the defendant broke and entered the plaintiff's house, seized, took and carried away his goods, and converted and disposed of them to his own use; and that the plea would profess to justify the entry of the house, and the seizing, taking and carrying away, and converting and disposing of the goods to the defendant's use, and for that purpose would allege that the goods liable to be taken in execution under and by virtue of the writ and warrant to the bailiff were in the house: that under and by virtue of the writ and warrant, the bailiff entered the house in order to seize and take, and did seize and take, the goods in execution; and afterwards, and before the return of the writ, sold the goods; and by sale thereof made and levied a sum of **[452]** money in satisfaction of the debt and damages. Such is, in fact, the form of the pleadings in the case which was argued at your Lordships' bar. The plea, therefore, would profess to allege, by way of an excuse for the entry, seizure and conversion of the goods, that they were taken in execution, and a levy made thereof, in satisfac-

tion of a debt. If this allegation contain matter of fact, it is traversable; if it be merely a consequence of law, it is not traversable; and whether the evidence mentioned in the question ought to be submitted to the jury must depend, as it appears to me, upon this point, viz. whether the allegation is to be viewed in the one light or the other. Whether the writ authorized the defendants to do any particular act, alleged to have been done, is matter of law, and cannot be traversed; but whether the defendants actually did any particular act, which they allege to have been done, is a matter of fact, and may be denied. It has been truly said that, if it be alleged that a particular act was done by *virtue* of a certain writ, the doing of such act by virtue of the writ is not traversable, because it is an inference of law; but if it be material to show whether the act itself was done or not, it will not be the less traversable, because it is alleged to have been done by virtue of a certain writ. It would not be competent to the plaintiff to insist, under the general denial contained in his replication, or under any more special traverse, that the writ in question did not authorize the bailiffs to take in execution the goods of the debtor, and to seize and sell them in satisfaction of the debt, as they have alleged; but whether they did really take the goods in execution, and deal with them as alleged in the plea, or seized them for purposes foreign to the execution, and disposed of them in some manner other than by way of sale in satisfaction of the debt, was, as it **[453]** appears to me, a matter of fact, put in issue by the replication, and to which the evidence in question was applicable. In the case of *Beal* v. *Simpson* (1 Ld. Raym. 410), Powell J. said, he confessed that, generally, the matter of a writ is matter of inference of law only, and then not traversable; but matter of fact may depend upon it, and then it is traversable; as, in that case, the taking out of prison; and for that reason it was there traversable. And Nevill and Blencow, Js., agreed with Powell, J., that generally a *virtute cujus* is not to be traversed, containing matter of law; but when it is mixed with fact, there it may be traversed: and though Treby, C. J., held that *virtute cujus* was not traversable in any case, it was given for the plaintiff according to the opinion of the majority of the Court. The principal authorities relied on by the defendants, and supposed to bear most directly upon the subject, are *Dr. Groenvelt* v. *Dr. Burwell* (1 Ld. Raym. 454), and *Crowther* v *Ramsbottom* (7 T. R. 654). But neither of those cases appear to me to govern the present, notwithstanding the resemblance they bear to it in several circumstances. In the case of *Dr. Groenvelt* v. *Dr. Burwell*, the plaintiff having complained of an assault and false imprisonment, which the defendants justified under a judgment of the College of Physicians, and a warrant issued thereon, the plaintiff, after protesting as to certain allegations of the plea, replied, that the defendants of their own wrong assaulted and imprisoned him as before alleged, and not by virtue of the warrant supposed in the plea. Upon demurrer, Lord Holt declared the opinion of the Court that the replication was bad, as well in matter as in form. He says, the defendants say there was such a warrant, and that by virtue thereof the plaintiff was **[454]** arrested and imprisoned; to which the plaintiff does not make answer, that there was not such a warrant, nor traverses it, but only says, that he was not arrested *by virtue* of it. If he had denied that there was such a warrant, it had been a good traverse; for the officer would not have been authorized to arrest the plaintiff. He says, "If the officer had a *good warrant at the time* of the arrest, though he had declared that he had arrested upon a warrant that was insufficient, yet, in an action brought against the officer, he might have justified under the good warrant, having had it in his custody at the time of the arrest." And he compared the case to that of a man who distrains for one thing, and avows for another; which undoubtedly he may do. And he held the traverse ill. It is evident that the objection here made to the traverse is, that, as the warrant, the arrest, and the imprisonment were admitted, the traverse that the arrest and imprisonment were made *by virtue* of the writ was not allowable. Neither the validity nor the effect of the warrant could be disputed under such a traverse; "*traversat* (says the special demurrer) *virtutem warranti quae non est traversabilis existens validitas et materia legis:*" and if the defendants only did that which they alleged in their plea that they had done, by virtue of the warrant, the denial that the defendants committed the assault and imprisonment by virtue of the warrant, amounted to no more than saying, that, although the defendants were in possession of a warrant, the sufficiency of which to justify those acts the plaintiff was not in a condition to dispute as a matter of law, the defendants

at the time of the act done had assigned a different reason for their conduct. Inasmuch, therefore, as this circumstance would afford no answer to the defendants' justification, the traverse [455] founded upon it was not material. Such also appears to have been the point professedly decided in *Crowther* v. *Ramsbottom* [7 T. R. 654]. The action was brought for seizing and taking cattle, and the defendant justified under a *justicies* out of the Chancery of the County Palatine of Lancaster, and a precept from the sheriff, commanding the defendant to attach the plaintiff by his goods, to compel his appearance, and alleged, that the cattle were taken for that purpose, and that the plaintiff having appeared, the cattle were re-delivered. The plaintiff admitting the writ, replied *de injuriâ absque residuo causae,* as in the present case. At the trial, evidence was adduced to show that the object in *executing the writ* was not to compel an appearance, but to enforce payment of a debt and the costs; and the Judge left it to the jury to say whether the defendants entered for the mere purpose of compelling appearance or for the purpose of compelling the plaintiff to pay the debt and costs. Lord Kenyon, in delivering his opinion on a motion for a new trial, said, "I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can show that he had a legal justification for what he did, that is sufficient. A man may distrain for rent and avow for heriot service. Now, here it appears that the defendants were justified under the process of the Chancery Court in entering on the plaintiff and taking his goods in order to compel appearance, and therefore the question ought not to have been left to the jury to say whether they entered for that or for some other cause." As to the excess, he said, "that is a subject for an action on the case." Mr. Justice Lawrence quoted Dr. Groenvelt's case [1 Ld. Raym. 454] as directly in point.

It may be admitted, that the object and motive with which the process of the law is put in execution are not [456] the subjects of traverse, nor consequently of evidence, under the replication *de injuriâ absque residuo causae.* And to this extent, and to this only, do the cases cited appear to me necessarily to go. It frequently happens that the real object of arresting a defendant upon *mesne* process is not to compel appearance to an action, but to procure immediate payment of a debt by the pressure of an arrest, but if nothing more be done than is required by the exigency of the writ, the act will be justified, whatever be the motive of the party, or the cause which leads him to employ the process of the law.

In the case put by your Lordships, the evidence points not merely at the object and purpose of doing particular acts, but to the nature of the acts done, in order to ascertain whether they correspond with the description of them in the plea, which alleges not merely a taking of them by virtue of the writ of execution, but a sale and levy in satisfaction of a debt.

The case, as it appears to me, stands thus: The defendant, by way of excuse, alleges that he has done various acts; all of which, if done, would be authorized by the writ; and which, if taken jointly, would afford a good defence to the plaintiff's whole complaint, but, taken partially, would not. The plaintiff, admitting the writ, denies the rest of the cause, and offers evidence to show that part of the defendants' acts were quite of a different character from those described in the plea. By this evidence, the effect of the writ is not impeached, but only the execution of it in fact; and unless it was executed in fact, as alleged, the defence must fail.

The materiality of this consideration may be illustrated by supposing the following case: Goods were shipped abroad to be delivered in England. By the charter-party freight for carriage of the goods is made payable within a limited time; suppose 10 or 14 days after the delivery of the goods; and by the bill of [457] lading the goods are to be delivered to the shippers or their order, paying freight according to charter-party. In such case, the goods would become deliverable to the order of the shipper before the freight for carriage of the goods would become payable. It might, therefore, be insisted by the consignees, that at the time of the delivery of the goods no lien had attached, the time for delivering the goods and for payment of the freight not being contemporaneous; yet if the consignees claimed the goods as holders of the bill of lading, they would, by taking under the bill of lading, become liable to perform the condition of it, and to pay freight at the expiration of the stipulated time. For "if a person accept any thing, which he knows to be subject to a duty or charge, it is rational to conclude that he means to take the duty or charge upon

himself; and the law may very well imply a promise to perform what he has so taken upon himself."—Abbott on Shipping, p. 286, 5th ed. In this state of things, therefore, if the consignors, in the character of execution creditors, could get the goods out of the possession of the ship-owners, before the freight had become due, without resorting to the bill of lading, they might refuse to pay the freight, and leave the ship-owner to his remedy against an insolvent shipper. It would, therefore, become an important question whether the goods were really taken and sold by the sheriff by way of levy of a debt in execution, or whether the writ of execution was not employed as the means only of getting the goods into the possession of the consignees, to be dealt with by them as they should think fit under the consignment, without producing the bill of lading. As consignors, they could have no right to the possession without claiming under the bill of lading, and as execution creditors, they could not justify taking possession except for the purpose of levying their debt by the hands of the sheriff. [458] Much embarrassment seems to have arisen in this case from the use of the word "purpose." What was the purpose of levying an execution on the goods is one question, and whether the goods were disposed of for the purpose of levying an execution upon them is another and very different question. The first assumes an execution to have been executed; the other raises the issue, whether an execution was executed or not. If there was a real execution in this case, the allegation in the plea, was maintained; if there was not such execution, it failed.

The ground, therefore, upon which my answer to your Lordships' question is founded is, that the evidence therein mentioned tended to show that the act done by the defendants was not the act alleged in their plea as part of their excuse, viz. an execution by levy upon the goods, but an act of a different character. For these reasons, I am humbly of opinion,

That it was competent by law, on the pleadings mentioned in your Lordships' question, for the plaintiff to show at the trial, in maintenance of his action, that the acts of one defendant were not really done under or in execution of the writ, but under another claim, and that the writ, and the proceedings under it, were a mere colour and contrivance to get possession of the goods.

Mr. Justice Parke: To the questions submitted by your Lordships to His Majesty's Judges, I answer, that in my opinion, it was not competent to the plaintiff, upon these pleadings to give in evidence that the act of the defendants was not really done in execution of the writ, but for another purpose, under another claim; and that the writ, and proceedings under it, were a mere colour and contrivance to get possession of the goods.

One defendant states a judgment, and both a writ of execution against the goods of A. B.; the delivery to the [459] sheriff of that writ; that there were goods of A. B. in the place where the trespasses were committed; and that the defendants were entitled to seize, and did seize and sell, the goods under the writ. There is an admission of the judgment and writ in the replication, and a traverse of the *residue of the cause*. There is also a new assignment of trespasses at other times, on other occasions, and for other and different purposes: and also alleging excess. And the question is, whether the above evidence was admissible, either on the traverse of the residue of the cause, or the new assignment.

I propose to consider these two parts of the question in an inverse order; for there is no difficulty about one, and the other requires further consideration. First, then, with respect to the new assignment, it is clear that the office of a new assignment is to correct a mistake, occasioned by the generality of the declaration, and to explain that the plaintiff is proceeding for a different cause of action from that mentioned in, and justified by, the plea: it admits, that the trespasses intended by the plea are not those for which he seeks redress. If the plaintiff is seeking to recover for the trespass mentioned in the plea, and justified by it, he must reply, and either traverse, or confess and avoid, the matter of the plea. Now, in either case, the plaintiff is, in truth, as appears from the evidence offered, insisting that the same acts, attempted to be justified by the plea, were not justified by it. The evidence applies to the acts mentioned in the plea, and not other and different acts on another and different occasion. But it has been contended, that the new assignment may be treated as if, after traversing the matter in the plea, it had gone on to aver that *the trespasses mentioned* in the plea were done *for other and different* purposes than those in the plea men-

tioned; that, under such a new assignment, it is clear the evidence would have been admissible; that such a new [460] assignment might, indeed, be demurrable; but, that not having been demurred to, the evidence may be given under it. To this I answer, that the new assignment does not contain any averment, that the trespasses *mentioned in the plea* were done for other and different purposes; if it had, it would have been bad on demurrer to so much of the new assignment; and if it had contained that averment alone, viz. that all the trespasses in the plea were committed for a different purpose, it would have been bad altogether, for then the replication and new assignment would have contained two answers to the same trespasses mentioned in the plea; one, a denial of the truth of the several matters comprised in the traverse, *absque residuo*; another, that the same trespasses were done for other purposes. And it was on this ground that the replication and new assignment were held to be bad in the case of *Cheasley* v. *Barnes* (10 East, 73), besides its being objectionable on another ground, which I propose to consider afterwards, viz. that the purpose could not be inquired into at all. If there had been a demurrer to *this* new assignment, the answer would have been, that the plaintiff meant—as he had a right to do under this declaration, which is not for a single trespass—to insist on other trespasses, committed at other times, and unconnected with the writ of execution, and not then attempted to be justified, and to apply the declaration, which contains an averment of trespasses committed on divers days and times, to such other trespasses; and such answer would have been a good one. The new assignment would, therefore, have been good on demurrer. And as the defendants must clearly have the power of objecting *at some time*, it follows that it was open for them to contend on the trial, that the plaintiff had no right to give in evidence, under this new assignment, that the entry justified by the plea, as having [461] been made by virtue of the writ, was made for a different purpose; and that was the first time at which it was competent for them to take the objection. It is also clear that the part of the new assignment which relates to excess is inapplicable to the evidence offered; the excess alleged appearing by the record to be the use of excessive and unnecessary force and violence. It is clear, therefore, as it seems to me, that the new assignment will not authorize the reception of the proposed evidence. And it is to be observed, that it is on the ground of the new assignment only that the Court of Exchequer Chamber decided that such evidence was admissible in the present case, as reported in 4 Bingh. 729.

The question, therefore, is reduced to this, whether on the general traverse of the residue of the cause such evidence is admissible? This replication *admits the judgment and the writ;* and, therefore, I conceive it to be clear, that the party so admitting cannot say there was, in point of law, no judgment and no writ. If by the terms "colour and contrivance," in the question submitted by your Lordships, it is meant to be suggested that these were fraudulent and void, and supposing even that the sheriff was a party to the fraud (which the evidence offered does not prove), I conceive that such fraud should have been replied specially, in avoidance of the judgment and writ.

Supposing then the judgment and writ to be valid, which I think the pleadings admit, the question is, whether upon this traverse, the plaintiff can be permitted to show, that the defendants did not enter under the writ, and in execution of it, but that they entered nominally under the writ, but in reality, under a different claim. This is a question of some nicety and difficulty. But, upon the best opinion I can form, I must say that it appears to me he cannot; and that [462] there should have been a special replication, in order to have enabled him to have done so. The plea, as shaped in the question proposed by your Lordships, does not justify the taking of the plaintiff's goods, nor does the plea in the case argued at your Lordships' bar; but it goes on to state, that the goods of A. B., which were taken, were sold; and the plea upon the record in this cause also states that part of the money was levied by the sale of the goods, and paid over to the execution plaintiff. In order to make the question clearer, I shall consider how it would have been if the plea had not stated the sale of the goods; and afterwards, whether the introduction of that averment makes any difference. Supposing the plea to have done no more than state the judgment, the writ, the delivery to the sheriff, that there were goods in the house liable to be taken under the execution, and that the Defendants entered the house to seize, and did seize, the goods under the writ, the question is, what the traverse *absque*

residuo causae puts in issue? It certainly puts in issue the delivery of the writ to the sheriff before the seizure, the existence of the goods of A. B. in the house, liable to be seized under the execution at the time of the entry, and in this case, it may be, the seizure also: does it put in issue the intention and purpose which the defendants had in making the entry? This is precisely the same question which would have arisen if the delivery of the writ and the existence of the goods in the house had been admitted, and the replication had traversed, without any special inducement, the entry so made under, or in the usual language of pleading, *under and by virtue of*, the writ. Now I take it to be a perfectly clear and settled law, that if a man has a legal authority, by writs or otherwise, to do all that he does, it is quite immaterial whether he intends to use that authority or not, or even [463] declares that he does not intend to use it. If he is authorized by a writ, or in any way, to do a particular thing and he does it in the manner in which he is authorized, he does it by *authority of the writ*, or, which is the same thing, "*under, and by virtue or by force of*," the writ. One of the earliest authorities is in Fitz. Avowry, 232: "If a man take a distress for one thing, still, when he comes and pleads, he may avow for whatever thing he pleases." And in *Groenvelt* v. *Burwell* (1 Lord Raym. 454), Lord Holt refers to this case, and says, the single question is, whether he had *good authority at the time of the arrest;* as if a man distrain his tenant for that which he cannot justify, but at the same time rent is in arrear, he may avow for the rent in arrear, and he is not obliged to avow for that for which he took the distress, nor can the plaintiff traverse the taking for the rent in arrear, but can only plead in bar to the avowry, *riens in arrière*. So, he says, referring to the particular case, "The plaintiff cannot say that Cole did not take him by virtue of the good warrant, for if he had such a warrant in his custody at the time of the arrest, he was arrested by it." So, in the same case (12 Mod. 386; and in Comyn's Rep. S. C. 78), Lord Holt says, "It is not what he declares, but the authority which he has, which is his justification." In *Crowther* v. *Ramsbottom* (7 T. R. 657), Lord Kenyon says, "I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was mentioned. If he can show that he had a legal justification for what he did, that is sufficient. A man may distrain for rent, and avow for heriot service." He goes on to say, "Now here it appears that the defendant was justified, under the process of the [464] County Court, in entering on the plaintiff and taking his goods, in order to compel an appearance, and, therefore, the question ought *not* to have been left to the jury to say whether they entered for that or for some other cause;" and Lawrence, J., gave the same opinion. It is to be remarked, that in this case, there is the clearest evidence that the defendant entered, not for the purpose of distraining to compel an appearance, but to compel the payment of a debt, under colour of process; it even appeared that he kept the goods seized for four or five days after the tender of the appearance money; and yet it was held that the replication admitting the writ, and traversing the residue of the cause, did not put in issue the question, whether the goods were seized "by virtue of the precept." It appears to me, therefore, that these authorities clearly establish the general proposition, that if a man is authorized by law to do the act he does, he is authorized in doing it, whatever his object or intention may be at the time he does it; and therefore where a sheriff has a writ, authorizing the seizure of certain goods, and he seizes those goods, he has a right to say, in point of law, that he seized under the writ.

But it is contended, that there are authorities which show that an averment that a fact was done by virtue of a writ, or in technical language, *a virtute cujus*, is traversable, and that therefore it might properly be put in issue in this case; and it is true that there are such authorities; but they are all cases in which the traverse included some matter of fact, or in which the question raised by it was, whether the writ really *authorized* the act, and not what the intention or purpose of the party having the writ was; and in all, the inducement to the traverse showed that the meaning of it was, not to put in issue a matter of law, but the [465] question of fact, whether those circumstances existed which were necessary to make the writ a sufficient authority to do the act justified. Thus, in *Beale* v. *Simpson* (1 Lord Raym. 408), the principal authority on this subject, which was an action against a bailiff of a liberty for an escape, the plea was, that the debtor was carried from the prison of the liberty of Westminster, under a *habeas corpus*, issued in Hilary, returnable

in Trinity, and delivered to the defendant before the escape. Replication pleads by way of inducement, that another *habeas corpus* was issued in *Hilary, returnable in Easter, and after the return of that writ*, and not before, the debtor was taken out of prison and brought to Westminster, and then the defendant, by covin, procured another writ, tested before, and returnable in Trinity Term, which was delivered to the defendant after the debtor was so brought, and not before; by virtue of which last writ, the debtor was brought into Court, and then committed to the Fleet; and concluded with a traverse, without this, that the defendant, by virtue of the writ in the plea mentioned, took the body of the debtor out of the prison of the liberty and carried him to Westminster, as averred in the plea. Now the majority of the Judges in this case were of opinion that the traverse was good, as it involved matters of fact; and Powell, J., mentions the removal from prison as one; Treby, C. J., *contrà*. But it does not involve the question of the intention of the defendant when he removed the debtor; it involves the question, whether the debtor *was* taken from the prison; also the question, whether the writ in the plea mentioned really did authorize the removal, and it did not, certainly, if it was issued and delivered to the sheriff after the removal. In the case put by Powell, J., the same observation applies. The case is this: If two writs be delivered to the sheriff against A., one at the [466] suit of B., returnable first return of Hilary, another at the suit of D., returnable the last return of the same term; and D. procures a warrant on his writ, upon which A. is arrested after the return of B.'s writ, and then gives a bail-bond for his appearance; and in a suit upon this bail-bond A. pleads that he was arrested upon the suit of B., returnable the first return of the term, and that he gave the said bail-bond after the return of the writ, by which it was void; the sheriff replies the other writ at the suit of D., and that A. was arrested; and *absque hoc* the arrest was by virtue of the writ of B.; there it is clear that B.'s writ did not authorize the arrest at the time it was made and the taking of the bail-bond.

In *Foster* v. *Jackson* (Hob. 52), where the plea to a *sci. fa.* on a judgment against executors was, that the original defendant was taken by the sheriff by force of a *ca. sa.*, the replication was, that the sheriff did not take by virtue of the *ca. sa.* It is clear the taking is involved, and probably also the existence of the writ itself, as well as its delivery to the sheriff; and besides, the question there, arose, not on demurrer to the replication, but after verdict. In the case of *Bennet* v. *Filkins* (1 Saund. 20), the traverse (which, however, was objected to by Saunders) is good on the same ground.

The result of these authorities is that the *virtute cujus* may be traversed where it involves matters of fact, and the question whether the writ did or did not authorize a particular fact, that is, whether those circumstances existed which gave it authority. But it is not traversable where it involves a mere matter of law; and if a man has the authority of a writ, and does the act authorized, and no more, it is a matter of law that he is justified in the act, whatever the intention may be. An averment that the act was done under and by virtue of the writ, [467] is equivalent to an averment that it was done by the authority of the writ, or in other words, that the writ authorized the act to be done. If, indeed, the authority of the writ be not pursued, but some act be done by the party who has it, *inconsistent with its authority and an abuse of it*, then the law adjudges by the subsequent act *quo animo* the party did the thing complained of, and the defendant will derive no justification from the authority which he had: *Six Carpenters'* case. But it is to acts done, and not to declarations and intentions, that the law looks; 3 Rep. 26. a.; for the law doth respect deeds, but words without acts, are not in this case regarded by law; and Lord Coke instances a case of distress for one thing and avowry for another.

But it is quite clear that all acts done which make the party unjustifiable under the authority of the law, and a trespasser *ab initio*, cannot be given in evidence under the general traverse, but must be specially replied: 1 Saunders, 300, b. *n.* g; *Dye* v. *Leatherdale* (1 Wils. 20); *Taylor* v. *Cole* (3 T. R. 292; 1 H. Black. 555); *Cundry* v. *Feltham* (1 T. R. 338).

If acts done, by which the *intention* of the party is less unequivocally demonstrated, cannot be given in evidence under the general traverse, why should other more equivocal proofs of the intention from declarations be admissible? In truth, looking by way of illustration to the evidence offered on the trial, which appears by

the bill of exceptions in the case itself, the strength of the case is, that the goods were delivered over to Hopley and Lingham, the execution creditors, by the Defendant the sheriff. This is an act done, which is a strong, and indeed the only evidence of Defendant's intent and purpose; and surely this, upon the sup-[468]-position of the state of the pleadings on which I have been arguing, is a matter which should have been replied.

From the reasons which I have above given, I conceive it to be clear, that a man, whatever his purpose may be in acting according to the authority of a writ, is justified by it, *if he acts according to it;* but if he does an act inconsistent with its authority, he is no longer justified by it, but is either a trespasser *ab initio*, or is liable to another action, according to the nature of the inconsistent act so done. In the present instance, therefore, if the Plaintiff had replied that the goods were delivered up by the sheriff, it would have been a good answer, but it is no answer as a proof of the *intention* of the Defendants under the general traverse.

I have so far argued the case on the supposition that the plea justified the trespass to the house, by the statement of the writ, and delivery to the sheriff, and seizure of goods in the house liable to execution, and omitted all mention of the subsequent sale or levy, and payment to the execution Plaintiff.

The next question is, whether the averment of the sale or levy, or both, make any difference. Now it is to be observed, that the plea does not justify seizing the Plaintiff's goods, *but only the entry into the Plaintiff's house;* and the question is, whether the unnecessary averment that the goods had been sold, etc. is involved in the issue that the Defendants committed the trespasses without the residue of the cause alleged in the plea. I take it to be clear, that the plea need have stated no more than the judgment: in the plea by the creditor, the writ, and entry under it, and the seizure of the goods of A. B. under the writ,—if indeed even that was necessary in the pleas by both,—and that if it had omitted to state that the goods had been sold, it would not have made any difference; and it is a general rule [469] in pleading, that an unnecessary averment, if capable of being separated without injury to the sense, need not be proved. That so much of this plea as relates to the *sale* and *levy* may be so separated admits of no doubt. Suppose that, under these pleadings, the Defendants had never sold at all, but having really entered and seized in order to execute the writ, they had kept the goods unsold for want of buyers, would not the Defendants have been entitled to a verdict? and if so, it must be on the ground that the statement as to the sale is immaterial and may be rejected. I think, therefore, that the averment of the sale, in this case, is immaterial. But that is not the question proposed by your Lordships, whether it was necessary under these pleadings to prove the sale of the goods and payment of the money. The question is a different one; and I feel satisfied that it was incompetent for the Plaintiff upon the pleadings stated in your Lordships' question to give evidence that the acts of the Defendants were not really done under and by virtue of the writ, but for another purpose, under another claim, and that the writ, and proceedings under it, were a mere colour and contrivance to get possession of the goods.

Mr. Justice Gaselee: Having attentively considered the question put by your Lordships to the Judges in this case, I continue of the opinion in which I concurred in the Court below, that it was competent by law on these pleadings for the Plaintiff to show at the trial, in maintenance of his action, that the acts of the Defendant were not really done in execution of the writ, but for another purpose, under another claim, and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods.

The difference between this case and those of *Groen*-[470]-*velt* v. *Burwell* [1 Ld. Raym. 454], and *Crowther* v. *Ramsbottom* [7 T. R. 657], which are principally relied on by the Plaintiffs in error, is so fully stated by the late Lord Chief Justice of the Court of Common Pleas, in giving the unanimous judgment of the Court of Exchequer Chamber, and by some of my learned brothers to your Lordships on this occasion, that it would be unnecessary waste of time to go over them again at any length. The main difference is, that in those cases what the defendants in their pleas professed to have done, they had done. Here it is not so. They have not executed the writ; they have not made the debt of the goods and paid it over to the creditors, but have delivered over the goods themselves, not in satisfaction of the

debt, as directed by the writ, but to the importers claiming under a bill of lading and seeking to avoid any other question of the payment of freight, or any other charge upon which any question might arise. This I am inclined to think also satisfies the new assignment. But it is said it was not competent to the plaintiff below to reply, and also to new assign, because, it is alleged, there is only one trespass in the declaration; and for this is cited the case of *Cheasly* v. *Barnes* (10 East, 73). Upon referring, however, to the statement of the declaration in the questions put by your Lordships, and also to that contained in the bill of exceptions, the trespasses are in both charged to have been committed *diversus diebus et vicibus*, in which case it is admitted the plaintiff may reply and new assign, and although the precise terms of the new assignment are not stated, enough of it is set out to show that it states the plaintiff to have brought his action not only for the trespasses in the pleas mentioned, and thereby attempted to be justified, but also for that the defendant committed **[471]** trespasses at other times, and on other occasions, and for other purposes; under which, supposing it to be held that the seizing of the goods is justified under the pleas, the afterwards delivering them over to the defendants below instead of making the debt of them and paying the money over to the creditors, may be given in evidence; but admitting it to have been wrong to have replied and also new assigned, it seems to me that as the defendants below have not demurred, it is now too late to take advantage of the duplicity. If I am at all right as to the first point, the question as to the new assignment is immaterial.

Mr. Justice Littledale: On considering the question stated by your Lordships, for the opinion of the Judges, I felt a difficulty in giving an answer to it.

The action is brought for breaking into the plaintiff's house and taking his goods; and the justification is under a writ of *fi. fa.* to take the goods of A. B. Generally speaking, the Plaintiff's goods could not be taken under an execution against the goods of A. B. But I must assume that the plaintiff has something to do with the goods in such a way as that they may be called his goods; and also that the property of the goods is in A. B. and that they are liable to be taken in execution absolutely; because if the plaintiff had such an interest in them as that they could not be taken in execution absolutely, but only subject to any claim which he might have either by the goods being let to him, or pledged, or pawned, with him, or by having a lien upon them; then, though the goods might have been seized *pro forma* they could not be removed, and the defendant's plea of justification would fail altogether. And then, on the other hand, if the goods were the property of A. B., liable to be taken in execution, the plaintiff would appear to have nothing but the possession of the **[472]** goods, and could not maintain an action against persons who stand in the place of the owner of the goods, and the sheriff might justify entering the plaintiff's house to take the goods.

But laying aside these considerations, the first point I notice is the allegation of excess. It does not appear that any excess was proved, and it forms no part of your Lordships' question. The next point I notice is, how far the new assignment bears upon the case; and as to that, I think a new assignment is not applicable to it. In case of a single trespass in the declaration, and a plea justifying it, the plaintiff cannot both reply and new assign, as that would be a double answer to the plea; *Cheasley* v. *Barnes* (10 East, 73); *Franks* v. *Morris* (10 East, 81, n.); in the notes to that case; and *Taylor* v. *Smith* (7 Taunt. 156). But in the present case the trespass is laid on divers days and times; and therefore, both in point of form as to the pleading, the plaintiff might new assign, and might also at the trial give in evidence trespasses committed on other occasions, and for other purposes than are alleged in the plea. Now the occasions and purposes mentioned in the plea are the acts done in executing the writ of *fi. fa.*, and upon a denial and traverse of the facts stated in the plea, the plaintiff may show that the defendants did not do the acts complained of in executing the *fi. fa.*, for that is a part of the issue raised by the replication. What the plaintiff would propose to give in evidence under the new assignment, of other occasions, and for other purposes than those mentioned in the plea, is, that the acts of the defendants were not really done in execution of the writ, but for another purpose, and under another claim, and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods. **[473]** It appears to me that that is the same thing as the traverse raised

by the replication; and more properly raised in that than by making a new assignment (see *Oakley* v. *Davis*, 16 East, 82). In fact, the whole is one entire act, and may be treated as one trespass, though different things were done on different days. I think, therefore, that the plaintiff could not maintain his action by resorting to the new assignment.

And in answer to your Lordships' question, as far as arises upon the plea and replication, I think that if the evidence was to prove that the goods were never seized in execution at all, then the plaintiff might show that the acts of the defendants were not really done under or in execution of the writ, but for another purpose, under another claim, and that the writ and proceedings under it were a mere colour and contrivance to get possession of the goods. But if the goods were once actually taken in execution, then I think that evidence would not be admissible.

With regard to the first part of what I have stated as my opinion, I assume, though your Lordships' question does not so state, that the plea alleges that the goods in the plaintiff's house were *liable* to be taken in execution, and that such was the fact; and then the other general allegation in the plea which comes under the traverse, *without the residue of the cause*, is, whether they *were* taken under the writ: and that, I think, is a material point of traverse. At common law the *fi. fa.* had relation to the teste, and bound the defendant's goods from that time, so that if the defendant had sold the goods, they were liable to be seized in execution. This was altered by the statute of frauds, which enacted, that the property should be bound from the time of the delivery of the writ to the sheriff: the meaning of that is, that after such delivery, if the defendant make an **[474]** assignment of the goods, the sheriff may take them in execution. But neither before nor since is the property of the goods altered, but continues in the defendant till execution executed; the execution is not executed till actual seizure under the writ, and till such seizure, in case of an act of bankruptcy, the assignees would have a preferable claim to the judgment creditor. But if the mere delivery of the writ to the sheriff was sufficient to constitute a seizure, then the inquiry at *Nisi Prius* which is now made, whether the seizure or act of bankruptcy was first in time, would be changed to whether the delivery to the sheriff or the act of bankruptcy was first in time.

But it has been argued that the *virtute cujus* is not traversable, and I admit, that where the words, *pretextu*, or *per quod*, introduce a consequence or inference of law from the preceding matter, they are not traversable, but that the preceding matter alone is so.

Many cases are referred to, as to that position, in the notes to 1 Wms. Saunders, p. 23. In the case of *Bennet* v. *Filkins*, Saunders, who was a counsel for the defendant, thought that the plaintiff would have objected to the traverse, because it was "without this that Kingswell was in prison by virtue of the warrant," and he said, that *by virtue* ought not to be traversed. And so also in *Greene* v. *Jones* (1 Saund. 298), where the defendant had shown that a bill of Middlesex was sued out, *per quod* the sheriff made his warrant, and so he had not alleged any thing traversable except the *per quod*. And the Court seems to have thought that the *per quod* was not traversable. And in the report of this case in 2 Keble, 607, the Court agreed that *virtute cujus* is not traversable, but only the issuing the writ, or, that he had no warrant. In *Beale* v. *Simpson* (1 Ld. Raym. 410), Treby, **[475]** C. J., refers to this case of *Greene* v. *Jones*, as having decided that a *per quod* or a *virtute cujus* is not traversable. And he adds, "When one says that such a thing was done by virtue of a writ, it is meant by authority of the said writ, by operation of law, without any ingredient or mixture of matter of fact, and a mere matter of law is not to be traversed and tried by a jury." And he afterwards adds, "The *virtute cujus*, *per quod*, *pretextu*, or *vigore cujus*, introduce a consequence of law only from the matters of fact before stated." And then he refers to several authorities which are stated in the report, where it is argued that the *virtute cujus* never introduces any new matter, but only collects the matter before. Nevill and Blencowe, Js., agreed with Powell, J., who had before delivered his opinion, that, generally, *virtute cujus* is not to be traversed, containing matter of law, but when it is mixed with fact, then it may be traversed; and in that case those three Judges held, against the opinion of Treby, C. J., that the taking out of prison was traversable. In *Foster* v. *Jackson* (Hob. 52), the traverse was allowed; but that was after verdict, and

therefore does not so much bear upon the point. In *Groenvelt* v. *College of Physicians* (12 Mod. 386; 1 Ld. Raym. 454; Comyn's Rep. 76), the traverse was, that the plaintiff was not arrested by virtue of the warrant stated in the plea, and that traverse was held bad. This case of *Beale* v. *Simpson* (1 Ld. Raym. 410) appears to me to unravel the whole of the mystery as to the *virtute cujus* and similar expressions not being traversable; that the reason is, that it only collects the matter alleged before, and draws a conclusion from it, and then being matter of law, it is not traversable. But where it is mixed with matter of fact, there it is traversable. Now, in the present **[476]** case, if the law were that goods are to be considered as taken in execution by the mere delivery of the writ to the sheriff, then I entirely agree that the allegation, by virtue whereof the sheriff seized the goods in execution, would be an inference of law, and, therefore, not traversable. But as I am of opinion that the delivery of the writ to the sheriff does not in itself constitute a taking the goods in execution, I think the seizure of the goods, by virtue of the writ, is not a matter of law, but is a matter of fact, whether the sheriff seized by virtue of the writ or not; and, therefore, is traversable.

I may remark, that if any particular technical effect is supposed to be given to the words, "by virtue whereof," they are not a necessary allegation in the plea, and may be treated as surplusage. It would be sufficient to allege, after the making the warrant, that the bailiffs took the goods in execution. This expression, however, although to avoid the *virtute cujus*, comes really to the same thing; and the point in this part of the argument is, in effect, whether the delivery of the writ to the sheriff, in point of law, amounts to a seizure of the goods in execution, so as to say that the making of the seizure in execution, or under the writ, or similar language, is matter of law; if it does not, then it is matter of fact and traversable.

On the second point, I think if there was once an actual seizure that was an execution executed, and the evidence in your Lordships' question was not admissible. I do not think it can be inquired into what motive the defendant had for suing out the writ. If there was a valid debt and judgment, he had a right to sue out a writ of execution; and though his object might be by means of that to get possession of the goods, which he could not otherwise so easily have done, and thereby to acquire some benefit for himself which he could not have **[477]** had but for the writ, I do not know why he cannot make use of a lawful proceeding to acquire that advantage. And that such motives and objects are not enquirable into, sufficiently appears from *Crowther* v. *Ramsbottom* (7 T. R. 65), in which I entirely concur, if the writ be once executed.

The nature and object of the other purpose, and the claim, is not stated in your Lordships' question; and I am not at liberty to refer to the bill of exceptions, but must confine myself to the questions submitted to the Judges. But it does not appear from the question that the ulterior object he had in view was unlawful; and, therefore, if he execute a lawful writ, and it does not appear that his ulterior object was for an unlawful purpose, the only detriment that the plaintiff could sustain is, that the defendant has a better means of enforcing his claim. I do not see what damage, in point of law, the plaintiff has sustained.

But then it is said, though the mere delivery of the writ to the sheriff may not amount to execution of the writ, yet if the same person who is sheriff seizes the goods from quite a different cause from any thing connected with the writ, and which he shows to be different, both by his words and acts, yet, nevertheless, that is, in point of law, a seizure under the writ; and if an action of trespass be brought against him for the seizure, he may treat that seizure as a seizure under the writ, and justify accordingly. And several cases are cited, which, it is said, show the law to be, that if a man has two authorities to take goods, and he take professedly under one, he may afterwards justify in trespass, or avow for the other. In *Butler* v. *Baker* (3 Rep. 26, a), it is said, that if a man takes a distress for one thing, yet when he comes into a court of record he may avow for what thing he pleases; for which is cited Fizt. Abr. Avowry, 232. And so in an anonymous case in 2 Leon. 196, **[478]** A. distrains, and being asked for what cause he distrains, he assigns a cause which is not sufficient, and afterwards an action being brought against him, he may avow the distress for another cause. In *Groenvelt* v. *College of Physicians* [12 Mod. 386; Com. Rep. S.C. 78], it is said by Lord Holt, in giving judgment of the Court, "Suppose one has a

legal and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one, for it is not by what he declares, but the authority he has is his justification." And then he goes on, what I have above mentioned from 3 Rep. 26 a, as to the distraining for one thing and avowing for another. In *Crowther* v. *Ramsbottom* (7 T.R. 654), Lord Kenyon repeats what I have before mentioned, as to distraining for one thing and avowing for another; and he adds, that it appears the defendants were justified under the process of the County Court in entering upon the plaintiff, and taking his goods in order to compel an appearance, and therefore the question ought not to have been left to the jury to say whether they entered for that or for some other cause: and Mr. Justice Lawrence quotes what I have above mentioned from Lord Holt, and adds, it was not essential to inquire what the defendants said when they entered and seized, but only whether they had in fact a legal warrant to justify them.

These authorities are certainly very difficult to grapple with. I do not mean to say they are not law; because so old an authority as that is from Fitzherbert, continued down to Lord Coke and Leonards, and further continued to a more modern time, in *Groenvelt* v. *College of Physicians*, and again recognised and confirmed in *Crowther* v. *Ramsbottom*, I must either subscribe to, or say they are not law; or distinguish them, so as to be able to reconcile the opinion I am now delivering.

I think that these cases *are* law; but I think the rule [479] should be confined to those cases where the seizure has been made under the process of the law; and then, when a man seizes, where he has two rights of seizure, of goods or of the person, either under the process of Courts, or by distress as to goods, he may be taken to have seized or imprisoned under all the different authorities which he has at the time, and when he comes to justify in trespass or avow in replevin, he may use whichever of the authorities he thinks proper; and that rule would reconcile all the cases as to distraining for one cause, and avowing for another; and so also in *Groenvelt* v. *College of Physicians*, the rule laid down may well apply, because if a sheriff has a man in custody at all, he is, as a matter of law, in his custody, in all actions in which the sheriff has any process of detainer against the person; and therefore, if he have his custody by operation of law, the sheriff may justify under any process which he has against the party; and it is quite evident from what is said in giving judgment in that case, that there was another writ or warrant besides, and that was the subject of the traverse. And in all these cases lastly referred to, there were two authorities; and, therefore, they fall within the restriction of the rule. In *Crowther* v. *Ramsbottom* [7 T.R. 654], however, there was only one authority, and yet Lord Kenyon and Mr. Justice Lawrence apply the same rule of law; but then in that case it was quite clear, that there was a seizure under the process of the Court, and that process was executed, and therefore the verdict was wrong, and there ought to be a new trial; and it very well might be, that if he seized under the writ, it should not be inquired into what his object was, whether to compel an appearance, or to compel the plaintiff to pay the debt and costs, and therefore, if he ever executed the writ, the law would say what was the effect of that; and it was not compe-[480]-tent to inquire what his object or motive was in executing it. And, therefore, I admit, that that case may, in a certain degree, appear to militate against my opinion, because that opinion is only that the proposed evidence is admissible, to show, in fact, whether the goods were seized under the writ or not. But that was not the point there, which appears to be, as to the object he had in view when he executed the writ.

I may here notice, that some cases have occurred where two writs of *fi. fa.* have been delivered to the sheriff at the suit of different plaintiffs at different times, and the sheriff has seized under the second writ first, and questions have arisen as to the right of the plaintiff, under the first writ, to priority, and as to the liability of the sheriff; as *Smallcombe* v. *Buckingham* (1 Ld. Raym. 251), *Hutchinson* v. *Johnson* (1 T.R. 729), *Rybott* v. *Peckham*, in the notes to the same case, *Payne* v. *Drewe* (4 East, 523), and *Jones* v. *Atherton* (7 Taunt. 56; 2 Marsh. 375), in which last case, Gibbs, C. J. says, "The writ which first comes to the sheriff's hands must have priority, which shows that the second writ is to be considered as operating in favour of the first, and that when the sheriff has a writ in his office, though he issue no warrant on it, if he afterwards get possession by any other means, professedly, perhaps, under another

writ, he must be taken to hold the goods under the former." In all these cases, there was an actual seizure under one writ or the other; and though in the last case, Gibbs, C. J. uses a very general expression, that if the writ be in the office, and the sheriff get possession of the goods *by any other means*, that must be taken to be in his character of sheriff, and not, as in the present case, under a claim, which, by your Lordships' question, I take to be wholly unconnected [481] with any legal process; this case falls within what is my opinion, that the rule should be confined to cases where both the authorities are under the process of the Courts or a distress.

For the reasons before given, I am of opinion, that whether the goods were taken in execution under the writ, was a matter of fact to be inquired of by the jury, and the evidence which your Lordships have mentioned, was admissible in support of the negative of the issue.

Mr. Baron Bayley: The preliminary facts upon which the question from your Lordships to His Majesty's Judges is founded are these: An action of trespass being brought against a sheriff and another person, for entering plaintiff's house, and seizing and taking away his goods on divers days and times, the sheriff pleaded a justification under a writ of *fi. fa.*, issued against the goods of A. B., at the suit of the other defendant, averring that the goods of A. B. were in the house, and that he entered the house to seize, and did seize and sell them under the writ. The other defendant pleaded the same plea, with the addition of the judgment recovered by himself against A. B. The plaintiff replied, admitting the judgment and the writ, and traversing the residue of the cause; and also added a new assignment at other times, on other occasions, and also alleging excess. At the trial, it appeared that the sheriff had made a warrant to his officers, who entered the house, and continued therein until all the goods were removed, which occupied three or four days, and that the sheriff was indemnified by the other defendant.

Upon this statement, the question your Lordships have proposed is this: was it competent by law, upon these pleadings, for the plaintiff to show at the trial, in maintenance of his action, that the acts of the defendant [482] were not really done under, or in execution of the writ, but for another purpose, under another claim; and that the writ, and proceedings under it, were a mere colour and contrivance to get possession of the goods? And I am of opinion that it was.

There are three modes in which a plea of justification can be answered: first, by confessing the material facts it states, and by the introduction of additional facts, avoiding the effect the facts stated in the plea would otherwise have; secondly, by traversing all or some of the material facts the plea contains; thirdly, by new assignment. In the statement to which our attention is directed, the plaintiff has traversed and new assigned; and if the evidence offered was calculated to support either the traverse or the new assignment, it was competent in the plaintiff to give it. If it, that is, the evidence offered, is to be considered as confessing all the material facts stated in the plea, and introducing new facts in answer to the justification that plea would otherwise afford, it certainly ought not to have been admitted upon the traverse. We must see, therefore, what are the material facts stated in the justification; what, in the language of the traverse, is "the cause" alleged by the defendants for the trespasses they profess to justify. The trespasses the defendants profess to justify are, the entry into the house, and the seizing of the goods; and the grounds upon which the sheriff professes to justify them is, that he had a writ, commanding him to cause to be made of the goods and chattels of A. B. a certain sum of money, that there were goods of A. B. in plaintiff's house, and thereupon defendant, under and by virtue of the writ, entered the house to seize them, and did seize and sell them. The other defendant states that he had a judgment, upon which that writ of *fi. fa.* was founded.

Now, what are the material facts alleged in these [483] justifications? Has the sheriff stated enough when he stated the writ, and that there were goods in the house liable to be seized under it; or has the other defendant stated enough when he has added his judgment? Is it not essential that they should go farther, and state in fact that they did seize under it? Is there any instance in which such statement is omitted? Supposing nothing stated but the judgment and writ, and the fact that the goods were in the house, would it not have been an unanswerable objection that you have stated grounds which would have justified you, had you acted on these grounds:

but you do not allege that you *did* act upon them. Suppose the plea had omitted the *virtute cujus*, and had stated only that defendants afterwards, and while the judgment and writ were in force, had seized the goods, would not your plea have been open to a special demurrer, on the ground that it did not state that they seized *under* or by *virtue* of the writ? Is it a consequence that because I have a judgment and writ against a man, under which I might seize his goods, I really make the seizure under such judgment and writ? I may have a conditional bill of sale from him of those very goods, and may seize under that bill of sale; I may be consignee of the goods from him, and may take under bills of lading he has sent me. The fact, then, that the defendant *might* have seized, and would have been warranted in seizing under a judgment and execution, does not exempt him from the obligation upon a justification, to state that he *did* so; and, if so, the fact of having so seized is an essential part of the cause stated in his plea, and is liable to be put in issue, either by a general or by a special traverse. If the writ had been a *capias ad respondendum*, or other *mesne* process, and the sheriff had justified under it, or it was returned, he must not only have stated that he seized **[484]** under and by virtue of it, but he must also have stated that he returned it; *Freeman* v. *Blewitt* (1 Ld. Raym. 632). And why? Because the process will not justify him; he shall not be protected by it unless he shows that he paid a due and full obedience in acting under it; Salk. 409. So in *Middleton* v. *Price* (1 Wils. 17), where an officer justifies under process he ought to return, he *must show he has done all it was his duty to do;* and if he must show it, is it not a traversable allegation?

It is said, however, that to include a ***virtute cujus*** in a traverse is unwarrantable, and that the better opinion is, it cannot be done. Where a *virtute cujus* is a mere inference of law, drawn from premises previously stated, I agree it cannot be traversed; but where it is not a legal result, but a mere question of fact, I believe all the authorities are, that it may be traversed. If, for instance, you allege that A. was in custody of the sheriff, at the suit of B., and that C., who had a judgment against him, delivered a *capias ad satisfaciendum* against him to the sheriff, whereby he became, and was in custody of the said sheriff, at the suit of C., a traverse, that he *thereby* became in custody at the suit of C. would be clearly bad, because the law says, in such case, he does become in the sheriff's custody, at the suit of C.; and the traverse, therefore, would be the traverse of a mere matter of law. So, wherever a *virtute cujus* introduces a consequence of law only, from matters of fact previously stated, the consequence of law cannot be traversed, but the matter of fact must be the object of the answer. But where a *virtute cujus* introduces matter of fact, it may be, and continually is, included in a traverse. It was done in *Foster* v. *Jackson* (Hob. 52); the point traversed was, whether the sheriff took J. S., **[485]** and had him in custody, by virtue of a *capias ad satisfaciendum*. In *Bennett* v. *Filkins* (1 Saund. 20) where the point upon the pleadings was, whether defendant, when he gave a bail-bond was in custody under a warrant upon a writ returnable on a Friday, which was before the bail-bond was given, or upon a writ returnable on a Saturday, the day the bail-bond was given, the point traversed was, whether he was in custody by virtue of the warrant on the Saturday writ. And in *Beale* v. *Simpson* (1 Ld. Raym. 408), the question being, under which of the two writs of *habeas corpus* one B. had been taken out of the defendant's custody, the traverse was, that B. was taken out of defendant's custody by virtue of the former of the two writs, and this traverse was held to be well taken by Powell, Nevill, and Blencow, Js., against Treby, C. J. So much stress, however, has been laid upon the opinion of Lord Chief Justice Treby, that I think it right to show that it does not militate against the opinion I am humbly submitting to this House. Whoever will carefully attend to the opinions he delivered, will find that he does not put the case wholly upon the ground that every traverse, including a *virtute cujus*, is bad; for he admits the traverse in that case would have been good after verdict, and his objection rested, in part at least, upon the intricacy of that traverse, and the multiplicity of matter, that is, of fact and of law, which it contained; and he laid considerable stress upon the manner in which the case came before the Court, viz. upon special demurrer. The undue reliance, too, he places upon *Greene* v. *Jones* (1 Saund. 208), seems to me to diminish the weight of his authority, for he considers that that was a judgment in point, whereas there was no traverse there, only a *dictum* from Saunders, who was of counsel for the plaintiff.

That *dictum* was, [486] "that defendant had only shown that a bill of Middlesex had been sued out, *per quod* the sheriff made his warrant, so he has not alleged any thing traversable, except the *per quod*, which is not traversable." The cases therefore, of *Beale* v. *Simpson* [1 Ld. Raym. 408], and *Greene* v. *Jones* [1 Wms. Saund. 295 *n.*; S.C. Keble, 607], appear to me to furnish no reasonable grounds for saying that the including the *virtute cujus* in the traverse mentioned in your Lordships' question, affects the validity of that traverse, or prevents it from including the question, whether the sheriff seized *by virtue of the writ.*

Two cases, however, were mentioned at your Lordships' bar, which I think we are called upon to notice, viz.; *Groenvelt* v. *Burwell* (1 Ld. Raym. 457), and *Crowther* v. *Ramsbottom* (7 T. R. 654). In *Groenvelt* v. *Burwell*, the defendants justified an arrest under a sentence and warrant; the warrant directed the officer to take the plaintiff and deliver him to the keeper of the gaol of Newgate; and the plea alleged, that the officer did take him, *by virtue* of the warrant, and deliver him, with the warrant, to the keeper of Newgate, there to be detained, etc. The replication was, that the defendants took him of their own wrong, and not *by virtue* of the warrant. The replication, therefore, admitted, that the warrant had issued, that it was in the hands of the officer, and that what it required, viz. that the plaintiff should be delivered to the keeper of Newgate, had been effected under it. The defendants demurred, and the traverse was held bad: First, because had the plaintiff been arrested by the officer under any other warrant, he ought to have shown it specially; and, secondly, because though he had been arrested under any other warrant, he would *in law* have been arrested under every warrant the party making the arrest held at the time; and consequently was, *in point* [487] *of law*, arrested under the warrant stated in the plea. That traverse, therefore, would have referred to the jury what upon the pleadings was a mere question of law, and was, therefore, upon the distinction I have made clearly bad. In *Crowther* v. *Ramsbottom* [7 T. R. 654], the defendant justified seizing the cattle under a warrant upon a *justicies* to compel an appearance in replevin, and alleged that, the plaintiff having appeared, the cattle were returned. The plaintiff admitted the *justicies*, but traversed the residue of the cause. It appeared in evidence that when the defendant seized, *he had his warrant with him*, and showed it, and that he returned the cattle when an appearance was entered; but there being proof that he said, at the time he seized, he was seizing for a debt, it was left to the jury to say whether the defendant entered for the mere purpose of compelling an appearance, or whether for the purpose of compelling the plaintiff to pay the debt, and the jury found for the plaintiff. Now it was clear, that the defendant entered *under the warrant*; he had it with him and produced it, and the object the warrant was to answer, viz. to compel an appearance, was answered. If he had any ulterior purposes, viz. that of compelling payment of a debt, the pleadings were not calculated to raise that question. The only issue was, whether the residue of the cause stated in his plea, that is, having the warrant, and entering under it were proved. The verdict, therefore, was clearly wrong; and the Court could not do otherwise than grant a new trial. But it is upon some expressions that fell from the Court that stress is particularly laid in that case; and in that case Lord Kenyon says, "I never understood that a man was obliged to justify a distress for the cause he happened to assign at the time it was made; if he had a legal justification for what he did, it is suffi-[488]-cient; a man may distrain for rent, and avow for heriot service. Here it appears defendants were justified, under the process of the county court, in entering upon the plaintiff, and taking his goods in order to compel an appearance, and therefore the question, whether they entered for that or *some other cause*, ought not to have been left to the jury; the verdict therefore proceeded on a mistake of the law." Lawrence, J., the only other Judge who spoke, referring to *Groenvelt* v. *Burwell*, as in point, observed, "that the Judge in the case in question had left to the jury what in *Groenvelt* v. *Burwell* was stated to be immaterial. For it was not material to inquire what they said when they entered and seized, but only whether they had in fact a legal warrant to justify them." Now, all expressions are to be considered in conjunction with the facts of the case in which they are used, and in *Crowther* v. *Ramsbottom* there was no doubt, not only that the defendants had the warrant under the *justicies* at the time they seized, but that they seized under it, and enforced the *obedience that writ required;* at least there was nothing to show

they had repudiated the right to refer to that warrant, as the right on which they acted. The expressions, then, of Lord Kenyon and Mr. Justice Lawrence, taken in conjunction with the facts of that case, go no further than this, that whoever seizes another's goods, and has a right by warrant, which it is his duty to execute, so to seize them, and *applies that seizure to the purposes that warrant directs*, is not precluded by anything he says at the time of the seizure, from so applying them. But that does not bear, as it seems to me, upon a case where an officer does not apply the seizure to the purposes of his warrant, but leaves those purposes wholly unsatisfied. Upon this ground, therefore, that in [489] *Groenvelt* v. *Burwell*, and *Crowther* v. *Ramsbottom*, the warrant was ultimately pursued, and the thing it commanded was enforced, which was not the case here, it seems to me that those cases form no ground for impeaching the opinion that I am humbly submitting to the House. My opinion therefore is, that upon the traverse *absque residuo causae*, it was competent to the plaintiff to show that the acts of the defendant were not really done *under or in execution* of the writ, but for another purpose, under another claim, and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods; and that what the writ required, viz. to cause the debt for which the judgment was obtained to be made, was never effected or attempted: and this being my opinion, it is unnecessary to say anything upon the new assignment. I will only observe, that unless the plaintiff proves more trespasses than the plea, if unanswered, necessarily covers, he cannot both reply to the plea and new assign; he may do either, not both.

Lord Wynford (June 25): Your Lordships must feel grateful to the Judges for the trouble they have taken to examine into this intricate case. It is, however, only intricate or difficult on the point with respect to the pleadings; for with regard to the justice of the case, it is impossible that any man who has filled the office of Judge, I had almost said, that any man whatever, could for a moment doubt. I hope that after a short time your Lordships will not be troubled with more of these questions upon pleading; I hope that the bill now passing through the Legislature will be adopted, and that the Judges will be enabled to prevent in future the justice of the case from being defeated by any accidental error of form in the pleadings. If your Lordships [490] were to reverse this judgment, justice would be defeated by formal objections, arising on the pleadings, and every one must lament such a result. One of the learned Judges has said, that he could not refer to the statements in the bill of exceptions. That is true; questions are put by your Lordships upon the law of the case, and the learned Judge has truly stated that he could not say whether the plaintiff would be injured or not, for the Judges are not supposed to be informed of the particular facts of the case on which their opinions in point of law are required by this House. Your Lordships are under no such restriction; you may look at the bill of exceptions, and there you will see enough to convince you that the plaintiff in the Court below would be grievously injured if he was not held entitled to recover. One of the learned Judges has spoken of the judgment of a late Chief Justice in the Court below. My Lords, I am that late Chief Justice; I have already delivered a judgment in this case; and I now state, that if the opinions of a majority of the Judges were against me at this moment, I should do what on other occasions I have done, I should advise your Lordships to act on the opinion of the majority of the Judges and against mine. There would be no certainty in law if that course was not pursued. But I am happy to say, that a majority of the Judges concurred with the opinion I have formed five years since in the Court below. I am sorry that the case has been so long pending, and I hope that that evil will soon be remedied. The case has been decided in the Court of Exchequer Chamber by eight Judges; only one of that eight now remains to assist your Lordships; all the rest have either retired from the Bench or gone to receive the reward of their virtuous and useful lives. The case was in the first instance tried before Lord Tenterden, and his [491] judgment has been confirmed by eight Judges in the Exchequer Chamber. Four out of the five now consulted by your Lordships are of the same opinion, and but for the opposing opinion of one learned Judge, the judgment of thirteen Judges would have been unanimous. For that one learned Judge I have the greatest possible respect, so much so indeed, that if this was a question upon the merits or justice of the case, and that that learned Judge differed as he now does from the rest of his brethren,

I should not make the recommendation which I am about to make to your Lordships. His Lordship here stated the facts of the case, and then said; In my opinion there has been a dishonest and fraudulent attempt on the part of the defendants to possess themselves of these goods, and this attempt has besides been accompanied by an abuse of the process of a court of justice. If the goods were properly seized, it was the duty of the sheriff to sell them, and with the money thus raised to pay the sum for which the levy was ordered. Instead of that, Hopley and Lingham, who were the real parties (for the sheriff acted in ignorance of the facts and under the direction of these persons) conducted themselves as if they were the proprietors of the goods, and one of them swore that he was the importer. That is not dealing with the goods as the law would have dealt with them, and it is clear throughout that the only object in making use of the process of the law on this occasion, has been, to enable the defendants to cheat the plaintiff. It is not possible that any man can doubt what is the justice of the case. The plaintiff then is entitled to a verdict if there is no rule of law against him, and this brings me to consider the legal difficulties of the case. This is an action of trespass, in which the plaintiff states that the defendants entered his ship and unlawfully took his goods. **[492]** The defendants admit that they have taken the goods, but they say that it was under an execution against a person of the name of Thornton, to whom the goods belonged. But Thornton had assigned his possessory right in these goods to the defendants, in consideration of the defendants paying freight for them; they, however, think proper to treat them as the goods of Thornton, and they go on to allege, as a justification of the trespass, these important facts: [The noble Lord here stated the allegations of the return of the writ, the seizure, and sale of the goods, etc.] The plaintiff states, in reply, that the defendants committed the trespass in the introductory part of the plea mentioned, without the cause alleged, etc. The fact is, that the defendants sold the goods on their own account, and the sheriff received instructions from them, that if the goods did not fetch a certain sum, persons whom they mentioned were to bid for and buy them in. The chief difficulty here is, whether the *virtute cujus* is traversable. That question has been well explained in the cases cited. If the *virtute cujus* raises a mere inference of law, it is not traversable. That is a rule of good sense. But if under this form of words a question of fact is raised, that question can only be tried by those who, by the Constitution, are judges of the fact—by a Jury. The defendants say, that they were entitled to take these goods under the writ, and that all they did was done under the writ. It is true that they entered the ship by virtue of the writ, but they did not do all the other things by the same authority. The learned Judge to whom I have before referred has said, that what was done afterwards is not now in question upon these pleadings. I confess, my Lords, that I have my doubts upon that point. The sheriff had not done his duty when he had merely seized the goods. His duty required him to sell **[493]** them and to deliver over the money to the party at whose suit the writ issued. It was necessary for him, if he justified under the writ, to show that he had not partly, but wholly, done his duty under that writ. The defendants have themselves put the plea, raising that question of fact upon the record, and they have no right to object to the other party showing whether that plea is true or not. The cases in 12 Modern and in the Term Reports warrant this doctrine. I fully subscribe to those cases. If a man has a writ which affords him a complete justification for all that has been done, though he has not done it with the view of obeying the exigency of the writ, yet having that authority, his justification is made out. Suppose one man knew that another had committed felony, and should, for private reasons, indict that other; though his motives in doing so might be most malicious, he would be justified if he proceeded exactly according to the forms of law. In all the cases where the writ which the party has had, has been a justification for all that he has done, he has followed it exactly. If therefore, the sheriff was completely justified by the writ in all that he has done in this case, I should, though I might lament it, advise your Lordships to set aside the judgment. But he is not so justified. The writ told him to enter and sell. Did he? No, he seized the goods and handed them over to the party at whose suit the writ issued. Taking, as I do, this view of the case, it would be a waste of your Lordships' time for me to go further in criticising all the cases that have been quoted. If your Lordships concur with me, you will affirm the judgment of the Court below.

The next question is, whether your Lordships will add anything on the subject of costs. If it were possible that you could approve of the conduct of the parties in [494] swearing that this was their property, when they had seized it as the property of another; if it were possible that you could approve of any merchants attempting to get property by cheating others (I can use no softer term) out of goods, which, though they might be of trifling value in New South Wales, were not so in England; I say, if it were possible that any noble Lord could approve of such conduct, I should say nothing about the costs. But I know that none of your Lordships can do so. The country is indebted for the state in which its commerce is, to the confidence reposed in the integrity of British merchants. That commerce would be no longer what it is, if that confidence were impaired. I submit that it is fit, therefore, that in all the cases in which conduct appears to have been observed that is likely to have the effect of making men withdraw that confidence, your Lordships should mark your disapprobation of it. I say again, that if my learned brother Parke doubted upon the justice of the case instead of merely doubting upon the law, I should not ask your Lordships to do what I now propose. But he does not; and standing, therefore, as I do, upon the authority of Lord Tenterden, one of the most learned Judges that ever sat in a court of justice, and one whose love of strict and impartial justice was combined with a temper in its administration that no man ever exceeded; I say, standing upon his authority and on that of seven of the Judges of the Court of Exchequer Chamber, and of four of those who have now delivered their opinions to your Lordships, I think I may safely recommend you to affirm this judgment, with £200 costs.

Judgment affirmed accordingly.

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[495]

APPEAL

FROM THE COURT OF CHANCERY.

WILLIAM NICOL,—*Appellant;* Sir ROBERT WILLIAMS VAUGHAN, Bart. and others,—*Respondents.*

[Mews' Dig. v. 510; vi. 811; vii. 264; S.C. 7 Bli. N.S. 395; 2 Dow and Cl. 420; 5 Bli. N.S. 505; and see 1 Cl. and F. 49; 6 Bli. N.S. 104. See notes to *Nicol* v. *Vaughan*, 1 Cl. and F. 49. See also *Huguenin* v. *Baseley*, 1800; 14 Ves. 273; 1 Wh. and T.L.C. 7th ed. 247, and notes thereto; and *Rhodes* v. *De Beauvoir*, 6 Bli. N.S. 195.]

In a suit for administration of assets of obligors in a common money bond, the Master, under an order of reference made by consent, enabling him to inquire into the consideration and all the circumstances relative to the bond, reported that it was a voluntary bond, given as a bounty to the obligee. The representatives of the obligors, and the obligee, took exceptions to the report; the former alleging that it was a bond of indemnity, the obligee claiming it partly for money advanced, and partly for services performed. The Court below refused leave to withdraw the obligee's exceptions, and directed issues to try whether the bond was given for money and services, or as a gift, or for indemnity. This House on appeal reversed that order, and remitted the case to the Court below to decide these questions on the evidence before it. The Court below decided accordingly upon a new hearing, and declared the bond to be partly for counter-security, partly as gift for services. This House, upon appeal, reversed that decision also, and ordered the Master's report to be confirmed. The Court below subsequently, upon the hearing of counter-petitions, one presented by the representative of the obligee, praying payment of the bond and interest, the other by the representative of the obligors, praying for leave to institute a new suit to impeach the bond, on the ground that a gift from a principal to an agent was invalid in equity, decreed for such suit, and granted an injunction against any proceedings on the bond in the mean time. This House, upon appeal, reversed that decree, holding that, as

the respondent omitted to take advantage of any of the opportunities of raising that objection to the bond in the preceding inquiries, it was not now competent for him to harass the other party by a new suit, in which no new evidence could be produced.

This is the third appeal to this House between the same parties, from several successive decrees of the Master of the Rolls, respecting the consideration of a [496] bond, bearing date the 15th day of July 1815, in which Lady Essex Ker and Lady Mary Ker became jointly and severally bound to Mr. George Nicol, of Pall Mall, bookseller, in the penal sum of £24,000 conditioned for securing the payment of £12,000, with lawful interest. The Appellant is the son and legal personal representative of the obligee, who died in the early part of these proceedings. The Respondent, Sir R. W. Vaughan, is the surviving trustee and executor of the will of Lady Essex Ker, who on the death of Lady Mary her sister, intestate, in 1818, was left her heiress-at-law and sole next of kin, and also, by obtaining letters of administration of her estate and effects, became her legal personal representative, and died in 1819. Of the other Respondents, some are the coheirs at law of Lady Essex Ker, some her legatees or their representatives, and all are parties to suits instituted in the Court of Chancery in England, for the purpose of establishing her will and the respective claims of the parties to the real and personal property left by the Ladies Ker. There were also suits instituted between some of the parties in the Courts in Scotland, and in one of them Mr. Nicol obtained a decree on his bond, and a sum of money sufficient to answer the same was deposited in the Royal Bank of Scotland. The proceedings in those suits, and the circumstances relating to the bond, are stated in the report of the first appeal (2 Dow and Clark, 420), together with the judgment of this House, by which so much of an order of the Master of the Rolls, as directed issues to be tried to ascertain the nature of the consideration of the said bond, was reversed, with directions to remit the matter to his Honor to deal with it upon the evidence before him, instead of sending it to a jury (2 Dow. and Clark, 428, 429).

[497] In pursuance of those directions, the matter was again brought before the Master of the Rolls, and his Honor, by an order bearing date the 2d of December 1831, declared that the bond was intended, to the extent of £10,000, as a counter-security to Mr. Nicol, in respect of his joining the Ladies Ker, as a surety in a bond to Messrs. Coutts and Co., their bankers, for £10,000; and that to the extent of £2000 it was intended as a voluntary gift or bounty to Mr. Nicol.

That decision became the subject of another appeal to this House (Vide *supra* [1 Cl. and F.], p. 49), which was heard in July 1832, when their Lordships were pleased to adjudge, amongst other things, that so much of his Honor's order then appealed from, as declared the bond for £12,000 to have been intended, to the extent of £10,000, as a counter-security to Mr. Nicol for his joint engagement with the Ladies Ker to the Messrs. Coutts, be reversed; and that the Master's report of the date of the 21st March 1828, by which he had found that the bond was not a bond of indemnity, but a voluntary bond, given to Mr. Nicol as a bounty, be absolutely confirmed.*

* The Master, in that report, after setting forth the titles of the causes, and two successive orders of reference to him—by the latter of which he was to be at liberty to inquire into the consideration and all the circumstances relating to the bond, and the plaintiff, Sir R. W. Vaughan, was to be held at liberty to examine George Nicol upon interrogatories, and both of them were to be at liberty to examine any of the other parties in these causes, or witnesses, if necessary, relative to the said bond, and the said George Nicol was to be at liberty to exhibit interrogatories for his own examination,—proceeds to the following effect: "I have been attended by the respective solicitors for all parties, and the said George Nicol hath laid before me an answer and examination to interrogatories, allowed by me, exhibited by the said plaintiff, whereby he states that the exhibit B. (being the bond in question) was prepared immediately, or very shortly, before the day on which it bears date, by Messrs. Blagrave and Walter, solicitors, who were the solicitors of the examinant, and that the examinant employed the said Messrs. Blagrave and Walter to prepare the same, and he is not aware that such solicitors had ever been employed by Lady Mary Ker and Lady Essex Ker.

[498] The Appellant, and the Respondent, Sir R. W. Vaughan, subsequently presented counter-petitions to the Master of the Rolls, respectively entitled in the [499] causes pending in the Court of Chancery between the Respondents. The Appellant's petition prayed, that it might be referred to the Master to compute what was [500] due for interest on the bond, and that the same, together with the principal sum of £12,000 secured by it, might be paid to him by the said Respondent, or that [501] the Appellant might be declared entitled to receive the same out of monies set apart by order of the Court of Session in Scotland, in the suit instituted there, to [502] cover the amount due for principal, interest and costs of the said

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and he believes that they never had been employed by the said ladies, or either of them. And the examinant states, that he had for a long period, commencing from the death of John, late Duke of Roxburgh, the brother of the said ladies, in the year 1804, up to the date of the said bond, incurred much trouble and loss of time and considerable expense in the service and affairs of the said ladies, at their request and with their approbation, and had advanced and paid out of his own money various large sums of money from time to time to them, or for their use, and with their knowledge, which had never been repaid; and that no account was rendered by him to the said ladies of such expenses and sums; and with regard to some of his advances in money, memorandums or vouchers were taken by him at the time, but he kept no regular accounts with the said ladies at any time, and at the period of the execution of the said bond the whole of the memorandums and vouchers which he held for advances of money to the said ladies, were cancelled and destroyed in their presence, and no memorandum or voucher of any payment has been preserved by him; and the said examinant states that the said ladies intended by the said bond to remunerate the examinant for his said services, expenses, payments and advances, and to satisfy the debt of gratitude which they conceived them to have incurred to the examinant, as well as the desire which they entertained of manifesting their friendship towards him. And the examinant states, that the consideration given by him for the said bond, consisted of such payments and advances of money and services, so far as such payments and advances of money and services amount in law to a consideration. And he believes that the said bond was given to him for such reasons, and no other; and that the same was, so far as appears from what he has herein deposed, given to the examinant as a voluntary bond, and so far as appears from what he has herein deposed, given to him in satisfaction of such existing debt as aforesaid. And the examinant states, that previous to the preparation of the said bond, the same was frequently mentioned in conversation between the examinant and the Ladies Mary and Essex Ker, and that both the said ladies repeatedly desired and requested the examinant to get the said bond prepared, and that Lady Mary Ker, in the presence of Lady Essex Ker and of the examinant, proposed and fixed the sum, viz. £12,000, for which the said bonds should be given, and that such sum was approved by Lady Essex Ker. And the examinant states, that the obligations, both pecuniary and otherwise, under which the said ladies lay to the examinant, and their friendship, and the friendship of the said late Duke of Roxburgh for the examinant, were frequently mentioned in several conversations as the motives and reasons for their giving the said bond. And that such conversations did not, to the recollection of the examinant, pass in the presence of any person other than the examinant and the said two ladies, and he says he cannot more fully state the particulars of such conversations or when the same passed, and that, in fact, at the date of the said bond, money to a considerable amount, though far short of £12,000, was due from the said ladies to the examinant; for from the death of the late Duke of Roxburgh to the time of the execution of the said bond, when the said ladies were in want of money, they applied personally, or sent to the examinant for the same, and he has from time to time advanced what was needed by them, and such advances were sometimes made to the said ladies, or one of them, personally, and sometimes to other persons whose names the examinant cannot remember, on their behalf; and he states that he does not remember to which of the said ladies any of such advances was actually made, but the examinant always considered that his transactions with them regarded them both equally. And the examinant states, that on several occasions he did receive from the said ladies, or one of them, memorandums and

bond. The Respondent's petition prayed, that he might be authorized to institute a suit in the [503] Court of Chancery, for the purpose of impeaching the validity of the bond, so in effect declared by this House to be a gift without consideration ; (upon the ground, [504] that if a gift, its validity was questionable, on the principles of Courts of Equity, applicable to parties standing in the relation of principal and agent) ; and that the sum set apart by the Court of Session be secured to abide the event of the proposed suit ; or, as an alternative, that the Appellant might be restrained by a perpetual injunction from taking out execution on the bond, or putting the same in suit.

vouchers in writing for payments and advances made to them ; and that from time to time he received monies from them, or on their account, which were partly retained or applied by him towards repayment of what had so become due to him, but unquestionably not so as ever to extinguish the debt due to the examinant, although the account between them, if attempted to be taken, must have been involved in great difficulty and obscurity. And the examinant says he is wholly unable to state what was the sum due to him from the said ladies at the date of the bond, or state further than he has herein stated the particulars of such debt, or when advanced, or to whom or on what account, or in whose presence each such sum had been paid ; and he says, that for payments made to other persons, he frequently took receipts, not however, that he is aware, expressing that the same payments had been made by him out of his own money. And the said examinant states, that he has in his possession various receipts for money paid on account of the said ladies, but he is unable to distinguish which of such receipts are for sums in which the said ladies stood indebted to him at the date of the said bond. And he had frequently, as he believes, though he does not remember the particulars, made applications to the said ladies for money, in consequence of the advances which he had made for them, but, except as by the examination and by letters appears, he is wholly incapable to set forth what claim or demand, in respect of such debt as aforesaid, he had ever made against the said ladies, or either of them ; and he says, that he from time to time stated to the said ladies that he had demands upon them in respect of loans and advances of money, but not in respect of his services to them. And he states that he had performed such services from motives of friendship and regard, and never in any manner made any charge for such services and never expressed to either of them any expectation that they were to pay him for such services. And the examinant states that the said ladies did frequently previous to the preparation of the bond, speak to the examinant, (but not in the presence of any other person that he remembers), on the subject of there being money, on account of the advances and payments aforesaid, due from them to him, and they did express their sense of the obligation they were under to the examinant, as well for the said advances of money, as for the services he had rendered them, and expressed a desire to remunerate him. And the examinant states that he was in the habit of acting as agent for the said ladies, so far as transacting various matters of business for them from friendship and at their request, and gratuitously, and not as manager for them ; and he saith that he was in the habit of receiving as well as paying monies on their account, and that all the sums borrowed for their use for many years passed through his hands ; and he states that the reason why no account was made out or delivered or required, was, as he believes, that the said ladies were satisfied they were indebted to the examinant, but by no means intended to limit the amount of their bond by the amount of such debt, the existence of which constituted but one of the reasons for giving the said bond ; and he is wholly unable to set forth how much was considered as a gift and how much as the satisfaction of a debt, because the proportions were not ascertained ; and the examinant says that the said bond was at first proposed by the said ladies, or one of them, to be given for the sum of £10,000, and that the examinant offered no objection thereto ; and that Lady Mary Ker, not on the basis of any calculation, but of her free will, insisted that it should be for £12,000, which was consented to by Lady Essex Ker. And the examinant says that no person except the examinant was consulted by the said ladies, to the best of his belief, respecting the said bond, previously to the execution thereof ; and the reason was, that they had no solicitor whom they consulted about any of their affairs, except that they sometimes consulted Daniel Moore, esq.

Both these petitions were brought on for hearing before the Master of the Rolls (see *Earl of Winchelsea* v. *Garretty*, 1 Mylne and Keen, 253); and his Honor, by an order made on the 14th of February 1833, directed that the Respondent, Sir R. W. Vaughan, should be at liberty to institute a suit in the Court of Chancery for the purpose of questioning the validity of the bond, taking it to be a bond intended as a bounty or gift to Mr. G. Nicol, in pursuance of the judgment of the House of Lords; and that the Appellant, as the administrator of the obligee, should be restrained by injunction from receiving, out of the sum set apart by the Court of Session, the amount claimed to be due on the said bond.

Against this order the Appellant now appealed to this House.

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about some matters relating to their brother's will, and being of very retired habits, they seldom saw any person out of their own family except the examinant. And the examinant says that he never advised them to consult their solicitors (not understanding them to have any) or any other person with respect to the said bond, and that the propriety of taking any such steps never occurred to his mind, and if it had he should have had no objection whatever so to do. And the examinant says, that sometime before the bond was signed, the said ladies, or one of them, in urging him to accept said bond, stated it would be paid at some time; and he says that there was no arrangement or agreement, nor understanding between the said ladies, or either of them, and the examinant, that he should not call for the principal upon the said bond, or the interest thereof, during their lives; but the examinant spontaneously mentioned to them, on the occasion of their executing the bond, that he should not ask them to pay any interest during their lives; and the examinant says, that independently of the said promise, the nature of the friendship between him and the said ladies, precluded, as he believes, the thought of their being personally sued or arrested by the examinant, or being called upon for the payment of the principal and interest of the said bond, before the means of such payment should come to them. And the examinant says, that he does not recollect that he ever explained to them, or either of them, the effect of the said bond, or that they might be sued and arrested upon it; but that unquestionably they understood the nature and effect of it, and they needed no explanation thereof; and he says that the said ladies, or either of them, to the best of the examinant's remembrance and belief, never said or expressed anything relative to the said bond after the same had been given, except that they did both, as he recollects, express themselves happy and relieved of having, so far as lay in their power, rewarded his long and faithful services, or to that effect. And the examinant says, that the only reason, as he believes, of the same bond being dated and executed on the same day with the bond to Mr. Coutts for £10,000 in the said interrogatories mentioned, was that the said ladies did not easily bring themselves to do any matters of business, and therefore it was deemed expedient to have both bonds settled at the same time. And the examinant says, that he was present at the execution of the bond, in which he is the obligee, and that the same was executed on the day of the date thereof, at the house of Lady Essex Ker, and that the parties present were the said Ladies Mary and Essex Ker, and the examinant, and William Butler, the attesting witness to the execution of the said bond, who was at that time in the service of Lady Essex Ker, and is since dead; and the examinant says he believes that there were other persons residing with the said ladies in the capacity of servants, at the time when the said bond was executed; and he believes that no person was residing with the said ladies of a higher station than that of a menial servant, or in whom they placed any confidence, or were in the habit of imparting their affairs to. And the examinant says that it was not the object, nor a part of the object, of the said ladies in giving him the bond, to indemnify him against the payment of the bond to the said Mr. Coutts, in which the examinant had joined with them as a surety, or against any sums which the examinant might thereafter advance for their use. And the examinant says, that he had no indemnity against his liability upon the said bond; and he says that being aware that the said ladies were entitled to a large property, although not of considerable immediate income, he did not conceive he stood in need of any such indemnity. And he says that out of the sum of £10,000 which was secured by the said bond to Mr. Coutts, the prior bonds, in which the examinant had been surety for the said ladies, were discharged, and that the

[505] Sir Edward Sugden and Mr. Tinney, for the Appellant: This is the second time we have to complain that the Master of the Rolls did nothing in this matter but direct new litigation. There is not an instance known of three successive appeals to this House on the same point. Your Lordships have already reversed two former orders of his Honor. The tendency, if not the direct effect of this third order now appealed from, is to impugn the orders of reversal, and is a departure from all the former proceedings relating to the bond. One ground alleged for instituting a new suit, after the adjudication of your Lordships, which ought to be final and conclusive, is, that until the bond was by your Lordships' judgment established not to be a bond of indemnity, but a voluntary bond, the Respondents had not an opportunity of discussing its validity as a gift. But they had the opportunity and power to enter into a full examination of that question before the Master. They did not choose to do so; if they did, we had a full defence on that point.

Under the order of the Court of Chancery of the 28th of April 1827, the Master was at liberty to inquire into the consideration of the bond and into all the circumstances relating to it; yet by the report made in pursuance of that order, and bearing date the 21st March 1828, the Master did not find, nor did any of the parties then suggest, that the validity of the bond was questionable on the ground which is now for the first time alleged. The direct and express object of that order of further reference was to enable the Court to decide the question in dispute respecting the consideration of the bond, without the expense and delay of a new suit in equity. Under the first order of reference, Mr. Nicol, allowing, at the request of the Respondents, a stop to be put to his proceedings on [506] the bond in the Scotch Courts, brought his charge in respect of it before the Master in Chancery. The solicitors for the Respondents then raised the question of the consideration of the bond, alleging that it was a bond of indemnity to cover Mr. Nicol's engagement to Messrs. Coutts and Co. on behalf of the obligors; that was the only objection then made by them. The Master not feeling himself authorized to inquire into the consideration, the second order of reference was moved for by the Respondent, and Mr. Nicol con-

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examinant was not, to the best of his recollection and belief, at that time liable for the said ladies on any other accounts, and accordingly he says that the amount of his liability for the said ladies at the time when the bond for £12,000 was given, was the sum of £10,000 secured by Mr. Coutts' said bond of even date therewith. And the said examinant says that he kept the said bond for £12,000 in his own custody from the time when the same was placed in his hands till on or about the 20th of December 1819, when he lodged it with the house of Coutts and Co. as a security for the sum of £3000 then advanced and lent to him by Mr. Coutts; that beyond all doubt the said ladies understood by the effect of the said arrangement they were to pay both sums, and he knows that such was their understanding, because the bond for £10,000 was given by them for money advanced for them, and the examinant joining therein was considered as a matter of form, and for Mr. Coutts' satisfaction; but the bond for £12,000 was given by them upon their own proposal to secure to the examinant the sum of £12,000 and interest, for the examinant's own use and benefit as aforesaid."

After setting forth the further examination of Mr. Nicol, and several letters from him to the Ladies Ker, put in by the respondent, to show Mr. Nicol was not in a condition to advance any money of his own at any time, and in two of which, of dates prior to the date of the bond, Mr. Nicol writes, that "he dare not look near Mr. Coutts," and that, "he had for several months studiously avoided him, for not having followed his advice in taking a counter-security," the Master concludes thus: "And I find that the said Lady Essex Ker, by her last will and testament, bearing date the last day of September 1819, gave and bequeathed to the said George Nicol the sum of £2000 in the following words: 'To my friend George Nicol, for his services, I leave £2000.' And upon consideration of the said examination, the said letters, and the several circumstances hereinbefore stated, I am of opinion that the said bond under the hand and seals of the Right hon. Lady Essex and Lady Mary Ker, was not a bond of indemnity, but was a voluntary bond given to the said George Nicol as a bounty by the said Ladies Essex and Mary Ker, without any consideration having been paid or given by the said George Nicol for the same."

sented, and the order was accordingly made, and the Master was thereby directed "to inquire into the consideration and all the circumstances relative to the bond." Can it be now therefore alleged that the Respondent had not had an opportunity of questioning the bond as a gift? The order of his Honor, directing issues to a jury, was reversed by your Lordships' House upon grounds which are equally applicable to the question before you now, namely, because it was a departure from the consent order of reference, and because there was no person in existence who could give additional evidence respecting the bond. This last order of his Honor is open to the same objections, and cannot be right unless your Lordships were wrong in reversing the first order.

Mr. Nicol did not, it is true, produce any settlement of accounts when he accepted the bond. The Ladies Ker most probably might not have wished it. They would not look into such accounts: they had too much reliance on Mr. Nicol to examine accounts with him. In his examination Mr. Nicol was drawn aside from the point now raised, by the Respondent's insisting that the bond was for indemnity, and making no other objection to it. There cannot be any question now that the bond was not for indemnity, for the Master by his report found that it [507] was not a bond for indemnity but a voluntary bond; and your Lordships, by the judgment of this House in the second appeal, ordered that report to be absolutely confirmed. The objection now made to the bond is, that taking it to be voluntary it is impeachable in equity, on account of the relation in which Mr. G. Nicol stood to the Ladies Ker. But the Respondent having all along in the whole course of the various proceedings relied upon the other single objection, ought not now to be allowed to shift his course. We confidently submit that where, as in the present case, a party relies upon two distinct defences, and all the facts necessary to raise and to enable the Court to determine both grounds of defence are before it, such party cannot be admitted first to abandon one of his defences, and carry his opponent through a long and expensive course of litigation confined to the other, and when his case fails him upon the ground he has selected, to re-assume the defence he had abandoned, and commence in effect an entirely new course of litigation.

The Respondents, alleging that the Master's report does not exactly accord with Mr. Nicol's account of the consideration for the bond, say, your Lordships did not give credit to Mr. Nicol's examination, because your Lordships confirmed the Master's report. The inference they draw does not necessarily follow. There is no doubt of advances of money being made by Mr. Nicol on behalf of the Ladies Ker. Mr. Nicol swore the bond was given for money advanced, and for services performed by him as a friend. The Master said that they were not such services as make a consideration for the bond. But may they not entitle him to a gift? Mr. Nicol, they say, could not accept a gift. What prevented Mr. Nicol from taking the bond as a gift? [508] We are prepared to go into that point, if your Lordships think it should be entered upon. The observations of Lord Eldon in the case of *Harris* v. *Tremenheere* (15 Ves. 34. 39), clearly establish the validity of this bond. His Lordship in that case said, "The consideration as to the other voluntary leases stands upon different principles, as they are pure gift," etc. "I cannot find any decision authorizing me to say that the Defendant should not have taken these leases as of the pure gift of his employer." There could not be a stronger case than that, in which the person who took the leases was a steward, bound to do everything for his employer. There is nothing in the cases of *Huguenin* v. *Baseley* (14 Ves. 273), or *Griffiths* v. *Robins* (3 Madd. 191), to affect the validity of this bond.—[The Lord Chancellor observed, that the question now was not whether the bond was valid or not, but whether a new suit should be instituted to discuss that question.]—Supposing even that the Respondents had a good case against the validity of the bond, which we deny, still we submit to your Lordships that the Master of the Rolls was wrong in ordering a new suit, thereby taking this case out of the course of proceeding already adopted as the fittest for its adjudication. It would, indeed, answer the purpose of the Respondents to have such suit, for they would then exclude the evidence of Mr. George Nicol; for he is dead, and his evidence in the existing proceedings would not be read in the new suit. If your Lordships think further inquiry necessary, for trying this point, you may direct such inquiry to be made upon the evidence now in the suit. But as no new evidence can be brought, there is no reason to put par-[509]-ties to the costs of another suit, in which there cannot be a better investigation than has already been had.

Mr. Pemberton and Mr. Hope, for the Respondents:—The first question for your Lordships' consideration is, whether you will set aside the order of the Court below: The second is, whether the parties ought to be precluded from further investigation into the transactions relating to the bond. It is mistaking the principles of Courts of Equity, to suppose that the restriction against gifts of this nature is confined to attorneys and agents; your Lordships will find that, not only persons in the relation of attorney, of agent, of guardian, trustee, and steward, but all persons in a situation that gives them advantage or influence over a party, cannot take a gift from him, while such relation between them continues; *Proof* v. *Hindes* (Forres. Ca. Temp. Talbot, 111), *Welles* v. *Middleton* (1 Cox, 112-125). Lord Thurlow, in his very elaborate judgment in the latter case, said, "It has been argued as if it was necessary to establish incompetency in this man, that rendered it impossible for him to convey; but this is not so. There are many instances where this Court is obliged to act for the preservation of mankind. The presumptions arising must be refuted by the strongest evidence. What is the case of expectant children anticipating gifts by sales? They go on general principles. So the cases of trustees, and guardians, and so of attorneys." That the principle applied to the case of an attorney, is applicable to any other party, placed in a confidential relation giving him influence over the person who makes the gift, is also clearly laid down in the cases of *Gibson* v. *Jeyes* (6 Ves. 266), and *Hatch* v. *Hatch* (9 Ves. 292). In the former, Lord Eldon said, (p. 278), **[510]** "The rule is, that he who bargains in matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence"—a rule applying to trustees, attorneys, or any one else. In *Hatch* v. *Hatch* he extended the rule to guardian and trustee, saying (p.296), "This case proves the wisdom of the Court in saying it is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand purporting to be bounty for the execution of antecedent duty."—"And recollecting that, in discussing whether it is an act of rational consideration, an act of pure volition, uninfluenced, inquiry is so easily baffled in a Court of Justice, that instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness, or forced by oppression."—"And, therefore, if the Court will not watch these transactions, with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud; where the connection is not dissolved, the amount not settled," etc. The principles thus laid down in those cases were acted upon in the subsequent cases, *Huguenin* v. *Baseley* (14 Ves. 273), *Wood* v. *Downes* (18 Ves. 120), *Montesquieu* v. *Sandys* (Ib. 302), and *Griffiths* v. *Robins* (3 Madd. 191), and is not departed from in the case of *Harris* v. *Tremenheere* (15 Ves. 34), cited for the Appellant, or in the later cases of *Lord Selsey* v. *Rhoades* (2 Sim. and S. 41), or *Pratt* v. *Barker* (1 Sim. 1; and 4 Russ. 507). The rule in all the cases is, that in respect to contract or bargain, the relation must be dissolved, and the parties must place **[511]** themselves as it were at arms' length, in the position of strangers; and in respect to gift, the person conferring it must know what he is doing, and the effects and consequences of it. It should be made to appear to your Lordships, that the obligors, when they executed this bond to Mr. Nicol, understood the obligation in all its bearings; that it was for services, or for money, or as a gift, and that they could be arrested on it; that, in short, they knew all the consequences of what they were doing. Mr. Nicol himself, in his examination, says, that he did not explain to them that they might be sued or arrested on the bond; that the nature of the friendship between him and the ladies precluded the thought of the ladies being personally sued or arrested by him. He say they knew the nature of it, and needed no explanation. He did not tell them he had accounts against them, but he swears he had memorandums and vouchers for large amounts advanced for them; but that all these were destroyed at the time of executing the bond. He swears, in effect, that he had a legal demand on them, and legal evidence to support it; but that he destroyed the evidence. By his own account, he stood in the relation of agent and guardian to the ladies, and took from them a bond for £12,000 for his own benefit, although they had not a pound but what they borrowed for their immediate necessities; and your Lordships are called upon to affirm this bond as a gift to him. If it could be ascertained that Mr. Nicol knew what he was swearing to, when his examination was taken, he being then

on his death-bed, it would not be difficult to say that this was a case of actual fraud. He was not examined sentence by sentence, but a written statement being presented to him in his last moments, he put his name to it. The bond was prepared by Messrs. Blagrave and Wal-[512]-ter, his own solicitors, who were strangers to the obligors, and was accepted without calling on the solicitor for the ladies, who then had a solicitor, Mr. Moore, employed by them upon most important business. Was it not the duty of Mr. Nicol to call on that gentleman, or on the gentleman who drew the bond of even date for Messrs. Coutts? He swears he did not explain the effect of the bond, except that it was for £12,000 with interest, as they directed, and the friendship between them precluded a thought of their being sued on it. But though Mr. Nicol would not take proceedings against them, his assignees might if he became bankrupt or insolvent. Did he explain that to them? If Mr. Nicol did not explain all these possible effects of the bond, he did not do what he was bound to do before he accepted it; and your Lordships cannot declare this to be a valid bond, unless you depart from all the former decisions of the Courts of Equity, and of this House, upon like instruments.

The letters written from time to time by Mr. Nicol to the obligors, during the two years preceding the date of the bond, and put in evidence in the case, will show how unlikely it was that money advanced formed any part of the consideration, or that the obligors were in a condition to make such a gift. In one he says, "If Mr. Parkes will call on me with his bill of £279, I will either get Coutts to accept it, or accept it myself; or if in distress, I will raise the money for him; for though as poor as a rat myself, my credit is without end." In another letter, February 1813, he writes, "I had a long interview with my old friend 'Tommy' (Coutts), and was graciously received, considering that I was a borrower; and as soon as our joint bond is made for £2000, I will bring it to you for execution. I shall then get up [513] and cancel our notes for £1100, the money you have overdrawn." In another, dated in March 1814, he writes to Lady Essex Ker, "As my friend Mr. Coutts is upwards of fourscore, and I can have no dependence on his junior partners, who would certainly lay hold of me; they have already sent me notice that they are so much in advance, besides what I have given them security for, that they can answer no more of your Ladyship's drafts." In another, dated March 13th of the same year, he writes, "Nay, I went further, and became security, either by signing my name, or pledging my honour for a great deal more than I am worth in the world." March 16th 1814, he writes, "I send your Ladyship the note inclosed for £500, which I mentioned in my letter, for your signature above mine; and this I believe is as far as the house will go, for they know very well that I do not pretend to be a man of property, and to draw down upon themselves Scotch law suits is what they will never agree to." In another, dated August 22d 1814, "I have had Captain Garretty with me, with your Ladyship's acceptance for £380, to get discounted. I have been with a friend for that purpose, but unfortunately he is not in cash at present, and I dare not look near Mr. Coutts, having so shamefully set his advice at nought. But I will, if I can, endeavour to get it done with some other friend." In a letter to Lady Mary Ker, dated the 3d of January 1815, he says, "I would to God you would inspire Lady E. with the thousandth part of your Ladyship's discretion and delicacy, in money matters. I confess I was shocked at the indelicacy of leaving me in the hands of the Philistines, whom I had made my mortal foes by my zeal and exertions for her interest, [514] and became bound for her in sums far beyond my power of paying, when simply signing her name would have obviated all."

Here it appears a little extraordinary, that a lady, who refuses in January to relieve him from a security by merely putting her hand to paper, gives him a bond for £12,000 as bounty in the same month. In a letter to Lady Essex Ker, on the 28th January 1815, Mr. Nicol writes, "I have not seen Mr. Coutts for several months, having studiously avoided him, because I had not followed his advice, so friendly to all parties, in taking a counter-security; but I must now say, that I had so near a prospect of your ladyship's getting possession, that I thought it became unnecessary." In another, dated April 19th 1816, he says, "as I know your ladyship's demands are peremptory, I have got £1000 from a friend for a few days, and passed my own word, which is always my bond, to return it before the week is out; your ladyship will be so good as send a line by the bearer that you have received

the money. I am quite mortified at this business, for having seen most of the creditors, I had convinced them that it was impossible your ladyship could pay the principal of their debts till you could either sell or raise money upon mortgage, but that their interest should be regularly paid them; this seemed to satisfy them, and how they have changed their minds I cannot tell; but I am apprehensive that some of the other creditors, finding that compulsion has been successful, will pursue the same course, in which case I know not what is to be done." In another letter to her, dated November 13th 1816, "I have had a very threatening visit from Mr. Dobie's partner, with a demand for £1000; I have got him put off a little with the old story, which I confess [515] my conscience smites me for so often asserting, viz. that your ladyship's debts are very safe, and will eventually be paid. I am so sensible of the contrary, that I look to end my life in a prison the moment anything happens to your ladyship or Mr. Coutts."

How can it be said on the part of the Appellant, that this bond was only commensurate with the liberality of those ladies, when it thus appears that at the very time of its execution, and for a year before and a year after, they were obliged to borrow money, and were so much in debt that it was doubtful whether those debts could ever be paid? The question now is, whether there is not, upon these facts in evidence, such a case made out as to require a further investigation of the bond, and of the circumstances under which it was given.

But it is contended for the Appellant, that we are now too late; that we are precluded from further investigation by our own conduct, and that we should have argued the matter before the Master, under the order of reference. Your Lordships will be of opinion, on looking to the course of the proceedings, that we have taken steps as soon as we could to make the inquiry which we ask. Mr. Nicol said before the Master, that the bond was given him for monies advanced and for services performed, not for indemnity nor as a voluntary bond. But the Master found that it was a voluntary bond.—[The Lord Chancellor: How can it be said, that the issue before the Master was indemnity, or not indemnity, when the order of reference was in such very general terms, "to inquire into the consideration and all the circumstances?"]—The issue was not confined to indemnity or not indemnity, or to voluntary or not voluntary: both parties agreed in repudiating the bond as voluntary, and both excepted to the report, [516] finding it to be voluntary.—[The Lord Chancellor: Could you not have raised your present defence when the Master reported, that the bond was voluntary?]—The Master had no power to inquire further than he was directed; he was not directed to find whether the bond was valid or not valid; all he was directed to do was to inquire into the circumstances under which it was executed. He only found a fact, but was not authorized to report what the law was on that fact. Two questions arose on the report: the first was, whether the Master was right in the fact found, and the Master of the Rolls not being satisfied that he was right, directed a further inquiry by issues. Your Lordships differed in opinion from the Master of the Rolls, and you affirmed the Master's report, finding that it was a voluntary bond. That was the first time that we could apply ourselves to the second question raised on the Master's report, which was a question of law; being, whether the bond given as a voluntary bond, under the circumstances reported, was legal. That question could not be brought before the Court below on the Master's report, because the Master could only report on the facts referred to him. Now that your Lordships have affirmed the finding of the Master, we raise the question of law on the facts so found and affirmed, and we impeach the bond as invalid. The Appellant, instead of putting in an answer to our bill impeaching his bond, comes here and asks your Lordships to stop all further inquiry, a course which he would not pursue if he had no further evidence or documents to explain against himself the circumstances under which the bond was given. We do not believe that he has not such evidence. We ask for further investigation, because at present the bond appears to have been made under circumstances which would induce a Court of Equity to [517] set it aside, upon the principles which are universally applied to gifts to persons standing in a relation of trust or confidence towards the donor; and because there is, at all events, so much suspicion as to the circumstances under which the gift was made, as to make it fit that further investigation should be had.

Sir Edward Sugden, in reply: It is part of my argument against a new bill, that the Appellant was drawn off and precluded from argument on the bond as a voluntary bond. The Respondents allowed our exception to the report to be withdrawn, and in that they acted with bad faith; for we could then show that it was a bond for valuable consideration. There is not a tittle of evidence to impeach the bond on that ground. It is said, this is an attack on the doctrines of the Courts of Equity, because we do not agree in all the doctrines of the Master of the Rolls. With great respect for that learned Judge, I do not agree in all his doctrines, and I have excepted to many of them. The Respondent's proposition is this: that for services of the most essential kind, rendered for a period of 20 years, if the person to whom such services are rendered, be he or she ever so able and willing, make a gift to the person rendering those services, such gift cannot stand. Has not Lord Eldon said over and over again, in the cases already cited, that if it is pure gift, no Court can interfere? But the Respondent says, it was not a pure gift, it was not voluntary. He precluded himself from taking that objection, by relying on a totally different objection. We say, this is a voluntary bond. Is not Lady Essex Ker to be supposed capable of a free gift for such services as Mr. Nicol performed, when we see her by her will bestowing her fortune upon hospitals and churches; when she is, in fact, looking about for objects of her bounty? It [518] was urged as argument on an inference of fraud, that this bond was never enforced during the lifetime of the obligors. That was agreed on; Mr. Nicol swears, that he told them he would not enforce it during their lives, not even for the interest. Another argument to infer fraud is, that the bond was never made known to Mr. Coutts. That was the best proof that the Master of the Rolls was wrong in declaring it to be for indemnity. If the bond was given to indemnify Mr. Nicol for his engagement for the ladies to Mr. Coutts, is it to be believed that he would not have knowledge of it? Another objection was made, that Mr. Nicol did not tell the obligors, that if he should become bankrupt his assignees might sue and arrest them. Now, could they be ignorant that they were liable to all the consequences of giving the bond to Mr. Coutts? They knew that they were liable to the like consequences for both bonds. With respect to the expression "poor as a rat," in one of Mr. Nicol's letters, that is a common expression, not implying poverty, but often used by persons rich in money as well as credit; and we find that Mr. Nicol's assets are sworn to be £36,000. The inference, that Lady Essex Ker would not make a gift of this bond, because she had by some neglect omitted to put her name to some paper, and Mr. Nicol complained of being put in jeopardy by such neglect, is the most far-fetched argument that was ever heard. I contend, that they might have raised the question of validity under the order of reference to the Master, and the Master would not be prevented from drawing the conclusion of law on the facts. They had another opportunity of raising the same question before the Master of the Rolls, when this House confirmed the Master's report finding this bond to be bounty. The Appellant petitioned the Rolls to confirm the [519] report; that was the last time that they might have raised this question. Either then, or when the inquiry was before the Master, when they had two defences to the bond, they ought to have brought them forward. They are not now entitled either to a supplemental bill or bill of review, because they cannot swear that they did not in the former stages know of this defence. Then what right have they to ask for leave to institute a new and distinct suit, after so many years of litigation, to harass the Appellant, who may not be able to contend against funds which are supplied to the other side out of the estate of the obligors?

The Lord Chancellor: I shall move your Lordships to postpone your judgment until I shall have the assistance of my noble and learned friend Lord Lyndhurst, who was with me on hearing the first appeal in this case. I will lay before him my notes of the argument.

The Lord Chancellor (August 27): My Lords, this case, which was an appeal on various grounds, now comes on, I hope and trust, indeed I think I may confidently state, for the last time, to receive decision from your Lordships. In October 1831, your Lordships reversed an order of his Honor the Master of the Rolls, directing three issues to be tried at law, on the ground that the evidence was all before the Court below, and that the Court below could then dispose of the question, which was, whether or not the bond was an indemnity, or counter-security, or gift. The Master of the Rolls then considered that question, and came to the conclusion, that as to £10,000

the bond was a counter-security, and as to £2000 it was a voluntary gift in remuneration of services. In July 1832, your [520] Lordships reversed the declaration as to the counter-security, and confirmed the Master's report absolutely, which had found that the whole bond was voluntary, and a gift and bounty from the obligors to the obligee. Upon this both parties petitioned the Court below; the Respondents, for leave to institute a suit to impeach the validity of the bond considered as voluntary and gift, and for an injunction to restrain the Appellant from receiving any portion of the money set apart in Scotland for the payment of it; the Appellant, for computation of interest due upon it, and for leave to have that and the principal paid out of the Scotch fund. On both petitions, the order now appealed from was made. It gave the Respondents the leave they asked to impeach the bond in a new suit, taking it to be bounty or gift, and it ordered the Appellant's petition to stand over in the mean time, restraining him from receiving the money. That the Court below had the power to make this order there cannot be any doubt; it was in the discretion of the Court, but a discretion to be exercised soundly; and the question is, whether or not, in the circumstances of the case, that discretion ought so to have been exercised as to grant the leave; in other words, whether your Lordships, having before you the case which was before the Court below, sitting in this Court, would have given the leave which the Court below did give by the order; and I am of opinion that your Lordships would not and ought not to have given that leave.

The case set up against the bond, and set up for the first time, is that from the relation subsisting between the parties, a Court of Equity would not suffer the obligee to take advantage of the obligors' bounty. Now this case might have been made in all the former stages of the long litigation, to the end of which it [521] may be hoped we are now approaching. The objection now first relied on was one which was open to the Respondents from the beginning; at all events, from the Master's report and it would have decided the cause in their favour, whether the rest of the case had been with them or against them. They then, and long afterwards, relied upon the wholly different ground, of which the decision of this House has deprived them, namely, that the bond was a counter-security. But if the bond was good for nothing as a gift, they ought to have urged that alternative, and said, "whether it be indemnity or bounty makes no difference; for if indemnity, *cadet questio*, and if bounty, it cannot be supported in a Court of Equity, regard being had to the circumstances, and the relation in which the parties stood." But, my Lords, a party cannot be allowed to bring forward his case piecemeal, and after exhausting his adversaries with litigation on one ground, to drag them through a second course of proceeding upon another ground, of which he might at first have availed himself. Then, was there anything in the proceeding, whether in the conduct of the Appellant or in the orders of the Court, which misled the Respondents, and prevented them from taking earlier the objection on which they now rest their case? I am very clearly of opinion that the more the whole proceedings are attended to, the more plainly will it appear that the Respondents have no such matter to urge. If the contention had always been, on the one side, that the bond was indemnity, and on the other, that it was for a valuable consideration, and if nothing had been done, either by the parties or the Court, to direct one another's attention to the bond considered as voluntary and bounty, there might be some ground for the application of the Respondents to be now let in with [522] a new case, referable to the bond as voluntary and bounty. But that is not the fact; it is the reverse of the fact. First, the Master's report in 1828, while it negatives the bond being indemnity, distinctly finds that it was voluntary and given as a bounty. Secondly, the Respondents excepted to that finding of the Master, upon the ground that the bond was not voluntary, but indemnity; and the exception of course proceeded upon the assumption that it was not only not voluntary, but also not given for value. Thirdly, the Appellant took an exception to the finding of voluntary, maintaining, it is true, that it was for value, but he desired leave to withdraw that exception; and though this was refused by the Master of the Rolls, declaring that the Appellant was bound by the terms of his exception to support the bond as partly for services and partly for money lent, he thereby gave sufficient intimation to his adversaries that he was satisfied to rely upon the bond as a gift, provided it were found not to be a counter-security. Fourthly, the frame of the issues then directed, that is, on the 29th June 1829, most distinctly

called the attention of the Respondents to the materiality of their present objection: for one was to try the question, given for value or not, another to try the question, indemnity or not, and the third to try the question, bounty or not (see 2 Dow and Clark, 425). It cannot surely be contended that they ought not to have been prepared for the event, had the issues been tried—the event, I mean, of the first being found against the Appellant, and the second and third in his favour, that is, the effect of the whole matter being found by the jury, as it is now placed by the decision of this House, confirming the Master's report, and establishing the **[523]** bond as voluntary and a gift. And fifthly, though this House in 1831 reversed the order directing the issues, it also gave the Appellant the leave, which had been refused below, of withdrawing his exception to the report. This is, in my view of the case, very material; for this leave given, and of course taken, to withdraw the exception, placed the case in October 1831 exactly as it would have been if no exception had been taken by the Appellant upon the ground of the bond being for value, and left the parties contending thus: the one that it was indemnity, the other that it was bounty; and therefore, it is manifest that there was no third or middle term, nothing to be considered but those two alternatives, that the only question now was between indemnity and bounty, and that if it should be found not to be indemnity, bounty it must be. Then surely was the time, when, if at all, the Respondents should have gone back to the Court below, after the decision of your Lordships in October 1831, prepared to meet the second alternative, namely, in case his Honor should be of opinion with the Master, that there was no evidence to show indemnity, for in that case it must be bounty, and then their present contention became material, nay, decisive; in a word, they had a plain course to take when they went back: they were to maintain, first, that the bond was a counter-security and not a gift; but next, if they should fail in showing that, they had to state that it was impeachable in equity on account of the circumstances now urged. That would have rendered it immaterial how the first question was decided, for either way they must prevail. The reference made to the Master, in April 1827, it must be further observed, was by consent of all parties, nor, indeed, without such consent could the examination, which formed part of the order, have been directed. **[524]** Their object apparently was, the object of all the parties apparently was, to void a tedious litigation, and the bringing on at once the investigation of all the circumstances; and the reference expressly gives the Master authority to inquire into the consideration and all the circumstances relative to the bond. Under that order, there was not a single one of the matters now alleged, into which the Master might not have inquired, and the Respondents could have raised the whole of their present objection. They might afterwards, when they found the Master had reported the bond not to be a counter-security, but a gift, have petitioned the Court and raised their objection, praying to have the circumstances in which the bond was granted further inquired into; if the Court should confirm the Master's report finding it was gift and not indemnity; and contending, that though a gift, it was impeachable. The only objection that could have been made then to such further inquiry, is this, that the Respondents might have taken the same ground earlier—I will not say that that objection might not have been then successful, but that objection applies with ten-fold force now. It is suggested that the Appellant may, by a bill being filed against him, be compelled to disclose something within his knowledge relative to the bond, something which he may have heard from his father; this is not very likely, considering that the father has himself been examined very fully; but supposing the Appellant to know something material against his own claim, he might have been examined upon interrogatories, had the Respondents chosen to take their present objection at the right time. Upon the whole, I can see no reason for a new suit to be now commenced, in order to give them the opportunity of doing what they had abundant opportunity of **[525]** doing before, bringing forward an objection, of the materiality of which they could not at any period of the cause have been ignorant, and to which their attention must needs have been repeatedly called.

Upon the merits of the case, my Lords, supposing that we were now to dispose of the case on the evidence as it stands; and when we consider that the examination of Mr. Nicol is at present in the cause, there can be no doubt that we possess better materials for coming to a decision than we could have in a new suit. It does not appear that any injustice can be done to the Respondents, or any favour shown to the transaction in question, inconsistent with principles of the Court of Equity, if this long

litigation is here terminated by sustaining the Appellant's claim under the bond. It is impossible to compare this with the cases to which it has been likened, of *Huguenin* v. *Basely* (14 Ves. 273), and *Lord Selsey* v. *Rhoades* (2 Sim. and Stu. 41), before the Vice Chancellor, the present Master of the Rolls. If any credit be given to Mr. Nicol's examination, no one can suppose that there was any ignorance on the part of the obligors touching the nature of the transaction; that they intended a bounty, though a bounty certainly dictated by gratitude for services performed. There was nothing of complexity in the affair; they are proved to have been fully aware of the sum, and to have altered it from £10,000 to £12,000 upon some discussion; that they became liable on their seal, and from the moment they executed the instrument, they must have known of course; but Mr. Nicol assured them, during their lives, he should keep it inactive, and he did so. The case of *Harris* v. *Tremenheere* (15 Ves. 34) was in [526] every way a stronger case of suspicion than this, and there the transaction as far as it resembles this case was supported. I have, in the former stages of the case, stated, that the only circumstance to which any importance can have been attached as against the elder Mr. Nicol's conduct, is, his having employed his own solicitor to prepare the instrument; but as it was a mere common money bond to be filled up, very little turns upon this, and the matter is more in appearance than in reality. It is very possible that the two ladies might not wish their own solicitor to be called in upon a matter requiring no explanation, and very little to be done, even if they had any professional man regularly employed in their affairs, which does not appear to have been the case.

Taking the facts as they are before us, there seems to be every reason to hold that, in Lord Eldon's words in *Huguenin* v. *Basely* [14 Ves. 273], the gift was the pure voluntary and well-understood act of their own minds; nor should we be justified in speculating on possibilities and running after the means of raising suspicions, when all chance of further light being thrown upon the question is at an end, and no new investigation can give us even so much evidence as we now have for our guide. The order, therefore, complained of, as far as it regards the leave given to the Respondents, must be reversed, and there must be a direction in your Lordships' order to carry into effect the prayer of the petition of appeal and dissolve the injunction. There must also be a direction as to the computation of interest: but I will recommend to your Lordships to make no order as to the costs.

Decree below reversed.

[527] WRIT OF ERROR.

THOMAS HENRY MIREHOUSE, and WILLIAM SQUIRE MIREHOUSE,—*Plaintiffs in Error:* FRANCES HENRIETTA RENNELL, Widow and Administratrix of *Thomas Rennell*, Clerk, deceased,—*Defendant in Error.*

[Mews' Dig. v. 1241; S.C. 7 Bli. N.S. 241; 8 Bing. 490; 1 Moo. and Scott, 683; and in Court below, *sub nom. Rennell* v. *Lincoln (Bishop of)*, 7 B. and C. 113; 9 D. and R. 810; 5 L.J. (O.S.) K.B. 320. Considered in *Ford* v. *Harington*, 1869, L.R. 5 C.P. 287; and *Walsh* v. *Lincoln (Bishop of)*, 1875, L.R. 10 C.P. 532; and see *Juttendromohun Tagore* v. *Ganendromohun Tagore*, 1872, L.R. Ind. app. suppt. 68.]

Where an advowson attached to a prebend falls vacant, and before filling it up the prebendary dies, the presentation belongs to the administratrix, and not to the successor.

In this case the defendant in error (the plaintiff in the original suit) had brought a writ of *quare impedit* against the two plaintiffs in error, and the Bishop of Lincoln (the defendants in the original suit), to determine the question of a right to present to the rectory of Welby, in the county of Lincoln. The pleadings stated, that the advowson of Welby belonged of right to the prebendary of the prebend or canonry of South Grantham, in the cathedral church of Salisbury: that Thomas Rennell, clerk, deceased, had been appointed prebendary of South Grantham, in the said cathedral

church of Salisbury, and as such had a right to present to the said rectory of Welby: that it became vacant in his lifetime, whereby the right to present vested in him, and that afterwards and before he had so presented, he died intestate; that letters of administration were granted to the plaintiff, who thereupon became entitled, as such administratrix, to present to the said rectory, but that the said defendants had hindered her, etc. The bishop put in the usual plea of disclaimer, and the other two defendants denied the [528] right claimed by the plaintiff; averred, that after the death of the said Thomas Rennell, and while the church of Welby was vacant, the defendant, Thomas Henry Mirehouse, was lawfully instituted prebendary of South Grantham, whereby he became entitled to present a fit person to the vacant rectory, and that he accordingly presented the other defendant, William Squire Mirehouse. The plaintiff demurred to this plea, and the Court of Common Pleas, in Michaelmas Term, 1825 (3 Bingham, 223), gave judgment for the defendants. The case was then brought on a writ of error before the Court of King's Bench. The majority of the Judges there (7 Barnewall and Creswell, 113), reversed that judgment, declaring the personal representative of the deceased prebendary entitled for that turn. The case was brought into this House by writ of error from the Court of King's Bench, and was argued in June 1830, by the Solicitor-general (Sir E. Sugden) and Mr. Serjeant D'Oyley, for the plaintiffs in error, and by Mr. Patteson and Mr. Follett, for the defendant in error; when the following question was submitted to the Judges:

"An advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented; does the right of presentation belong to the personal representatives?"

Mr. Justice Bosanquet: In offering my humble reasons to your Lordships for answering this question in the affirmative, I propose, with permission, to consider it.

First, with reference to the right of presentation itself, to which the question relates. Secondly, with reference to the person (a prebendary of a cathedral church) to whom the right first accrued. Thirdly, with reference to the deceased prebendary's personal [529] representatives, whose right is the immediate subject of the question.

With respect to the first point, I take it to be clear that the patron's right of presentation to an ecclesiastical benefice is a temporal right. It is expressly said by St. German, in the 36th cap. of the Doctor and Student, that the right of presentation is a temporal thing and a temporal inheritance. It was insisted, however, at your Lordships' bar, that the right of presenting is a personal spiritual trust; and the authority of Bishop Gibson was relied on in support of that position. Bishop Gibson (Codex, tit. 33, c. 1) does, indeed, question the propriety of calling it a temporal inheritance, or that it ought, legally speaking, to be considered otherwise than as a spiritual trust. But he refers to no authority in support of his view of the subject. And in the very same chapter in which he suggests this doubt, he says, that the right of nominating, which at first was annexed to the person building or endowing the church, became by degrees appendant to the manor in which it was built; that the right of advowson, though appendant to a manor, castle, etc. may be severed from it, and that being severed, it becomes an advowson in gross; and he calls the right itself an incorporeal inheritance, which may be granted by deed or will. The grounds on which it has been considered that the advowson or patron's right to present is a temporal, and not a spiritual, inheritance, are well stated by Godolphin (*Repertorium Canonicum*, p. 209), who was, as your Lordships know, an eminent civilian, and King's advocate after the restoration of King Charles the 2d. It hath ever been held, he says, that by the common law, an advowson is a temporal inheritance; for which he gives the following reasons: that it lieth in tenure, and may be holden either of the King or of a common [530] person; and hath been held of the King in *capite* or in knight's service; that a writ of right of advowson lieth for him who hath an estate in an advowson in fee simple; that a *praecipe quod reddat* lieth for it; that a common recovery may be suffered of it: that an advowson, as other temporal inheritances, may be forfeited by attainder, or lost by usurpation, negligence and other means there specified; that the wife shall be endowed thereof, and the husband be tenant by the curtesy; that it may be taken in coparcenary; that it may pass, by way of exchange, for other temporal inheritance; that by grant of all lands and tenements, an advowson doth pass; and if not by livery, yet by deed is transferable, as other temporal inheritances, which pass with the manors whereunto

they are appendant. It is said that the object of an advowson is of a spiritual nature, since it is to provide a spiritual person to serve the church; but the right to nominate such person is not the less a temporal estate. That right, according to Fleming, C. J. (Starkie and Poole's case, 1 Bulstr. 28), is an interest, and not an authority. The spiritual interests of the church are provided for by subjecting the fitness of the person nominated to the judgment of the bishop, but the exercise of the patron's right of nomination is not subject to the jurisdiction of any Court but the King's temporal courts. On this point, Godolphin (p. 256) says, it is sufficient for the ordinary's discharge, if the presentee be able, by whomsoever he be presented; which authority is acknowledged on all sides ever to have been inherent in the ecclesiastical jurisdiction. But as to the right of presentation itself, to determine who ought to present and who not, and at what time, and when the church shall be judged to become void and when not; all these appertain to the King's temporal laws.

[531] It appears to me, therefore, my Lords, to be indisputable, that a right of presentation is temporal property, the alienation of which must be governed by the rules and analogies of the common law; and that it is no more to be considered in contemplation of law as a trust, than all other temporal property, for the proper use of which the owner is responsible *in foro conscientiae*. An advowson being an incorporeal hereditament, may be taken by descent, conveyance or devise, like other temporal property of that class. It may be limited in fee or in tail, for term of life or for years. If the advowson be held in fee or in tail, it descends to the heir general or special: if for life, it passes to the remainderman or reversioner; all these being freehold interests. A term of years or a single turn goes to the executor or administrator, such interests being less than freehold; and the whole estate, or a portion of it, or a single turn only, may be sold for a pecuniary consideration. If indeed the church be vacant, the right of presentation for that turn cannot be granted by a subject, either for value or gratuitously. This restriction, however, is not peculiar to a right of presentation; it applies to annuity or rent actually due, which may be granted before the day of payment, but which cease to be alienable at law after they have accrued; yet the arrears in both cases are unquestionably temporal rights. The nature of the difference which subsists between the right to present on the next turn which may accrue, and the right of presentation to a vacant turn, it is now material to consider. The right to present upon the next turn which shall accrue, is an interest carved out of the fee in the advowson, and if re-conveyed to the owner of the fee, will merge. But the right of presentation to a vacant benefice, though arising from the advowson, is no part of it. It has sometimes been called a chattel, some-**[532]**-times a chose in action, sometimes a fruit fallen. It is called in Dyer (283), a mere personal thing, a thing in right, power and authority, a thing in action and in effect, the fruit of an execution of the advowson, and not the advowson. In Co. Litt. (120 a.), it is said to be not merely a chose in action, for it survives to the husband, which a bond does not. But by whatever name it may be called, it is treated in law as a right of a distinct nature from the ownership of the advowson itself. In Jenkins (236), it was held by all the Judges of England, that where the next presentation to a church, then void, had been granted, the grant being made by a subject was void, for the present avoidance (it is said) is a thing in action and privity, and vested in the person of the grantor (the patron), and is like a relief or arrear of rent, or an obligation, or a debt. And it is added, if a grantee of an annuity in fee grants an annuity for lives or years, it is good, for this is an estate settled and of continuance; but a grant of the arrears of the annuity is void *causâ qua suprâ*, that is, because the subject of the grant is become a chose in action. And notwithstanding what is stated in the note to the *Bishop of Lincoln* v. *Wolforstan* (3 Burr. 1512), respecting the fictitious nature of this reason, it appears to me fully warranted both by analogy and authority in point.

No instance can be shown in our books in which a right of presentation to a vacant church has accompanied the ownership of an advowson, in the hands of a subject, if the person to whom the right of presenting accrued, has ceased, either by death or otherwise, to hold the advowson. If a right of presentation accrues to the owner in fee of the advowson, it does not pass to his heir. If the right accrues to a tenant in tail or tenant for life of the advowson, it does not pass to the issue in **[533]** tail or the remainderman; but in all these cases it goes to the executor, as the representative

of the personal rights of the individual to whom it accrued. If the right accrues to a lessee for years of the advowson, and the term expires within six months afterwards, the lessee is entitled to present, notwithstanding the expiration of the term, in preference to the reversioner. Upon what principle can such a claim be sustained, but that of a personal right, vested in the individual during the term, distinct from his interest in the advowson? If a feme covert be entitled to an advowson, and the church become void during the coverture, and the husband survive, he shall present; but if the avoidance happened before the coverture he shall not present; such right being, as it is said, only a chattel real in action, not reduced into possession during the coverture. And if the avoidance happen during the coverture the husband shall present, though he be not tenant by the curtesy, as in cases where the wife had but a life estate, or where there has been no issue of the marriage; and in such case, if the husband himself die before presentment, his executor shall present, and not the heir (Watson Clerg. Law, chap. 9). Can any reason be assigned for this, but that the right which had accrued during the coverture was distinct from the estate in the advowson? The uniformity of the law in all these instances appears to me manifestly to show the general rule to be, that a right to present to a vacant church vests in the individual to whom it accrues as a personal right, which, though accruing from the advowson, is no part of it, is not annexed to it, and does not follow it, when it devolves upon any other person than the individual to whom the right of presentation first accrued.

Two instances, indeed, may be mentioned, in which, though the right of presentation does not pass to the **[534]** succeeding owner of the advowson, it does not pass to the personal representatives of the deceased individual to whom it first accrued. These are the cases of a bishop and a tenant *in capite* of the Crown, in both of which cases the right belongs to the King. This right of the King, upon the death of a bishop, is sometimes said to arise by reason of his title to the temporalities, and sometimes by reason of his prerogative. But it is equally consistent with either form of expression to say, that it arises by reason of the relation in which a bishop stands to the King. The temporalities of a bishop, of which his advowsons form a part, are held of the King *per baroniam*. The title of the King to seize the temporalities upon the bishop's decease may reasonably be referred to the tenure by which they are held; and the further title to one of the fruits of these temporalities, accrued during the life of the bishop, and vested in him as a chattel at his death, may, consistently with the analogies of the law, be referred to the same source. That the right in question is a condition of the bishop's tenure *per baroniam*, there is great reason to suppose, from the similarity of right which accrues to the King in a case of tenant *in capite* by knight's service. If tenant *in capite* be seised of a manor, with an advowson appendant, and the church become void, and he die, his heir within age, the King shall not only have the wardship, with the right of presenting to such livings as become void during the infancy of the heir, but to any right of presentation which accrued during the life of his tenant. In this respect the case of tenant *in capite* is strictly analogous to that of a bishop. Yet if the land be holden by knight's service of a common person, and not of the King, the executors of the deceased tenant shall present, and not the guardian (Co. Litt. 90 a. 388 a.). And if **[535]** tenant in socage be seised of an advowson, and the church become void, and he die, his heir under age, the guardian in socage shall not present, but the executor or administrator. Sir Edward Coke in one place gives as a reason why the King shall present in the case of a bishop, that the presentation is but a chose in action (90. a); and in another, that nothing shall be taken for the presentation, and therefore it is no assets (388. a). The circumstance of the presentment being a chose in action, is a singular ground of objection to its going to the executor; and that of its not being assets would be equally applicable to the cases of a tenant who holds in socage, and to a tenant paravail who holds by knight's service; in both which cases the executor is entitled. How far, indeed, it is quite correct to say that a presentation is not assets, will be seen hereafter. If the right of the King to a presentation accrued before the bishop's death be not a condition of tenure, it may possibly be derived from the same principle which entitles the King to other personal property of the bishop upon his death. It will be recollected that the King is entitled, according to Sir Edward Coke (2 Inst. 491), to six things: the bishop's best horse or palfrey, with his furniture;

his cloak or gown, and tippet; his cup and cover; his bason and ewer; his gold ring; and lastly, his *muta canum*, his mew or kennel of hounds, all of which says the record quoted by Sir Edward Coke, *ad dominum Regem, ratione prerogativae suae, spectant et pertinent*. The origin of the King's right to these chattels is not very clearly ascertained. Coke says, that it was not any mortuary, but was given to the King as a fine, that the bishops might have power to make wills, and grant probates and administrations. Blackstone, on the other hand (2 Bl. Com. 245), thinks, that it was in the nature of a mortuary, which he calls a sort of ecclesiastical heriot, a term which [536] imports a duty due to a superior, either by service or custom. Whether it is to be referred to the cause assigned by the one or the other of these learned persons, it is clear that in cases to which the King's right did not extend, the chattels would pass to the executor. To show that the right of presentation is not distinct from the advowson, the following case is relied on by Fitzherbert (Fitz. Nat. Brev. 33): "If the King have an advowson in fee which voids, and during the avoidance the King granteth the advowson in fee, the King shall not present to this avoidance." Now it will be observed, that this proposition turns altogether upon the effect of the King's grant, and that a chose in action is grantable by the King, which it is not by a subject. That the proposition is founded on the operation of the King's grant, may in some degree be inferred from what follows, namely: "But if the King have an advowson by reason of the temporalities of a bishop, and during the avoidance the King restore the bishop to the temporalities, yet he (the King) shall present to the advowson, and not the bishop, for this avoidance." In this case the restoration of the temporalities, of which the advowson is part, does not carry with it the presentation, which has fallen while the temporalities were in the King's hand, though it is said in the former part of the passage, that a grant of the advowson would have that effect. A difference, therefore, is taken between a grant of an advowson by the King, and a restoration of the temporalities, including the advowson. Moreover, it must be observed, that Sir Matthew Hale, in his Notes on Fitzherbert's Natura Brevium, does not implicitly adopt the position in the text, but cites some authorities to show that even the *grant* of an advowson will not carry the presentation, unless there are special words of the avoidance in the grant. His note is as [537] follows: "Vide contra, except there are special words of the avoidance, 16 Hen. 7. 8; Dyer, 282. 302. a. 348, a; and see Accordant, 18 Edw. 3. 58. a; but contrary in the case of a common person, 11 Hen. 4. 54. b; and an avoidance fallen is not grantable by a common person. Dyer, 283. 348; see Stamf. Prerog. 44; 46 Edw. 3, Grants, 50; 18 Edw. 3. 22, etc. in margin." Watson agrees with the suggestion of Hale, for he says: "If when a church is void the King grants a manor, with all advowsons appurtenant, the void turn does not pass thereby, unless he also mentions it in his grant." Chap. 10. And another case arising upon a grant of the King is stated (2 Roll. Abr. 345), from which the distinct nature of the presentation strongly appears: "If the King has an advowson by reason of a wardship, and he grants to another during the minority of the ward, and after the church becomes void, and continues so until the ward attain his full age, whereby the interest of the grantee determines, yet the grantee shall have the presentation, and not the King." This case is analogous to that of the lessee of an advowson, whose interest having expired, he is entitled to present to a church which had become void during the term. But for the grant, the King would be entitled in preference to the heir; and by virtue of the grant, the grantee is entitled in preference both of the King and the heir.

I will trouble your Lordships with only one more instance, which occurred in the reign of Queen Elizabeth, to show how clearly the right of presenting to a void church was considered as distinct from the advowson itself. If an advowson comes to the Queen for forfeiture by outlawry, and then the church becomes void and the Queen presents, and then the outlawry is reversed for error, yet the Queen shall enjoy the pre-[538]-sentment, because it came to the Queen as a profit of the advowson; but if the church be void at the time of the outlawry, and the presentment be forfeited as a chattel principal, and distinct, and then the outlawry is reversed, the party shall have restitution of the presentment. *Beverley* and *Cornwall's* case (Moore, 269). Here the Queen's right to the presentment as a profit of the advowson while in her hands, is asserted in the first part of the case; and the subject's right to restitution of the presentment upon an avoidance before the outlawry, is acknowledged in the

latter part, because such right of presentment became a distinct chattel before the outlawry.

Secondly: I have next to consider the question with reference to the person, a prebendary of a cathedral church, to whom the right of presentation accrued. A prebendary is a sole corporation existing by charter of foundation, or by prescription, which presumes a charter; and all the possessions of the prebend are derived either from the endowment of the founder or of subsequent benefactors. The right of presentation to a parish church must therefore have been derived mediately or immediately from the original patron of the living, who as such was seised of a temporal estate in the advowson. The nature and incidents of that estate could not be changed by its transfer to any particular person or body politic; what the heir of a natural person cannot take, will not go to the successor of a sole corporation; for, as it is said in *Fulwood's* case (4 Rep. 64), succession in a body politic is inheritance in the case of a body private. And therefore, in case of a sole corporation or body politic, be it created by charter or prescription, as bishop, parson, vicar, master of an hospital, etc., no chattel, either in action or possession, shall go in succession, no more than the heir [539] of a private man can have them; but the executors or administrators of the bishop, parson, etc. shall have them. On this ground it is that a bishop, parson, etc., or any sole corporation, which are bodies politic by prescription, cannot take a recognizance or obligation but only in their private, and not in their public capacity. If, indeed, there be a custom, that the successor of any particular corporation sole, as the Chamberlain of London, shall have a recognizance acknowledged to his predecessor, he shall take it, because the same custom which made him a corporation in succession for the particular purpose, has enabled his successor to take recognizances, obligations, etc. made to his predecessor, in the absence of which he would not be entitled to do so. The exception, founded on custom, in the *Chamberlain of London's* case, establishes the general rule in those cases in which custom cannot be relied on. And according to Sir E. Coke, in the case of bodies politic by prescription, such as bishops, parsons, etc., in which "etc." is manifestly included "prebendaries," there wants such custom to take a chattel, or, as I apprehend, any interest distinct from the inheritance in their politic or corporate capacity. Independently, however, of this negative argument, arising from the incapacity of the successor, I am led to infer from analogy, that the personal right of the prebendary existing at the time when the church becomes void, is to be preferred to that of his successor. The appendancy of an advowson to a manor is analogous to its union with a prebend; yet if the church is void, and the lord of the manor die leaving the church vacant, his executor and not his heir shall present. The title of a husband in right of his wife, endowed of an advowson by a former husband, is not unlike the seisin of a prebendary in right of his prebend; yet if the church [540] become void during the coverture, and the second husband survive, he, and not the heir of the first husband, shall present; and if the second husband die before exercising his right, his executor would be entitled to stand in his place. The ecclesiastical character of the prebendary does not appear to me to make any material difference between this case and that of any other corporation sole. A prebendary, before the stat. 13 and 14 Car. 2, c. 4, might have been a layman; a prebendary as such has no cure of souls, and was not obliged by the 13 Eliz., c. 12, to subscribe or read the 39 articles (Burn's Eccles. Law, vol. 2, p. 79). Nor would the ecclesiastical character, supposing the prebendary always to have been a priest in holy orders, necessarily entitle his successor to a right of nomination or presenting to a benefice accrued to him in right of his prebend. The transmission of an archbishop's options to his personal representatives, and the right to dispose of them by will, is a strong instance to show that a personal right, though arising from the ecclesiastical character, does not pass to the successor. Another strong instance is that mentioned by Fitzherbert, in his Natura Brevium (34 *n*): "If a vicarage happens void, and before the parson presents he is made a bishop, etc., yet he shall present unto this vicarage, because it was a chattel vested in him." In this instance, the individual to whom the right accrued as parson, after having vacated the rectory by acceptance of other preferment, is allowed to present the vicar, in preference to the successor in the rectory. Whether the case here put was founded upon any actual decision, or only upon Fitzherbert's own understanding of the law prevailing in his own time, it has

the sanction of his great name, and must be deemed of high authority. One distinction indeed is recognized between lay and ecclesiastical patrons, in respect to the right to vary a clerk pre-[541]-sented. If an ecclesiastical patron once present a clerk, and then vary his presentation by presenting another, the bishop is not bound to receive either; whereas, if a lay patron, having presented one clerk, afterwards present another, the bishop cannot absolutely refuse to institute, but may make his choice; the ground of which distinction is, that the ecclesiastical patron has not the same excuse as the lay patron for omitting to ascertain the sufficiency of the clerk first presented (Kielway, 154). But this distinction has no bearing on the question of succession to the right of presentation. It has been urged at your Lordships' bar, that where a judicial officer entitled to appoint to some office, dies without having made an appointment, the successor in the office shall appoint. The first answer to this case is, that such right of appointment is not property of any kind; and the next, that the same law, whether old or new, which has established the superior office, has regulated the right of appointment; in which respect the case resembles that of the Chamberlain of London, the principle of which is, that the law which regulates the right of succession, is coeval with the establishment of the office.

It now only remains for me, in the third place, to consider your Lordships' question with reference to the personal representatives of the deceased prebendary. The right of the personal representatives of a natural person, where a right of presenting has accrued, was not disputed in argument. It was admitted to be too firmly established upon authority to be now called in question; but it was contended to be an exception from the general rule of law, which ought not to be extended to a new case; the exception itself, though established, being, as it was said, inconvenient and founded on a vicious principle. I do not propose to offer your Lordships any observation upon the convenience or inconvenience of the existing [542] law, by which the personal representative is, in ordinary cases, preferred to the owner of the advowson; but if the view which I have taken of the right be at all correct, the law which prefers the personal representative is the general rule, and it lies on those who deny its application to the administrator of a prebendary, to establish a ground of exception. It may be admitted, that the right of such administrators has never been the precise subject of any judicial decision; but little is to be inferred from that circumstance, either on one side or the other. If any argument is to be built upon the absence of litigation upon the subject, I should rather conclude that the general rule has prevailed, than that an exception to it had been admitted without dispute. There can be no doubt that (generally speaking) the executor of a prebendary, as well as every other ecclesiastical corporation sole, takes the personal rights of his testator, whether in possession or in action, which accrued to the deceased in right of his prebend; such as the produce of the prebendal lands actually severed, or rent become due before the death of the prebendary. So a ward, relief, heriot, etc. accruing from the prebendal lands, would pass as chattels to the executor; and on the other hand, the successor does not take any such rights or interests as are less than freehold. Even if a bond be expressly given to a corporation sole, (as the Dean of St. Paul's) and to his successors, the successor shall not sue upon it, but the executor; 20 Edw. 4, 2; Pro. Corporations, 60. It is urged, however, that the right of presentation to a vacant church is not a matter of profit, and that the personal representative of the deceased prebendary ought not to take it, because it would not be assets. But the same argument applies to the personal representatives of a natural person, in which case their title is admitted to be unimpeachable. If the right of pre-[543]-sentation be not part of the freehold, it cannot be exercised by the successor: by whom then should it be exercised, but by the person who represents the personal interest of the deceased? The title of a personal representative is not confined to those things which become assets in his hands. All the personal estate of the deceased, whether held for his own benefit or for that of others, passes to his executor or administrator. Terms for years producing no benefit, covenants and obligations for the benefit of strangers, vest in the personal representative. If the patron be disturbed in presenting to a vacant church, and die, his executor, and not his heir, must bring the writ of *quare impedit*. It can scarcely be argued, that the successor of a deceased prebendary, who was disturbed in his lifetime, could maintain such a writ: and if not, who but the executor could maintain it? And who is to have the writ to the bishop? More-

over, it is to be recollected, that in such an action damages are recoverable, and that such damages would be assets. In *Smallwood* v. *The Bishop of Coventry* (Cro. Eliz. 207), it was expressly held by the Justices, that this action was within the equity of the statute of the 4th Ed. 3; for the presentation is a chattel that should go to the executors if the disturbance had not been, and for a disturbance in their own time they shall recover damages to the use of the testator; by the same reason, for a disturbance in the time of their testator, they shall recover damages by the equity of the statute 4 Ed. 3; and according to the report of the same case in Saville, 118, it was held, with reference to the objection that the presentment could not be assets, that everything which the law gives to executors should be said to be valuable assets; that by recovery in *quare impedit*, the damages would be assets; [544] and so, as the advowson is assets in the hands of the heir, the presentment shall be in the hands of the executor. Will it be said, that such assets belong to the successor of a prebendary, or that he rather than the executor is to sue for them for the benefit of the deceased's personal estate? It has been objected, in argument against the right of the personal representative, that he cannot present in right of the prebend, yet that he ought to present in that right in which the deceased prebendary must have presented. But the same difficulty, if it be one, would apply to the case of a husband, who, though not tenant by the curtesy, presents after his wife's death, in respect of an advowson vested in the wife, to a living becoming vacant during the coverture; and also, to the case mentioned by Fitzherbert, of a parson to whom a right of presenting to a vicarage has accrued in right of his church, and who presents a vicar after having vacated his rectory by promotion. In both these cases, the title, which accrued *alieno jure*, is asserted by the presenter as a personal right vested in the individual to whom it accrued. The observations which I have humbly submitted to your Lordships, have been confined to the case of a presentative advowson, the object of your Lordships' question being in terms a right of presentation. The case of a donative advowson, in which there is no presentation to the bishop, stands altogether upon different ground, not forming, as I conceive, any exception to the general rule which has been mentioned, but being of a nature to which the rule is inapplicable. The principle of the rule which carries the right of presenting to the executor, is, that the right which accrued to the testator as patron, is become distinct from the advowson. It belongs to the patron for a limited time only, which time is independent of his interest in the advowson. If not exercised within six months, it passes as a separate and distinct [545] interest to the bishop; and if not exercised by the bishop within six months more, it passes in like manner to the King; neither the bishop nor the King having any interest in the advowson. In the case of a donative, the right of presenting is subject to no limitation. Though the patron forbear to fill the church for any length of time, his right is not lost; it does not pass from him to the bishop, nor to the King, nor to any other person; and if he never fill the church at all, the common law has made no regular provision for compelling him to do so. So different is the right of the patron of a donative from that of a presentative advowson, that even during the incumbency, the sole right of visitation and correction continues in the patron, independent of the jurisdiction of the ordinary. The patron alone can deprive the incumbent, and it is to him that resignation must be made. It is necessary here to consider, whether by the Spiritual Court, or by any means, the owner of a donative might be obliged to supply a minister for the service of the church, upon the ground of his having dedicated the church to the public for spiritual purposes; for admitting such obligation to lie upon the patron, yet during the vacancy of a donative, either by death, resignation or otherwise, the freehold of the church, of the glebe, and of the tithes, reverts to the patron, and remains in him till by a new gift he confers it on a new incumbent; and it would therefore be inconsistent with this title of the patron, that any other person should have a right to divest his freehold by collation. For these reasons, my Lords, I am humbly of opinion, that where an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation belongs to his personal representative.

[546] Mr. Justice James Parke: To the question which your Lordships have been pleased to refer to the Judges, I answer, that, in my opinion, the right of presentation belongs to the personal representatives of the deceased prebendary. The precise facts

stated by your Lordships have never, as far as we can learn, been adjudicated upon in any court; nor is there to be found any opinion upon them of any of our Judges, or of those ancient text-writers to whom we look up as authorities. The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science. I propose, therefore, to inquire, by reference to those sources from which we usually derive them, what the rules and maxims of the common law upon this subject are; and it will be found that there is little difficulty in the inquiry, and none, as it seems to me in their application to the facts under consider-[547]-ation. The decision of the present case depends upon two propositions, both of which appear to me to be established by authority, and neither of which can be shown to be unreasonable or inconvenient. First, that in every presentative benefice, the void turn is a personal right or interest, which is disannexed from the estate in the advowson, and vested in the person of the individual to whom the advowson then belongs. Secondly, that whether valuable in a pecuniary point of view or not, all personal rights and interests of the nature of property, and which are not extinguished by death, (with some exceptions, which are easily explained, and which have no bearing upon the present case), vest, on the death of the owner, in his personal representatives.

The first of these two propositions, I say, will be found to be supported by authority; for in every case which is reported, and in every book in which the subject has been treated of or mentioned, as far as I have been able to discover, the void turn or right of presenting to a vacant presentative benefice is either expressly stated to be a personal right or interest, under a considerable variety of description, or the cases mentioned are capable of a satisfactory explanation upon that supposition only. It is true, that the great majority of the authorities to which I refer relate to benefices in lay hands, but all do not; and there is no one case, text-book or dictum, of which I am aware, in which any intimation is conveyed that there is any exception to this general rule. Surely it is impossible to argue, with such a constant, uniform and unvarying course of precedent on one side, in all cases in which the subject has been in question, and in the absence of all authority for such an anomaly on the other, that the case of an advowson in spiritual hands is an exception to the general rule; and if the absence of authority [548] were not sufficient, it seems impossible to show in what way the exception could have arisen.

I have said that this rule exists in all presentative benefices, and I confine it to these; for donatives are a very different species of property, and are governed by different rules. This subject is most clearly explained, and all the authorities referred to, in the very learned judgment of my brother Littledale, in the Court below (7 Barn. and Cres. 145); and it is enough to say the result is, that in donatives the complete dominion over the vacant benefice, and the freehold in it, remain in the patron, together with the right to take the intermediate profits, until it is again granted out by him to a new incumbent, in the nature of a new investiture. This freehold, in the case of the death of the patron during a vacancy, of course passes to the heir. I do not propose to occupy your Lordships' time by citing all the authorities to prove that the void turn of a presentative benefice is a personal right or interest. They have been all referred to in the arguments at your Lordships' bar, and in those in the Court below. In some cases this interest is called a "*chose in action*," *Leach* v. *Babbington* (Cro. Eliz. 811); in some "a chattel," as by Periam, justice, in the *Queen's*, *Fane's*, and the *Archbishop of Canterbury's* cases (4 Leon. 109); in others, as in Fitz. Nat. Brev. Quare Impedit, 34 N., and 3 Keble, 152, "a chattel vested." A "personal

chattel," Vin. Abr. Executor, z. 2, pl. 4, note. "A chattel vested and severed from the manor," Fitz. Nat. Brev. 33 P. In one it is called a "personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy;" also, "a thing in right, power and authority;" and also, "a chose [549] in action, and in effect, the fruit and execution of the advowson, and not any advowson," by six Justices, in *Stephens* v. *Wall* (Dyer, 283, a.); in 3 Leon. 256, "a power to present, and an authority annexed to the person." In *Digby* v. *Fitch* (Bro. and Golds. 167), Justice Warburton said, "the presentment is the possession, in *quare impedit:* as in rent, the reserving; in common, the taking of the profits." In *Brooksby* v. *Wicham* (1 Leon. 167), it is also compared to rent, and this analogy will be found to be the most perfect. The advowson is the estate, which descends, may be conveyed, is limited, and escheats as such; the presentation is the mode of enjoyment, the profit or rent of the estate, and, like the rent or profit, belongs to the owner of the estate at the time; it accrues in the nature of a personal chattel, distinct and severed from the inheritance; it belongs to him not as owner, but as an individual.

These authorities, in which the right of presenting on a void turn is treated as a personal right, are not confined to the case of passing to the executor, in the event of the patron's death during vacancy. There are many others in which it is so treated. A termor in the advowson has a right to present, though after the term has expired, to a vacancy which happened during the term, Fitz. Nat. Brev. Quare Impedit, 33 a.; Brooke, Presentation Eglise, 22; and he would be equally entitled to the rents in arrear of an estate granted for the same term. A husband is entitled to present after his wife's death, on an avoidance during his wife's lifetime, of a church of which she had the advowson, Co. Litt. 120 a.; Brooke Present. à l'Eglise, pl. 22; as he would also be entitled to the arrears of rent of his wife's estate. It is incapable of being assigned (Dyer, 283 a.) [550] or released by one joint tenant to another (1 Leon. 167), as arrearages of rent are. If the patron be outlawed in trespass, the church being void, the King is entitled, as to the other goods and chattels of the outlaw, and as he would be to the rents of his lands. Brooke Presentation à l'Eglise, 22; Fitz. N. B. 34 Q. All these are cases of advowsons in lay hands; but a void turn is treated in one case as a personal right, disannexed from the advowson when in spiritual hands. In Fitz. N. B. 34 N., it is said, that "if a vicarage happen void, and before the parson present he is made a bishop, etc. yet he shall present unto this vicarage, for it was a chattel vested in him." All the authorities which I have cited are uniform (and many others might be adduced) to show that the right of presentation is a personal right disconnected from the estate of the advowson, and belongs to the person of the owner; and the last applies to the case of a spiritual person, and is in point. But on the part of the successor it is argued, so far as his case is put upon the ground of authority, that the last case is single and unsupported, and that all the others are anomalies; that in truth the general rule is, that the void turn continues part of the advowson; that these exceptions have been introduced in all cases of lay patronage, without any reason at all, though they have been too firmly established by authority to be now disturbed, but that the general rule still continues and ought to be maintained in the case of spiritual advowsons. Of course the burthen of proving the existence of this rule lies on those who assert it; but the singularity of this argument, which was urged at your Lordships' bar, is, that while it treats all the cases in the reports and books as anomalies and exceptions to a supposed general rule, without the least authority for stating that they are exceptions and anomalies, it asserts [551] the general rule, as will be found, without any authority for it; for there is no one case or dictum cited which makes any mention of such a general rule. But it is contended that it must be implied that there is such a rule, from four cases which lead to the inference that the next turn continues part of the advowson: one was where the incumbent was also patron, and died seised in fee of the advowson; the heir was held entitled to present, and it was said that this must be because the turn continued a part of the advowson; *Hall* v. *The Bishop of Winton* (3 Lev. 47): but this case was decided, not on the ground of the next turn continuing parcel of the advowson, but expressly on the ground that the descent to the heir and the fall of the avoidance to the executor happened in one instant, and that the elder right should be preferred. The general nature of the interest which arises on an avoidance was distinctly admitted, and the right of the heir put upon a ground which is perfectly

consistent with it. Two other cases from which this inference was raised, were those referred to in Co. Litt. 388 a. A bishop dies, a church being vacant in his life, and after his decease the King shall present, and not the executor or administrator: so also in the case of the death of a tenant by knight service *in capite*, with an advowson appendant, which has become void in his life, his heir within age, the King presents, and not the executor or administrator. And this is said to be another proof that the void turn is still a part of the advowson. But though the King omit to present till he restore to the bishop his temporalities, or till the heir be of age and sue his livery and hath it, the King still has the right to present; and this shows that in neither case the void **[552]** turn remains parcel of the advowson, and belongs to the person who is owner of it. For both these positions, Fitz. N. B. 33 N. O., is an authority. Besides, it is said in Co. Litt. 388 a., that if the land be holden of a common person, in that case the executor shall present; but if the void turn were still part of the advowson, why should not a common person as well as the King, when both take the advowson, exercise this right? It is quite clear, therefore, that as neither of these cases can be explained by the supposed rule, we must look for another explanation. Both are clearly referable to the King's prerogative, which entitles him in these special cases to this personal interest. It should be observed also, that Rolle's Abr. Presentation à l' Eglise, c. pl. 4, and Bro. Present. à l'Eglise, 10, which state that the King is entitled, both state that the bishop's executors are not; which shows that these great lawyers thought the void turn was disannexed, and that the successor at all events had no right whatever. A fourth case, from which the inference of this continuance of the void turn as part of the advowson was deduced, was that of a conveyance by the Crown of an advowson, whilst the church was void, which, according to Fitz. N. B. 33, n., passes the void turn. Admitting that authority to be correct, and it is doubtful from what is said upon this subject in Dyer, 347 b., it is a question only as to the effect of the King's grant, and never could have arisen unless the void turn had been severed and distinct from the advowson. The case, in truth, amounts to no more than this, that the grant of an advowson which involves in it every present and future right of presentation, passes, in the case of the Crown, the next presentation to a void living, which the Crown can grant; Dyer, 283 a.; though in the case of a subject it would not; for a subject cannot grant over such a **[553]** personal right. None of those four cases, therefore, which are relied upon as proofs of the existence of this supposed rule (and there are no others,) in reality prove it at all, and all are capable of being satisfactorily explained upon another supposition. There is, therefore, as it appears to me, a great body of authority in favour of the position that the void turn is a personal right in all cases; and when the cases are investigated, a total absence of authority to the contrary. If it be conceded that this interest is of a personal nature, and dissevered from the advowson in all cases, it must be contended that in the case of a spiritual person, this personal interest or chattel will go by succession. But that is a violation of the established rule that a corporation sole cannot take a chattel by succession, whether in possession or action; *Fulwood's* case (4 Coke, 64); and no authority can be cited to show that this special chattel interest is an exception. I have shown, therefore, that there is no authority for the alleged general rule that the void turn continues annexed to the advowson, and is not of a personal nature; and if it be of a personal nature, there is not only no authority, but it is against the rules of law that it should pass to a successor. Upon the hypothesis in favour of the successor, all the decided cases are anomalies; upon that made by the personal representatives, that the right of presenting is in all cases, both of lay and spiritual patronage, a personal interest, we have an uniform and consistent system. As this right when in lay hands is analogous to rent, in the case of land, so it is when the advowson is in spiritual hands; and as a parson or prebendary, who resigns, or his executor, when he dies, is clearly entitled to the arrearages of rent and profits which accrued before his resignation or **[554]** death (Fitz. N. B. 122 D.; 120 L.; 19 Hen 6, 44); so he or his personal representative ought to be entitled to the right of presenting, which fell during the same period. Besides, if this anomalous principle is introduced on the ground of the spiritual character of the prebendary, what is to be said of it while the prebend was in lay hands, which it clearly might have been before the Act of Uniformity, according to the case of *Bland* v. *Madox* (Cro. Eliz. 79)? Is the void turn to be dissevered or not,

according as the prebendary is a layman or ecclesiastic? It is said that this patronage is so annexed to this spiritual corporation as to be incapable of separation from it; but not only is there no authority for this position, but many precedents are against it, in which bishops and other ecclesiastical corporations sole have granted away their right to laymen, which grants have been considered good against themselves. I need not refer your Lordships to the authorities; they are collected in the reported cases in the Courts below. And indeed I am at a loss to see in what way the alleged difference, if there be any, between the qualities of an advowson in lay hands and in those of a spiritual proprietor, could have arisen. It is highly probable, to say the least of it, that all rectories were originally created in the hands of laymen, who received the patronage from the bishops in lieu of those lands which they granted on the foundation or endowment of a church; and if this be so, what is there to raise the presumption that when they afterwards granted these advowsons to the church, they wished them to have new properties and qualities different from those they had in their own hands? or if they did wish it, what power had they to communicate them? They could no more alter the rules of law, **[555]** and make chattel interests be taken in succession by a corporation sole, than they could make the estate in a freehold descend to executors. "Succession in a body politic, is inheritance in a body private;" *Fulwood's* case (4 Coke, 64); and no grantor can, however much he may wish it, limit his estate against the rules of law. And supposing that there were instances in which a bishop or other ecclesiastical person, and not a layman, had originally founded or endowed a church out of the lands belonging to him in that character, and became the proprietor of the advowson which he or his successor had granted to the prebendary, the same difficulty occurs in proving the intention of the donor, and a similar difficulty in carrying that intention into effect; and if those difficulties are overcome, the alleged difference in the quality of lay and spiritual advowsons must at all events be confined to those very special cases, exclusive of all others.

The next proposition which the authorities establish, is, that all personal rights and interests of the nature of property, and which are not extinguished by death, vest on the decease of the owner, (with some few exceptions,) in his personal representatives. The executors or administrators are not constituted for the purpose of paying the debts of the deceased; their liability to those debts is a consequence of their representative character. Litt. s. 337, says that executors represent the person of their testator; so Yelverton, 103, is to the same purpose. He is in law the testator's assignee; Wentworth Off. Ex. 100. As to the estate committed to his trust, he may charge others and be charged himself, sue and be sued, as the testator himself ought: Sheppard's Touch. 401. Executors take therefore all the personal estate and **[556]** interest of the testator, and are identified with him in respect to all personal property, but their obligation to pay debts is only to the extent of the value of those effects which are valuable. They have all the deceased's effects, but they are liable only for assets. It is a fallacy to suppose that they take nothing but what is valuable; and therefore do not take rights of presentation to void benefices: a fallacy which has led to the argument that all the cases in which a personal representative has taken a void turn, which certainly cannot be sold, are unreasonable anomalies. The 31 Ed. 3, st. 1, c. 11, puts administrators who are the deputies of the ordinary on the same footing as executors (*Vide* also Shep. Touch. 401). To this rule, that the personal representatives take all the personal rights of the deceased, of the nature of property, there are some exceptions, which the common law, in the case of private individuals or the King's prerogative right, has established. Chattels touching the realty, deer in a park, fish in a pond, evidences of heir-looms which go to the real representative, and the analogous case of the ornaments of a bishop's chapel, which pass to the successor, are of the former description: the right of the Crown to the void turn, in the case of the tenant in *capite*, and the bishop, stated by Coke, p. 388 a., are instances of the latter: and it is to be observed, that both those instances are put by him as exceptions to the general rule, that chattels, as well real as personal, shall go to the executors or administrators. None of the excepted cases have any bearing on this, and there is no mention anywhere made of an exception of the right in question when in spiritual hands; and it would violate the rule of law, as to succession by a corporation sole to chattels, if it did.

[557] My Lords, I must own that it appears to me to be quite clear, that if this case

is to be decided, as I conceive all similar cases ought to be, according to the rules deduced from former decisions and legal precedents and principles, there is no doubt as to the right of the personal representative of the prebendary to present to the void living. These rules cannot be shown to be contrary to sound reason and just policy. We are not inquiring whether other rules might or might not have been more wise or reasonable, and whether the heir in the case of lay property, and the successor in that of spiritual property, might or might not have been likely to exercise the right of presentation more beneficially to the public interests. If such an alteration is proper, and it is not my province to inquire whether it is, it must be made by the Legislature. "What ground has a Judge," says Lord Keeper Henley, "to alter the law because he cannot approve the reasons that others have given, or may not be able to assign a satisfactory one himself?" At present the system is at all events uniform and consistent, and uniformity and consistency ought not to be lightly sacrificed. The law of England, which has from the first treated advowsons as property, (the founders or benefactors of churches having had the patronage granted to them as property for a valuable consideration,) has not relied upon the person or character of the patron for the due exercise of the trust, but has adopted other securities for that important purpose. The incorrupt exercise of the trust is secured by the penalties against simony, and the selection of a fit clerk by the examination of the ordinary. Subject to these provisions, it has left the patronage of churches to descend, be limited and enjoyed, like other real property. For these reasons, I am of opinion that [558] the right to present to the void turn passed to the personal representative of the deceased prebendary.

Mr. Justice Gaselee: This, my Lords, is not the first occasion on which my attention has been called to this question. The case has been since very fully and ably argued at your Lordships' bar; and in the course of the several discussions which it has undergone, I believe every authority that can be brought to bear upon the subject has been cited, and they are all mentioned in the reports of the former discussions (3 Bing. 223, 11 B. Moore, 139, and 7 Barn. and C. 113): I shall therefore not trouble your Lordships with going through them at length, but shall state, as shortly as I can, the grounds upon which I found my answer to your Lordships' question in the affirmative. It is extraordinary that although cases similar to the present must have happened, there are no traces of any such having been made the subject of legal investigation; nor, upon the best inquiry I can make, have I been able to ascertain what the practice in such cases has been. It is admitted that the general rule with respect to presentative livings is, that if after a vacancy the patron of the advowson dies without having presented, the rights of presentation to the vacant turn belong to the personal representative, and not to the heir of the patron: and the reason given in the books for this is, that it is a fruit fallen, a chattel severed from the inheritance; or, in other words, that the moment a church becomes vacant, the turn is separated and disannexed from the advowson, and is vested in the person of the individual to whom the advowson at that instant belongs. See 4 Leon. 109; Fitz. N. B. 33 P. 34 B. and 34 N. P., and many other authorities. And it is so far consi-[559]-dered as disannexed from the inheritance, that the grant of an advowson during the vacancy does not carry the vacant turn. Where the husband is tenant by the curtesy, and the church becomes void during his life, and he dies before it is filled up, yet the heir of the wife, who takes the advowson, shall not have the vacant turn, but the husband's executors. So where the wife is seised of the advowson, and the church being void, dies without having had issue, so that the husband is not a tenant by the curtesy, yet the husband shall present to the vacant turn, and not the heir of the wife. Again, in the case of a *termor*, if a vacancy happens during the term, and he does not fill it up during the continuance of the term, he is entitled to do so after the expiration. And there are many cases which decide that although the grant of the next presentation be made to a man and his heirs, yet it shall go to his executors, and not the heir.

But it is said there are exceptions to this general rule: one of which is, that where the patron is the incumbent, the vacancy occasioned by his death shall not be filled by his executors, but by his heir, upon whom the advowson descends; and for this is cited the case of *Hall* v. *The Bishop of Winchester* (3 Lev. 47). But what is the reason given by the Court for this? It is, that all is done in an instant, the

descent to the heir and the falling of the advowson to the executor; and that where two titles accrue in the same instant, the elder shall be preferred; as in the case of joint tenancy, where one devises his part, the titles of the devisee and of the survivor happen in the same instant, and the title of the survivor, being the elder, shall be preferred.

Another exception is, where the patron is a bishop, and entitled to the living in right of his see; in that [560] case, if the bishop dies after the vacancy, and before it is filled up, the King, and not the executors of the bishop, shall present. Various reasons are given in the books for this; one is said to be, for that nothing can be taken for the presentation, and therefore it is not assets. This merely cannot be the reason; for if it were, it would apply to every case, and entirely do away with what is admitted to be the general rule in presentative livings.

Another reason given is, that it is a spiritual trust, and consequently, in the vacancy of the see, vested in the King as supreme patron and head of the church. Is this the reason? The vacant turn is by all the authorities considered as part of the temporalities of the see. The King takes it as such; it passes to a third person by the grant of the temporalities; and nothing can be more strong to show that it is considered as disannexed from the advowson, than that if the vacancy remains unfilled, not only until after the consecration of the new bishop, but after restitution of the temporalities, the vacancy is still to be supplied by the King or his grantee, and not by the new bishop, to whom, if not considered as so disannexed, it would naturally pass as part of the advowson. The rights of the Crown upon these subjects are stated in Watson's Complete Incumbent, c. 9, 48. If the rule be that all ecclesiastical patronage is a spiritual trust, and cannot be transferred into lay hands, what becomes of the case of an archbishop's options, which are to all purposes considered as chattels, and his personal property? He may devise them, and if he does not, they pass to his personal representative.

It is true that after the vacancy happens the option cannot be sold; and although it cannot be supposed that any archbishop would sell it during his lifetime, yet there [561] may be cases in which his executors or administrators might be compelled to do so before a vacancy happens; as, for instance, on the application of a residuary legatee, or one of the next of kin. A distinction is attempted to be made between ecclesiastical and lay patronage, because it is said that in the latter the church is secured from an improper person being presented, by the bishop's right to refuse the party presented. But there is in fact no ground for this distinction. In this very case the administratrix claims only to present; the Bishop of Lincoln is to judge of the fitness of the person presented. And so it is in all presentative livings, whether of ecclesiastical or lay patronage; the bishop of the diocese in which the benefice is situated, is to examine and decide upon the fitness of the presentee. I am not aware of any authority which has determined that a grant by an ecclesiastical patron of a presentative living, to which he was entitled in respect of his ecclesiastical preferment, is void, although of course he cannot grant it beyond his own life. In Watson, p. 53, it is said to have been held, that a grant by a bishop of an archdeaconry for 21 years, though void against the successors and the King, is good as against himself. And many of such grants in ancient times are to be found in the Books of Entries. I will not trespass upon your Lordships' time by stating them at length, but merely refer to the books where they are to be found: *The King* v. *Abbott and another*, Vet. Intr. 110. *Stanhope* v. *The Bishop of London and others*, Hob. 237; Winch's Entries, 825. *Webster* v. *The Archbishop of York and Woodroffe*, Co. Entr. 507. *Hill* v. *The Bishop of London and others*, Co. Entr. 508. *Adamson* v. *The Bishop of Lincoln and others*, 2 Bro. Entr. 233. *J. N.* v. *The Bishop of Bath and Wells*, Rastall, 522. *Overton* v. *Syddal*, Co. Entr. 122. *Byng* v. *The Bishop* [562] *of Lincoln*, Winch, 853. Although there do not appear to have been any decisions in these cases, yet Mr. Justice Ashurst, in *Radcliffe* v. *Doyley*, 2 Term Rep. 636, says, that "the forms of legal proceedings are evidence of what the law says." In one case indeed, that of *London* v. *Southwell*, reported in Hob. 303, the pleadings of which are in Winch's Entries, 810, it was held that an advowson did not pass by a lease made by a prebendary, not because the grant of an advowson by a spiritual person was illegal, which if the law were so would have been an answer to the case, but because the words of the lease were not sufficient to

comprise it. And in the case of *Armiger* v. *Bishop of Norwich and Holland*, the Court said that the grant by a bishop of an advowson, though void under 1 Eliz. c. 19, against the successor and the Queen, was good against the bishop whilst he continued to hold the see. And in *Poyner* v. *Chorleton* (Dyer, 135. *a*), it appears that the grantee of a dean and chapter of the next avoidance, may recover in *quare impedit*. Much stress has been laid by the counsel for the plaintiff in error, on the case of *Repington* v. *The Governors of Tamworth School* (2 Wilson, 150), in which it was held, that in the case of a donative the right of donation descends to the heir, and that the executor has no title, which the Court said he would have had if it had been a presentative living. This case is so very miserably and scantily reported that it is impossible to ascertain the grounds of the decision. It does not militate against the general rule which I have stated in the early part of what I have addressed to your Lordships; and which, as I have above stated, the Court, in giving their judgments in the case of *Repington* v. *The Governors of Tamworth School*, said, would have governed that [563] case if it had been one of presentative livings. It is said in a case subsequently reported, that "judgment was overruled in Easter 1763, by reason of a mistake in records."

Another ground of objection taken to the plaintiff's claim is, that admitting the vacant turn to be a chattel, still the plaintiff is not entitled to present, because it is said that the prebendary is a sole corporation, and that a sole corporation cannot take a chattel by succession, except in the case of the King. That a sole corporation, except in the case of the King, cannot take a chattel in succession, is true; but what appears to be the fallacy of the argument in this part of the case is, that the prebendary did not take the void turn by succession; the advowson goes to the next prebendary by succession, and if the void turn went with it, it must be as a part of the advowson; for if disannexed from it, and a chattel, as it is stated by the authorities, he could not take it. It appears to me, however, that the moment the vacancy happens it becomes a chattel vested in the then prebendary, in his individual capacity, and passes to his representatives in the same manner as rent or any other fruit of the prebend, which has accrued or fallen during his lifetime; and for this I would refer to the case cited in Mr. Justice Holroyd's judgment, from Co. Litt. 99, and to the passage in Fitz. N. B. 34 N., that if a vicarage happen to be void, and before the parson presents he shall be made a bishop, yet he shall present to the vicarage, because it was a chattel vested in him. With respect to any observation that arises from the form of the present claim of the last incumbent, which is set out in 3 Bingham, 279, supposing your Lordships can take notice of it, which I apprehend your Lordships cannot, framed as the record in this case is, in which the patron states himself to be prebendary of [564] the prebend of South Grantham, anciently founded in the cathedral church of Sarum, and in right of that prebend the true and undoubted patron of the rectory of Welby, in the county of Lincoln, in the diocese of Lincoln; I am not aware of any determination that the common form, which is to be found in 1 Burn's Ecclesiastical Law, 150, would not be sufficient. That form runs thus: "I, Sir W. B. P., true and undoubted patron of the rectory of the parish church in the county of ———— and in your diocese of ———— now vacant by the death of A. B., the last incumbent thereof." But if that form be necessary where the presentation is made by the prebendary himself, it does not follow that, because the administratrix cannot use that precise form, she cannot present at all. In the common case the executor or administrator cannot use the precise form used by the patron; it must of course be adapted to the particular situation of the party. In considering the answer I shall give to your Lordships' question, I have confined myself to the matters contained in this record. Of the several documents stated in the judgment of the noble Lord who was Chief Justice of the Court of Common Pleas when the case was determined in that court, we have no judicial notice; they were not, they could not have been given in; because upon this record nothing decisive can be drawn from the general history of the foundation of prebendal churches, or the appropriations of livings to them. There does not appear to have been any general mode of appropriation; they are stated to have been made to the body, or to some one particular member of it. Of what was the course pursued in the case before us, we have no judicial notice, nor any evidence, either judicially or otherwise, respecting the will of the founder. Under these circumstances, therefore,

in a case admitted to be of the [565] first impression, and upon which no precise authority can be found, it seems to me that the safest course is to follow the general rule applicable to presentative benefices.

My humble answer to your Lordships' question is, that the right of presentation belongs to the personal representative.

Mr. Justice Park: When the case, out of which the question propounded by your Lordships for the opinion of His Majesty's Judges, first came before the Court of Common Pleas, I took infinite pains, by reading much in ecclesiastical history, by consulting our text writers, to satisfy my mind upon it (for as to decided cases, there are none); and after that, after having two very elaborate arguments at the bar, and long consultations with the then Lord Chief Justice of the Common Pleas, I came to the conclusion that Mrs. Rennell, as administratrix of her deceased husband, was not entitled to that, which she claimed; and in giving which opinion, I am happy to say I concurred with Lord Chief Justice Best, (now one of your Lordships' house,) and Mr. Justice Burrough, a man who for legal knowledge, and sound and correct understanding, was of no ordinary kind. To err in judgment with two such Judges, if err we did, can be no disgrace to any man. When this case was removed from the Common Pleas into the King's Bench, by writ of error, three of the learned Judges of that Court reversed the judgment of the Court below, against the opinion of Lord Tenterden, the Chief Justice; so here again the Judges were three to one against the judgment: thus four Judges were opposed to four; and, therefore, we need not wonder that this case has found its way into your Lordships' house. I have again heard this case argued with great learning and ability at this bar; I have considered [566] every argument, and studied the judgments of my different learned brethren, and the authorities they have quoted; and though I do not deny that my mind has now and then fluctuated, (which great learning and great ingenuity at the bar will frequently occasion), I have arrived at the same conclusion I did in the Common Pleas; namely, that the administratrix of Mr. Rennell is not entitled to the presentation to the church in question, the advowson of which belonged to Mr. Rennell, as prebendary, in right of his prebend in the church of Salisbury; and that is the answer I propose to give to your Lordships' question. Before I enter into the argument, which must be almost a repetition of what I formerly delivered, and which is now in print, I hope I may be allowed to assert, that had anything passed, either in the Court of King's Bench or in this house, which had convinced my understanding that my former opinion was erroneous, I should be one of the first to acknowledge my mistake, and to retract my judgment. I have done so on two other occasions in this house, and shall never be ashamed to make such an avowal; for none but a weak, nay a wicked mind, will persist in error, if the understanding and more mature reflection convince a man that he had before formed a wrong judgment. It is admitted, then, that it is not necessary for your Lordshops to decide, upon this record, who has the right of presentation to the living in question; the point is, whether Mrs. Rennell, as administratrix to her deceased husband, (which must be in his natural capacity,) has established her claim to a living, the advowson of which belonged to her deceased husband, in right of his prebend of South Grantham. Not that upon that question I have not a clear opinion: for I do not think it goes to the Crown, as it was surmised it did, but I think it goes to his successor in the stall or [567] prebend in the church of Salisbury. A point has been much insisted and argued upon, which seems to me to be the foundation of all the misconception in this case, but it is a point upon which there is no difference of opinion; namely, that in the case of lay patronage, in the events which have happened, the patron dying after the actual vacancy, the personal representative and not the heir would have been entitled to the presentation: because in merely lay patronage, the church, having become vacant in the lifetime of the last possessor, thereby became a chattel, and went to the executor as personal property, being severed, and therefore no longer remained with the advowson as a part of the possessions of the heir of the person seised of the advowson; and in that case it is a mere question between the different representatives of the same patron. Of this law there is now no doubt, grounded upon the authority of decisions and of a practice long known; although I own I cannot state or discover any reason very satisfactory to myself for deciding that the void turn in the lifetime of the patron is a mere chattel, when the question arises between the heir and the executor of a natural person. For Lord Coke, in his first Instit. 388 a., says that such a turn is not assets,

and therefore nothing can be made of it for the payment of debts; therefore the rule between heir and executor cannot depend upon considerations of that sort. But I agree with Lord Tenterden that the want of a satisfactory reason is not a sufficient ground for overturning a practice long established. This, however, in my way of considering this case, leaves the point still open; and I cannot find from any of my learned brethren in any court, who have judicially given any opinion, nor from any industry displayed at the bar in the courts below or in this house, nor from my own laborious reading and research upon this subject, that in **[568]** any Court in England has such a case in specie ever been decided. The question is, in my view, whether lay and spiritual patronage are not to be considered as standing upon a very different footing. That facts similar to those which have occurred in this case must have existed many hundred times, no man can doubt; and that ecclesiastical patrons thought it clear one way or other, must be the reason why no decision upon such a point is to be found in our books. I myself verily believe that till this claim was set up, no spiritual person ever imagined that those rights which a man held *jure ecclesiae* merely, could be exercised by others after his death; the words of the grant to such a person being, "We duly and canonically invest you" (not your executor, etc.) "in and to the said prebend and canonry, and invest you with all and singular the rights, members, privileges and appurtenants thereunto belonging;" otherwise one cannot but think in 500 or 600 years such a claim would have been contested, and the point by some legal decision ascertained. No distinction can be more broadly drawn in the whole law of England than that between the lay and the spiritual function and character; even the variety of cases and statutes quoted by my learned brothers who have gone before me, and which I shall not fatigue the House by wading through, establish the distinction. Certain personal rights belong to one of these characters, which do not belong to the other. The transmission of church property also stands under very different considerations from the transmission of lay property: for instance, a person seised of a freehold right is said to be *seised in his demesne as of fee;* a clergyman, as in this declaration, is said to be seised in his demesne as of fee *in right of his said prebend or canonry.* I cannot deny that many of the evils and absurdities which I contemplate **[569]** by giving effect to Mrs. Rennell's claim will also arise in lay patronage, because it must be admitted that by giving the presentation to the *personal* representative of a lay patron, it may fall to a very inferior person to present; but this evil arises out of the unfortunate situation in which lay patronage stands, but which I contend ought not to be carried one single point further, especially where the rule hardly applies, the lay patron acting in his natural, the other in a *politic* or *corporate* character. What was the origin of lay patronage? I have looked much into it, and the result of all my researches is this, that it arose in the infancy of society, and under these circumstances, that though the appointment of fit persons to officiate throughout a diocese was originally in the bishop, yet when lords of manors, and other great men of old, were willing to build churches, and to endow them with glebes and mansion-houses for the accommodation of fixed and resident ministers, the bishops, for the encouragement of such pious undertakings, were content that those munificent persons should have the nomination to churches so built and endowed by them, reserving to themselves still the right of judging of the fitness of the persons so nominated. "*Si quis ecclesiam cum assensu diocessani construxit, ex eo jus patronatus acquiritur;*" and hence have followed all the consequences of a mere lay possession, or property: chattels, where chattels, going to the executor; the rights of the heir, to the heir, in cases where by the common law the rights of the heir were paramount to those of the personal representative. But still the question recurs, do those rules apply to the spiritual patron; and can the rights and property which belong to his politic character be dealt with as if he were a private person? Of this there can be no doubt, that in our law now, and I hope they ever will be, lay and **[570]** spiritual patronage are upon a very different footing. Bishop Gibson, in his Codex, p. 757, decisively marks the distinction. That very learned prelate says, and his authority upon subjects of this nature has always been considered as entitled to great respect, "The right or property which the patron has in an advowson will not warrant a plea, as it is in temporal property" (of course therefore the bishop is contrasting it with an advowson in spiritual hands) "that he is seised in *dominico suo ut de feodo*, but only *de feodo*. The reason of which is

given by Lord Coke, Inst. 17 a., because that inheritance (viz. an advowson) savoureth not *de domo*, and cannot serve for sustenance either of himself or his household, nor can anything be received of the same for defraying of charges; and in the case of *John London* v. *The Church of Southwell* (Hob. 304), where the words of the lease were, *commodities, emoluments, profits* and *advantages* to the *prebend belonging*, it was adjudged that the *advowson* did not pass by the said words; because, said the Court, all the words used implied *things gainful, which is contrary to the nature of an advowson regularly*." Why is this so? I say it is so, because an advowson in the hands of a sole corporator, a churchman, is not a matter of *profit*, but of naked *trust* merely; and the churchman who has an advowson appendant to an ecclesiastical dignity, has it as a mere matter of trust in *jure ecclesiae*, which he can only exercise for the benefit and advantage of the church of which he is a member, and of which only as a *member of the church* could he have a right to dispose. Mr. Rennell, therefore, had only a right as member of the church of Salisbury, and the moment he expired all his rights as **[571]** a member of that church ceased. Suppose, instead of his death, he had resigned his prebend of South Grantham, having omitted to fill up this living, could it have been for a moment alleged that he still had a right to it as fruit fallen during his holding the prebend? Am I right in stating to your Lordships that this is a matter of trust only; for upon that much of the argument has turned? I wish to found myself again upon the authority of Bishop Gibson on this point, in page 757 and 758, founding himself on the authority of Lord Coke, even in cases of lay patrons: "Guardian in socage shall not present to an advowson, because he can take nothing for it, and by consequence he cannot account for it, and by the law he can meddle with nothing he cannot account for; which said doctrine, and the plain tendency thereof, are exactly agreeable not only to the nature of advowsons, which are merely a trust vested in the hands of the patrons by consent of the bishop, *for the good of the church and of religion*, but also to the express letter of the canon law; the rule of which is, *jus patronatus cum sit spirituali annexum vendi vel emi non potest*." In another place, the bishop says they are mere trusts for the benefit of men's souls. If this be so, in the origin of these things, even as to lay patronage, however the exercise of the right of selling advowsons and next presentations, when the churches are full, may have grown, am I not right in stating to your Lordships that the greatest difference exists between lay and ecclesiastical; and though it may now be impossible to shake the custom of making profit of advowsons in the hands of laymen, the other has always been considered as a *mere trust*, to be exercised *by the patron for the benefit of the church*, to the due discharge of which he alone is to look, which **[572]** he alone is competent to consider with a view to the welfare and advantage of religion, in this respect committed to his sole care, and upon which his personal representative may be absolutely unable to form a judgment? It may appear to your Lordships a low and unfit argument to state to this House; but when I gave my judgment in the Court below, I thought, and I think so still, that it is one of vital importance to the interests of that church which every good man must love and revere, and to which I have never received a specious answer, except that the same inconvenience may occur in lay patronage, and which I admit. Suppose a prebendary died insolvent as well as intestate, and that all his next of kin, as they probably would in such a case, renounced administration, and that his butcher, baker or other inferior tradesmen, being a creditor, took out administration, must such person present? Is such a person capable of forming a correct judgment of a person fit for the cure of souls? And yet I defy the ingenuity of man to get out of the dilemma; for if Mrs. Rennell is to present, the butcher or baker must, under the circumstances supposed, have exactly the same right. I lament that the same consequence would follow in lay patronage; but I am quite sure, till compelled by the judgment of your Lordships' house, I cannot, consistently with my feelings to your Lordships nor to myself, declaring a judicial opinion, advise that such lamentable consequences should be carried one step farther. That the presentation now under consideration is not assets of value is quite clear; it may be a chattel, but, in the hands of an ecclesiastic, a chattel of mere trust. It is admitted by every Judge and by every counsel that has spoken upon this subject, that there is a total silence in our law books during the whole period of our ascertained law of England, upon **[573]** this precise point; although circumstances similar to the present must have existed many times. And this, to me, is a

strong convincing proof that till these days of novelty no such idea was ever entertained upon this question; and I verily believe that no man now living ever before heard of such a claim being advanced. Nothing, I think, can be put in a stronger light, than was done by my learned brother, Burrough, when this case was before the Court of Common Pleas. The allegations of this declaration are, that the late prebendary, in his lifetime, and at his death, was seised of the prebend or canonry founded in the church of Sarum, with its appurtenances, to which prebend the advowson of the rectory of the said parish church of Welby belongs, in his demesne as of fee, in right of the said prebend or canonry. By the law of England, a prebendary or canon is an ecclesiastical sole corporation; as such, he can have no heir, he can have no personal representative; as such, his prebendal rights or property cannot go either to his natural heir or to his personal representative. Where then must they go? To his successor. In their corporate capacities, in estimation of law, the predecessor and successor being one, it is a continuance of the same corporate body. A prebendary or canon is a corporator in two respects; in one respect, as a member of the corporation of dean and canons, he is one of the chapter having *sedem in ecclesiae et vocem in capitulo;* and he is a corporator sole as prebendary. In every relation in which he stands to the church he is a corporator. I do not presume to state to your Lordships anything particular respecting the constitution of this canonry of South Grantham, though much pains has been taken respecting it by Lord Chief Justice Best and Mr. Justice Burrough, in the Court below; because, though there be no doubt of the authenticity of **[574]** the documents from whence their information was drawn, yet we are not judicially informed of the foundation of this particular prebend. When, therefore, in this declaration the prebendary is said to be seised in his demesne as of fee in right of his canonry, it cannot be meant a seisin to him and his heirs, for by a canon he has no heirs; it must therefore mean, to him and his successors. We find in all our law books the same law that I have above stated as to ecclesiastical sole corporations, from the highest to the lowest order of the church. Thus it is always said the prebend is vested in the spiritual incumbent; but if we could suppose it vested in him in his natural capacity, on his death it might descend to his heir, which cannot be. The law has therefore wisely ordained that the spiritual person, as such, shall never die, any more than the King, by making him and his successors a corporation; by which means all rights are preserved entire to the successor; for the present incumbent of a spiritual charge, and his predecessor who lived centuries ago, are in law one and the same person; but if the personal representative, or even the natural heir, were to intervene, the succession would be broken. 1 Blacks. Com. 470. The position of Lord Tenterden, agreeing with the majority of the Court of Common Pleas, though differing from his own more immediate brethren, has put this case in a strong and luminous point of view: "It is clear," says his Lordship, "that the administratrix cannot present in right of the prebend, because the prebend is not vested in her. If, therefore, she be allowed to present, she must present in a right different from that in which the intestate would have presented; and this will not be conformable to the general rights of an administratrix, which are those only that belonged to the person or personal property of the intestate. **[575]** She is the administratrix of the personal rights and property of the intestate; but I find no authority for saying that she is the administratrix of his politic rights or property also. If in the case before the Court it be held that the administratrix is entitled to present, it cannot be denied that a right generally annexed to a prebend will in the present instance be exercised, not merely by a person who has not the prebend, but by a person claiming as if he from whom the title is derived, and who had the advowson in his politic capacity only, had in fact held it in his natural capacity. A decision to this effect will be contrary to the nature of the right." Some stress was laid, in arguing this case, upon the stat. of 21 H. 8, c. 11, and I own I was at first impressed with the argument arising upon it. But upon considering the statute, and the motive for making it, it now appears to me to have no bearing upon the case. The statute was made at the dawn of the Reformation, and it appears that the then heads of the Church, following in that respect the example of the see of Rome, exercised, or endeavoured to keep in their hands the temporalities of the Church, which belonged to them in their corporate character, whether aggregate or sole, to an unreasonable time, for their private benefit, to the great ruin and impoverishment of persons appointed to livings; the statute deprived

them of that right, and gave the benefit to the new incumbent, from the death of the last, and to the executors of such new incumbent, if he should happen to die before he realized those interests which the statute thus gave to him. Much stress has also been laid, both at your Lordships' bar and at the bar of the courts below, on the options of the archbishops, which I admit are allowed to be the subject of devise, and may go to executors. But I answer, that they are ano-[576]-malies in the law, and the exception proves the general rule. They were originally, Mr. Justice Blackstone thinks, derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury, and that right has been continued to the archbishops in their respective provinces of Canterbury and York, even after the power of the popes has ceased in this country. But all these anomalies, I again repeat, support my general argument to show that the rights of lay and ecclesiastical persons stand upon a totally different foundation; and that the law, attaching as it may upon property of this description, in the hands of a lay person, does not attach upon the same species of property in the hands of one who holds *jure ecclesiae*. The case of *Repington* v. *The Governors of Tamworth School* (2 Wilson, 150), has been much pressed; but it is difficult to ascertain the grounds of that judgment. It was the case of a donative, and Lord Tenterden thinks that the decision may have proceeded on the ground that the Court thought the rule as to presentative benefices in lay hands not well founded, and therefore not to be extended. A donative is, however, of a very peculiar nature, and therefore any decision respecting that may be considered as anomalous also. And, indeed, Mr. Justice Blackstone, vol. 2, p. 24, speaking of donatives, considers them as exceptions; for he says, "These exceptions to general rules and common right are ever looked upon by the law in an unfavourable view, and construed as strictly as possible." If, therefore, the patron of a donative, in whom such peculiar right resides, does once give up that right, by presenting his clerk to the bishop, and procuring institution and induction, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever, [577] and will therefore reduce it to the standard of other ecclesiastical livings. The ground of my opinion is, that this species of interest in the case of spiritual patrons, whether aggregate or sole, is a mere personal trust to be exercised by him or them in the spiritual character, which he cannot, consistently with his high duty, if he be a sole corporation, either devolve upon another during his life, or at his death leave to be exercised by his heir or personal representative. He holds *jure ecclesiae*, and in that right only; if he had it not in that right he could not have it at all; and when he dies, all his rights, powers and privileges derived from the church absolutely cease, as if he had never existed. This is no new notion; for that laborious and learned writer upon ecclesiastical law, Dr. Burn, in his 2d vol. 7th edit. p. 92, title Dean and Chapters, observes (Dr. Godolphin having said that after the death of a prebendary the dean and chapter shall have the profits). "But by statute 28 H. 8, c. 11, the profits of a prebend during the vacation shall go to the successor." Dr. Burn reconciles this apparent contradiction thus, which bears on the discussion now before your Lordships: "the issues of those possessions which he has in common with the rest of the chapter, (that is, a corporation aggregate,) shall after his death be divided amongst the surviving members of the chapter; but the profits of those possessions which he has in his separate capacity as a sole corporation of himself, shall be and enure to his successor." Dr. Burn seems well supported in this distinction, by the case of *Young* v. *Lynch* (Sayer's Rep. p. 84). Therefore, if a member of a chapter, which is an aggregate corporation, should die after a living had become vacant, it seems to me that his personal representative might as well contend for a voice [578] in the chapter as to the filling it up, as that such representative might have it to himself exclusively, where a living belonged to the intestate as a sole corporation merely; although Dr. Burn more justly says in that case, "it would go to the surviving members of the chapter; in the other, to the successor." When Bishop Gibson says advowsons may be granted by deed or will, etc., he is evidently speaking of lay patronage only; for he adds, "This general rule is to be understood with limitations, that it extends not to ecclesiastical persons of any kind or degree who are seised of advowsons in right of their churches; all these being restrained, (as to bishops, by stat. of 1 Eliz., and the rest by 13 Eliz.,) from making any grants but of things corporeal, of which a rent or annual profit may be reserved; and of that sort, advowsons and next avoidances, which are incorporeal.

and lie in grant, cannot be." This distinction between laity and clergy pervades every page of our ecclesiastical history; and those well versed in the history of our venerable church will immediately recognize the justice and accuracy of those principles I have been endeavouring to establish.

It is well known that in the early periods of the church history of this country, the *parochia* or parish was the episcopal district. The bishop and his clergy lived together at the cathedral church, and all the tithes and oblations of the faithful were brought into a common fund, for the support of the bishop and his college of presbyters and deacons, for the repair and ornament of the church, and for other works or piety and charity. At this time, and in the infancy of society, the stated ordinances of religion were performed only in these single choirs, to which the people of each whole diocese or *parochia* resorted, especially at the more solemn seasons of devotion. But in order to supply the inconvenience [579] of distance from the mother church, the bishop was wont to send forth some of his clergy to preach and dispense the word and sacraments, and these missionaries returned to give to the bishop a due account of their labours and success. As the wants of society for spiritual instruction increased, and when the members of the episcopal college found it inconvenient to go forth, certain churches were allotted, some by laymen (where they had the patronage given them as a compensation for having built and endowed churches, and hence the origin of lay patronage, as before shown), some by the bishops to the prebendal body at large, some to one particular member of the body: all which may be seen by those who will take the trouble of looking into the ancient records of the church. Thus these churches which were not in lay hands became prebendal; and the supply of the duty was left to the aggregate corporation, where the perpetual advowson was in the whole community of the dean and chapter, or to that sole corporation, or single canon, or prebendary, who was to have his prebend or exhibition from it. In progress of time the representative curates, who were to account for their profits, and only to receive a small stipend for their services, were so ill paid, that the bishop obliged his clergy who had such advowsons to retain fit and able capellans, vicars or curates (for these are all nearly of the same import), with a competent salary. This failing, the bishop again interfered, and obliged the clergy (that is, the chapter, or that single prebendary, in whom the perpetual advowsons in right of the chapter, or in right of his prebend, of which he was seised *jure ecclesiae*, was vested,) to make the presentation to spiritual persons to be endowed and instituted, who should thenceforth have no more dependence upon their spiritual, than others [580] had upon their lay patrons, with a competent maintenance to be assigned by the bishop.

Much of this information may be inferred from the stat. 15 R. 2, c. 6, and the 4 H. 4, c. 12.

I have not thought it necessary, in giving this detail to your Lordships, to refer to authorities, but what I have advanced will be found as the early history of our church, in various books well worthy the attention of the curious: such as Spelman *de non temerandis Ecclesiis;* Bish. Kennet on Impropriations; and Burn, title "Appropriation." But I have presumed to trouble your Lordships with this short history of the Church, because it seems to me to prove incontrovertibly, that what is thus vested in the churches for spiritual purposes vests in them as a body politic, and can never be allowed to fall into the private common stock of the body at large, or of the individual sole corporator. And it will be found, that what is said of the church at large, is no less true of the church of Salisbury, as was luminously shown by Lord Wynford and Mr. Justice Burrough in the court below; and much is to be found in 3 Dugd. Mon. 371. Thus then an ecclesiastical person, during his incumbency, is entitled to all the profits that may fall of a chattel nature: but when a living falls vacant to which he has a presentation in right of his church, as it is not a matter of profit, he merely presents *quasi* incumbent.

I have shown to your Lordships that the living, in the present case, was probably endowed out of the prebend, or the advowson attached to the prebend of South Grantham: in either case, the prebendary, as a sole corporator for the time being, has the right of presentation, and when there is an avoidance he may present in right of his church: he presents as a trustee; [581] the trust is personal, without profit, and cannot be transmitted: how then can a private personal representative of a deceased

prebendary, who dies after avoidance, but before presentation, claim the presentation? Is it that he makes it a chose in action, out of which to pay the debts of testator or intestate? That cannot be, for it is not assets. Does he claim to present because this trust had devolved upon, or as it were, become vested in, the testator or intestate? The trust has indeed devolved upon him, but not in his own right, but, as the declaration truly states, in right of his prebend: the presentation is in him, not for his own use or benefit, but for the use and benefit of the Church, confided to his spiritual not to his lay hands, for the dignity and ornament of the Church; a trust which he, and he only, must execute upon his great personal responsibility, for the cure of souls, and for the advancement of the interests of religion; a duty which his personal representative, in his natural capacity, cannot in law be deemed qualified to discharge.

I fear I have fatigued your Lordships with the length of the argument; but as some of my brethren unfortunately differ from me, I could not satisfy my conscience upon this great, and as I think, awfully momentous question, without satisfying your Lordships that I have not come to the conclusion I have done without most anxious consideration and deep research. The result, then, of my opinion is this, that whatever is attached to a spiritual sole politic body, sinks with the death or resignation of the party who possesses that right.

Mr. Baron Bayley: As the opinion I delivered when this case was before the King's Bench is in print, and as I see no reason to vary from any of the grounds upon which that opinion was founded, I shall not be [582] obliged to detain your Lordships at any considerable length. I take the general rule, with the single exception of benefices in the gift of bishops, to be, that where a benefice becomes vacant, the right to present is immediately detached from the estate which gives that right; it vests, as a mere personal power of presenting, in the individual who had the right of patronage at the time that vacancy occurred, and will continue in him and his personal representatives, let what will become of the estate which gave such right.

Therefore, if the right to present to an advowson appendant, or an advowson in gross, when a vacancy occurs, be in tenant in fee or tenant in tail, and he die without presenting, though the estate will pass to his heir or devisee in one case, and to the issue in tail or remainder-man in the other, the right to present will devolve on his executor or administrator. F. N. B. 33, p. 34, b.; Co. Litt. 388; Dyer, 283, a.; 21 H. 7, pl. 6; Bro. à l'Eglise, pl. 34. If the right to present where a vacancy occurs be in tenant *pur autre vie*, or in a termor, and before he presents *cestui que vie* dies, or the term expires, so that the estate which gave him the right to present is gone, that right nevertheless remains in him, and he may still present. F. N. B. 34, b.; Bro. Presentation à l'Eglise, 22. Again, if husband and wife be seised in fee or in tail, or in right of dower in right of the wife, and the church become void, and the wife die before the husband present, though the fee descend upon her heir, or the estate in tail passes to the heir in tail, or the estate in dower ceases, the right to present remains in the husband. 21 Hen. 6, b.; 38 Hen. 6, 36. 6; 14 Hen. 4, 12; Bro. Presentation à l'Eglise, pl. 22; Co. Litt. 120; and if a vicarage become vacant, and the parson to whom the right of presentation belong be made bishop, whereby his right in [583] the parsonage ceases, he shall nevertheless present. F. N. B. 34, n.

So, had Rennell been promoted to a bishoprick, would he have lost the right? The general rule, however, will probably be admitted; but its application to the present case is denied, and the ground of that denial is, that the present case is an exception; first, because Mr. Rennell was a spiritual corporation, and had this right of presentation annexed to a spiritual dignity, and clothed with a spiritual trust. My answer is, that though Mr. R. was a spiritual person, it was not till the statute of Car. 2 necessary that he should be so; that the dignity to which the right of presentation was attached, was not in its creation spiritual; and that if it were, it was not clothed with any spiritual trust. Mr. R.'s dignity was a prebend only, and at common law a layman might be a prebendary. *Bland* v. *Maddox* (Cro. El. 79). A prebendary has no cure of souls; he is called prebendary, because his duty is *praebere auxilium episcopo;* he has his possession annexed to his prebend, to enable him to provide for himself and family. It is by the restraining statutes alone that he is prevented from alienating, with consent of the patron and ordinary, all his possessions, to the deprivation of his successor; and he has of himself the full power of alienating them, so as to bind himself, and it is not of necessity that he should have any

possessions. It is only under 13 and 14 Car. 2, c. 4, s. 14, that he must be in holy orders. 3 Co. 75, b.; Dyer, 61, b., pl. 30; 58 Edw. 3, 24; 2 Roll's Ab. 341. But admitting that a prebend were a spiritual dignity, does it follow that church preferment, in the gift of the prebendary, in right of his prebend, is clothed with a spiritual trust? Is the spiritual prefer-[584]-ment to which a bishop is entitled in right of his see, clothed with any spiritual trust? May he not grant away the next avoidance of any church, though the avoidance be in gross, which he as a bishop is entitled to fill; or as many avoidances as shall happen within his own time? And will not such a grant bind himself? Watson says, he may make the grant, and it will bind him. Watson, c. 10, p. 135, 136; c. 45, p. 873. If an advowson be appendant to a manor usually let, and a lease be made thereof, it will at all events bind the bishop who made it, and his lessee shall present. Gibson, 797, says, "Advowsons may be granted by deed or will, either for inheritance, or one or more turns. But this extends not to ecclesiastical patrons seised in right of their churches, nor to colleges or hospitals seised in right of their houses; for they are so far restrained by the statute of Elizabeth, that their grants, though confirmed, will not bind their successors. But they will bind the grantors, for their own times." And if they be made conformably to the statutes, they will bind the successors. Watson, c. 10, p. 137; c. 45, p. 875, 876. In *Smallwood* v. *Bishop of Coventry* (Cro. Eliz. 207), the bishop had made a grant of the next avoidance of an archdeaconry (a spiritual dignity); he afterwards disturbed the grantee, the grantee died, and his executor brought a *quare impedit*, and the bishop's grant was held good, and the executors had judgment. In *Foord's Case* (1 Ander. 47; 5 Co. 81; Dy. 338, b; Cro. El. 447. 472, a), a prebendary of this very church made a lease of a rectory, part of his prebend, for 70 years. The dean and chapter confirmed it for 51 years; the successors disputed it within five years. Watson says, it would have been good for his own time, without confirmation. Watson, 48. And all [585] the Court (except Jeffery) held it good for the 51 years. In *London* v. *Chapter of Southwell* (Hob. 303), where plaintiff claimed in *quare impedit*, as lessee of a prebend to which the advowson belonged, the question was, whether the lease had words sufficient to carry the prebend or not; and it was only because the words were not sufficient that the decision was against the plaintiff. Presentation to a vicarage belongs of common right to a parson; but by consent of patron and ordinary, he may grant it to another. F. N. B. 34. The case of *Sharnock* v. *Boucher* (Sir T. Raym. 88; 1 Lev. 125), seems to show the distinction between what is clothed with a spiritual trust, and what is not; and what may be alienated, and what cannot. A prebendary leased his prebend for three lives; and whether that passed the right to fill the office of commissary within the prebend, was the question. The Judges agreed that it did not, if the right belonged to his spiritual functions; but on that point they were divided.

The only remaining point is founded upon the rule which prevails in the case of the King and a bishop, and a supposed analogy between that case and this. Where a bishop dies, leaving a church in his gift vacant, the King is to present, not the executors of the bishop. And if this rule be founded upon the spiritual character of the act of presenting, it is an authority in this case. If it be founded on the relation between the bishop and the King, and is referred to the King's prerogative, it is not; and I am of opinion it is referable to the relation between the bishop and the King, as to the King's prerogative. The King is the sovereign patron of every bishopric. 6 Edw. 3, 40; and though he gives the chapter leave to elect, the patronage is in him. [586] 6 Edw. 3, 40. And upon the death of a bishop the see comes to the King as the bishop left it; and if a deanery or a stall be left vacant, the King shall fill it up: 6 Ed. 3, c. 40. A prebendary of Abergwilly died; the bishop (of St. David's) died: the temporalities were seized into the King's hands. A new bishop was appointed, and filled up the stall. The King brought *quare impedit*, and it was adjudged that he had right, and a writ was awarded to the bishop. *Rex* v. *Bishop of St. David's* (50 Edw. 3, c. 26). The temporalities come to the King as founder by presumption. Mall. 65, n. to pl. 6. And this is so high a prerogative, and so far incident to and inseparable from the Crown, that a subject cannot claim it by grant or prescription. Mall. 65, n. to pl. 6. And if the King die, *sede vacante*, the succeeding King shall have the temporalities, not the King's executors. Mall. 65, n. to pl. 4; Bro. Chatt. 2; 2 Roll. Abr. 211. And if the King die, leaving a church void, the succeeding King

shall present. *Semble*, Mall. 65, pl. 4, and n.; Mall. 42, pl. 16; Bro. Chatt. 2; 2 Roll. Abr. 211. And this though the church became void in the bishop's life, and though the new bishop has sued out his livery out of the King's hands before the King presents. Mall. 65, pl. 5; 2 Roll. Abr. 343, pl. 5; Wats. 73; F. N. B. 33, n. In the case of a bishoprick, therefore, if the bishop dies, whatever spiritual preferment in the gift of the bishop was vacant at the bishop's death, and whatever shall become vacant till the see is filled up, devolves upon the Crown, and is inseparable from the Crown: so that the Crown cannot grant it away; and in case of the demise of the Crown, it will pass, not to the executor of the deceased King, but will accompany the Crown, and go to the succeeding King.

[587] Upon this, two observations occur: one, that in the case of the Crown, and in the case of the Crown only, can a sole corporation, which the King is, take a chattel by succession; so that what is the rule in the King's case, where the right to present may by reason of the prerogative pass from the bishop to the King, from the King to the King, will not apply to the case of a prebendary, where there is no such prerogative to pass the right from prebendary to prebendary. 16 Vin. Q. 14. The other, that what is the case with the Crown with reference to a bishop who holds *per baroniam*, is the case with every other tenant *in capite*, where the tenancy by reason of infancy in the heir becomes as it were suspended, and the tenancy returns in wardship to the King. Co. Litt. 388, a. is express upon this point, and puts the two cases together; that of the King's tenant *in capite*, and that of a bishop. If the King's tenant by knight's service *in capite* be seised of a manor to which an advowson is appendant, and the church be void, and the tenant die (leaving his heir in ward), the King shall present, not the executor; and if a church in the gift of a bishop become void, and the bishop die, the King shall present, and not the executor. Co. Litt. 388, a. The right, therefore, of the King, in case of a bishoprick, appears to me to be referable not to the spiritual character of the person from whom the right comes, but to the King's prerogative, because it obtains equally in the case of every tenant *in capite*, whether he be a spiritual person or not.

Upon the whole, therefore, I am of opinion that the general rule is, that if a church become vacant and the patron die, the right to present devolves upon his executor; that this is the rule also when a prebendary in right of his church is patron, because until the statute [588] of Car. 2, (13 and 14 C. 2, c. 4, s. 14,) it was not necessary a prebendary should be a spiritual person, and because in the case of spiritual persons their right to present to churches is temporal, not spiritual, inasmuch as they only grant it away when a vacancy occurs, as they may their other temporal possessions; and that the excepted case of a bishop is not applicable to other spiritual persons seised of advowsons in right of their dignities or churches, because the case of a bishop is referable to the prerogative of the Crown, which enables the Crown to take a chattel in succession, and to the relation in which the Crown stands to a bishop, the bishop being tenant *in capite* to the Crown, not to the spiritual character of bishop, nor to any spiritual nature in the right. My answer, therefore, to the question proposed by your Lordships is, that, in the case that question propounds, the right of presenting belongs to the executors of the prebendary.

Mr Baron Bolland, after stating the question, said: It is highly probable that the state of facts out of which this question arises, has in very many instances existed, and it is remarkable that no light is thrown upon the subject by any decision at law, nor by any practice of the church, upon a presentation to a benefice under circumstances precisely similar to the present. If any such decision exist, it has escaped the industry of the experienced counsel who argued this case in the court below, and at the bar of this House, and the researches of the learned Judges of those courts, whose inquiries were so sedulously directed to the discovery of some authority upon which their judgment might be founded. It is to principle, therefore, and to cases analogous to the present, if any can be found, that the [589] attention is to be turned, in order to arrive at a satisfactory conclusion.

In pursuing this inquiry, I do not mean to dispute that by the law, as it stands, if a presentative church, the advowson of which belongs to a layman, become vacant, and the lay patron die without presenting, his executor shall present, and not his heir nor his devisee, or the next owner of the advowson, it being considered that the next turn is a chattel: though this seems to have been doubted in the case of the

Queen v. *The Archbishop of Canterbury, Fane and Hudson* (4 Leon. 109), and the Court left it undecided. The distinction which I shall endeavour to make will be, that the right of the owner of an advowson does depend, though the contrary is contended for on the part of the defendant in error, upon the character in which he holds; and that as the deceased was seised of and in the prebend of South Grantham, with its appurtenances, to which prebend the advowson of the rectory of the parish church of Welby, with its appurtenances, belonged, in his demesne as of fee, in right of the said prebend, the right of presentation to the church, when it should become vacant, arose out of his office of prebendary, was a spiritual trust to be executed for the support and for the promotion of the welfare of the established religion, and that to him, and to him alone, was confided the choice and appointment of an incumbent. It appears from history, that for six or seven centuries the *parochia* was the diocese, or episcopal district; there was the residence of the bishop and his clergy at the cathedral church; all tithes, offerings and ecclesiastical profits belonged to the bishop and to his clergy, for their support, for the repairs and ornaments of the church, and **[590]** for other works of piety and charity. Such community and collegiate life of the bishop and his clergy was the practice of the British, and was afterwards adopted by the Saxon church.

Many causes contributed to the existence of parochial churches. In some places the liberality of the inhabitants raised them, and by supplying preachers with houses, induced them to settle and become the pastors; kings founded free chapels, for the purpose of worship for their court and retinue. The bishops, too, to plant and encourage Christianity amongst the people, built churches; but the great source from whence the increase of the number of buildings for divine worship arose, was the piety of the great lords, who, having large possessions and territories, founded churches for the use of their families and tenants, within their respective domains; and hence it seems a title to patronage in laymen first sprung: hence the boundaries of parishes became commensurate with the extent of manors; hence the several portions of the same church were divided according to the separate interests of the several lords. But although, for the purpose and in the hope of more firmly establishing religion, and more widely extending its divine influence, these changes in the constitution and management of the church were permitted, the right of the bishop, either in respect of spirituals or temporals, was not invaded. He still had the cure of souls, and a title to all the ecclesiastical revenues within his whole diocese; by his authority and consent priests were ordained, as assistants given to him; no church could be used for public worship till consecrated by him; no priest could officiate there without his delegation.

From the causes I have above stated, the privilege **[591]** of nominating fit persons to officiate in churches, which the piety and liberality of private persons had founded or endowed, was given; and the bishops were content, in such cases, to forego the privilege of appointing the ministers who were to perform the duties in such churches. This power was conceded to the founders or benefactors *ratione fundationis*, where they were founders; *ratione donationis*, where they endowed the churches; and *ratione fundi*, where they gave the soil upon which they were built; the bishops reserving only the power of deciding upon the fitness of the persons nominated (1 Co. Litt. 119 b). In process of time this practice became the law of the church. The church having made these concessions, and having thus parted with the right of presenting, it became a matter of indifference to the bishops, whether, upon the death of the lay owner of an advowson, during the vacancy of the church belonging to it, the right that the patron, had he lived, would have exercised, should go to his heir, or should belong to his executor; the church left that question to the courts of law to determine, and I am bound to admit that, in such cases, the claim of the executor is established; but I cannot apply that rule to the case in question, because the advowson, of which the late prebendary of Grantham was seised, was given to him as a member of the church of Salisbury, was appendant to an ecclesiastical dignity, and is not to be governed by the same law as is applicable to the advowson in lay hands. If I am wrong in taking this view of the question, the error arises from my considering the right of the executor of a lay patron to be an exception from the rule which governed property of this description in the hands of the church, as there appears to be a mani-**[592]**-fest distinction between lay and spiritual property. In the note upon the 10th section of Littleton, it is said (Co. Litt. 17 b), "Of

an advowson, wherein a man hath an absolute ownership and property, as he hath in lands and rents, yet he shall not plead that he is seised in *dominico suo ut de feodo*, because that inheritance, savouring not *de domo*, cannot either serve for the sustentation of him and his household, nor can anything be received for the same for defraying the charges, and therefore he cannot say that he is seised therein *in dominico suo de feodo*." In the section of Littleton, upon which this is a commentary, the author is treating of an advowson in lay hands, and these authorities are adduced by Gibson in his Codex (p. 757), in speaking of spiritual property, to illustrate the difference he points out. In the pleadings in the present case, the prebendary is alleged to be seised of the advowson in his demesne as of fee; and why is it so pleaded? the answer is, it is not a lay title; but that, to use the language of Coke, it savours *de domo*, may be made serviceable for the sustentation of him, as a spiritual person, and his household. The case of *London* v. *The Chapter of the Collegiate Church of Southwell* (Hob. 303) is a further proof of the distinction I have taken between lay and spiritual property. I shall next call the attention of your Lordships to the ecclesiastical character of the officer, in whom, till his death, it cannot be denied, the right of presentation was vested; to the object of the founder of the prebend; and to the nature of the property with which he endowed it. A prebend, as defined by Dr. Cowell, is the portion which every member or canon of a cathedral church receiveth in the right of his place, for his maintenance. So *canonica portio* is pro-**[593]**-perly used for that share which every canon or prebendary receiveth out of the common stock of the church; and *prebenda* is a several benefice arising from some temporal land or church appropriated towards the maintenance of a clerk or member of a collegiate church, and is commonly named of the place where the profit groweth. And these prebends be either simple or with dignity. Simple prebends be those which have no more than the revenue towards their maintenance. Prebends with dignity are such as have jurisdiction annexed to them, according to the divers orders in every church. Of the object of the founders of prebends, there cannot be a doubt: it was to provide for the maintenance and support of the prebendaries; and it cannot be supposed that it was the intention of any founder that the instalments of the prebend should be appropriated beyond the life of the party in possession. I shall not stop to inquire whether this charitable intention of founders has not been in a great measure defeated; but I shall confine myself to the consideration of whether the particular right contended for by the executrix is founded upon any decision, or can be supported upon principle. It is admitted on all hands that no authority is to be found on the subject; let us then look to the character of the person under whom the right to present to the church of Welby is claimed by the defendant in error. He was an ecclesiastic; as a layman he could not at this day have enjoyed the dignity; the office was conferred on him by the church; its emoluments and profits were intended by the founder for his support; to him was confided the sacred trust of providing a proper minister for the church appendant to his prebend. Looking back to the times when similar benefactions were bestowed upon the church, no one can hesitate to be convinced that the founder of the prebend of South **[594]** Grantham intended the prebendary to become incumbent of the church, or, at least, that he should (unless provided for in such a manner as to render the living of Welby untenable) have the power of being so. The selection of the prebendary by the bishop was a voucher for his piety, and a sanction and authority to him that in presenting himself, or any other clerk, the true interests of religion would be promoted. Can it be contended that the trust can be carried further? To do so is to put into the hands of a stranger to the church, a trust, the execution of which was confided to a member of its own body; is to divert the course of the founder's bounty into a different channel from that in which he intended it should flow, and to establish a precedent by which the best interests of the church (I admit the instances would probably be few) might be affected. If I am correct in considering an advowson in the hands of a prebendary in right of his prebend, as a separate trust which is vested in him *jure ecclesiae*, it should be inquired whether such a trust can be transferred to another, or whether it survives, and will go to the representative of the deceased person in whom it was placed. I find in *Colt and another* v. *The Bishop of Lichfield and Coventry* (Hob. 154), it is said, that "If a lapse incur, and then the ordinary die, the King shall present, and not the executors of the

ordinary, for it is rather an administration than an interest." Fitz. N. B. 34 (G.); 25 Ed. 3, 24; Dyer, 87. The case of Chester College is doubtful, whether to the King, or to the metropolitan. So again, Hob. 154, "A lapse, as I have said, is an act, an office of trust reposed by law in the ordinary, metropolitan, and, lastly, in the King; the end of which trust is [595] to provide the church with a rector in default of a patron, and yet as for him and to his behoof; and, therefore, as he cannot transfer his trust to another, so cannot he divert the thing wherewith he is trusted to any other purpose." The reason given by the learned Judge why the presentation does not go to the executors of the ordinary, viz. that it is an administration rather than an interest, appears to me mainly to fortify the position for which I am contending.

I cannot fail also to pray in aid the weight that is to be derived from the further consideration of the legal character of a prebendary. He is an ecclesiastical sole corporation: and, as such, he can have no heir nor personal representative. To his natural heir his prebendal rights cannot pass, nor can they vest in his personal representative; but the right of presenting to the vacant church must remain unserved and in abeyance till the appointment of a successor. In treating this matter, I have not commented upon, nor attempted to remove the effect of those arguments that have been drawn from several of the authorities that have been relied upon in support of the claim of the defendant in error, because as they have proceeded upon lay patronage, they have, in the view I have taken in the subject, no bearing upon the question.

From what I have said, your Lordships will have collected, that the opinion to which I have come is, that if an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation does not belong to the personal representative of the deceased prebendary.

Mr. Justice Littledale simply expressed his concurrence with the majority of the Judges, intimating that [596] he saw no reason for altering the opinion which he had given in the Court below.

Lord Chief Justice Tindal: My Lords, upon the best consideration I can bring to this case, I have come to the conclusion, that the right of presentation belongs to the personal representative of the late prebendary; but at the same time I am ready to admit it is after considerable doubt upon the question which has been submitted to us by your Lordships. If I felt myself at liberty to look at the particular foundation of this prebendal stall, or to consider upon general principles what might be most fitting and expedient, in the case of patronage belonging to an ecclesiastical corporation, such as is a prebendary, I could bring myself without difficulty to the conclusion, that the right to fill up the turn which was vacant at the time of the late prebendary's death, ought to devolve upon his successor, and not to go to his personal representative. But neither upon the abstract question proposed by your Lordships nor upon the facts stated on the record in this case, can I take judicial notice, either of the circumstances attending the original foundation of this prebend, the endowment thereof with this particular advowson, or the form of presentation which has been used and adopted on occasion of former vacancies. And as to any considerations derived from general expediency, I feel myself restrained from entering into them, because there appears to me to be an analogy of sufficient strength and certainty, to bring the present case within the reach of acknowledged principles of law, and within the authority of various decided cases. It is upon the ground of this analogy which exists between the present case and those principles and authorities, that I feel myself bound to concur in the opinion which has been [597] expressed by the majority of His Majesty's Judges; thinking it a safer course upon this occasion, as I find has been the opinion of other Judges from the earliest periods of the law, to adhere to any rule which can be safely inferred from the cases, rather than to substitute another, although it may appear upon general principles more reasonable and more just. I assume it to be settled law, admitting of no doubt or dispute, and not requiring to be supported by reference to any authorities, that where an advowson presentative is vested in any person in his natural capacity, either in fee or for life, and the church becomes void, and the owner dies after such avoidance without making any appointment, the right to appoint to the vacant turn belongs to the executor, and not to the heir or to the next owner of the advowson. Indeed so clearly

is this principle recognized, that all the books concur in calling this vacant turn a chattel vested in the testator, (Fitz. N. B. 33, P., 34, N.; 4 Leon. 109). In the case in Fitzherbert's N. B. 33, P., it is stated, "If a man be seised in fee, in gross, or in fee appendant unto a manor, and the advowson becomes void, and he dieth, his executor shall present, and not his heir, because it was a chattel vested and severed from the manor." If the chattel is severed from the manor in that case, why may it not be considered as severed from the prebend in this? and if once severed, it is difficult to assign any legal principle upon which it can be reunited. Unless therefore some solid ground can be laid down, upon which a distinction can be made between a prebendary seised of the advowson in right of his prebend, and a person seised in his own natural right of a manor to which an advowson is appendant, there can be no doubt but that the case falls within the general rule, that the right to present is a chattel interest, and would go to his personal repre-[598]-sentative. It will be advisable, therefore, to refer to some of the cases and principles which carry the analogy more closely to the particular question now under discussion. In Fitz. N. B. 34, N., is found this case, "If a vicarage happen void, and, before the parson present, he is made a bishop, etc., yet he shall present unto this vicarage, because a chattel vested in him." The authority referred to is 24 Ed. 3, 26; but the case, which is not to be found in the Year Book, will be found inserted nearly in the same words in Fitz. Abr. Quare Impedit, 22. In that case, as in the present, the patron was seised *in jure ecclesiae;* and notwithstanding he ceased to be rector, he still carried with him in his natural capacity this chattel interest, the right of appointing to the vacancy. In that case it was held that the chattel interest which had once vested in him, did not afterwards reunite with the corporation sole, the parson. That case appears to me to be a direct authority upon the present question, to this extent; that if the living had become void, and the prebendary had vacated the prebend, the right of appointment would have belonged to him, not to his successor. If so, and he still retained the right to appoint, notwithstanding his *cesser* of the prebend, on what principle shall his death be held to reunite the presentation with the prebend from which it has once been severed? The case in 2 Rolle's Abr. 346, f., pl. 4, shows the law where the avoidance of a vicarage happens after the vacancy of the rectory, and before the new rector is appointed: "If the parson has the right to present to the vicarage, yet if the vicarage becomes void during the vacancy of the parsonage, the patron of the patronage shall present." So that, although the rector be in the nature of an ecclesiastical corporation sole, and although the rector be seised of this right of presentation *jure* [599] *ecclesiae*, yet it shall not devolve to the successor; but if it happen before the vacancy, the former rector shall still appoint; if during the vacancy, the patron. Both which cases are strong to show there is no indissoluble union between the right of presentation and the prebend itself. To which may be added the case stated in Fitz. N. B. 33, P., "That if a bishop die, seised of a manor to which an advowson is appendant, and the advowson happen void before his death, the King shall present unto the same, by reason of the temporalities, and not the bishop's executor." The reason is, that the King takes the temporalities by reason of his prerogative, and the turn being once vested in him, cannot be got out of him but by matter of record. Now, although the express point adjudged by that case does not apply here, because there is no prerogative in this case; yet it furnishes an observation which appears not unimportant. Fitzherbert puts this case in apposition with that which had immediately preceded it, namely the case in which he has stated, "The executor shall present and not the heir, because it was a chattel vested and severed from the manor," etc. He then puts the case of the bishop, and the inference to be drawn is, that, but for the prerogative, the executor would have presented; otherwise he would not have said, the King shall present, and not the bishop's executor: the observation would have been, the King shall present, and not the successor. If this is a just inference, the authority of the case last referred to would go the length of deciding the present: if the executor of the bishop would be entitled to present to the turn which fell vacant in the bishop's life, and which belonged to the bishop *jure ecclesiae*, had not the prerogative stepped in and prevented him; it would follow in the present case, where no such prerogative exists, [600] that the executor has the right to present to the vacant benefice.

The power of the prebendary to grant the next turn to a stranger before it be-

comes vacant, affords a further argument against the notion, that the right of presentation is to be considered as inseparably annexed to the prebendary himself for the time being, on the ground that it is an ecclesiastical trust to be exercised by him only to whom the presentation has given it. Such grants are of very frequent occurrence in the old Books of Entries containing pleadings in *quare impedit*, and it is impossible to conceive they should be found there unless the practice was common, or that they could have been put upon the record, if such grants were against law: inasmuch as the plaintiff deriving title under them, would only be showing the insufficiency of his right to sue.

Again, the universal practice of grants made to the archbishops by bishops of their province, of those rights of presentation well known by the name of options, furnish at least the inference, that though the right to present comes to an ecclesiastical person by virtue of his ecclesiastical character, still there is no rule of law that it must be exercised in person, but the law allows it to be transferred to another. It may indeed be said, that this is not a transfer to a layman or a stranger, but merely to an ecclesiastic of the same or higher dignity; and therefore the ecclesiastical trust may be presumed not to be violated by such transfer of its execution. Admit it to be so; still how can we reconcile to that principle, the right which the archbishop has to devise these options to any one he chooses to select? And that such power exists, appears from the case of *Potter* v. *Chapman* (Ambl. Rep. 98), where the only question before Lord Hard-[601]-wicke is made upon the propriety of the particular appointment by the trustees under the archbishop's will, but none whatever upon the right of the testator to bequeath them to his trustees. If then the bishop may sever and disannex from his bishopric a right of presentation, to which he becomes entitled *jure episcopatus*, and not otherwise; still further, if the archbishop to whom the grant hath been made, may bequeath it to a stranger by his will, or what is an identical proposition, if it would devolve upon his personal representative in case he had made no such bequest; it will surely be dangerous to build an opinion that the presentation now in dispute must belong to the successor, on the ground that it is of an ecclesiastical character, in the nature of an ecclesiastical trust, and by reason thereof must be exercised by the person who fills the prebendal stall, and by him only. So that the doctrine laid down in the Doctor and Student would appear to be correct, where no distinction whatever is introduced between presentations made by laymen, or presentations made by ecclesiastical corporations, between advowsons appendant to manors, or advowsons appendant to offices of the church, but it is laid down generally thus (*see* Dial. 2. c. 26): "It is holden in the laws of the realm that the right of presentment to a church is a temporal inheritance, and shall descend by course of inheritance from heir to heir, as lands and tenements shall, and shall be taken as assets, as lands and tenements be." And again, "the goods of spiritual men be temporal, in what manner soever they come to them, and must be ordered after the temporal law, as the goods of temporal men must be." Now if the vacant turn in a benefice be a chattel interest, as the authorities above referred to seem abundantly to show, if it passes by grant, is devisable by will, or in case of no bequest, [602] goes to the personal representative, then indeed is the passage above cited a strong proof of the opinion of learned men, at the early period when that book was written, that no just distinction can be taken between a right of presentation vesting in a spiritual man, by whatever means it may come, and a similar right in a layman. It affords a further argument that the right to present to the vacant living cannot devolve upon the successor and go along with the prebend, that a prebendary is a corporation sole; and that by law, a corporation sole is incapable, except by custom, of taking in succession chattels real or personal, either in possession or action. (Co. Litt. 9 a., 46 b.; Hob. 64). If this be the law, how can this vacant turn, once severed from the prebend, become re-united, or descend with the corporation sole? That such would be the case as to some of the profits of the prebendal stall, where they fell due in the lifetime of the predecessor, appears clear. Rent which accrued due in his lifetime would go to his executor: for the stat. 28 Hen. 8, c. 11, gives to the successor the rent only which accrues during the vacancy: leaving the right to the rent due in the predecessor's lifetime where it then stood, that is, as a chose in action, or a personal chattel, which would go to the personal representative. But it is very difficult to draw a sound distinction between rent which has fallen due, and a right of presentation which has attached during the life of a former pre-

bendary, except upon the ground that the one is a right of a temporal nature, the other of a spiritual; and whether that be a sound distinction or not, I must leave upon the reasons and authorities which I have before given. The case of the donative, cited from 2 Wils. Rep., does indeed furnish some inference for a different opinion from that which I have formed; but I must confess myself unable to **[603]** see the grounds upon which that judgment proceeded, in so short and unsatisfactory a report, with such a degree of clearness as to place it in competition with the other principles to which I have referred, and which lead my mind to a different conclusion. I have therefore felt myself bound, by the analogy to be drawn from cases decided as to lay advowsons, to adopt the opinion, that the right of presentation in this case belongs to the administratrix of the late prebendary. I must admit at the same time, that it might be more fitting and expedient that it should devolve upon the successor; but I am not asked by your Lordships what is most expedient, but what the law at present is, upon the question submitted to us.

Lord Lyndhurst (August 19, 1833): My Lords; I move for your Lordship's judgment in the case of *Mirehouse* v. *Rennell*. It was a case of a writ of error from the Court of King's Bench; that Court reversed a previous judgment on a *quare impedit* in the Court of Common Pleas. When the case came here, it was argued with great ability and learning in the presence of the Judges; they took time to consider the subject; there was ultimately a difference of opinion, six of them pronounced judgment in affirmance of the judgment of the Court of King's Bench, and two of them were of an opposite opinion. I have to move your Lordships, that the judgment of the Court of King's Bench be affirmed; not on the ground of the majority of the Judges being of opinion in favour of that judgment, but because I think it is a sound and correct opinion. It is not necessary on this occasion, after the many discussions the subject has undergone, and after the correct reports of the different proceedings in the various stages of the case, to enter into a detailed statement of these proceedings: **[604]** I shall briefly state the grounds on which I shall move that the judgment of the Court of King's Bench be affirmed. The facts are shortly these: Mr. Rennell was a prebendary of Salisbury cathedral; to his prebend was annexed the rectory, or the advowson of the rectory, of the parish church of Welby, in Lincolnshire. The incumbent died during the lifetime of Mr. Rennell, and before Mr. Rennell had appointed a successor he himself died. The question is, whether the right of presenting to the vacant benefice belongs to the personal representative of Mr. Rennell, or to his successor in the prebend. This is the question for consideration. The advowson is the right of presenting to the benefice; it is an incorporeal right, and is subject to all the incidents of that species of property; it may be granted in tail, and demised for life or for a term of years. These different interests can be carved out of the fee. As long as the church was filled, the right of presentation was annexed to the advowson, and it passed with it into whose hands soever the advowson passed; the grant of the advowson carried the right to present. This continues so only as long as the church is filled; if the church is vacant, in that case the right of presentation is a fruit fallen, a pure chattel; it is a chose in action, and severed from the advowson. The right of presentation, when so severed, passes like the arrears of rent, not to the heir (I am now considering the case of a natural person), but, according to all the authorities, to the personal representatives of the last owner of the advowson. If the advowson is granted for a term, and the benefice fall vacant, and the benefice is not filled up when the term expires, the lessee still has the right of presentation, on the ground of its being severed from the advowson. If a wife is entitled to an advowson, and the benefice is vacant, and she dies before presenta-**[605]**-tion, the husband has the right to present, because it was severed from the advowson. I apprehend that there is no doubt respecting this principle which I have now stated. But it was argued at the bar and also in the court below, on the authority of certain cases to which I will refer, that in reality there was no severance. The authorities cited on that point appeared to me to be mere exceptions to the general rule, or, if not, they tended to establish exceptions. There was one case, of a tenant *in capite* of the Crown, who held a manor to which an advowson was annexed: the incumbent died; the tenant of the manor died, his heir not of age; under these circumstances it was decided that the right to present did not pass to the personal representatives, but belonged to the Crown. It appears to me that this is an exception to the general

rule, and is founded in the prerogative of the Crown; and the exception appeared from this, that if it had applied to a common person, the Court would not have decided so, but would have held that the right passed to the personal representative; and it also appeared, for another reason, that it was founded in the prerogative: in that case the heir, being an infant, might, when he came of age, sue out his livery, and if the King had not already presented, then he, and not the King, would, notwithstanding the circumstances, be entitled to present; which shows that the right was not severed from the advowson. In like manner, if the party entitled to the advowson, the benefice being vacant, granted the advowson, the right of the next presentation did not pass, because of the severance from the advowson. There was cited another case; it was that of a bishop entitled to an advowson in right of his bishoprick. The incumbent dies, and the bishop dies before presentation; the [606] Crown has the right to present, not the personal representative of the bishop. That is another of those cases which are exceptions to the general rule, and are founded on the prerogative of the Crown. There was another case of this description: the incumbent died, the patron died during the vacancy of the benefice; and the question was, whether the personal representative of the patron had the next presentation, or the heir; which question was decided in favour of the heir, on the ground that the heir's title was superior. These are the cases which were relied on for the purpose of combatting the general position of law, that on the death of the incumbent, the right of filling the church was severed from the advowson; and the case is made out in respect of a natural person. The next question then is, how it applies to a sole corporation? I will first consider it disencumbered of its ecclesiastical character. A prebendary is a sole corporation. What is the difference between a sole corporation and a single natural person? I cannot distinguish the case of a sole corporation from that of a natural person. What would be the difference between them as to the right of succession? Respecting real estate, it would pass to the heir, or the successor; respecting personal estate, (I consider it as an individual right,) it would pass, as in the case of a natural person, to the personal representatives, executors or administrators. Arrears of rent, relief, and all fruits of this description, which are severed from the realty, become attached to the person, and pass to the personal representative as a chattel interest, and which cannot attach to the successor, and that was decided in Coke. If so, then this right to present becomes a chattel passed to the personal representative, and could not go to a successor. I consider the case as clear in point of [607] law, with reference to a sole corporation, as to a natural person. The doctrine is the same as to a prebend. A prebend implied no cure of souls attached to it. It was unnecessary, before the Statute of Uniformity, that a prebendary should be an ecclesiastic. Prebends were often granted to laymen, and there was no alteration made by the Statute of Uniformity, except that the office was to be filled by an ecclesiastic: it made no difference because it was so filled. It was not because it was held by an ecclesiastic that the presentation must devolve on his successor: in the case of an archbishop's option, it did not pass to the successor, but to the personal representative. The case of these options seems to me to furnish a strong analogy to the present case, and the same arguments that apply here against allowing ecclesiastical patronage to be vested in any but ecclesiastical hands, apply with equal force to the case of archbishops' options: yet upon the mode of their passing no doubt whatever is entertained.

It was said, in the course of the argument, that much inconvenience would arise from this decision, and that if carried into effect, the personal representative might be a female or a mere tradesman, who would thus have a right to present to a valuable and important living or benefice of this description. This must be the case, as the law exists at present; but your Lordships must not allow such considerations to influence your judgments: you must decide according to the law, even though the law is inconvenient. You must not suit your judgments to meet the opinions of what is convenient; the alteration, if any is necessary, must come from the Legislature. On these grounds and on this view of the case, I humbly submit that the judgment of the Court of King's Bench be affirmed.

[608] Lord Wynford: I have had an interview with Lord Tenterden on the subject of this case, since it came into this House, and that noble and learned Lord still continues of opinion that the judgment of the Court of Common Pleas was right. I confess that my opinion too is unchanged. If this were lay patronage, I should be

ready to admit that the right of presentation was severed, that it was a fruit fallen, and ought to go to the executor or administrator. But in my opinion there is a wide distinction between ecclesiastical and lay patronage. These two rights of patronage are placed on perfectly different grounds; one being, as Lord Kenyon has truly said, connected with an interest, while it is impossible to consider the other in the same view. There has been a point put in the court below, which to me seems unanswerable. It is this, that in this case the lady is the administratrix of the lay property of her deceased husband, but not of the possessions of the church of Salisbury. The patronage now under discussion has no connexion with the person of the individual himself, except so far as he stands in the character of a part of the church in whom the patronage was really vested. Lord Coke says, that where there was no common law, nor any statute nor custom against it, the ecclesiastical law would prevail (1 Inst. 344 a). Now that was the case here, and this benefice fallen belongs to the church, and so *pertinet ad successorem*. I ask your Lordships whether it is proper that patronage of this sort should be liable to be disposed of for the benefit of creditors? In the present instance, I can say from my personal knowledge of the family, that it might have been safely left to the disposition of the adminis-**[609]**-tratrix; but when your Lordships shall decide in her favour, that decision will govern other cases of a similar nature when the advowson may fall into bad hands, and the interests of the church may be made to suffer materially. Under these circumstances, I think it would be better if your Lordships could give the advowson to the successor; and if you do not consider yourselves bound to do otherwise, I think you should so give it. My noble and learned friend has alluded to the case of archbishops' options. I know that in some cases in the courts of equity, these options have been treated as property, and trusts relating to them have been recognized, but in all those cases it was taken for granted that archbishops' options were legal. We all know whence these options are said to have come, namely, from the Pope; but the first recorded instance of them that I can find, is in the reign of Henry 8th, at a time when the papal power in this country, both ordinary and extraordinary, had been overthrown. The first instance to be found in the books of the assignment to the archbishop of a particular benefice, is in the case of Archbishop Cranmer. I have good reason, therefore, for doubting, whether they can be said to be established here by common law, and I hope sincerely that these options may soon be brought before this House, and that the law respecting them may be settled by Act of Parliament. I am bound, however, to say that Archbishop Cranmer, by the use he made of these options, almost justified the creation of them, for in every instance he handed them over to the successor. I shall not oppose the motion of my noble and learned friend, although I must say, that notwithstanding the great respect I entertain for the six learned Judges who have delivered their opinions in favour of the claim of the **[610]** administratrix, I cannot help thinking, that able as they are, their opinions on this question are erroneous. I repeat, that I trust an Act of Parliament will soon set this matter right; and with that observation I shall consent to the judgment which has been moved by my noble and learned friend.

The Judgment of the Court of King's Bench was accordingly affirmed.

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[611]

APPEAL

FROM THE COURT OF CHANCERY.

SARAH LOGAN and others,—*Appellants;* MARY WIENHOLT and another,—*Respondents.*

[Mews' Dig. x. 949: xii. 819; S.C. 7 Bli. N.S. 1. As to decree of specific performance see *Butler* v. *Powis* 1845, 2 Coll. 156: *Jones* v. *How* 1848, 7 Hare 267: 1850, 9 C.B. 1: *Maddison* v. *Alderson* 1883, 8 A.C. 467. As to allowance of interest beyond penalty see *Hatton* v. *Harris* (1892) A.C. 547: and *Knipe* v. *Blair* (1900), 1 I.R. 372.]

A., in consideration of the intended marriage of his niece, entered into a bond,

with a penalty conditioned to give by will or otherwise, unto or in trust for her or the issue of the intended marriage, so much in money, or in valuable effects, as he should by his will give or bequeath to any one of his next of kin, or to any other person whomsoever. HELD, that this condition was not to be satisfied by the penalty, but must be specifically performed. All voluntary assignments and transfers of personal property, and all conveyances of real estate purchased subsequently to the date of the bond, in which real estate or personal property the obligor retained a life interest, were declared to be in the nature of testamentary dispositions, to be considered in equity, for the purpose of giving effect to the true intent of the agreement in the bond, as if the said estates had been given or devised by the obligor's will. The persons entitled to the benefit of the bond were declared to be specialty creditors upon the obligor's estate, for satisfaction of their claims under the bond.

The Respondent, Mary Wienholt, filed her bill in the Court of Chancery, in the month of April 1818, against the appellants and others, stating, amongst other things, that in the year 1772 a marriage was agreed on between John Wienholt, of St. Helen's, London, merchant, and Sarah Jopson, of Cannon-street, London, spinster, both since deceased; and that the said Sarah Jopson was the niece of Daniel Birkett the elder, also since deceased; and that, in consideration of the intended marriage, the said Daniel Birkett agreed to secure to her and the issue of the marriage, if Sarah Jopson or any issue of that marriage should survive him, the sum of £1000, in case he should leave a wife or any lawful issue; and in case he should die unmarried or without lawful issue, then the **[612]** sum of £2000, and such further share of his property as should be equal to the largest devise or bequest that he should make to his next of kin or any other person. And the said agreement was reduced into writing, and prepared in the form of a condition to a bond, and such bond was executed on the 8th April 1772, and thereby the said Daniel Birkett bound himself, his heirs, executors and administrators, in the penal sum of £4000, for the due performance of the agreement contained in the condition of the said bond. That condition—after reciting the marriage agreed on, and that Daniel Birkett approved of the same, and in consideration thereof and of his natural love and affection for his niece, had determined to make provision for her and for the issue of the intended marriage,—was declared to be, "that if the said intended marriage should take effect, and the said Sarah or any issue of the said intended marriage should survive the obligor, the heirs, executors and administrators of the obligor should in that case, and also in case the obligor should happen to die unmarried and without any lawful issue, well and truly pay or cause to be paid unto Thomas Norman and John Greaves, their executors or administrators, the full sum of £2000 of lawful money of Great Britain, within the space of 12 calendar months next after the decease of him, the obligor; but in case the obligor should happen to depart this life, leaving a wife, or any lawful issue by him begotten, living at his decease, then the sum of £1000 only: the said £2000 or £1000, as the case might happen, to be paid to the said Thomas Norman and John Greaves, their executors or administrators, within 12 calendar months next after the decease of the obligor, to be by them, their executors or administrators, applied upon the trusts following, (that is **[613]** to say): that the said Thomas Norman and John Greaves, or the survivor of them, or the executors or administrators of such survivor, should lay out the said sum of £2000 or £1000, as the case should happen to be, in some of the public stocks or government securities, in trust for the said Sarah, and to permit and suffer the said Sarah or her assigns, notwithstanding her coverture, to receive and take to her own separate use, exclusive of her said intended husband, or any husband she might thereafter marry, the yearly interest, dividends and proceeds thereof, from time to time during the term of her natural life; and from and after her decease, in trust for the issue of the said intended marriage, if any should be living at the decease of the said Sarah, equally to be divided between them, share and share alike, if more than one, at their respective ages of 21 years; and if but one, then the whole to such only child, at his or her said age of 21 years, with benefit of survivorship in case any or either of such issue should happen to die under the said age; and the interest or dividends thereof to be paid and applied in and towards their respective maintenance and education:"

(with a power of appointment to the said Sarah over the said trust-fund, in case she survived the obligor and died without issue of the said marriage, or having issue, but such issue dying under the age of 21; and in default of such appointment, the said trust-fund was to go to John Wienholt, the intended husband.) "And also if the said intended marriage should take effect, and the said Sarah, or any issue thereof, should happen to be living at the time of the death of the obligor, and the obligor should happen to die unmarried and without issue, he the obligor should, exclusive of the above-mentioned provisions, either **[614]** by his last will and testament give and bequeath, or by some other ways or means give or leave, unto or in trust for the said Sarah, or the issue of the said intended marriage, so much in money or in valuable effects as he should by such will give or bequeath to any one of his next of kin, or nearest relations, or to any other person or persons whomsoever, to be paid within 12 calendar months next after the decease of the obligor; or in case the said obligor should make no such bequest in such will to or in trust for the said Sarah, or the issue of the said intended marriage, or if such bequest should fall short of the greatest bequest in such will to any one of his, the obligor's, next of kin, or any other person whomsoever, then if the executors or administrators of the obligor should within 12 calendar months next after the decease of him, the obligor, pay or deliver over to the said Thomas Norman and John Greaves, or the survivor of them, or the executors or administrators of such survivor, such bequest, or make good any deficiency that the same shall fall short of as aforesaid, in trust for the said Sarah and the issue of the said intended marriage, in manner as before mentioned respecting the said £2000 or £1000, then the above-written obligation to be void and of none effect, otherwise to be and remain in full force and virtue."

The bill further stated, that shortly after the date of the said bond, the said marriage was duly had and solemnized; and there were issue of the said marriage several children, of whom the plaintiff and J. B. Wienholt were the only survivors living at the death of the said Sarah their mother, and that had attained their respective ages of 21, and that the said Sarah and John Wienholt died in the lifetime of the obligor. The bill, after **[615]** describing the several interests possessed or represented by some of the parties, defendants thereto, further stated, that the obligor, after the date of the said bond, had a natural daughter, (the appellant Sarah Logan,) who in the year 1795 intermarried with Daniel Birkett the younger, nephew of the obligor, and that the obligor, through the influence of the said Daniel Birkett the younger, and his wife, became desirous of avoiding the effect of the said bond, and of depriving the said Sarah Wienholt and her family of the benefit to which they might be entitled under the same, or of diminishing such benefit; and the obligor, and Daniel Birkett the younger, and the appellant Sarah his wife, at many different times took the advice of counsel as to the most effectual method of accomplishing this object, and consulted and employed several different solicitors for that purpose; and that, in pursuance of the suggestions contained in the opinions so taken, or some of them, and with a view of defeating the operation of the bond, D. Birkett the elder invested large sums of money, in the whole above £100,000, in the purchase of real estates, for the purpose of withdrawing the property so invested from the effect of the said bond and agreement; and that of such estates some were conveyed originally to himself for life, with remainder to Birkett the younger, and Sarah his wife, or one of them; and others were originally conveyed to Birkett the obligor in fee, and were afterwards settled by him to the use of himself for life, with remainder to Birkett the younger, and Sarah his wife, or one of them; and that all such conveyances were made for the purpose of defeating the effect of the said bond.

And the bill further stated, that Daniel Birkett the elder was possessed of leasehold houses in different counties, that he assigned the same at different times to various persons upon trusts for the benefit of himself **[616]** for life, and after his death in trust for Daniel Birkett his nephew, and Sarah his wife, or one of them, absolutely; and that such assignments were made solely or principally with the view of diminishing the amount of the personal property of which Birkett the elder should appear to be possessed at the time of his death; and that amongst several other conveyances and assignments of real and personal estate so made by Birkett the elder, was a voluntary settlement of certain freehold lands at Hadley, in the county of Hertford, and Enfield, in the county of Middlesex, in favour of the nephew and wife, reserving

a life interest to the settlor, and the reversion in fee in default of appointment. There was also by the same deed an assignment of an unexpired term of a house in Queen-square, subject to a rent of £18 10s., upon the same trusts as were thereinbefore declared as to the said freehold estates: and by an indenture of the same date, and likewise without any consideration, certain freehold estates, situate in Cheddiston and Linsted, in the county of Suffolk, were conveyed to trustees for the nephew's family, with a life interest reserved to the settlor. There was also a further voluntary settlement, dated on the 31st March 1814, of certain other freehold estates in Asfield Thorp, St. Peter's, Westhall, Brampton, Chiddeston, Linsted Parva and Metfield, in the county of Suffolk, in favour of the nephew's family, with a like reservation as in the former cases: and there was another voluntary settlement of the same kind, dated 31st March 1814, with a like reservation in favour of the settlor.

The bill further stated, that Daniel Birkett the elder assigned securities for money, in favour of Daniel Birkett the nephew and his wife, without consideration, and that amongst such assignments was one dated in March 1811, of a bond for £16,000, to Daniel Birkett the nephew; that no notice of the assignment was **[617]** given to the obligors, and the assignor received the dividends to the time of his death: That the settlements were made on the understanding that Daniel Birkett the elder should, notwithstanding, have the power of disposition over the property, and that the nephew and his wife should re-convey and re-assign as he should appoint: That Daniel Birkett the elder transferred large sums of stock to Daniel Birkett the nephew, and Sarah his wife, on condition that he should receive the dividends during his life; that a deed to that effect was prepared; that he went into the City to make the transfer, but changed his mind; that afterwards he consented to make such transfer, on the importunity of Daniel Birkett the nephew, and his wife, and did transfer sums of £20,000 navy five per cent. annuities, and £37,000 three per cent. consols, into the names of Daniel Birkett the nephew, and wife, in order to evade the bond, and on condition that he should receive the dividends for life. That in the same manner he made an assignment of a mortgage for £2000 for the benefit of Mrs. Birkett, but reserving a life interest to himself; and that by his will, dated 31st March 1814, he gave to trustees as follows: "all my household goods, furniture and fixtures, plate, linen, books, pictures, wearing apparel, watches, trinkets, china, glass, wines, liquors, provisions, and other effects, in and about or belonging to my dwelling-house in Hatton-garden aforesaid, and Hadley, in the county of Middlesex, and also my carriage, and everything belonging thereto, in trust for the sole and separate use of Sarah Birkett, the wife of my nephew, Daniel Birkett, and to assign and dispose of the same as she, notwithstanding her coverture, and as if she were a feme sole, shall direct or appoint; and I give to the same trustees the sum of £2500 sterling, upon the like trusts, for the **[618]** separate use of the said Sarah Birkett. I give to my said nephew, Daniel Birkett, the like sum of £2500 for his own use. I give to my said trustees the sum of £20,000 sterling, which I direct shall be laid out by my said trustees in the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities, to be varied from time as to my said trustees or trustee for the time being shall seem meet; and I declare that they shall stand possessed of the said sum of £20,000, and the stocks, funds and securities in which the same shall be invested, and the interest, dividends and annual produce thereof, in trust for the four daughters of my said nephew, Daniel Birkett." He then made certain provisions with regard to the division of this money amongst the daughters of his nephew, and then proceeded in the following manner: "And I give to John Birkett Wienholt and Mary Wienholt, the two children of my late niece, Sarah Wienholt, the sum of £6000 sterling, to be equally divided between them; and I declare the same to be in full satisfaction of all claims under my bond, bearing date on or about the 8th day of April 1772; and in case they or either of them shall refuse, upon the request of my executor, to execute an effectual release of the said bond, then I revoke the last-mentioned bequest of £6000." The testator, after divers other bequests to servants and others, gave, devised and bequeathed all the residue and remainder of his estate and effects to his said nephew, Daniel Birkett, his heirs, executors, administrators and assigns, for ever, to and for his and their own use and benefit absolutely, and appointed him sole executor of the will.

The bill further stated that the obligor made a codicil to his will, making an

alteration in one of his legacies, but without otherwise revoking or altering the [619] same, and died on the 8th of March 1817, unmarried; and that Daniel Birkett the younger duly proved the said will and codicil, and by virtue of the probate thereof possessed himself of the personal estate of the testator to a very large amount, which after payment of debts, etc., gave a clear surplus of personal estate to the amount of £20,000 and upwards, independently of the personal property assigned and transferred by him in his lifetime as aforesaid; and the said testator's estates, including such property and the value of the real estates settled and conveyed as aforesaid, exceeded £200,000; and the respondents claimed by virtue of the bond, and in the events that happened, to have paid to them, out of the testator's personal estate, the sum of £2,000, and also such further sum as would equal the largest amount of property given by the said testator's will, or by the said dispositions in his lifetime, to take effect in possession after his death, whether the same were of real or personal property.

The bill then charged that the property which passed by the residuary clause in the said testator's will was very large, and was a legacy or bequest within the meaning of the agreement set forth in the said bond, and that the several gifts made by the testator in his lifetime to take effect in possession after his death, whether of real or personal property, were testamentary dispositions within the meaning of the said bond and agreement; and that the real estate was within the meaning and intention thereof, or if not, that the said personal property being invested in real estate for the purpose of taking it out of the effect of the said bond and agreement, such investment was a fraud upon the bond, and the said real estates ought either to be considered personal estate as against the parties claiming under the said bond and agreement, or as a security for the amount of the personalty invested in the purchase [620] thereof. And that the conveyances, settlements, transfers and assignments were made without any consideration, as mere gifts, and the testator reserved a life interest in all the property so conveyed and transferred, and also a power of disposition over the same, or if not, at least that he reserved a life interest therein, and that the gifts were only reversionary, and not to take effect in possession and enjoyment till after the death of the said testator; and that all such conveyances, settlements, assignments and transfers, were void as against the respondent Mary Wienholt, and all persons claiming under the said bond.

And the bill prayed that Mary Wienholt might be declared entitled to have the agreement contained in the condition of the said bond specifically performed, and that an account might be taken of the real and personal property of the said Daniel Birkett the elder, conveyed, settled or transferred by him, without consideration, to or in trust for the said Daniel Birkett the younger, and Sarah his wife, or either of them, or their or either of their issue, or in any manner for their benefit, subject to any trust for, or power or interest reserved to the said testator, either absolutely or for the term of his life, and that all such conveyances, settlements and transfers might be declared fraudulent as against the respondents, and subject to the agreement; and that an account might be taken of the general personal estate of the said testator, and of his debts, funeral and testamentary expenses and legacies, and that the same might be applied in a due course of administration, and that an account might be taken in like manner of all the said real and personal estates so conveyed, settled and transferred as aforesaid, and the rents, profits and produce thereof, and the proceeds of the sales thereof; and that the value of the property to which the respondent Mary Wienholt was entitled [621] under the said agreement, and the value of what she was entitled to under the said will, might be ascertained, and that she might be allowed to take the £6000 bequeathed by the will, or the benefit secured by the bond, according as either should appear most beneficial for her.

D. Birkett the younger died before putting in an answer to the bill, and appointed his wife, Sarah, (now Sarah Logan the appellant,) and J. Quilter, executor and executrix of his will, and they proved the same, and put in a joint and several answer to the said bill, and therein admitted that the transfers of stock were voluntary, as well as the assignment of the bond debt, but denied that there was any trust in favour of testator in the stock or in the bond debt, and also denied that the testator retained any interest therein, and insisted that the annuities and bond debt ought not to be estimated as part of the testator's personal estate at the time of his death, but that

the same must be considered as effectually given away and disposed of by the said testator in his lifetime, in manner aforesaid; and they denied that to their knowledge or belief any part or parts of the said testator's personal estate were or was assigned or transferred to the said Daniel Birkett the younger and defendant Sarah Birkett, or to either of them, subject to any trust in favour of the testator.

The separate answer of the appellant Sarah Logan, put in afterwards to the amended bill, denied that the bond for £16,000 was subject to the disposition of the testator, or that he had any interest therein; but admitted the testator was to receive the interest during his life, and that Daniel Birkett the nephew executed a counter bond for payment of such interest; and that appellant believed that obligors had notice of the assignment; and that it was the intention of the [622] parties that D. Birkett the elder should receive the dividends of the stock during his life. And the appellant admitted it to be true, that some time before the transfer was made, the testator had agreed to make such transfer to her or her husband, or both, but she denied that to her knowledge and belief the same was done upon the importunity of herself or her husband; and she admitted that the said testator did agree to make and did make such transfer, for the purpose of diminishing the amount of his property which was to pass by his will, but she denied that it was to evade or defeat the agreement in the said bill mentioned; and she denied also that the said testator consented to make such transfers, or any of them, upon any written declaration of trust or agreement being made, or under any verbal promise by D. Birkett the younger, or the appellant, or either of them, that such stock should be re-transferred to him the said testator, whenever he should call for the same, although she admitted it was understood and agreed that the dividends of such stocks or funds should be paid to him the said testator: That Daniel Birkett the elder intended to prevent the respondents taking anything more than was bequeathed to them, and that he disposed of the bulk of his property in his lifetime, so as to prevent his will operating thereon.

The appellant admitted the assignments of leaseholds, and that they were made that the property might not be subject to his will; she admitted also the assignment of the bond debt of £16,000, and of a mortgage debt of £2000, and also a mortgage for £1523 17s. 2d. on St. Mary Hill estate, in the island of Tobago, which by his private cash-book he appeared to have given to his nephew in 1808; and that such assignments were made without valuable consideration. The appellant referred to entries in the private cash-book of Daniel Birkett the [623] elder, to show that these had been regularly entered, but admitted that, notwithstanding the transfer, Daniel Birkett the elder received the interest of the bond debt to the time of his death. She denied, however, that it was agreed the testator should have the power of disposing of the property settled or assigned, or that there was any secret trust as to that property, except as appears by the conveyances and assignments. She admitted the transfer of £20,000 navy five per cents. and £37,000 three per cents. into the names of Daniel Birkett the nephew, and Sarah his wife, and that such transfer was without valuable consideration; and that it was intended to pay the dividends to the testator for life, but that he died before the dividends became due; and that he reserved to himself no power of disposition over the stock, and did not mean the stock to be subject to his will.

The appellant, on her marriage with Mr. Logan, her second husband, conveyed and assigned all her real and personal estate to trustees, for her separate use; and these trustees and Mr. Logan were made parties to the suit, by supplemental bill.

The cause came on to be heard before the Lord Chancellor, who by his decree dated on the 31st of May 1825, declared, that the condition of the said bond contained an agreement which ought to be specifically executed by the Court, according to the true intent and meaning thereof, and that the parties intended to be benefitted thereby were not bound to accept the penalty of the said bond, or the legacy given by the said testator's will, but were entitled in equity to have the full benefit of the provision agreed to be made in manner in the said condition mentioned; and his Lordship further declared, that the said testator having died unmarried and without lawful issue, the sum of £2000 [624] ought to be paid out of his estate, according to the said agreement, for the benefit of the parties entitled thereto, with interest at four per cent. from one year after the testator's death; and that exclusive of such pro-

vision, the testator ought to be considered as having engaged by will or otherwise to give or leave to or in trust for the parties meant to be entitled to the benefit of the said agreement, so much in money or in valuable effects as he should give or leave to any one of his next of kin, or any other person or persons, to be paid within twelve calendar months next after his decease; or if he should make no such bequest in his said will, or the same should fall short of the greatest bequest in such will, then that his executors or administrators should, for the benefit of such parties as aforesaid, pay or deliver over such bequest, or make good any deficiency that the same should so fall short. And his Lordship declared, that according to the true construction of the agreement contained in the said bond, the respondents electing to take under that agreement, and not to accept the £6000 bequeathed by the will, were entitled to claim so much of the testator's property disposed by his will as would be equal in value to the largest amount of what was thereby bequeathed to any person or legatee, whether specific, pecuniary or residuary legatee; and did declare further, that the assignment of the £16,000 bond debt, the £2000 mortgage debt, the transfers of the said £37,000 three per cent. annuities, the £20,000 navy five per cent. annuities, and all other voluntary dispositions of personal property remaining personal at the testator's death, in which he reserved or retained a life interest, or over the disposition of which he had a power of appointment or revocation, ought to be considered in equity, for the purpose of giving effect to the true intent and meaning of the said agreement, [625] as having the same effect as if the said sums of £16,000, £2000, £37,000, £20,000, and such other personal properties so voluntarily disposed of, had been bequeathed by the testator's will to the persons after his death respectively entitled thereto. And it was ordered that it be referred to the Master to inquire whether the testator in his lifetime made any and what other voluntary dispositions, as to his personal estate, which would fall within the declaration as to voluntary dispositions; and that the then defendants should transfer the said sums of stock, respectively standing in their names, into the name of the Accountant-general in trust in the cause, and pay the dividends thereon, until such transfer, into the Bank: and that the Master should inquire into the circumstances of the transfers by the testator. And it was ordered that the said Master should inquire what purchases were made by the testator of real property, after the execution of the said bond, of which the conveyances or assurances were originally taken either to himself or in trust for himself in fee, and as to which, by subsequent acts, assurances or conveyances, and of what dates, he afterwards reduced himself to be tenant for life in law or equity, and with remainder or remainders to other person or persons, and to whom, and also what purchases of real property were made by the testator after the execution of the said bond, taking the conveyances or assurances to or in trust for himself for life, with remainder or remainders over, and to whom. And it was ordered that an account should be taken of the personal estate of the said testator that had come into the hands of the present appellants, or any person or persons by their or any of their order or for their use, including what might have been received under the voluntary dispositions of [626] personal estate, as to which the respondents were thereby declared to be entitled to be relieved.

The Master having made his report, the case came on to be heard on exceptions to that report, and for further directions, before the Vice-Chancellor, on the 7th day of March 1829; who, by a decree then made, declared that the exceptions against the said Master's report be overruled, and that the several voluntary dispositions of personal estate made by the testator were to be considered in equity, for the purpose of giving effect to the agreement contained in the condition of the bond, as having the same effect as if the personal estate so voluntarily disposed of had been bequeathed by the testator's will to the persons who after his death were intended to take the benefit of such dispositions. And it was declared, that according to the true construction of the said agreement, all testamentary dispositions of freehold, and copyhold, and leasehold estates, and dispositions of that nature, which by the decree in the cause were declared to be of the nature of testamentary dispositions, were within the intent and meaning of the said agreement. And that all the several freehold and copyhold estates, purchased by the said testator after the execution of the said bond, were to be considered in equity, for the purpose of giving effect to the true intent and meaning of the said agreement, as if the said real estates had been given

or devised by the said testator's will. And it appearing that Daniel Birkett the younger was the person to whom, by such testamentary dispositions as aforesaid, or dispositions in the nature of testamentary dispositions, the largest benefit was given, it was referred to the Master to compute what, at the time of the testator's death, would have been the amount and value of the benefits which [627] the said Daniel Birkett the younger would have taken under such several dispositions as aforesaid, according to the declarations contained in the said decree made on the hearing and in that order, if the said bond had not been made; and it was declared that the respondents were entitled to stand as specialty creditors upon the estate of the said testator, for a sum equal to such amount and value, with interest thereon at £4 per cent., from the end of a year from the death of the testator. And it was further declared that, as between the parties taking the freehold and personal estate of the testator, the general personal estate should be first applied, then the personal estate specifically bequeathed or disposed of, and lastly the freehold estates, in satisfaction of the demand of the plaintiff and the defendant John Birkett Wienholt (the present respondents). And it was referred to the said Master to take the subsequent accounts of the personal estate of Daniel Birkett the elder, received by the appellants, including what might have been received under the voluntary dispositions of personal estate, as to which the respondents are thereby and by the decree in that cause declared entitled to be relieved. And that in case the funds in court, and other property applicable thereto under that decree, should not be sufficient to answer what should be found to have been received by Daniel Birkett the younger, it was ordered that the deficiency be answered by Sarah Logan his executrix, out of his estate and effects. And the Master was directed to inquire who, since the date of the decree, had been entitled to receive the rents, dividends and interest of the separate estate of Sarah Logan, and to whom the same had been respectively paid; and in case he should find Sarah Logan to have been in the receipt and enjoyment of the said rents, dividends, and interest, he was to in-[628]-quire whether her receipt thereof respectively was or not with the permission of her trustees, and to state the particulars of the said separate estate, and what had become thereof, and to state special circumstances.

The appellants appealed against both the decrees, and the case was several times argued by Sir C. Wetherell and Mr. Pepys for the appellants, and by Sir E. Sugden and Sir W. Horne for the respondents.

For the Appellants, it was contended that the question was whether the agreement must be taken to affect the whole of the testator's property, or whether its operation was to be limited by the amount of the penalty; whether it was to be executed specifically, or might be cut down to the penalty stated in the bond. The obligation was not, that the "heirs, executors and administrators" of the obligor should pay the increased provision, but that only the executors and administrators were bound to do so. That difference was important, as it showed that it was not the intention of the testator to put that portion of the provision for his niece on the same footing with the other. Another question was, whether the testator only meant a gift *inter vivos*, or whether he intended to take away from himself any possible discretion to dispose of his property as he pleased during his life. This latter construction of the agreement must be considered as one *strictissimi juris*, and therefore could not be viewed with favour by their Lordships. They who argued for such a construction, must go to the extent of saying, that if he converted any part of his personal property into land, that land would not go to his heir-at-law, and that every estate coming from another person to him must also be brought under the operation of this instrument; so that in all cases whatever the realty must be converted into personalty, in order to be disposed of by this clause.—[The [629] Earl of Eldon: — It was left to the Master to examine whether the real estate had not been purchased in fraud of the agreement. The evidence given before the Master showed that in this case purchases had been made in fraud of the agreement, and the principle on which the case turned was, that the testator could not be allowed to commit a fraud upon his own agreement. If a man agreed to leave all his children equally, and during his life gave to one of them a sum of money, that would be a gift in charity; but if he only gave the money, reserving to himself a life interest, that would not be a gift within the meaning of the covenant.]—The Vice-Chancellor's decree assumed

that these conveyances of land and stock were fraudulent. That was wrong. But assuming it to be right, the decree gave more than an equivalent to the other party. The decree had improperly ordered the then plaintiffs to be "specialty creditors on the estate of the testator;" a direction that ought not in this case to have been given. In *Chilliner* v. *Chilliner* (2 Ves. sen. 528), it was stated by Lord Hardwicke, that in all cases of this kind everything must depend on the nature of the consideration of the original agreement. Now here the testator had only said that he would make the parties equal, or that he would pay a sum of £4000. If he only gave each individual £4000, it would save the agreement. In all other cases the agreement was made part of the condition of the bond, and it should be so considered here. It was, in fact, recited before coming to the condition of the bond.

For the Respondents, it was argued that the case of *Chilliner* v. *Chilliner* was not opposed to the present. That case was before Lord Hardwicke, and the argument there proceeded much upon the question, whether **[630]** if the agreement was not stated in the recital, it was good for anything. That case, however, decided that where a father had agreed to settle property on a marriage, and then gave a bond for £600, with £1200 penalty if he did not make the settlement, he had not afterwards the election to forfeit the £600 or to settle; the settlement being treated as the primary agreement, and the £600 as only a penalty or further security. The consideration here was, "if the intended marriage shall take effect." The condition, pointing out what was to be done, operated in the same way as an agreement to do the thing thus designated. This case was therefore precisely the same as that of *Chilliner* v. *Chilliner* [2 Ves. sen. 528]. Lord Eldon had properly held that the amount of the penalty was not a matter to be considered, for that the act agreed upon must be done specifically. The answer of the defendants admitted the transfer of the property, by means of which the testator had tried to render it impossible for him to perform the agreement he had made. The facts were now settled, but they had not been so when the case was before the Court below. When the case was before Lord Eldon, he declined expressing any opinion as to the effect of the bond on the realty as well as the personalty, though he intimated that he was inclined to think it did relate to both. The agreement in substance amounted to this, that the testator should give his niece as much in money as he gave in any other way to any other person. The case of *Jones* v. *Martin* (3 Anstr. 882; more fully reported in 5 Ves. jun. 266, n.; see also *West* v. *Errissey*, 2 P. Wms. 349), was an authority in favour of the respondents. In that case there was a covenant by a father to give, or leave by his will, all his personal estate equally among his children. It was held that that covenant **[631]** did not deprive him of the right of unlimited expense, and of any fair application, even by gift, if absolute and *bonâ fide;* but that a disposition for the purpose of defeating the covenant could not stand. Transfers of stock to one of the children by the father, were therefore, upon the circumstance of the reservation of the dividends for his life, and other evidence of a partial intention to elude the covenant, set aside. In that case the Lord Chancellor said, "If a father be partial and will give a preference, he must give against himself, and not make a mere reversionary gift." The principal case to which that of *Jones* v. *Martin* was appended as a note, was *Randall* v. *Willis* (5 Ves. jun. 262), where there were articles entered into for the settlement of certain real estates, and then came the words, "and also all and singular my personal estate of what nature or kind soever." In that case the decree was, that upon the true construction of the articles, the personal estate of which Randall was possessed at the time of the execution of the articles, and which had since been laid out in land, in fraud of those articles, ought to be subject to the provision made by the said articles, and settled according to the agreement therein contained. That case established, that when real estate was improperly acquired by money that was already subject to the stipulations of an agreement, it should be treated as personal estate, for the purpose of avoiding the fraud upon that agreement.

In reply, it was contended, that if the doctrine contended for by the respondents was admitted, a person could not vest personalty in land without its being liable to a bond creditor. Lands purchased as these had been, were withdrawn from the operation of the **[632]** agreement, and it would be absurd to carry the doctrine contended for by the respondents so far as they now desired, for that would be to make

an agreement contained in a bond entered into with a penalty of £4000, affect the disposition of property that might amount to £100,000. This never could have been the intention of the parties, nor would the law permit such a consequence.

The Earl of Eldon said that he saw no reason to change the opinion he had formed in the court below.

The Lord Chancellor: In the course of the argument, it had been the opinion of all the Lords who had heard the case, that great difficulties had been pressed upon their consideration. It had been thought that the condition of the bond must be taken to operate *in limine*. That was the foundation of the decree of Lord Eldon, and they felt that they could have no difficulty in concurring with that view of the matter. The difficulty had arisen upon what had been since done, namely, in the decree of the Vice-Chancellor; and as that difficulty which had been raised in the discussion had not been removed, he should propose taking further time for consideration. But without stating that he possessed any distinct opinion on those important points to which the decree of the Vice-Chancellor had given rise, he could not avoid expressing the strong inclination of his opinion on one or two of the matters on which the Vice-Chancellor had decreed. He should say nothing with respect to the £57,000 that had been transferred, which the Vice-Chancellor dealt with as if transferred to Daniel Birkett the younger: on that he had some doubt. But that on which he had less doubt, and where his opinion was opposed to that of the Vice-[633]-Chancellor, was that part of the decree where his Honor had said that all the testamentary dispositions of leasehold, freehold and copyhold estates were within the intent and meaning of the agreement. He was not prepared to say that that was the true construction of the agreement; he should rather say that it was confined to personalty. But that on which he had a very strong impression was, as to the mode of calculation adopted with regard to the bequests. The result of his Honor's decree on that point was, that it was the plain and obvious meaning of the parties to this agreement that, whatever the most favoured person received in personalty or realty, as much should be given to Sarah Jopson; so that whatever was given to Daniel Birkett, would be suddenly taken away from him, and given to Sarah Jopson, who, getting this in addition to what she before had, would therefore take nearly the whole. He was not prepared to put a construction on the agreement that would produce such a result. The parties ought to agree among themselves as to the division of this property; but as they would not agree, they ought to give in schemes of what each asked to obtain from their Lordships.

Lord Plunkett entirely concurred with the Lord Chancellor on the points now referred to. There was not any difference of opinion or any doubt as to the propriety of the decree first made in this case. What Lord Eldon had decided had been most properly decided; but his decree necessarily left a great many most important points untouched. The first of these points was, whether the contract related to more than personal estate. On that point he should wish for further time to consider the case and refer to the authorities. The second point was, if the House would go the length of [634] saying that the contract related merely to the personalty, and not to the real estate, and if so, then whether the party had a right to vest his personal estate in the purchase of real estate; a question, indeed, whether their Lordships would follow the motive of the party in transferring his property from personalty to realty, and would say that it was done for the purpose of increasing one fund and diminishing another, and if so, whether in their opinion it was done with a view fraudulently to defeat the agreement. Then came the important questions as to the transfer of the £37,000 stock: as to the mode of ascertaining the amount; then, in what way the fund should be distributed, and how to give effect to the contract. It was impossible to say on this contract, though no doubt a great benefit was intended to be given to Sarah Jopson, no greater benefit indeed to any person than to her; still, it was impossible to say that it was intended she should get all; at least so he thought at present. But if that should in the end be considered to be the effect of the contract, their Lordships must see it carried into execution.

The Earl of Eldon desired that counsel on both sides should draw up the minutes of what they claimed respectively, in such way as they thought proper.

Their Lordships, by an order bearing date on the 4th of April 1833, and reciting the substance of the two decrees of Lord Eldon and of the Vice-Chancellor, confirmed them both.

That part of his Honor's decree which had been doubted, namely, that relating to the liability of the after-purchased real estate to the claims of the obligees in the bond, was referred to in the following terms: "And their Lordships further found and declared, **[635]** that all the real estates referred to as having been purchased after the 5th of April 1804, and in which purchases, or by any subsequent conveyance, Daniel Birkett the elder retained any interest for his life or in fee, and gave any interest to Daniel Birkett the younger, ought, for the purpose of the said agreement, to be considered as personal estate, and as if made the subject of testamentary disposition to Daniel Birkett the younger, and to be dealt with as part of the residue, in so far as Daniel Birkett the younger's interest was concerned." Their Lordships' order further declared, that "the demand of the respondents was a debt by specialty, and as such entitled to priority over both the simple-contract debts and the legacies, whether residuary or otherwise, and that the whole of the property disposed of by the will, under the description of residue, was applicable to discharge such debt to the respondents; and if that fund should not be sufficient, then that the shares of Daniel Birkett the younger and his wife were liable, for satisfaction of this claim, to abate in proportion to the amount of the benefits taken by them under the will, or by gifts in which Daniel Birkett the elder retained any interest during his life."

REPORTS OF CASES heard in the House of Lords, on Appeals and Writs of Error, and decided during the Sessions 1833-35. By C. Clark and W. Finnelly, Barristers-at-Law. Vol. II.

APPEAL

From the Court of Session.

MICHAEL GILFILLAN, Writer in Glasgow,—*Appellant;* ALEXANDER PIRIE HENDERSON, Writer in Edinburgh,—*Respondent.*

[Mews' Dig. xiii. 1756. See 36 and 37 Vict. c. 63, s. 21; and *In re Lydall and Others*, 1900, 17 T.L.R. 73.]

An agreement of partnership was made between two solicitors, one of whom could only practise in a superior, the other only in an inferior court. Both undertook to divide the profits of their general business, and each stipulated to recommend the other to his clients, and to keep the partnership a secret from all the world. Held, that such an agreement is void, for a Court cannot suffer statements to be made and papers presented to it by parties who are neither parties to the cause, nor their lawfully authorised agents, and who are consequently not properly responsible to the Court for their conduct.

This was an appeal from the decision of the Court of Session, arising out of the following circumstances. Previous to the year 1817, the Defender was residing [2] in Glasgow. The Pursuer was at that time a partner in the firm of Bogle and Gilfillan, writers to the Signet. In the year 1817 the Defender came to Edinburgh, and got employed as clerk, and while there was occasionally employed in that capacity by the Pursuer. The Defender, soon after going to Edinburgh, resolved to commence business on his own account, and various letters were written by him to the Pursuer, setting forth the Defender's wish to be employed as the Pursuer's agent, and stating the terms on which he was willing to undertake that office. In one of these letters he said, "If Mr. Gilfillan thinks it at all a practicable case, and one that he, from a confidence in me, I trust not misplaced, would feel inclined to go into, that a copartnership in the conduct of a general business can subsist between an Edinburgh agent and a Glasgow agent, I now offer him, in consideration of his employment, his considerable interest, and his advances towards the establishing and conducting the concern, which necessarily must be much more considerable than I have above pointed out, a third share of the free profits of my general business for a term of years. From my present views, the portion I offer to Mr. Gilfillan will not be inconsiderable, and must be extended by his own endeavours to procure me business; and I think the remaining two-thirds to myself, considering the trouble and responsibility of the undertaking, will not be considered too great. These separate proposals I make in the view of remaining in Edinburgh, which I confess is a wish most agreeable to myself." That the above was followed by a proposal of joining the Pursuer in his business in Glasgow, which was not acceded to; and then the [3] Defender's proposals concluded thus: "In making these proposals, I beg Mr. Gilfillan will view them as intended for his private use; and trust in God he will conceal,

if not destroy this paper, so as it does not catch the eye of any other person." An arrangement was accordingly entered into between the parties, to endure for five years after the 12th of November 1818, but restrictable to two, by either party giving the other six months' notice. The agreement was to the following effect:—First, Mr. Gilfillan, from confidence in Mr. Henderson, agrees instantly to advance him the sum of £100 sterling, to admit him an agent in the Supreme Court; which sum, with the legal interest thereof from the 12th day of November next, Mr. Henderson engages himself to repay within two years from this date. Mr. Gilfillan farther engages to place at the disposal and command of Mr. Henderson, for the purpose of enabling him to conduct and carry on his business, the sum of £400 sterling, according as the business shall require the same, without any right to demand interest therefor; and in case Mr. Gilfillan should be called upon by Mr. Henderson at any time to advance a large sum, he binds himself to pay him at the rate of two-and-a-half per cent. for such additional advance. These advances to subsist for five years, except in the restricted case after mentioned. Second, Mr. Gilfillan engages to promote the interest of Mr. Henderson, as much as shall not interfere with the free exercise of his own profession. Third, In return for these advances, and Mr. Gilfillan's influence, he shall be entitled, for the full period of five years from the 12th day of November next, (restricted to two years in the event after mentioned,) to retain from his own private, and from his client's accounts, one-third share of the [4] free profits of the same, as the same shall be pointed out by Mr. Henderson, Mr. Gilfillan regularly paying to Mr. Henderson his proportion, or the balances of said accounts, as the same shall, from time to time, be recovered; and Mr. Henderson separately engages, in return for the accommodation of advances, to pay to Mr. Gilfillan, during the above period of five years, but restrictable always to two, as after mentioned, one-third of the free realized profits of the whole other business conducted and performed by him. Fourth, In case the parties, or either of them, shall think it of importance to them to dissolve this agreement, then, after the expiry of two years from this date, and upon giving thereafter six months' notice, the one to the other, of their intention, this agreement will come to a close in the same way as if the whole five years above mentioned had elapsed; and in this case, as if the whole five years had expired, Mr. Gilfillan will be entitled to call, upon the concern being wound up, for repetition of his advances, and appropriation of any balance of his share of profits, in the same way as in common cases of copartnery, the parties suffering, in proportion to their respective shares, the possible loss occurring from bad debts, and the claims of either party in the concern shall be preferable to any private debt. Fifth, This agreement shall be private betwixt the parties, Mr. Henderson throughout appearing the sole ostensible person, having full power to transact with clients or others, in such manner, and on such terms and conditions, as to him may seem expedient, without any control on Mr. Gilfillan's part, or his management, in one respect or another, except his private advice; and whether any of his clients, in certain circumstances, ought not to receive reasonable indulgence, as to charge and indul-[5]-gence in payment. Sixth, In case of any dispute, legal proceedings upon one part or another are disclaimed—the parties hereby agreeing to submit any difference to the Dean of the Faculty of Advocates for the time—with power to him to call for the writ or oath of Mr. Henderson, in place of all other proof, as to the purity of his management, and correctness of his books, but the same shall be open for his inspection. Which books, Mr. Henderson, for the first two years, engages he shall keep free of all expenses to Mr. Gilfillan, but thereafter he shall be entitled to charge a reasonable proportion to the said Mr. Gilfillan's interest, for the keeping of the books and accounts. The accounts to be regularly rendered at least once each session. Lastly, For more effectually carrying these minutes into effect, the parties will be ready, in the course of the winter, to enter into a valid agreement, extended in regular form, and with such other additional clauses as may occur, to meet the true spirit of this agreement: If any serious loss or misconduct happen to take place to any of the parties, the arbiter shall be entitled to judge whether, in such event, this agreement should not be void and terminate.—This agreement was immediately acted upon by both parties. Disputes afterwards arose between them, and the Pursuer commenced his action, to recover a large balance, which he alleged to be due to him from the Defender.

The defence was, that in fact this proposed contract had never been executed; and further, that none of the stipulations it contained had ever been performed by the Pursuer; and also (and on this point the case now came to be decided before the House of Lords), that, had any agreement been entered into between the Pursuer and Defender for the division of [6] the professional profits of the latter, it would have been a *pactum illicitum*.—Vide *Brashe* v. *Mackinnon*, Fac. Coll. March 1820.

After hearing parties by counsel, Lord Fullerton, Ordinary, pronounced the following interlocutor:

"13th December 1831.—The Lord Ordinary, having heard parties' procurators, and considered the closed record, finds that, by the agreement libelled, the Pursuer, an agent in Glasgow, undertook to employ the Defender, an agent in Edinburgh, in the business of his clients, and, in return, stipulated for a third part of the profits derived by the Defender from that business: finds, that it was also part of the agreement that it should be kept secret: finds that such an agreement was illegal, and therefore sustains the plea of *pactum illicitum*; assoilzies the Defender from the conclusions of the action, and decerns: finds the Defender entitled to expenses, and allows an account thereof to be given in, and to be taxed by the auditor."

Against the interlocutor of the Lord Ordinary a reclaiming note was presented by the Pursuer to the second division of the Court, upon which interlocutors were pronounced, adhering to that of the Lord Ordinary, and granting expenses to the Defender. Against these interlocutors the present appeal was brought to this House; and the question for their Lordships' decision was solely the legality or illegality of the agreement.

Dr. Lushington and Mr. Busby appeared for the Appellant; and the Lord Advocate and the Solicitor-general for the Respondent. After Dr. Lushington had replied—

The Lord Chancellor moved the Judgment:—He [7] entertained no doubt whatever of the propriety and soundness of the decision of their Lordships in the Court below, and therefore he should not delay further the time of their Lordships in recommending them to affirm those judgments. As to the conduct of the party, Mr. Henderson, at whose instigation the arrangement was made, and who was undoubtedly as much a party to the illegal arrangement as the Appellant, in availing himself of that objection, that was a question with which their Lordships had nothing to do; he might have reasons for so doing, into which it was not their province to inquire. This was an observation applicable to all cases in which two parties were similarly circumstanced, and one of them set up the illegality of the transaction as a bar to a claim founded upon it. Their Lordships had nothing to do with that, nor was there any reason why they should express an opinion on the conduct of a party for availing himself of that illegality. The next point of importance for their consideration was, what was the law with respect to the conduct of a partnership between two persons, of the same profession, both of whom were qualified to carry on business in either of the Courts, and who conducted the business of that partnership openly before all the world, each following his professional duties at his own place of residence. That also was a question with which their Lordships had nothing to do. That was not the case here, where, first, one of the parties was disqualified from practising in the Court of Session, and the other in the lower Court; had they both been qualified to practise in both the Courts there might have been no objection to the contract, at least upon the nature of the contract itself. But here there was an objection arising out of the mode [8] in which the parties proposed to conduct their business. It was one of the essential articles of this partnership, that its existence should be kept a secret from the world. These were circumstances, in his opinion, sufficient to set the contract aside, and to warrant him in saying, that the Court below had most justly decided the question. It was impossible to say that the case was new. At all events there was the case of *Brashe* v. *Mackinnon* (Fac. Coll. 1820), in which it appeared from the books that the Court was unanimous, and where it was "found to be illegal for an agent before the Court of Session to draw papers for a solicitor before an inferior Court, and to receive a proportion of the fees," upon the ground stated by the Lord Ordinary, that it was of the nature of a *pactum illicitum*; and the Court, upon advising a reclaiming petition for the Defender, were of opinion that such a practice was improper in both parties; that it was improper for an agent

in that Court to make profit of the proceedings before an inferior Court, and that it was improper in a solicitor before an inferior Court to enter into an arrangement, by which papers to be given into Court by him were to be drawn by others, though he was bound to certify that they were drawn by himself. Both these improprieties did not exist in the present case, but one of them did, and either of them was sufficient to avoid the agreement. If it was improper for an agent of a superior Court to make a profit of business done in an inferior Court where he could not practise, so it must be improper under similar circumstances for the agent of the inferior Court to make a profit of business in the superior Court; the objection in both cases being that the Courts were called upon to exercise their functions [9] upon statements made and papers presented by persons who were neither the parties in the cases nor their lawfully authorised agents, and who were consequently not properly responsible to the Court for their conduct. On every finding, therefore, in the case of *Brashe* v. *Mackinnon*, he could see no difference between it and the present. This was a matter of Scotch practice, as had been most justly stated by the learned Solicitor-general; and their Lordships would be very slow to go against the decision of the Court below on a point of practice, when coming here by way of appeal. The case of *Brashe* v. *Mackinnon* was not decided till 1820, but if it had not preceded this, he should have been very reluctant to entertain a different opinion on the subject. He should have proceeded on the ground that the parties could not enter legally into this contract, one of the parties not being qualified to practise in the Court from whence the emoluments arose. He was of opinion, therefore, that the contract was illegal between the two parties, standing in the relation they did towards each other. Part of the contract bound the parties to secresy as against all the world, including their clients, each undertaking to advise his clients, who were in ignorance of the contract, to employ the other in causes in which the country solicitor had such an interest, as in this case he would have had, in the profits of the town solicitor's practice. These things taken together were sufficient grounds in themselves to warrant him in humbly moving their Lordships to affirm the judgment of the Court below, with full costs.

Judgment affirmed with costs.

[10]

APPEAL

From the Court of Chancery.

WILLIAM HARLAND, WILLIAM CHARLES HARLAND, and ORFEUR WILLIAM KILVINGTON,—*Appellants:* JAMES LLOYD EMERSON, JANE LOUISA WALCOT, and EDMUND GEORGE DENHAM,—*Respondents.*

[S. C. 8 Bli. N.S. 62. Commented on in *Lyell* v. *Kennedy*, 1882, 20 Ch.D. 486; and see S.C. 1883, 8 A.C. 217.]

To a bill filed by persons claiming title to an estate as co-heirs of A. T. *ex parte materna*, and charging an agreement and a correspondence in which they alleged their title was admitted, the defendants pleaded to the whole bill, that there was in existence an heir of A. T. *ex parte paterna*. Held, that the plea was properly overruled by the Courts below, on the ground that it ought to be accompanied by an answer as to the correspondence and some of the other charges in the bill.

The Respondents, as the co-heirs *ex parte materna* of Anne Trigg, widow, who died in 1826, intestate and without issue, filed their bill in October 1829, in the Court of Chancery, against the Appellants, thereby praying, among other things, that it might be declared that the Respondents, as the co-heirs of the said Anne Trigg, were entitled, in the several and respective shares therein mentioned, to the proportionate part of the yearly rent of £300 therein mentioned, up to the day of the decease of the said Anne Trigg, and to one equal third part of the freehold and

renewable leasehold estates devised by the wills of Richard Harland and Phillip Harland therein respectively mentioned, and of the rents and profits thereof respectively accrued due since the decease of [11] the said Anne Trigg, and for accounts and directions consequential on such declaration of right; and that a partition of the said estates and premises between the Appellants and the Respondents, according to their respective interests, might be made under the decree of the said Court; and that the Appellants might be restrained by injunction from setting up any outstanding term affecting the said hereditaments and premises, in any action or actions at law which the Respondents might be advised to bring for establishing their title to the aforesaid one-third part of the said hereditaments and premises.

The bill recited the wills of Richard and Phillip Harland. By the former, bearing date July 1747, the testator devised his estates, freehold and leasehold, in Yorkshire and elsewhere, to each of his four sons successively for life, with remainders to their first and other sons severally and successively in tail male, and for want of issue male of his said sons, (an event which happened,) then, "to all and every the daughter and daughters of all his said four sons, and their heirs, as tenants in common."—That Phillip Harland, the eldest son, entered into possession of the estates so devised, upon his father's death, and by his will, dated in 1764, he devised some estates taken in exchange for the former, and others acquired by purchase, to trustees, to go with the estates devised by his father's said recited will; and he died in 1766, leaving two daughters, Elizabeth and Anne, his co-heiresses at law, and three brothers, him surviving. John Harland, his next brother, upon Phillip's death, entered into possession of the estates devised by both wills, and died in 1772, leaving Anne Harland, afterwards Anne Trigg, his only child, him surviving. The other two brothers, the remaining [12] sons of the first testator, died in 1784 unmarried. Elizabeth Harland above mentioned, also died unmarried, leaving her sister Anne, then the wife of the Rev. Henry Goodricke, her surviving, to whom she devised all her freehold and other estates and interest for her life, remainder to Orfeur William Kilvington, one of the Appellants.

The bill next stated, that upon the death of the last of the said tenants for life, the said Anne Harland or Trigg claimed to be entitled to the third share in all the devised estates and premises, and that, to end amicably some doubts respecting her title, she executed an agreement or lease of her third share in the said estates to the said Anne and Henry Goodricke, at a rent of £300, for a term of 99 years, terminable on her death, and that they then entered into possession of the receipts of the rents and profits of the said estates. The Rev. Henry Goodricke dying some time afterwards, Anne, his widow, intermarried with Charles Hoar, who took the name of Harland, and was knighted. The bill further stated the settlement made upon this marriage, and the wills respectively of Sir Charles Hoar or Harland, who died in 1803, and of Dame Harland, upon whose death without issue, on the 29th June 1826, the Appellants, William Harland, formerly William Hoar, and his son William Charles Harland, entered into possession of part of the said estates as devisees in the will of the said Dame Harland; and that Orfeur William Kilvington about the same time entered into possession of the remainder of the said estates, under and by virtue of the will of Elizabeth Harland; and they have ever since continued in possession of all the said estates, devised as aforesaid by the wills of Richard and Phillip Harland.

[13] The bill, after stating that Anne Trigg, the daughter of the said John Harland, the second son of the first testator, Richard Harland, having survived her husband, Richard Trigg the younger, died in August 1826, intestate, without issue, and without any heir or heirs on the side of her father; and that the male line of her family was extinct, and that on her death the before-mentioned agreement or lease became determined; set forth the pedigree and claims of the Respondents, as the cousins and heirs-at-law of the said Anne Trigg, on her mother's side, to the said rent of £300, up to the decease of Anne Trigg, and to a third share of the said estates, hereditaments and premises, and the rents and profits thereof, from the day of her decease.

The bill charged, among other matters, that the Appellants pretended that there was in existence an heir-at-law *ex parte paterna* of the said Anne Trigg; whereas the Respondents charged that the Appellants set up that pretence merely to enable

them wrongfully to continue in possession of the one-third part of the estates and hereditaments late belonging to the said Anne Trigg; for that they had no reasonable ground for making such pretence, as would appear if they would set forth the actual grounds on which they made such pretence; and as evidence of Anne Trigg's title, Respondents referred to the lease above mentioned, by which they alleged that title was admitted.

The bill further charged that the Appellants had frequently, by correspondence and otherwise, admitted the title of the Respondents to the one-third part of the said hereditaments and premises, or some part thereof; and in such correspondence the facts and circumstances in the bill set forth, or some of them, had been admitted or noticed. It likewise [14] charged, that the Appellants had in their custody or power the title-deeds, muniments and evidences of title relating to the several estates and hereditaments in the bill mentioned, or some of them, and also divers other deeds, evidences of title, books of account, letters or extracts from letters, vouchers and writings, relating to the said several estates, or some of them, or to the share and interest of the said Anne Trigg therein, and relating to the rents and profits of the said hereditaments and premises, which had accrued due since her death, or relating to the several matters in the bill mentioned, or from which the truth thereof, if produced, would appear.

To this bill the Appellants jointly and severally pleaded, "that Lois, the wife of Timothy Morine, of Wetherby, in the county of York, gentleman, formerly Lois Harland, was, at the death of Anne Trigg in the said bill named, and now is, heir-at-law of the said Anne Trigg, *ex parte paterna* of the whole blood; all which these Defendants aver to be true, etc.; and these Defendants do plead the same to the whole of the said bill, etc."

This plea came on to be argued before the Vice-Chancellor in May 1830, when his Honor overruled the same, being of opinion that it ought to be supported by an answer denying or explaining the correspondence (3 Sim. 490).

The matter of the plea was in the August following again argued on appeal before Lord Lyndhurst, then Lord Chancellor, but no judgment having been given before he resigned the great seal, his Lordship afterwards, by consent of the parties to the suit, delivered the following judgment in writing:

[15] "In the case of *Emerson* v. *Harland*, I am of opinion that the plea was properly overruled, and that there are parts of the charge in the bill which require the plea to be accompanied with an answer and discovery, according to the principle laid down in *Saunders* v. *King* (6 Madd. 61), and *Gun* v. *Prior* (1 Cox, 197)."

The Appellants appealed to this House from both these decisions.

Mr. Swanston and Mr. Wigram, for the Appellants:

We plead the title of Lois Morine, the heir-at-law *ex parte paterna* of Anne Trigg, as a bar to the claim of theRespondents as heirs *ex parte materna*. This is an affirmative plea, the truth of which the Appellants undertake to verify: if the fact alleged in it be true, the bill must be dismissed; and until the truth of that fact is disposed of, no further answer is required or can be called for. The bill contains such statements as, if not met by plea only, would involve the Appellants in great difficulty and expense, from both which they ought to be permitted to protect themselves, tendering as they do to the Respondents a fair issue as to the substantial fact on which they rely in their bill.

Lord Redesdale, in his Treatise (Fourth edit. p. 283), lays down the rule that "if a plaintiff, in his bill, states that he has an interest which entitles him to call on the defendant for a discovery, though in truth he has no such interest, the defendant may protect himself by plea from making a discovery which may involve him in difficulty and expense; as if the plaintiff states himself to be heir or administrator of a person who died intestate, and in that character seeks a dis-[16]-covery from the person in possession of property which did belong to the deceased, of his title thereto, or of the particulars of which it consists, the defendant may plead that another person is heir or personal representative." That rule is applicable to this plea. In a preceding page (p. 230), of the same book, the mischief of making a discovery is illustrated. Lord Redesdale, referring to the case of *Newman* v. *Wallis* (2 Bro. C. C. 142), in which Lord Thurlow overruled the plea that the plaintiff was not heir, says, "that decision was doubted by the learned Judge himself, (in the

subsequent case of *Hall* v. *Noyes* (3 Bro. C. C. 483), when pressed by the necessary consequence, that any person falsely alleging a title in himself, might compel a defendant to make any discovery which that title, if true, would enable him to require, however injurious to the defendant; so that any person might, by alleging a title ever so false, sustain a bill against any person for anything, so far as to compel an answer; and thus the title to every estate, the transactions of every commercial house, and even the private transactions of every family might be exposed, and that in the name of a pauper, at the instigation of others, and for the worst purposes." But no doubt has been entertained since Lord Thurlow's time of the validity of negative pleas. *Drew* v. *Drew* (2 Ves. and Bea. 159), *Saunders* v. *King* (6 Madd. 61), *Thring* v. *Edgar* (2 Sim. and Stu. 274-278). The objections, however, to negative pleas do not apply to the present, which is an affirmative plea, and its validity must be tried by a different test from that which is applied to a negative plea.

[17] This is not denied to be a good plea, but the objection to it is, that it is not sufficient, without being accompanied with an answer to collateral matters charged in the bill. The most difficult part of a pleader's duty is, so to frame a plea and answer, as that the latter will not overrule the plea. Upon that point also, Lord Redesdale, in his book (P. 299), says, "A defendant may also support his plea by an answer touching anything not charged by the bill, as notice of title or fraud; for by such an answer nothing is put in issue covered by the plea from being put in issue, and the answer can only be used to support or disprove the plea. But if a plea is coupled with an answer to any part of the bill covered by the plea, and which, consequently, the defendant by the plea declines to answer, the plea will upon argument be overruled." What is put in issue by this plea is the fact of heir, and it is impossible to put in any answer to the evidence of that fact that will not overrule the plea.

The order overruling this plea was affirmed by Lord Lyndhurst, an the authority of the cases of *Gun* v. *Prior* (1 Cox 197), and *Saunders* v. *King* (6 Madd. 61). The plea in the former case was, that the plaintiff was not heir-in-law of Ann Allen, for that he was only first cousin of the half blood, and not in any other manner related to her. Lord Thurlow held that to be a good plea in abatement; but there being a charge in the bill that one of the defendants offered the plaintiff £300 if he would give up his claim as heir, his Lordship said that charge ought to be answered, and on that ground he disallowed the plea, with which he was satisfied in all other respects. In *Saunders* v. **[18]** *King* the plea of no partnership was overruled, on the ground that it should be accompanied by an answer to the facts specially charged as evidence of the partnership. We do not question the authority of these cases, but we say the circumstances in them are not like the present case, and the decisions are not applicable, for there are no allegations in this bill specially charged as evidence of the Plaintiff's title. This distinction should be observed. Mere vague or general allegations in a bill cannot entitle the plaintiff to a discovery. *Jones* v. *Jones* (3 Meriv. 161), *Frietas* v. *Dos Santos* (1 You. and Jerv. 574). It is a common form in a bill to call for books, muniments of title, accounts and writings, but the answer to such call is upon motion for their production.

This form of plea has been recently much discussed both before the Vice-Chancellor and in the Lord Chancellor's Court. In *Thring* v. *Edgar* (2 Sim. and Stu. 274), the Vice-Chancellor held that the answer to the main fact in the bill covered by the plea overruled the plea; and in *Pennington* v. *Beechey* (2 Sim. and Stu. 232), his Honor held to be good a plea denying notice generally of a conveyance. These cases strongly support the plea in this case, but the later cases of *Tarlton* v. *Hornby* (2 Younge), *Stanley* v. *Campbell* (2 Myl. and K.), and *Hardman* v. *Ellames* (Ibid.), are still stronger in support of it. We admit there may be cases in which the form of plea put in here would not be sufficient without answer also, as where fraud is charged in the bill, or where the bill charges a fact which, if true, would destroy the plea; in such cases an answer must accompany the plea, but this is not a case of that description. There is no allegation in this bill tending to defeat the matter pleaded; and, according to the rules of pleading, if the Appellants **[19]** answered any part of the bill, the plea, which is to the whole bill, would by such answer be overruled.

Mr. Knight and Mr. Spence, for the Respondents:—We admit that if there is a

paternal heir of Anne Trigg in existence, those whom we seek to make heirs *ex parte materná* can have no claim. But why will they not tell us who and where the paternal heir is, what is the pedigree, and how entitled to this inheritance? Common sense decides that the Respondents are entitled to this discovery. Is it likely that, if a paternal heir existed, he would not come forward to assert his title to property such as this? It is evident this appeal is brought from a spirit of litigiousness and a resolute perseverance in wrong, by which these Appellants have contrived for four years and a half to withhold an answer to the Respondents' bill. We have no doubt of the decision to which your Lordships will come on this case, but in respect of the costs we shall refer your Lordships to some cases. Besides the cases of *Gun* v. *Prior* [1 Cox, 197] and *Saunders* v. *King* [6 Madd, 61], already referred to, Lord Eldon's decision in *Jones* v. *Davis* (16 Ves. 261) is perfectly applicable, and one precisely in point. The bill there was for an account of stones taken from the plaintiff's quarry under a promise to account, and the bill charged that accounts were kept by the defendant. The plea there put in denied the promise only, but not that accounts were kept. Lord Eldon overruled the plea as not containing a negative that the accounts were kept, for the accounts, if produced, might show a promise to account. So in *Evans* v. *Harris* (2 Ves. and Bea. 361), where the bill was for specific performance of a contract to grant a lease, charging collateral facts as evidence of the con-
[20]-tract, and the defendant pleaded the statute of frauds, of no contract in writing, Sir Thomas Plumer overruled the plea, because it did not go to the collateral circumstances specially charged as evidence of the contract. The present bill charges that there is no paternal heir, and that the Defendants often admit that in their correspondence. It is imperative on the Appellants to deny or explain the correspondence, by answer. These cases, followed by Sir John Leach in *Saunders* v. *King* [6 Madd. 61], by the present Vice-Chancellor and by Lord Lyndhurst in the present case, decide the question now before your Lordships. We do not think it necessary to seek for other authority than these three Judges.

Mr Wigram replied:—This appeal is not for litigiousness. The Respondents have no right to a discovery of the grounds of the Appellants' title. The object of a plea is to protect a defendant from discovery. If what this plea alleges be not true, then the Respondents will be entitled to the discovery. The cases of *Jones* v. *Davies* [16 Ves. 261] and *Evans* v. *Harris* [2 V. and B. 361] do not weaken our argument, for the bills in both these cases contained special allegations which the defendants to them were bound to answer; they went to prove the title of the plaintiffs in both cases, and not to disprove that of the defendants. Here are no special charges, but general allegations; if your Lordships once admit such form of allegations in a bill to be entitled to be answered by the production of books and other documents, no man's title can be safe.

The Lord Chancellor:—My Lords, I think this is a case which would receive light from a disclosure **[21]** by the Appellants of the facts alleged in the bill. One ought not to be allowed to suppress a discovery of the evidence by which another proposes to prove his title. But although I am of opinion that the plaintiff has a right to the disclosure he asks, I wish, with your Lordships' permission, to take one or two days to look into my judgments in *Stanley* v. *Campbell* [2 My. and K.] and *Hardman* v. *Ellames* [2 My. and K. 732], in both which I took occasion to examine most of the cases on this subject.

The Lord Chancellor:—I delayed to move for your Lordships' judgment upon the question which arose on the pleadings in this case, until I looked into the case of *Hardman* v. *Ellames*, in which I took a view of all the cases decided on this point, and differed from some of them. I have, besides, looked again into the cases of *Thring* v. *Edgar* [2 Sim. and St. 274], *Saunders* v. *King* [6 Madd. 61], *Newman* v. *Wallis* [2 Bro. C. C. 142], and also *Hall* v. *Noyes* [3 Bro. C. C. 483], where Lord Thurlow changed the opinion he formed in *Newman* v. *Wallis*, taking a different view of the subject, and in fact changing his former opinion. I have also looked again into the case of *M'Gregor* v. *The East India Company* (2 Sim. 452), having differed from the view taken by the Court below of that case, in my judgment in *Hardman* v. *Ellames* and *Stanley* v. *Campbell*. I find the present case, upon a full consideration of it, different from all the preceding cases; but I have no reason to doubt the correctness of the judgment given on it by the Vice-Chancellor, and affirmed by Lord

Lyndhurst. I, therefore, move your Lordships that that judgment be affirmed, and the appeal dismissed, with costs not to exceed £150.

Judgment below affirmed.

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[22] APPEAL

FROM THE COURT OF EXCHEQUER IN IRELAND.

THORNHILL and Others,—*Appellants;* FREDERICK HALL,—*Respondent.*

[Mews' Dig. xv. 1342. S.C. 8 Bli. N.S. 88.]

It is a rule of the Courts, in construing written instruments, that when an interest is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate.

A testator recites *seriatim* in his will the interests he had in several leaseholds for lives, and after each recital he devises the rents and profits of each leasehold to his wife and a married daughter, and to each of his sons and unmarried daughters, severally and respectively, devising to his son R. part of the profit rent of Blackacre during the term of the lease, which was for the lives of the testator and of R. and another, and devising to his unmarried daughters *nominatim* different parts of the rents of Whiteacre, in addition to equal shares given to them by the preceding clause in the rents of another estate; "and further, if any of the above legatees should die, or die unmarried, he left the property bequeathed to them to be divided equally among the survivors of them." Held, that the devise to R. in Blackacre was for the whole term of the lives of the *cestuis que vies*, and was not on R.'s dying unmarried, cut down to an estate for his life only, by the clause of survivorship, but that the words of the clause applied to the last mentioned unmarried daughters only.

The question in this appeal arose upon the construction of a clause in the will of James Badham Thornhill, of Thornhill Hall, in the county of Limerick, [23] who died in the year 1796, leaving his wife and nine children, (five sons and four daughters), and considerable property, consisting chiefly of freehold leases of divers farms, underlet to tenants at profit rents.

The will, which bore date December 5th, 1794, and was duly attested for passing real estate, was, so far as it is material to set it forth here, as follows:—"There appears arising to me out of the farm and lands of Flemingstown, I hold by a lease of lives under Lord and Lady Kingsborough, a profit rent of £233 10s. 5d. above the head rent of the same. I leave and bequeath to my dearly beloved wife, Elizabeth Thornhill, £200 yearly of the said profit rent for her own sole use and benefit during her life, and at her decease £50 yearly out of the same to my eldest daughter, Sophia Godsell, for her own sole use and benefit; this given more as a token of the great regard and affection I bear her, than thinking it necessary to giving her any more, being sensible in giving her the £1500 she got as a marriage portion, I gave her a child's share, and got a suitable provision for her; the other £150 yearly I leave to my wife Elizabeth Thornhill, to bequeath to which of our children she thinks most deserving of it by their duty and affection to her should she outlive me; the rest of the profit rent of said farm, being £33 10s. 5d., together with all future uses out of it over and above the £200 left to my wife, I leave to my fourth son James Badham Thornhill, now a minor, in part of what I intend for his support. And whereas there appears in the rental (not including the house and demesne lands) of Thornhill Lawn, over and above the head rents of the same, a sum of £674 1s. 3½d.; be it known that I leave £600 yearly of the said present rent to my eldest son, Richard Badham Thornhill, together with [24] all emoluments and benefits arising out of the same except

the odd sum of £74 1s. 3½d. arising out of the same, which I leave to my third son, George King Thornhill, for his own sole use and benefit during the continuance and term in said lease. *And whereas there also appears on the land of Killeen, taken from General Straton by purchase, and by him taken from said Lord and Lady Kingsborough, over and above the head rent of the same, a profit rent of* £251 3s. 4½d.; *now be it known, I leave and bequeath* £200 *yearly of the above profit rent to my now second son, Robert King Thornhill, for his own sole use and benefit, during the term of said lease, being for mine, his own, and his brother George's life; the residue, being* £50 3s. 4½d., *I leave to his brother, my now third son, George King Thornhill, for his own sole use and benefit; any benefit arising out of said lease of Killeen, by rise of rent or times, to be for the benefit of my said son Robert (except as before excepted.)* And whereas there appears out of the farm and lands of Lisnalaniff, a profit rent of £51 4s. over and above the head rent, I leave and bequeath the same to my now said third son, George King Thornhill, together with all emoluments and benefits out of said lease, for his sole use and benefit during said term. And whereas there appears arising to me out of a dwelling-house in Michelstown, and other houses and land near said town, a profit rent of £48 11s. over and above the head rent, I leave and bequeath the same, with all benefits and advantages arising therefrom, to my now fourth son, James Badham Thornhill, for his sole use and benefit. And whereas there also appears out of the lands of Coolnemahogue a profit rent of £65 10s., I leave and bequeath the said profit rent, with all [25] emoluments and advantages, to my said son James Badham Thornhill, except £10 yearly, which he is to pay yearly out of the same to my fifth son, Badham Thornhill. And whereas there appears out of the lands of Knockanevin a profit rent of £392 1s. 7½d., I leave and bequeath £100 yearly of the same to each of my three daughters, Anne, Caroline, and Elizabeth Thornhill; the residue of said profit rent, being £92 1s. 7½d. sterling, I leave to my fifth son, Badham Thornhill, for his sole use and benefit, together with all future benefits and emoluments arising out of the same, (except as before excepted). And whereas there appears a profit rent of £79 15s., arising out of a part of Thornhill Lawn, not included in the demesne and lands of Thornhill Lawn before mentioned, I leave said rent, (not subject to pay any part of the head rent, that being already paid by the demesne and lands of said place,) as follows; £30 yearly of the same to my daughter Anne Thornhill; £29 15s. to my daughter Caroline; and £20 to my daughter Eliza, in addition to the sums of £100 each left them out of Knockanevin: *And further, if any of the above legatees should die, or die unmarried, I leave the property bequeathed to them, with all benefits arising out of the same, to be divided equally, share and share alike, among the survivor or survivors of them; and also in like manner, if any of the lives in the leases should die, so as to leave any of the legatees unprovided for by the lapse or fall of said life or lives in any of the above bequests, that in such case a proportion shall be equally deducted from the bequests of each, to make up the deficiency by the determination of such lease as it shall so happen to fall, in proportion to the loss sustained, and in proportion of the property of the survivor or survivors.*"

[26] The testator then recites, that three sums of £3000, £500, and £800, were due to him from different persons, all which he left to "pay all the bond and judgment debts justly due of me; the residue or surplus of the same, being, I am sure, of a large amount, I leave to be divided, share and share alike, among all my legatees, wife and children, mentioned in this will, Mrs. Godsell included."

The testator executed a codicil to his said will, bearing date the 29th day of March 1796: and thereby, after stating that his daughter Anne had married R. T. Rye since he had executed his will, and that on her marriage he had given his bond to R. T. Rye, payable in five years, for £1000, in lieu of a bond for £1000 of one David Bradshaw, he leaves the last-mentioned bond to R. T. Rye, to discharge his own bond for £1000; and directs that the annuity of £130 he had left to his daughter Anne should be left with R. T. Rye, until he was paid £500 promised him at the testator's death; or if R. T. Rye should prefer to have the said annuity instead of the bond, then the testator directs that the amount of Bradshaw's bond should go equally divided, share and share alike, between his daughters Caroline and Elizabeth Thornhill, in addition to what he left each of them by his will; but if not, and R. T. Rye should prefer to take the bond and the annuity of £130, until he is paid the

£500 promised to him, or any deficiency of the £1500, should any happen, he is then to keep the before-mentioned annuity until he is paid all, and then hand it over to the testator's daughters Caroline and Elizabeth Thornhill; £80 a year of it to Caroline, and the remainder of it, being £50 yearly, to Elizabeth, in addition to their former bequests. And the testator, by the said codicil, next proceeds, in an event therein mentioned, to [27] cut off his son Richard to £300 yearly demesne, and all the trees on Thornhill Lawn; the rest, being £300 yearly, he leaves to pay his judgment debts.

The testator died on or about the 1st day of December 1796, leaving his wife and all his said children surviving him.

Upon his death, Robert King Thornhill entered into the receipt of the rents and profits of the lands of Killeen and its subdenominations, and continued to receive the same until the year 1800; when, by an indenture bearing date the 20th April in that year, for valuable consideration he conveyed the same to Robert Hall, father of the Respondent, his heirs and assigns, during the lives and life of him Robert King Thornhill and George King Thornhill, who were the then surviving *cestuis que vies* named in the head lease, subject to the head rent and to the annuity of £51 3s. 4½d. bequeathed to George King Thornhill, and to an annuity or rent-charge of £170, to be issuing out of and chargeable upon the lands, and payable to Robert King Thornhill during his life. By another deed, bearing date the 30th of June 1804, Robert King Thornhill, for valuable consideration, viz. £393, released the said Robert Hall, and the lands of Killeen and its subdenominations, from the payment of the sum of £56 5s. per annum, part of the annuity of £170 reserved by the former deed. By a third indenture, bearing date January 1817, and made between the said Robert King Thornhill and the Respondent, as trustee for the said Robert Hall, in consideration of the sum of £625 12s. 6d., the said Robert King Thornhill conveyed and confirmed to the Respondent, his heirs, executors, administrators and assigns, the residue of the said annuity of £170.

[28] Robert Hall, by indenture bearing date the 30th day of May 1819, conveyed the lands of Killeen and its subdenominations, with other estates and interests therein mentioned, upon trusts, for the benefit of Robert Hall and Catherine his wife, for their respective lives, and after the death of the survivor of them, in trust for the absolute benefit of the Respondent; and he, on the death of the survivor of them some years afterwards, entered into possession or into the receipt of the rents of the said lands of Killeen and its subdenominations, by virtue of the will and deeds above mentioned, subject to the annuity of £51 3s. 4½d. bequeathed to George King Thornhill, as before stated.

Robert King Thornhill died in 1825, whereupon his mother and his surviving brothers and sisters, the Appellants, claimed to be entitled, share and share alike, to the interest in the said lands of Killeen and its subdenominations, by virtue of the clause of survivorship in the will of James Badham Thornhill; and accordingly, in Easter term 1826, the Appellants brought their action of ejectment on the Pleas side of the Court of Exchequer in Ireland, for the recovery of the possession of the said lands. The ejectment having gone down for trial at the assizes, a special verdict was agreed upon, for the purpose of having the opinion of the Court upon the construction of the said will, touching the devises hereinbefore mentioned. That verdict having come on for argument in Michaelmas term following, the Court suggested that the estates devised by the said will of and in the said lands, were merely equitable, and that the legal estate therein had descended upon the Appellant, Richard Badham Thornhill, the testator's eldest son. The Court was pleased to respite judg-[29]-ment upon the verdict until the then ensuing term, for the purpose of enabling the Respondent in the mean time to file a bill against the Appellants.

The Respondent accordingly, in January 1827, filed his bill on the Equity side of the said Court of Exchequer against the Appellants, stating the several matters and things now stated, and praying that the Appellants might be restrained by injunction from proceeding further in the said ejectment, and that the Respondent might be decreed entitled to the estate and interest in the said lands of Killeen, devised to the said Robert King Thornhill by the said will, for the lives of the *cestuis que vies* named in the lease of the said lands; and that, if necessary, the Appellant Richard might be declared a trustee for the Respondent in respect of the said lands.

The cause having come on to be heard in the June following, the Court of Exchequer decreed, "That Robert King Thornhill, upon the death of his father, became entitled, by virtue of the devise contained in the will of his father, to the entire estate and interest which the testator had in the lands of Killeen, that is to say, an estate for life of himself the said Robert King Thornhill, and of the Defendant George King Thornhill, subject to the annuity of £51 3s. 4½d. charged thereon for George King Thornhill, and subject also to the yearly rent of £600, payable under the lease under which the said James Badham Thornhill held the said lands; and that Frederick Hall (the Respondent) was entitled, under and by virtue of the several deeds in the pleadings mentioned, to all the estate and interest which was so devised to the said Robert King Thornhill in the said lands; and it was declared that the Defendant Richard Badham Thornhill, in [30] whom the legal estate in the said lands vested as heir-at-law of the said testator, for the benefit of the said Robert King Thornhill, was then a trustee for the Respondent in respect of the said lands and premises."

This appeal was from that decree.

Mr. Tinney and Mr. J. Jervis, for the Appellants:—In the event, which has happened, of Robert King Thornhill's dying unmarried, the interest bequeathed to him is vested in the Appellants by virtue of the clause of survivorship; for there is nothing on the face of the will or in the nature of the gift to lead to an inference that the testator did not intend what he so clearly expressed in that clause to be applicable to all the preceding bequests. The devise to Robert King Thornhill was sufficient, it is true, to pass the whole of the testator's interest in the lands of Killeen to him, if it was not cut down by the subsequent clause. The question whether it was or was not cut down depends on the meaning of the testator in the use of the word "above" in that clause: "If any of the above legatees should die, or die unmarried, I leave the property bequeathed to them, with all benefit arising out of the same, to be divided equally among the survivors." What can be plainer than the meaning of that clause? The word "above" must be taken to mean all the legatees before mentioned, Robert King Thornhill included. The like extensive meaning must unquestionably be given to the word "said" in the following part of the same clause: "And if any of the lives in the leases should die, so as to leave any of the said legatees unprovided for by the lapse or fall of *said* life or lives in any of *the above bequests*, a proportion shall be deducted [31] from the bequest of each, to make up the deficiency by the determination of such lease, in proportion to the loss sustained and to the property of the survivor or survivors." The case of the Respondent is, that the "above legatees" apply only to the daughters last mentioned; but we submit that these words have as extensive an application as the words "said legatees" and "the above bequests," in the latter part of the same clause, and your Lordships will see that it is inconsistent and insensible to restrict that part of the clause to the daughters. The whole clause must be taken and read together; and if so taken, the words "the above legatees" must include all those before mentioned, except the testator's wife and Mrs. Godsell, of whom he cannot be understood to say "if they should die unmarried." Besides, he gave the wife no interest that could survive her; he gave her £200 a year for life, to go over after her death, in default of appointment. It is also conceded that the Appellant Mrs. Godsell was not intended to take any further benefit, she being then married, and the testator having stated that she had been amply provided for, although he afterwards gives her an interest in the residue.

Whenever the testator uses the words "above" or "said" or "aforesaid," in all other parts of his will, he repeats and annexes to them the particular antecedent; as, "I leave £600 yearly of the *said* rent (of £674), except £74 etc., to Robert King Thornhill, with all benefits etc., except the *above odd sum* of £74 etc;" again, "the profit rent of £251 etc., I leave £200 yearly of the *above profit rent;*" and again, "*my said son Robert.*" In all these and other passages the testator repeats the immediate particular antecedent, but in the passage now in discussion he uses the general expression, "the above legatees," as [32] applicable to and comprehending all the antecedents. That is the common acceptation of the word "above" in the construction of all written instruments. The preceding clauses of the will give separate bequests to the legatees *seriatim et nominatim:* then comes this clause of survivorship applicable to all the "above legatees," the "legatees before mentioned," the "said legatees;" and next and last comes the residuary clause. By our construction of the will, it is sensible, orderly and consistent.

Mr. O'Connell and Mr. Bagshawe, for the Respondent:—The interests of two of the Appellants is abandoned by their own counsel. The testator's widow and his daughter, Mrs. Godsell, admit by their counsel at your Lordships' bar, that they do not come within the description of the "above legatees" in this clause. By what peculiarity is the devise to Robert King Thornhill distinguished, so as to bring him within those words? The terms of the devise to him are sufficient to pass absolutely to him the whole interest of the testator in the lands of Killeen, subject to the annuity of £51 given to George King Thornhill. In order to cut down the unlimited interest so given, and reduce an absolute devise to a life estate, to support the construction contended for on the other side, there must be clear express words in some other part of the will, removing all doubt as to the testator's intention. There are no such words in any part of the will or codicil. Can the absolute interest given to Robert King Thornhill, in one clause, be cut down by a remote clause from which he takes no benefit? The counsel for the Appellants admit that there is an ambiguity in the latter clause, but none in the former. The [33] general intent of the testator is clear in making provision for his family. The devise to Robert King Thornhill is as absolute as the clearest terms could make it. We submit that it is the law of the Courts, in construing written instruments, never to break in upon the general intent of the maker, nor cast a doubt upon what is clear, by suggesting a possibility of an afterthought, or discovering an ambiguity in some other part of the instrument. The general intention is not to be defeated by any imagined particular intention. Protecting the Respondent by reminding your Lordships of that established rule of construction, we still deny that there is any obscurity or difficulty in interpreting the meaning of this testator. Your Lordships, looking to the whole scheme of the will, can clearly see the intention through the confused expressions of an ignorant dying man, who, being of an untechnical mind, in drawing his will, applies the word "above" to the next or last-mentioned, and not to all the before-mentioned legatees.

But apart from the argument on the general intent, taking a philological view of the words, we hold that according to grammatical construction, the words "above legatees" refer to the testator's three unmarried daughters only. There is nothing in any part of the will from which any intention of the testator contrary to that construction can be inferred.

The testator, in another part of his will, uses the word "above" in the sense of "last-mentioned;" but when referring to what has gone before, but not immediately before, he uses the compound word "before-mentioned." When he is desirous of describing his wife and all his children by the word legatees, he enumerates them in the following way: "All [34] my legatees, wife and children, mentioned in this will Mrs. Godsell included." There can be collected from the whole will and codicil, an intention to make a different kind of provision for the testator's unmarried daughters, from the provisions made for his sons and his married daughter. On the one hand, his unmarried daughters are appointed his residuary legatees; and after his daughter Anne was married, in his lifetime, by the codicil he took away from her the provision made for her by his will, and gave it to his two daughters who remained unmarried. On the other hand, in making provision for his married daughter and his sons, he uses the phrases "for her" or "his sole use and benefit," and "during the continuance of the lease," or "term;" while in the devises in his will to his three unmarried daughters, there are no such words, and no words which indicate anything more than a life estate in what is devised to them respectively. The words "above legatees," if extended beyond the testator's unmarried daughters, must include the Appellant, James Badham Thornhill; and the clause in which they occur must extend to the profit rent of £65 10s. devised to him: whereas it is manifest that the devise to him must have been meant to pass an absolute interest, inasmuch as the will contains a direction for him to pay £10 a year out of the same, during the term which the said testator had therein, to Badham Thornhill; an intention inconsistent with his having an interest therein of a less duration than the duration of the said term. So again the same words, if extended beyond the testator's unmarried daughters, must include the Appellant, Richard Badham Thornhill, and must cut down the annuity to him of £600 out of Thornhill [35] Lawn, to a life estate. But it is manifest that the testator intended Richard Badham Thornhill to take an absolute interest therein.

inasmuch as, in an event mentioned in the codicil, one-half of the said yearly sum of £600 is devised for the payment of the testator's judgment debts; an intention quite inconsistent with the supposed intention that the £600 a year should be divided among the surviving brothers and sisters, on the death of Richard Badham Thornhill. If the testator had intended to cut down the interest devised to Robert King Thornhill to a life estate, he would have done so in express terms; inasmuch as when he intends to devise an estate to his wife for her life, he expressly devises to her "for her sole use and benefit during her life." The testator expressly states, that he considered a child's share £1500; but the provision made by the testator for his son Robert King Thornhill, would be of far less value than that sum, if his interest in the said lands was cut down to a life interest only.

The Lord Chancellor:—My Lords, this question, which comes before your Lordships from the Court of Exchequer in Ireland, depends entirely upon the construction of the will of James Badham Thornhill, and upon two passages in that will. Upon a question of construction it is not often that so elaborate an argument has been urged at this bar, or in any Court which I know, than has been addressed to your Lordships upon the construction of this instrument. I do not complain of it, for the more thoroughly sifted, the more minutely the parts are examined, the more accurate is likely to be the result to which your Lordships are able to come, and **[36]** the more confident the opinion which in your judgment you pronounce.

My Lords, I confess from the beginning of this argument, though I listened with very great attention to the discussion of the matter by the learned counsel for the Appellant, both in his opening speech, as well as the reply, that the impression upon my mind has been very distinct, very decided in favour of the judgment of the Court below. I hold it to be a rule that admits of no exception, in the construction of written instruments, that, where one interest is given, where one estate is conveyed—where one benefit is bestowed in one part of an instrument by terms clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms upon which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt—in order to reverse that opinion, to which the terms would of themselves and standing alone have led, it is not sufficient that you should raise a mist; it is not sufficient that you should create a doubt; it is not sufficient that you should show a possibility; it is not even sufficient that you should deal in probabilities, but you must show something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way; and that the interest first given cannot be taken away either by *tacitum* or by *dubium*, or by *possibile*, or even by *probabile*, but that it must be taken away, and can only be taken away, by *expressum et certum*.

My Lords, I have disposed of this case in stating this clear and undoubted proposition. The very learned, experienced and able counsel that argued this case on behalf of the Respondent with an exem-**[37]**-plary conciseness, and as succinctly as he argued it distinctly, relied upon this view alone, for it is decisive of the present question. Let us apply this rule to the facts of this case. The testator states in his will, "I leave and bequeath £200 yearly of the above profit rent to my second son, Robert King Thornhill, for his own sole use and benefit,"—here is the *habendum*—"during the term of said lease, being for mine," (the testator's,) "his own and his brother George's life;" and he afterwards says, "any benefit arising out of the said lease of Killeen, by rise of rent or times, to be for the benefit of my said son Robert, except as before excepted." Here, therefore, is the subject matter of the devise or bequest—a lease for three lives, and, mark, one of those lives being the testator's own, another being George's, and the third is the legatee's, a very material circumstance in this discussion. Now upon this, (which, if it stood alone, is an absolute devise to A. of a leasehold interest for the remainder of the lives of the *cestuis que vies*,) the question is, whether what follows is sufficiently distinct to take away that plain, clear and intelligible, and undeniable and absolute bequest. And it is after having given certain parts of the profit rent of another lease to the three daughters Anne, Caroline and Elizabeth, the residue of that rent to Badham, his fifth son, that the word "whereas" occurs, which always indicates the introduction of something to follow, and, generally speaking, indicates a change from one subject of discussion, or of handling or of dealing with, to another which is different. "And whereas there appears a profit rent" (then describing it) "now be it known, I leave said rent, not subject to pay any part

of the head rent, that being already paid by the demesne [38] and lands of the said place, the above profit rent as follows, viz. £30 yearly to Anne, £29 15s. to Caroline, and £20 to Eliza, in addition to the sums of £100 each, left them out of Knockanevin, together with all future advantages, if any should arise out of the same." Then came the words that are said to alter the preceding clear part: "and further, if any of the above legatees should die, or die unmarried, I leave the property bequeathed to them, with all benefits arising out of the same, to be divided equally share and share alike, among the survivor or survivors of them." It is clear, if these words stood alone and without reference to the immediate preceding bequests alone, they would operate clearly a life estate to Robert, and it is clear that if the other words of bequest to him stood alone they would give him an absolute interest. Then the question is whether, if those latter words would qualify it to a life estate, they do or not apply to Robert. The words are "if any of the above legatees." The "above legatees" *may* mean all the above legatees, including Robert, or a part of the legatees, namely the latter part, being applicable to the last antecedent. Is this not decisive of the present question? Here are terms which, taken altogether, may, or may not apply to Robert, and may, or may not qualify the interest given to Robert by themselves, if they stood alone, to a life interest, if "above" refers to him and not to the last antecedent. Here is that which may apply to either, here is that which is doubtful, here is that which is not of necessity or by necessary implication to be held to cover Robert's interest, and you are called upon in the face of a devise clearly giving to Robert an absolute interest, to elect between two possibilities, to convert what is doubtful into a certainty, [39] and to convert that which is absolutely certain into absolute *dubium*, or something the very reverse of certainty: that disposes of the question and leaves it without any doubt.

What I am about to add is, I may say, by way of supererogation, and to show that not a vestige of ground remains for differing with the Court below. The first remark I add, unnecessarily, is this: It is said, if you are to go to the last antecedent a doubt is raised; but if you stop at the "whereas," and begin at the bequest to the three unmarried daughters, and the son Badham, and the £100 part of the other profit rent, there is no reason why the arrangement made in the latter clause, under the description of the "above legatees," should be confined to apply to the second profit rent, and not extend to the £100 also. I meet that by these observations: the frame of the clause as to "unmarried," seems rather to apply to the daughters, that is, the unmarried daughters, rather than the sons; that would make it possible to carry back this to the three daughters, including Badham Thornhill, as regards their £100, as well as regards that which comes after. But in the next place, and that is the second remark I have to make, there is a reference made to the £100, without going back beyond the "whereas:" without stepping over the break, there is a reference made to the £100 in the part immediately antecedent to "the above legatees," where he is dealing with the second profit rent, for he says, "I give them that in addition to the £100." I have known, over and over again, the Courts of Law and Equity in this country, with no better reference to a gift, to imply a new character and add a new qualification to a gift before given, with even less distinctness of reference than there is to the £100, and [40] I have very little doubt that this is sufficient to be made applicable to that £100.

But, (and that is the last reason upon which I rely,) take it whichever way you will, even if you were to concede that it extended to the profit rent *ultra* the £100, it is a much more probable supposition, and does much less violence to the construction of the instrument and the clear intent of it, than the opposite construction, which would by the word "above" make it spread over the whole preceding part of the will. My reason for so saying leads me to the last of the general observations which I think superfluous, and that is this: I cannot conceive a more clumsy, a more roundabout, (I will not say, merely inartificial, but a more absurd and indistinct course of expression, for the purpose of showing his intention, cannot be conceived,) than the argument in favour of the Appellants, and against the judgment under appeal, would suppose him to have used. They say he means to give him a life interest; a life interest in what? an estate *pour autre vie*, the *cestuis que vies* being A., B., and himself. It is merely saying, I give a man a life interest in a leasehold estate upon lives. Would it not be a more obvious course to say, I give Robert the estate of Knockanevin, or whatever it is, the estate of Blackacre, for his own life and no longer, and not for

the lives of the other two *cestuis que vies!* Because your attention is here called to a life interest; you are not dealing with a *corpus* in which a life interest has nothing to do, but with an estate *pour autre vie*, one of the *cestuis que vies* being the donee; and therefore the natural and the proper course would have been to say, here is an estate for three lives, of which you, Robert, are one; take it for your own life, but not for the other lives. I cannot doubt upon the [41] will. I hold it to be as clear a case as ever came before your Lordships; and though I am not unaware of the force of the argument of Mr. O'Connell, that there is here a symptom of perpetual charge, though that is not quite so clear as the other, but that there is an intention manifested to charge the estate beyond the life of Robert; if so, that would be perfectly decisive; but I put it upon the effect of those parts of the will I have read to your Lordships, and I move your Lordships that this judgment be affirmed with costs.

The judgment was accordingly affirmed, with costs not exceeding £150.

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[42] WRIT OF ERROR.

FROM THE COURT OF KING'S BENCH IN IRELAND.

RICHARD RADFORD ROWE, Esq., —*Plaintiff in Error;* HIS MAJESTY'S ATTORNEY-GENERAL IN IRELAND,—*Defendant in Error.*

[S.C. *sub nom. Rowe* v. *Mahon*, 8 Bli. N.S. 1. See Short and Mellor's *Cr. Off. Pract.* p. 187.]

An indictment was removed from an inferior Court into the Court of King's Bench in Dublin, after plea pleaded and issue joined thereon; the issue thus joined is not such "an issue joined in the Court of King's Bench" as will satisfy the words of the statute 17 and 18 Car. 2, c. 20, and cannot therefore be tried under the authority of that statute at the Nisi Prius sittings of that Court.

This was a writ of error from a judgment of the Court of King's Bench in Ireland. An indictment for subornation of perjury had been found against Mr. Rowe, at the sessions of Oyer and Terminer for the city of Dublin. The Defendant pleaded "not guilty." The indictment was afterwards removed to the Court of King's Bench in Dublin. The Defendant was there convicted, and judgment pronounced. That judgment was brought by writ of error into this House. When the case was called on, it was stated that no counsel appeared on behalf of the Plaintiff in Error.

Lord Denman inquired into the cause of this circumstance.

Mr. Ullithorne, the agent for the Plaintiff in Error, stated that when this case had been before their Lordships on a previous occasion, the Plaintiff in [43] Error had declared his inability to pay the fees; and the House had then assigned Mr. Follett as his counsel; and that gentleman had kindly undertaken the duty: but he was at present on the circuit, and Mr. Ullithorne therefore applied to their Lordships to have the case postponed till his return.

Lord Denman intimated to the Attorney-general that the House would be glad to hear him on the first of the errors assigned, namely, that in this case the issue had only been joined in the inferior Court from which the case was removed by *certiorari*, but that no issue had been joined in the Court of King's Bench.

The Attorney-general (Sir J. Campbell) contended, that the issue had been regularly joined in the inferior Court, and as the Plaintiff in Error had, upon the record thus made up after it had been removed into the superior Court, proceeded to trial, he must be taken in the superior Court to have abided by his plea, and that now, after verdict, the irregularity was waived.

Mr. Wightman was with the Attorney-general, but was not heard upon the question.

Lord Denman said that the question on the validity of which this writ of error

depended, was whether the trial which had taken place in the Nisi Prius Court at Dublin had been had in pursuance of the Irish statute 17 and 18 Car. 2, c. 20, by which the Chief Justice was authorized to try at Nisi Prius issues joined in the Court of King's Bench. The question here was whether this was an issue which could be said to have been joined in the Court of [44] King's Bench. If it was not, then the objection to the proceedings was in the first instance fatal. It appeared to him extremely doubtful whether any issue joined in the Court of Oyer and Terminer could be said to be an issue joined in the Court of King's Bench. It was argued, however, that this objection had been cured by the Defendant (now Plaintiff in Error) having proceeded to trial upon the record so made up. Without expressing his own opinion on that point, he should propose the following question to be put to the Judges. His Lordship then proposed the question, which is stated at length in the opinion delivered by Lord Chief Justice Tindal on behalf of himself and the other Judges.

Lord Chief Justice Tindal: My Lords, the question proposed to His Majesty's Judges is this: "A bill of indictment for subornation of perjury having been found at the sessions of Oyer and Terminer for the city of Dublin, and the Defendant having pleaded not guilty, and issue being there joined thereupon, the indictment and proceedings, with all things touching the same, being afterwards removed into the Court of King's Bench, whether a legal trial of that issue can take place at Nisi Prius, in the same court, under the Irish statute of 17 and 18 Chas. 2, c. 20?" and upon this question, after hearing the arguments at your Lordships' bar, we are of opinion that no legal trial of the issue could take place under the circumstances above stated.

If this point had depended solely on the consideration of what part of the record is removed by the *certiorari*, it would have been extremely difficult to contend that the trial could have been legal; for although in point of form the whole of the record may be removed into the superior Court by the [45] general words of the writ of *certiorari*, yet by the universal course and practice of the Court, which course of the Court is the law of the Court, and of which the Judges are bound to take notice, no other part of the record but the bill of indictment itself is filed of record, and the party subject to such indictment is called upon by the superior Court to plead *de novo* to the indictment when removed; and accordingly, he may to such indictment when so removed, instead of the general issue which has been pleaded in the Court below, either plead a special plea, or may demur, or plead a pardon; as he may be advised under the circumstances of the case. Upon this point, therefore, we should be inclined to hold that no legal issue has been joined between the Crown and the Defendant, and unless the issue has been properly joined there can be no legal trial.

But the question put by your Lordships involves another and more important point; viz. assuming that the whole record is properly removed into the superior Court, whether, under the proper construction of the Act of 17 and 18 Chas. 2, there was any authority given to that Court to proceed to try the issue? and it appears to us that the statute gives no authority for trying the issue in the superior Court. The object of the Act was to prevent the inconvenience of trials at bar in the very numerous cases which at that time occurred, and for that purpose the statute proceeds to define what cases should in future be tried and triable at Nisi Prius, by the Chief Justice of the Court of King's Bench. The statute therefore, after stating the difficulties which had occurred in practice, proceeds to enact "that from henceforth the Chief Justice of the King's Bench for the time being, upon issue joined or to be joined in the Court of King's Bench or in the [46] Court of Chancery, etc., shall try the same at Nisi Prius, etc." Now the great accuracy with which this is penned ought to be kept in view. It is not confined to issues joined or to be joined in the Court of King's Bench; but as it is well known that issues joined in the petty bag office of the Court of Chancery are, without any intermediate proceeding, triable in the Court of King's Bench, the statute extends to and includes them also. The whole question, therefore, turns upon the construction of the words above referred to. And we cannot think, by any reasonable construction, an issue joined in an inferior Court can be held to be issue joined or to be joined in the Court of King's Bench. Upon this ground, therefore, we are all of opinion that the Court of King's Bench in Ireland had no jurisdiction under the statute to try the issue above raised.

Lord Denman: My Lords, the learned Judges having given an answer to the question proposed by your Lordships, I take the liberty of expressing my entire con-

currence in the opinion so given, both on the ground of the object of the statute in question, which was made to render it unnecessary to try at bar cases that otherwise would have been tried there, and also with reference to the situation of the party, who clearly must have a right, when the proceeding is removed into the Court of King's Bench, to withdraw the plea which he may have hastily pleaded below, and to adopt that line of defence which may be suggested to him in the new situation in which he is placed. It is possible he may have discovered some fatal objections to the bill of indictment itself, and may wish to demur to it, or he may be advised to plead special matters, the decision upon which by the higher Court into which the case is removed [47] may render it unnecessary to answer at the bar of criminal justice for the offence charged. It is my intention, therefore, to move your Lordships that the judgment which has been given in the Court below be reversed: but inasmuch as that judgment was given nearly five years ago, and it appears a great hardship that a person entitled to have a judgment against him reversed has been so long detained under that judgment which turns out to be invalid, I would take the liberty of adding that the party has very much brought this upon himself by assigning a variety of errors, to the number I believe of thirty-four, the great majority of which presents no matter of doubt. Many of them arrange themselves under the name of something very nearly approaching to nonsense, and suggesting a variety of things which no person in an official situation could be expected, from the first view of the thing, to look through and to be able to meet without considerable labour, in consequence of the great extent of the statement. Delay has also arisen from another cause: the House was about to appoint a day for hearing the argument: the defendant, it appeared, was extremely desirous of being brought over to argue the case himself, but it appeared that he had no funds, and the House of Lords had no power to pay the expenses of his being brought over. My Lords, upon looking into the case it appeared to me that it was our duty to call upon the learned counsel for the Crown to support the judgment of the Court below, if he felt that he could do so. The learned Judges being of opinion that the judgment cannot be supported, I will not detain your Lordships further than by moving that the judgment be reversed.

Judgment reversed.

[48]

APPEAL

From the Court of Chancery.

THE ATTORNEY-GENERAL,—*Appellant;* SIR CHARLES FORBES, Bart., GEORGE JACKSON and Others,—*Respondents.*

[Mews' Dig. xii. 216; S.C. *sub nom. A.-G.* v. *Jackson*, 8 Bli. N.S. 15; and, in Ex. *sub nom. Jackson* v. *Forbes*, 2 C. and J. 382; 2 Tyr. 354; 1 L. J. Ex. 159. Discussed in *Arnold* v. *Arnold*, 1837, 2 My. and C. 273; *Thomson* v. *Advocate-General*, 1845, 12 Cl. and F. 1; and *Shirley* v. *Ferrers* (*Earl*), 1842, 1 Ph. 167. And see *Colquhoun* v. *Brooks*, 1889, 14 A. C. 499; and *Lawson* v. *Inland Revenue* (*Commissioners of*) [1896] 2 I. R. 418.]

A testator born in Scotland, but having for many years resided in India, died there, leaving real and person property situated in India, but no assets in England. By his will and testamentary papers, all executed in India, he left the whole of his property, in equal divisions, to his four natural children or the survivors of them, and their heirs, subject to some small legacies and annuities. His executors, who were in India before and at the time of his death, having obtained an Indian probate, paid the debts and bequests, and got in the testator's estate and converted the principal part thereof into money, which they sent to their bankers in England, and afterwards invested in the funds in their own names. A suit was afterwards instituted in the Court of Chancery in England, to ascertain the claims of the residuary legatees under the will; whereupon the stock was transferred into the name of the Accountant-general of the Court of Chancery, and that Court made a decree declaring the

shares of the several claimants. In that suit a claim was made on behalf of the Crown, for the legacy duty on the residuary fund. Held by the House of Lords, affirming the judgments of the Courts below, that legacy duty was not payable on the legacies, annuities or shares of the residue bequeathed.

The question in this Appeal was, whether the residue of a testator's estate, brought from India to England, was liable to payment of the legacy duty under the circumstances here stated:—Colin Anderson, deceased, a native of Scotland, was in his life-time, [49] and at the time of his death, seised of some real estate in the East Indies; and was also possessed of considerable personal estate and effects, all of which, at the time of his death, and of making his will and codicils, hereinafter stated, were in India, where he was resident for some time before, and until his death. Being so seised and possessed, he duly made and published his will, bearing date the 25th October 1802, and thereby desired that his house and grounds in the island of Coolabah, together with his household furniture, horses, liquors, etc. etc., might be sold, and the produce placed to the credit of his estate; and after noticing, that on the 1st of January 1803, he should have assets in India to the amount therein mentioned, and that he was entitled to any other division of prize-money which might thereafter be made for Columbo and Seringapatam, and to whatever might be given to the captors of Kurree, on both which services he was head surgeon; and also noticing, that there was one boy at home, named Colin Anderson, born on the 25th day of October 1788, then at school at Glasgow; that there was one girl in India, named Jane Jarvis Anderson, born at Poondamalee, on the 2d day of October 1797; that there was one girl in India, born at Mangalore, on the 21st day of September 1800, named Ann Nesbitt Anderson; that there was another child (viz. Caroline Erskine Anderson), in India, born at Coolabah on the ; to those children, or the survivors of them, and their heirs, he left the whole of his property, in equal divisions, subject to such regulations and legacies as he should thereafter mention. And it was his wish, that his brother, Lieutenant Patrick Anderson, should come to Bombay as one of his executors, and take the children then in [50] India to England with him; and as that duty might put him to some expense and inconvenience, he bequeathed to him £500 sterling, as some kind of recompence.

The testator, by his said will, gave certain annuities to different persons in England and in India; and to provide for those legacies, and the education of the children, his executors were thereby directed to place the whole of the estate securely at interest, either on landed property or in some public funds; but he left the choice entirely to the executors. As the annuitants died, the principal producing such annuity was to revert to the common stock, for the benefit of the whole: as the whole of the estate was to be equally divided amongst the before-mentioned four children, or the survivor of them, a regular division must be made of the estate when each came of age, or was married; and the share of such person was not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy, subject however to the control of the executors, their heirs and assigns, for nine years more, when he would have arrived at years of discretion, if ever; when the girls, or any of them, became of age or got married, he directed that their shares might be so settled on themselves during their lives, and on their children, in equal proportions, after their death, that it would not be in the power of the husband, if so inclined, to injure either the wife or the children. The share or shares of one or more of such children dying without issue, were to be equally divided amongst the survivors; but in case of issue, those children were to inherit the share of their parent, amongst them equally; and in case of their dying without issue, it was to return for the benefit of the survivor of those four children, [51] or their families. Upon the reversion of any sums to the public stock, the issue of a deceased child was to have the share that its parent would have had if living; but again, if such issue died without issue, the whole of its original and after shares reverted to the common stock. And he thereby appointed his brothers Alexander Anderson and Patrick Anderson, Brevet Lieutenant-colonel Lachlan Macquarie, and the Respondent, Sir Charles Forbes, then Charles Forbes, of Bombay, esq., executors of his said will.

The testator afterwards made a codicil, or testamentary paper, dated the 4th

of July 1804, and addressed the same as a letter to the said Patrick Anderson, and which was (amongst other things) to the effect following: "If I should be so unfortunate as to meet with any accident to prevent my getting to Bombay soon, you must endeavour to get leave, and go home in charge of these infants, place them at school, and be in some degree their father." And further, "After fitting out my children for the voyage, and paying for your and their passage, the whole of my property in Bombay I would have lodged in the Company's funds; and the expenses of the children's education, together with such other legacies as I have mentioned in my will, to be defrayed out of the interest of this money; and any surplus which may remain, after defraying these expenses, is annually to be added to the principal, until the children are of age." And further, in the same testamentary paper, he writes, "I have half a lac of rupees, more or less, with Messrs. Harrington, at Madras, which, as they have lowered the rate of interest, I have directed to be remitted to Messrs. Cotterill and Co., of Calcutta: this sum, if possible, I wish to allow to accumulate for eight or eleven years, when it will enable me, if [52] alive, to keep a carriage for my daughters; and if I die, it will make their portions so much the better."

The testator afterwards made another codicil, or testamentary paper, as a letter addressed to the said Patrick Anderson, containing (among other things) as follows: "After fitting out the children for the voyage, paying your own and their passage to England, and procuring bills for their expenses for the two first years, besides paying the sums I have already mentioned, and those to be mentioned hereafter, be pleased to lodge the whole of my property at Bombay, when an opportunity occurs, in the Company's next good loan." And he afterwards made another codicil, or testamentary paper, dated on board the *Candidate*, off Kedyeree, the 21st July 1804, and addressed the same as a letter to the said Patrick Anderson, containing (among other things) as follows: "I wish you to go home with the children, as you can endeavour to get on in the army at the same time. General Lake will hardly refuse you leave, when you tell him that the father of the children served his Majesty 30 years, and that they are deprived of the protection and instruction of a mother, depending solely on your and their relations at home." To which he added the following statement, and signed the same; that is to say, "Messrs. Forbes and Co., of Bombay, receive the interest, half yearly, of the three notes into which the opposite of 32,000 rupees was divided or opposed to the name of each child, at nine per cent. per annum, until they can place it to more or equal advantage in the funds of the Honourable East India Company, and wish these sums to continue accumulating until each progressively shall amount to £8000 sterling, the expenses of maintaining and educating these three children in the meantime to be defrayed by me, or at my [53] expense. The reason why I have made this separate provision for these three children is, that they may be independent of me, in case I should be blockhead enough to marry at my time of life, and perhaps have more children; but in the event of my death without an increase of family, my will will show the manner in which whatever property I may die possessed of is to be distributed, including the opposite rupees—32,000, with its interest. I have paid for a cornetcy for Colin Anderson, jun., in his Majesty's 19th regiment of Light Dragoons, on the 29th of September 1802; of course, in case of my death, an equal amount of my property, with its interest from that day, will be credited to each of the girls, and the remainder then equally divided amongst the four children, or the survivors of them, agreeably to the tenor of my will. C. ANDERSON, 30th Nov. 1803."—"1803, January 1st, lodged in the treasury at Bombay of the East India Company, 32,000 rupees, as a loan, at eight per cent., the interest payable at Bombay, half yearly, for the sole use and benefit of the under-mentioned children, and in the proportions set down opposite to their names:

"Jane Jarvis Anderson	13,600
Ann Nesbitt Anderson	10,245
Caroline Erskine Anderson	8,155
Bombay rupees	32,000

Do. do. lodged in do. of do., 5000 rupees, at the same rate, and payable in the same manner, for the support of the mother of these children; when she dies, the principal will revert to me or my heirs, etc. . . . . 5,000"

[54] The testator died on the 28th day of July 1804, at sea, while on a voyage from Calcutta to Bombay, without having revoked or altered his said will and codicils, leaving the four children before referred to, who were all illegitimate, him surviving, and all, except the eldest, were then resident at Bombay.

By letters patent under the great seal of Great Britain, bearing date the 28th of February, in the 38th Geo. 3, being the charter for establishing the Courts of Recorder of Madras and Bombay in the East Indies, his Majesty was pleased to order and appoint that the Court of Recorder at Bombay should be a Court of Ecclesiastical Jurisdiction within Bombay and the limits thereof, and upon British subjects there residing, with the same powers, authorities and privileges, and subject to the same restrictions as are thereinbefore given, granted or mentioned unto or as to the Court of Recorder of Madras. And by the same charter it was, amongst other things, ordained and appointed that the Court of Recorder at Madras should be a Court of Ecclesiastical Jurisdiction, and should have full power and authority to administer and execute within Madras and the limits thereof, and towards and upon British subjects there residing, the Ecclesiastical Law, as the same was then used and exercised in the diocese of London, so far as the circumstances and occasions of Madras and the people would admit or require. And for that purpose was given to the said Court full power and authority to grant probates, under the seal of the said Court of the said Recorder of Madras, of the last will and testament of all or any of the said British subjects dying and leaving personal effects within the said territories or districts respectively, and to demand, require, take, hear, examine and allow, and, if occasion require, to disallow [55] and reject the account of them, in such manner and form as was then used, or might be used, in the said diocese of London, and to do all things needful and necessary in that behalf.

In conformity with the provisions of that charter, and orders and regulations of the said Court of Recorder of Bombay, the Respondent, Sir Charles Forbes, the said Patrick Anderson, and the said Lachlan Macquarie, obtained probate of the said will and codicils from the Court of the Recorder of Bombay. And under the directions and authority of the said will and codicils, they possessed the testator's house and land, and sold the same, and collected and got in all the testator's goods, chattels and effects, and converted the principal part thereof into money; and they paid all his debts and legacies, and paid the annuities given by his said will as they became due; and the residue of the said testator's estate, which they so converted into money, was invested by them in the public funds, in manner hereinafter mentioned.

In the year 1805 Patrick Anderson proceeded to England with the three youngest children, and he took with him part of the said testator's assets; and on the 12th of November 1811, the Respondent, Sir Charles Forbes, on behalf of himself (Lachlan Macquarie having never intermeddled with the said testator's estate), and pursuant to the rules and regulations of the Recorder's Court of Bombay, rendered unto the Recorder of the said Court an account of the administration of the said testator's estate and effects by the executors, and the same accounts were examined and passed, as approved of by the said Court: and previous to his (Sir Charles Forbes') departure from Bombay for England, which was in the month [56] of November 1811, the balance appearing by the said account to be due to the testator's estate was remitted by him to Messrs. Parker and Co., in London, as the agents and bankers of the said executors, and they afterwards accounted for the same to the said Sir Charles Forbes, who with his co-executor, Patrick Anderson, having collected and administered the said testator's goods and effects as aforesaid, invested the residue, or a principal part of such residue, in Bank three per cent. annuities, in the joint names of the said Patrick Anderson, Lachlan Macquarie, and the Respondent, Sir Charles Forbes. They never applied for or obtained probate to be granted of the said testator's will by the Prerogative Court of Canterbury.

Colin Anderson, the son, attained his age of twenty-one in the year 1809, and a separate account was kept with him of sums paid and expended on his account, but no distribution of the testator's residuary estate was made in the lifetime of the said son.

In the month of March 1819, the testator's eldest daughter, Ann Nesbitt Anderson (she being then an infant), intermarried with the Respondent, George Jackson, and they, in the month of May in the same year, filed their bill in the Court of Chancery in England, against the Respondent, Sir Charles Forbes, the said Colin Anderson and Caroline Erskine Anderson, also against Lachlan Macquarie (who was then out of the jurisdiction of the Court,) thereby stating the said will and codicils partly to the effect hereinbefore stated; and further stating, that since the death of the said testator, the said executors proved the said will and codicils, and took upon themselves the burthen of the execution thereof in the East Indies; and erroneously stating that the Respondent, Sir Charles Forbes, had duly proved the same in the [57] Prerogative Court of the Archbishop of Canterbury, in England.* The bill further stated, that the said Jane Jarvis Anderson had since died an infant, and unmarried; that the expense of maintenance and education of Ann Nesbitt Jackson and Caroline Erskine Anderson had been discharged by the said executors, and that they had purchased a commission for the said Colin Anderson, and that the residuary estate of the testator had been laid out in the purchase of stock, and that there was then standing in the names of the said executors £49,900 Bank three per cent. annuities in the books of the Bank, purchased by such residuary estate; that the said Patrick Anderson departed this life, and that Colin Anderson had some time since attained the age of twenty-one years, and that Caroline Erskine Anderson and Ann Nesbitt Jackson were still infants; and that, in March then last, a marriage was duly solemnized between the said George Jackson and Ann Nesbitt, and in consideration of such marriage, and for the purpose of making a settlement of the property of the said Ann Nesbitt Jackson, it being uncertain what was the extent and nature of the interest which she was entitled to under the said will and codicils, certain articles of agreement were entered into to the effect therein stated. The bill then prayed that the rights and interests of the Respondent, George Jackson, and the said Ann Nesbitt Jackson, in her right, and of all parties, to and in the residuary estate of the said testator, might be ascertained and declared by the Court; and that the share and interest of Ann Nesbitt Jackson might be transferred into the names of the trustees of the said marriage articles, upon the trusts [58] thereof; and if necessary, that accounts might be taken of the estate and effects of the said testator, and of his debts, legacies and annuities; and that such residue, and the share of Ann Nesbitt Jackson thereof, might be ascertained, and an account taken of the interest and dividends of the share of the said Ann Nesbitt Jackson therein, which had accrued due, and that the same might be paid to the Respondent, George Jackson, etc.

The defendants to the said bill, (except Lachlan Macquarie, who was out of the jurisdiction,) put in their answers thereto; and the Respondent, Sir Charles Forbes, by his answer, admitted only that the said will and codicil were proved in the said Recorder's Court of Bombay, and that he and his co-executor, Patrick Anderson, had got in and received the personal estate and effects of the said testator, and had remitted the same, together with the proceeds of his house and lands at Coolabah, which they had sold, to England; and that they had paid and discharged the testamentary expenses of the testator, and his debts, and legacies given by his will, and had kept down the annuities bequeathed thereby; and they admitted that the residuary estate of the said testator had been laid out in the purchase of stock in the public funds; and that there was then standing, in the names of the said Patrick Anderson (then deceased), Lachlan Macquarie, and Sir Charles Forbes, in the books of the Governor and Company of the Bank of England, £49,000 Bank three per cent. annuities, which had been purchased with such residuary estate; and that there was in the hands of the said Sir Charles Forbes a balance of cash, and he said he was unable to determine the rights and interests of the plaintiff, Ann Nesbitt Jackson, and [59] the other persons interested under the will and codicils of the said testator, and he therefore claimed the directions of the Court in that respect, and he submitted to act as the Court should direct.

The cause came on to be heard before the Master of the Rolls, on the 25th of April 1820, when his Honor ordered that it should be referred to the Master to take an account of the personal estate of the said testator, not specifically bequeathed, come to the hands of the said Sir Charles Forbes, or of any person or persons, by his order,

* This statement in the bill was admitted on the argument to be an error.

or for his use; and also an account of the said testator's debts, funeral expenses, legacies and annuities; and that the said testator's personal estate, not specifically bequeathed, should be applied in payment of his debts and funeral expenses, in a due course of administration, and then in payment of his legacies and annuities; and that the Master should ascertain the clear residue of the said testator's personal estate; and the usual directions were given for taking the said accounts.

After the aforesaid proceedings had been had in the cause, Caroline Erskine Anderson having, with the approbation of the Court, intermarried with the Respondent, Thomas Falkner Middleton, they and the trustees of their marriage settlement, and the Respondents, George Jackson Jackson and John Anderson Jackson, the two children of the said George Jackson and Ann Nesbitt his wife, and also the said L. Macquarie, who had come within the jurisdiction, were all made Defendants to the suit by supplemental bills, for the purpose of bringing the said several parties before the Court.

On the 25th of October 1824, the Master, to whom the said original and several supplemental causes stood referred, made his general report therein, [60] whereby he found, among other things, that no creditor had come in to prove any debt, in pursuance of the advertisements in the London Gazette and other public papers for that purpose; and he found that the legacies of the said testator were all paid, and were included in the schedules to his report, and also certain annuities, all of which lapsed by the death of the annuitants, except an annuity of 720 rupees to Mrs. Mary Burchell, the mother of the testator's children, and who was resident at Bombay, for the term of her life; and an annuity of £50 to Mary Thompson, a niece of the testator, resident in the county of Dublin, determinable on her death or marriage. And he found that the Respondent, Sir Charles Forbes, and Patrick Anderson, by virtue of the said probate granted in India, collected and got in the testator's effects in India, and administered the same in India jointly, until the 14th of February 1805, when the said Patrick Anderson proceeded with the said three female children of the testator for England. And that the said Sir Charles Forbes continued in India, and administered the estate and effects of the testator in India, and collected and got in such parts thereof as were not taken by the said Patrick Anderson with him to England. And that, on the 12th of November 1811, pursuant to the rules and regulations of the Recorder's Court at Bombay, he rendered an account of the administration of the testator's estate and effects in India, which account commenced on the 1st of August 1804, and ended on the 31st of August 1811: and the Master adopted and allowed an official or notarial copy thereof, as an account of the administration of the testator's estate in India; and the balance of which, amounting to the sum of £2407 12s. 7d., is accounted for as a [61] receipt in England, on the 23d of January 1813, and as such is included in the first schedule to the said report under that date. And the Master further found that the said Sir Charles Forbes, jointly with the said Patrick Anderson, by themselves and their agents, between the 18th of December 1809 and the 31st of December 1818, received of the personal estate of the testator several sums of money, amounting together to the sum of £41,074 13s. 10d., as appearing by the first schedule to his report, and against which he also found that they had made certain payments and disbursements, as appearing by the second schedule to his report; and that the said Sir Charles Forbes had, since the death of his said co-executor, by himself and his agents, received of the testator's personal estate several sums, appearing by the said first schedule to amount to the sum of £25,216 17s. 7d., and had also paid and disbursed various sums, as by the said second schedule also appeared; and the said Sir Charles Forbes was allowed, in the said second schedule, a sum of £4000, set apart as a capital sum, bearing compound interest, in the hands of the said Sir Charles Forbes and his agents, for the purposes of securing the said annuities to the said Mary Thompson and Mary Burchell; and that the same, subject to such annuities, was subject to the general trusts of the testator's will; and that, with the said compound interest received, the same then amounted to the sum of £5018 12s. 10d., as appeared by the said third schedule to the said report; and after referring to payments made in respect of the said annuities, as appearing by the fourth schedule to the report, and stating that the said Sir Charles Forbes had claimed to be allowed several sums paid for maintenance, education and [62] advancement of the testator's children, but which the Master had not thought fit to allow,

as not falling within the scope of the inquiries directed by the decree, the said Master certified that the clear residue of the said testator's personal estate then consisted of the sum of £36,000 three per cent. Consols, standing in the name of the said Patrick Anderson, deceased, Lachlan Macquarie, deceased, and the Respondent, Sir Charles Forbes; and of the sum of £30,683 0s. 5d., then due from the said Sir Charles Forbes, subject nevertheless to the said two annuities.

The following legacies, £50 to the said Patrick Anderson, £50 to the said Sir Charles Forbes, £50 to the said General Macquarie, £50 to Alexander Anderson, and the value of a lieutenancy to Colin Anderson, viz. £564 2s., are allowed as disbursements to the said Sir Charles Forbes; and the legacy duties on such legacies, and also on the value of annuities to the said Margaret Thompson, Archibald Anderson, Isabel Thompson, and Isabella M'Dougall, are also allowed as payments, by the said Master, on the second schedule to his said report, but nothing in respect of probate duty, and no other payments in respect of the legacy duty are claimed or allowed.

Colin Anderson (the son) having died intestate and illegitimate, his Majesty's Attorney-general was brought before the Court by supplemental bill, in respect of the interest of the said Colin Anderson in the said trust funds. Jane Jarvis Anderson (one of the daughters) having also died intestate and without issue, letters of administration to her and the said Colin Anderson, limited to the purposes of the suit, were granted to John Hopton Forbes. Ann Nesbitt Anderson, wife of the Respondent, George Jackson, afterwards died, leaving several children; and a bill [63] of revivor and supplement was filed, to revive the suit, and to make her children and the said J. H. Forbes defendants.

On the 7th July 1829, the Respondent George Jackson, and Ann Nesbitt his wife, the Respondent Thomas Falkner Middleton, and Caroline Erskine his wife, and the said Respondents, George Jackson Jackson, John Anderson Jackson, and Jane Jackson, presented their petition to the Master of the Rolls, in all the said causes, praying payment of certain advances for maintenance of the said Ann Nesbitt Jackson and Caroline Erskine Middleton, out of their shares of the said trust funds, and for inquiries as to their subsequent maintenance, and also the maintenance of the children of the said Ann Nesbitt Jackson.

The said causes came on to be heard before the Master of the Rolls for further directions on the 17th of July 1829; and the said petition and the said supplemental suit coming on to be heard at the same time, his Honor ordered that it should be referred to the Master to inquire and state to the Court what sum ought to be set apart to answer the two several annuities of £50 and 750 rupees, in his said report mentioned. And his Honor declared that, according to the true construction of the testator's will, the said Jane Jarvis Anderson, Ann Nesbitt Anderson and Caroline Erskine Anderson, were in no event to take more than an interest for their respective lives; but that Colin Anderson, one of the residuary legatees, being a boy, was to take an absolute vested interest on attaining his age of twenty-one years; and that, while all the residuary legatees continued under age and unmarried, the residue of the testator's estate formed an aggregate fund, out of the interest whereof they were to be maintained and educated; and that [64] the surplus interest was to be invested, and added to the principal, for the benefit of the persons who should be eventually entitled thereto. And his Honor declared, that the said Colin Anderson, upon attaining his age of twenty-one years, became absolutely entitled to one-fourth part of the aggregate fund, and all subsequent interest and accumulations thereof, subject to a deduction of the sum paid for his cornetcy, with interest thereon from the time of the testator's death; and that the remainder of the aggregate fund continued until the death of the said Jane Jarvis Anderson to be one aggregate fund, out of the interest whereof the said Jane Jarvis Anderson and the two other residuary legatees were to be maintained and educated, and that the surplus interest thereof was to be invested, and added to the principal, for the benefit of the persons eventually entitled thereto; and upon the death of the said Jane Jarvis Anderson, under twenty-one and unmarried, Colin Anderson became further absolutely entitled to one-third part of the third share, in which she had a contingent life interest, in the said remaining aggregate fund; and his Honor declared that, upon the marriage of the said Ann Nesbitt Jackson, she became entitled for her life, for

her separate use, to the interest of one moiety of the said then remaining aggregate fund; and on the marriage of Caroline Erskine Middleton she became entitled for her life, for her separate use, to the interest of the then remaining aggregate fund: and that, on the death of Ann Nesbitt Jackson, the share of the residuary estate, to the interest whereof she became entitled for her life, became, under the trusts of the said will, divisible, in equal shares, among her surviving children and the legal representative of her deceased [65] children; and his Honor declared that the share and interest which vested as aforesaid in Colin Anderson, deceased, with the accumulations thereof, belonged to his Majesty, subject to the payment thereout of the costs and expences incurred by the said John Hopton Forbes, in taking out letters of administration to the said Colin Anderson the younger, and Jane Jarvis Anderson, *ad litem*; and his Honor referred it back to the Master to make the necessary inquiries consequential on such declarations.

In pursuance of the last-mentioned order, the Master to whom the said causes stood referred made a separate report, bearing date the 1st day of December 1829, and thereby (amongst other things) found that the effect of the said decree was to convert the one-fourth share of the said testator's residuary estate, which vested in the said late Colin Anderson, on his attaining 21 in October 1809, to a third share thereof, on the death of the said Jane Jarvis Anderson, on the 19th day of April 1812; and he certified, that it appeared by the account annexed to the examination of the said Sir Charles Forbes, therein referred to, and which accounts were adopted by his general report, dated the 23d October 1824, and absolutely confirmed, that the aggregate of the funds, with the surplus and accumulated interest, which constituted the clear residue of the testator's estate, on the 31st day of December 1822, the year in which the said Colin Anderson died, consisted of £36,000 Bank three per cent. annuities, and of the sum of £23,974 14s. 1d. cash, in the hands of the said Sir Charles Forbes, subject, however, to the payment of the two annuities in the said report mentioned; and that the said late Colin Anderson was, at his death, entitled to one-third of the said £36,000 Bank annui-[66]-ties, and one-third of the said sum of £23,974 14s. 1d., together with the amount of dividends on both sums, but subject, nevertheless, to the deductions therein mentioned; and he further found that the sum then due to his Majesty, as representing the said Colin Anderson the son, for his share of the said testator's estate, was the sum of £12,000 three per cent. Consolidated annuities, being one-third of the said sum of £36,000 like annuities, subject as therein mentioned.

By an order of the Court of Chancery, bearing date the 21st day of May 1830, it was ordered (among other things) that £12,000 Bank three per cent. annuities be carried over in trust in the cause of *Jackson* v. *Forbes*, to an account to be entitled "His Majesty's Account;" and that the costs of his Majesty's Attorney-general, of the said suits, were to be paid out of the said £12,000, when so carried over, but that was to be without prejudice to any question as to whether the residuary estate of the testator, Colin Anderson, was liable to legacy duty.

Subsequently to the said decree, Caroline Erskine Middleton died, having had two children, both of whom died in her lifetime, but administration to them was taken out by their father, the Respondent, Thomas Falkner Middleton, and he filed a bill, claiming to be entitled to the share of his said wife, in the said testator's residuary estate.

The Attorney-general, in October 1830, presented a petition in these causes, praying that it might be declared, that his Majesty is entitled to be paid the amount of the probate duty and of the legacy duty upon the whole of the testator's estate and effects which were brought or remitted to England, or administered or remaining to be administered in [67] England; and that probate of the will and codicil of the testator ought to have been taken out from the Prerogative Court of Canterbury upon the same estate and effects, and praying the necessary directions for the raising and paying the amount due to his Majesty, in respect of the said probate duty and legacy duty. The Respondents, at the same time, presented a cross petition, praying that the Attorney-general's petition might be dismissed, and that it might be declared that the executors were not required by law to have obtained probate in this country, and that the testator's estate was not liable to such probate duty; and that the residuary estate of the testator, collected and alleged to have been appropriated in the East Indies, was not liable to the legacy duty.

The two petitions came before the Lord Chancellor in 1831, when his Lordship ordered a case for the opinion of the Court of Exchequer, and that the questions should be,—First, Whether the said Sir Charles Forbes and his co-executors were not bound to have taken out probate from the Prerogative Court of the Archbishop of Canterbury, to the testator's will and codicils, before they could legally do all, or any, and which of the acts hereinbefore stated. Second, Whether the said Sir Charles Forbes and his co-executors were not, and whether the said Sir Charles Forbes, as the survivor, was not, bound to take probate from the Prerogative Court of Canterbury, and to pay a probate duty upon the whole, or any, and what part of the testator's property collected in India, and brought or transmitted to England. Third, Whether the duties chargeable upon legacies, annuities and shares of residue, under the Acts of Parliament in force touching such duties upon testators' estates administered in England, were and are [68] chargeable in respect of all, or any, and which, of the legacies, annuities and shares of the residue respectively bequeathed by the testator's will and codicils.

The Attorney-general and the Respondents' counsel, in pursuance of the said order, agreed upon a case, in which were submitted the said several questions; and in which were stated all facts necessary to bring the matter in question before the Court of Exchequer, and the facts therein stated were the same and to the same tenor as the same are hereinbefore stated. The case was argued in Easter term 1832, and upon the argument the counsel for his Majesty waived the subject matter involved in the two first questions; and in respect of the third question, the Barons of the said Court certified to the Lord Chancellor that they were of opinion, that the duties chargeable upon legacies, annuities and shares of residue, under the Acts of Parliament in force touching such duties, were not chargeable in respect of any of the legacies, annuities and shares of residue, bequeathed by the testator's will (see *Jackson* v. *Forbes*, 2 Crompt. and J. 382, and 2 Tyrw. 354).

Upon a petition afterwards presented to the Lord Chancellor by the Respondents, praying (among other things) for a confirmation of the said certificate, his Lordship, by an order bearing date the 18th day of July 1832, ordered that the petition of his Majesty's Attorney-general be dismissed, and declared that the legacies, annuities and residuary personal estate of the testator were not liable to duty chargeable upon legacies, annuities and shares of residue, under the Acts of Parliament then in force touching testators' estates got in and distributed under probates of wills granted by the Ecclesiastical Courts of this country.

From that order his Majesty's Attorney-general [69] appealed to this House, abandoning here, as he did in the Courts below, the claim in respect of the probate duty.

The Solicitor-general (Sir C. C. Pepys), and Mr. Wray, for the Crown:—The proposition for which the Crown contends is, that wherever a *British* subject dies, the legacy duty attaches on legacies and shares of his personal estate administered in this country; we confine the rule to British subjects, because it has been lately decided that it does not apply to the subjects of other states, *In re Bruce* (2 Crompt. and J. 436-451; S. C. 2 Tyrwhitt, 475). The question here is, whether the residue of this testator's estate was brought to this country to be administered, or, being administered in India, was remitted here for payment only? If it was brought here to be administered, there cannot be a doubt that it was liable to the legacy duty. Sir Charles Forbes remained in India after the departure of his co-executor, to realise the fund, and he then sent it home for the purpose of being administered here in the ordinary course. His answer to the bill in Chancery, the decree pronounced in the cause, and the Master's report in pursuance of that decree, cannot be in any way distinguished from the ordinary proceedings in an administration suit. No payment or appropriation of the legacies had been made before the institution of the suit. Some of the money had been invested in the funds, in the names of the executors, some had remained in the hands of the acting executor, and he was called upon by the bill to administer in due course the assets of the testator.

By the true construction of the 36 Geo. 3, c. 52, this fund comes within its operation. By the second [70] section, every legacy specific or pecuniary above £20, and the clear residue and every part thereof, is made subject to the duty imposed by that Act. The language of the fifth, sixth and seventh sections is equally general,

and applicable to every executor taking on himself the burthen of the execution of a will or administration of an estate in this country. The fifth provides the form of receipts, which *it shall be lawful for any of his Majesty's subjects* to fill up. The sixth requires the duty to be paid by the executor or administrator taking the burthen of the execution of the will. The seventh defines what shall be considered a legacy within the meaning of the Act, which is in very general terms, limited neither to the place of the party's death, nor to the place where the estate is found, but applying to any person dying after the passing of that Act.—[The Lord Chancellor: Suppose a Frenchman came from Normandy to Hampshire, with a sum of money bequeathed by a testator in France to a legatee in Hampshire, and said, "Here is your legacy of £1000, give me a receipt"; would his Majesty's Attorney-general have a right to interfere?]—A foreigner is not within the Act. The fifth section has the words, "any of his Majesty's subjects." There is no clause in the Act applying to foreigners, and the construction put upon it is, that they are not included. The principal sections bearing on this case, are the 27th, 28th, 32d and 33d, besides those which have been already referred to.—[The Lord Chancellor: According to your argument, if a foreigner resides in this country his estate is liable to the duty?]—Yes. That is decided *In re Ewing* (1 Crompt. and J. 151; S. C. 1 Tyrw. 91), but that question does not occur here. The Respondents cannot find any one [71] expression in this Act exempting them from payment of this duty. It does not signify in what part of the world the property lies; if it be administered here, the duty attaches.—[The Lord Chancellor: By your argument, it depends on the executor whether the duty attaches or not; if he choose to remain abroad, and send the money to the legatee here, the legacy is free from duty; but if he come here to pay it, then you say it is not free, because if the executor come and remain here, he is within the jurisdiction of this House or of Chancery.]

There are some lately decided cases in which this question arose. The *Attorney-general* v. *Cockerell* (1 Price, 161), is a case in all its circumstances like the present, except that the surviving executor took out probate in this country after the death of the co-executor, who took out probate in Bengal and brought the fund home with him. The testator there was a British subject resident in the East Indies, realizing his property there, making his will there, and dying there. The executors were in India at the time of his death, and the will was proved there; yet it was held that the legacies bequeathed by that will to persons in England, and paid to such persons here, were liable to this duty, if anything remained to be done in the way of administration here. That case, of the authority of which not a doubt has been entertained from the year 1814 to this time, must be held overruled if the decision of the Courts of Exchequer and Chancery in the present case be correct. Another of the cases which come nearest to the circumstances of the present, is that of the *Attorney-general* v. *Beatson* (7 Price, 560). The testator there was also a native of Scotland, had been domiciled in Madras, where he made his will, and [72] died at sea in a voyage to London, leaving his will at Madras, where administration was granted with the will annexed. His assets were got in there, and his debts paid and legacies to such legatees as resided there, and the balance was remitted to the attornies here of a residuary legatee in Scotland, who took out letters of administration with the will annexed in England. The legacy duty was held to attach upon the property remitted from India, although it was only *in transitu* to Scotland. The next case in point, is that of *Logan* v. *Fairlie* (2 Sim. and Stu. 284). The testator there resided in India, had all his property there, and died there, leaving a will, by which he bequeathed his residuary estate to legatees in Scotland. The executor also resided in India, proved the will there, and remitted the residue to his agent in England, with directions to pay it to the legatees. In a suit instituted in Chancery in England in respect of the residue, it was held that it was liable to the legacy duty. That case also, and all the cases decided on this subject since 1814, must be founded in error if the decision of the Courts below in the present case be affirmed. The true criterion is this: if the property is in a state in which you cannot hand it over to the legatee, then it is not yet administered; if the legacy remains to be severed from the general estate, as in the case of *Logan* v. *Fairlie*, or if any question as to the rights of the legatees in the estate or residue thereof remains to be decided and declared, as in the present case; in all these cases the legacies become liable to the payment of

the duty to the Crown. Another case applicable to the question before your Lordships, is that *In re Ewing* (1 Crompt. and J. 151), which was the last argued by one of your [73] Lordships when at the bar. A testator domiciled in England died here, possessed of property in American, Austrian, French and Russian stock; his debts were paid by his executor out of his personal property in this country, and the stock was transferred into the name of the executor, who remitted the dividends to the legatees. It was held that, although the funds were transferable to parties abroad, and the dividends on them payable in the foreign countries, yet the legacies were liable to the duty. There is another case, the last decided on this subject, which is conceived by the Respondents to be an authority for them. It is the case *In re Bruce* (2 Crompt. and J. 436-451; S. C. 2 Tyrw. 475). The testator was an American and died in America, having bequeathed his property in this country to English legatees, and appointed an English executor resident in England. It was held that the property in this country was not liable to the legacy duty, on the ground that he was not a British subject, and his property was not liable any more than himself to be bound by the statutes of this realm; and these circumstances distinguish that case from the cases already cited.

When the case now before your Lordships came before the Court of Exchequer, there was an uniform rule, that property like this was not exempt from the legacy duty. During the argument there, Lord Lyndhurst and Mr. Baron Bayley put to the counsel several supposed cases (see *Jackson* v. *Forbes*, 2 Crompt. and J. 401; S. C. 2 Tyrw. 364-372), which certainly could not be controverted, if such cases arose. They seemed to think that the institution of the suit in Chancery made no difference in the case. If this estate had [74] been, as they supposed, administered in India, the proceedings in Chancery here were erroneous from the commencement.—[The Lord Chancellor: How would this claim stand before the institution of the Recorder's Ecclesiastical Court in India?]—The question is not in the least affected by the establishment of that Court; that is a Court for *probate* only. The property, after being collected by the executors there, was remitted to this country for the purpose of being administered here, and a suit was accordingly instituted for that purpose. If an executor in India assents to the legacy there, and then remits it to his agent here, or to the legatee himself, the duty does not attach on that legacy, because it is appropriated; but if sent here for the purpose of ascertaining the right of the legatee, it is subject to the duty. It is clear that there was an administration of this estate in this country from 1811 to 1818. The property was brought to this country, the children were brought and domiciled in this country, and the legacies were payable in this country.

The Lord Chancellor: It is very much to be regretted that the Judges give no reasons in their certificate for the conclusion to which they come on a case sent for their opinion. The reason assigned for not giving such reasons is, that the learned Judges may have afterwards to give their reasons in this House; but so may they in every decision given in the Courts of King's Bench, Common Pleas and Exchequer.

Sir Charles Wetherell, and Mr. Garratt, for the Respondents: This case had been elaborately argued in the Court of Exchequer, and the certificate of the [75] opinion of the Judges of that Court was signed by Lord Lyndhurst, C. B., Barons Bayley, Vaughan and Bolland, (all the Barons who heard the argument), and it was adopted by the Lord Chancellor. It would be professionally more satisfactory if the certificate contained the reasons of the judgment of the Court, but its authority is not less cogent notwithstanding the absence of them. If this decision should appear to be irreconcileable with former cases in similar circumstances, be it remembered that it is the judgment of the Court of Exchequer overruling its own decisions, or rather reviewing them and settling the law on the subject. But your Lordships will find, on examining the former decisions, that you do not overrule them by adopting this certificate and affirming the decree of the Court of Chancery. First, however, it is proper to draw your Lordships' attention to the statute on which this question arises.

The collection of the legacy duties was loose and irregular prior to the passing of the 36th Geo. 3, c. 52. Would the framers of that Act, which was intended to provide for every case of legacy duty, have omitted a clause expressly applying to a testator's estate in India, if such an estate were intended to be subject to this duty?

The express provisions of that Act show that the Legislature had no such intention. By the fourth section, the Commissioners of Stamps are to appoint persons in "*the several counties of Great Britain*" to collect this duty. Can those Commissioners appoint, under that section, persons in Bombay and Madras to collect the duties in those places? By the fifth section, the Commissioners are required to have a supply of printed receipts, according to the form in the schedule annexed to the Act. These receipts are printed in the neighbourhood of Lin-[76]-coln's-inn, and a quantity of them is kept at the Legacy-duty Office in Somerset-house, and in the offices of the collectors. Is a Bombay executor to come or send here for these receipts? By the sixth section, the executors are required to pay the duties for which those printed receipts must be taken, stamped according to the Act. Can this stamp be affixed to receipts in India? The answers to these questions are obvious. What has been said of these sections is applicable to the 23d, 27th and 28th sections, which more strongly define the locality of the property to which the Act is applicable. There are Acts (see 42 Geo. 3, c. 99; 44 Geo. 3, c. 98; 48 Geo. 3, c. 140, and 55 Geo. 3, c. 184) requiring copies of wills in Wales to be sent up by the registrars of the local Ecclesiastical Courts, for the purpose of better collecting the duties; but there is not a word in any Act, nor in the charter constituting the Probate Courts of Bombay and Madras, requiring copies of wills or probates to be transmitted thence to this country. By that charter, "His Majesty granted and appointed that the Court of Recorder at Bombay should be a Court of Ecclesiastical Jurisdiction within Bombay and the limits thereof, and upon British subjects there residing, with the same powers, authorities and privileges, and subject to the same restrictions, as are thereinbefore given unto the Court of Recorder at Madras; and that the Court of Recorder of Madras should be a Court of Ecclesiastical Jurisdiction, and should have full power to administer within Madras and the limits thereof, and towards British subjects there residing, the Ecclesiastical Law, as the same was then exercised in the diocese of London, so far as the circumstances and occasions of Madras and the [77] people would admit or require; and for that purpose was given to the said Court full power and authority to grant probates, under the seal of the said Court of the Recorder of Madres, of the last will and testament of all or any of the said British subjects dying and leaving personal effects within the said territories respectively, and to demand, require, take, hear, examine and allow, and if occasion required, to disallow and reject the account of them, in such manner and form as were then used or might be used in the said diocese of London, and to do all things needful and necessary in that behalf."

The Lord Chancellor: Suppose a testator dying in India and his executor residing there, the legatee obtains probate for the purposes of a suit in this country, and takes it with him to India; can that probate operate on the estate in India? We know probates obtained here are sent to France and other states, and effect is given to them.

Mr. Wray: A probate taken out here would not operate on an estate in India, where there is an Indian administration.

The Counsel for the Respondents: With respect to the cases cited, this case is distinguishable from all of them. And the first distinction is between an estate administered wholly or partially here, and one administered wholly in India. By the proceedings on behalf of the Crown, it is in effect admitted that this estate was administered in India. Why otherwise is the claim for the probate duty abandoned? The reason alleged is, that the property, being within the limits of the Probate Court in [78] India, cannot be subject to probate here: but if the property was local for one purpose, it is so for another, and is no more liable to legacy duty than to probate duty. In the case of the *Attorney-general* v. *Cockerell* the will was proved in the Ecclesiastical Court in England, and that fact alone, independent of other circumstances, distinguished that from the present case; although, with great respect for the learned Judges who decided that, it is not easy to understand how the obtaining of probate here, the property being in India, can confer an English locality on that property. If one executor here is obliged to file a bill in Chancery for the purpose of obtaining the property from the representatives of the other, who proved the will in India, we cannot understand how such an act can change the locality of the property and constitute an administration in England. But whether the judgment in that case be right or not upon the ground stated, there is nothing of the

sort in this case. The same distinction is found between the present case and that of the *Attorney-general* v. *Beatson*, to which the same observations are applicable. The Master of the Rolls followed the decisions in those two cases in his judgment in *Logan* v. *Fairlie*. But in that judgment his Honor says (2 Sim. and Stu. p. 291), "Where a testator dies in India, leaving personal estate there only, and his executors reside and prove the will there, no duty is payable on the legacy remitted to a legatee in this country." These words describe accurately the position of the estate in the present case.—[The Lord Chancellor: Mr. Solicitor-general, you agree that if the legacy be paid in India, it is not chargeable with the duty. Now, if the executor in India give [79] the legatee in India his draft for the amount of the legacy on his (the executor's) agent in London, and the legatee coming to London, goes to a bank here to get the draft discounted, would the legacy duty attach in that case?—The Solicitor-general: The affirmative answer to that is the judgment in the case of *Logan* v. *Fairlie*.—The Lord Chancellor: So, if the executor pay by draft, it is under one law; if by money, it is under another law.—The Solicitor-general: Always regarding the payment of it in England; there is no doubt, that if to administer the estate you must resort to the Ecclesiastical Court here, that makes it English property; or if the property must be brought here to be administered under a decree of the Court of Chancery, and it is paid into the name of the Accountant-general in the meantime, that makes it English property as much as if it had been vested in the English funds.]—In all the cases in which it was decided that the legacy duty attached, there were probates or some administration in this country. But it is alleged that in this case also probate ought to have been obtained in the Ecclesiastical Court in England. There was no reason for obtaining probate here, and probate cannot be granted except where the property lies within the diocese. *Daniel* v. *Luker* (3 Dyer, 305), *Yockney* v. *Foyster*, cited in the case of *Scarth* v. *The Bishop of London* (1 Hagg. 631). All these cases show that the Court of Chancery has jurisdiction to entertain a suit in respect of a testator's estate without probate or letters of administration. Can it make any difference in this case whether the legacy is paid by the executor directly, or through the medium [80] of the Court of Chancery? Can the Court, by taking possession of the property, alter the situation of the parties, and subject the property to the legacy duty? This is not a suit seeking for the administration of the estate of the testator.

The Solicitor-general replied: The right of the Crown to the legacy duty cannot be affected by the parties not applying for probate in England. No English probate was taken out in the case of *Logan* v. *Fairlie*, and yet it was there held that the estate was chargeable with the legacy duty.

The Lord Chancellor: The question, my Lords, is whether the Crown is entitled to the legacy duty on the legacies and shares of residue bequeathed by the testator in the cause. On that question coming before me incidentally in the Court of Chancery, I thought it proper, with the consent of the parties, to send it to a Court of Law. As it was a question of construction of an Act of Parliament, and having not a particle of equity in it, I thought it was not fit for the Court of Equity to decide it. If it was proper that it should be sent to a Court of Law, then the Court of Exchequer, which is concerned with his Majesty's revenue, was the proper Court for the construction of a Revenue Act. The case was sent therefore to the Court of Exchequer, and that Court decided against the Crown, came to the opinion which it certified to the Court of Chancery, without stating the reasons on which the decision was founded. Such is the custom: a custom, the grounds of which I do not see, the continuance of which I do not understand, which has long been the subject of disapprobation and has given much discontent, [81] and which, I hope, will soon cease. But that certificate stated, that the duty did not attach on this property. The decision, it is said, is not reconcileable with the decisions of the same Court in the cases of the *Attorney-general* v. *Cockerell*, and the *Attorney-general* v. *Beatson*: but I find it as difficult to reconcile these previous decisions with the Act of Parliament, as to reconcile this with them. On that account I recommend to your Lordships not to decide this until your Lordships will have time to look into those previous cases. They were cited in the argument in the Court of Exchequer, and the discrepancies were then pointed out to that Court. It was not therefore from overlooking these cases, but on full consideration of them, that the decision contained in this certificate

is founded. When the case came before me again, on the certificate of that Court, I do not recollect if the case was argued before me, I rather think I agreed with the Judges of the Court of Exchequer, without argument, my impression was that it would require great consideration from me, sitting in the Court of Chancery on a case concerning the revenue, coming from the Court of Exchequer, which is the proper Court for questions concerning the King's revenue, before I could determine to follow a course different from that Court. This decision of mine is now brought under your Lordships' review. I have no bias in my mind, nor partiality to the decision, nor any motive to induce me to adhere to it, if I thought it was not well founded. I would urge your Lordships to give the case your careful consideration before you say that a decision on a question of revenue, coming from a Court of Revenue, is wrong.

Lord Plunkett concurred in the postponement of [82] the case for further consideration. The principle, on which the claim of the Crown to the duty was put, was in substance, this:—That whenever the property of a British subject dying in a foreign country is brought to England for distribution amongst the legatees, it becomes chargeable with the legacy duty. It would require much consideration of the circumstances of the cases cited to determine whether they did or did not support that principle.

The Lord Chancellor: I said, when this case was argued, that it would require your Lordships to have a strong opinion on it, before you could come to a decision contrary to the deliberate judgment of the highest Court of Revenue in the kingdom, upon a question of revenue. That I was perfectly satisfied with that judgment, and that the case was free from doubt, I will not take on myself to say, ignorant as I was of the reasons upon which it was founded, and seeing that it appeared to differ in some respect from the decisions of the same Court in one or two former cases. I have since considered those cases, and the Lord Chancellor of Ireland, whose valuable assistance I had here when the case was argued, has since sent me his opinion in writing, which coincides with my own, that the cases of the *Attorney-general* v. *Cockerell*, and the *Attorney-general* v. *Beatson*, are distinguishable from the present; and that, as in neither of those cases do the facts completely agree with those of the present case, there is not in reality any conflict among the decisions. In the *Attorney-general* v. *Cockerell*, the will was proved in the Prerogative Court of Canterbury by the defendant, who assumed the character and duty of the executor of the will of Robertson, the [83] testator in that case, and subsequently got in part of the testator's estate. In the *Attorney-general* v. *Beatson* also, the will was proved by the defendant in England. In *re* Ewin likewise, the will was proved in England, and the only point decided in it was that assets in a foreign country, of a testator domiciled and dying here, were liable to the legacy duty. In the case of *Logan* v. *Fairlie* the residuary estate of the testator was found in England in the course of administration; and before any specific appropriation of it was made, it was held that it was liable to the legacy duty. My noble and learned Friend has in his judgment, communicated to me, taken these distinguishing circumstances of all these cases into his consideration. In affirming the judgment of the Courts below in the present case, your Lordships do not overrule any of the former cases; they stand on different grounds, each resting on its peculiar circumstances: I therefore move your Lordships to affirm this judgment.

The judgment was accordingly affirmed.

[84]

APPEAL

FROM THE EQUITY EXCHEQUER.

HIS MAJESTY'S ATTORNEY-GENERAL,—*Appellant*: WILLIAM HOPE, JAMES WOOD and JAMES BRIERLY,—*Respondents*.

[Mews' Dig. xii. 203. S.C. 8 Bli. N.S. 44; 1 C. M. and R. 530; 4 Tyr. 878. Followed

in *A.-G.* v. *Pratt* 1874, L.R. 9 Ex. 143; and see *Stern* v *Reg.* (1896), 1 Q.B. 216; *A.-G.* v. *Sudeley* (*Lord*), *ib.* 361.]

Where a testator dies in this country possessed of personal property here and also in foreign funds, and the executor takes out probate here and pays probate duty on the amount of the property in this country, he is not chargeable with the probate duty in respect of the property in the foreign funds, although he afterwards obtain such property and administer it.

John Marshall, late of Ardwick, near Manchester, in the county palatine of Lancaster, was for many years previous to, and at the time of his death, resident and domiciled in England, at Ardwick aforesaid, and had no other place of residence or domicile. John Marshall was a merchant trading with North America, and at the time of his death was possessed of personal estate and effects, amounting together to £300,000 and upwards, part of which personal estate and effects was, at the time of his death, situate in this country, or on the high seas, and the residue thereof was, at the time of his death, situate in North America, and consisted partly of goods and effects belonging to him, and which had been sent by him to North America for sale, and were then remaining in the hands of his agents and unsold at New York and elsewhere in North America; and partly of book [85] debts and other simple contract debts due and owing to him from divers persons at the time of his death, domiciled and resident in North America; and partly of monies in the public funds or stocks of the United States of North America, and in the funds or stock of the State of New York, in North America, standing partly in the name of the said John Marshall and partly in the name of his agent there.

The said John Marshall duly made and published his last will in writing, with a codicil thereto, bearing date respectively the 22d day of August 1823, and the 15th day of May 1824, and he appointed the Respondents executors. He died on the 19th day of July 1824, and the executors on the 28th day of September 1824, obtained probate of the will and codicil in the proper Ecclesiastical Court in this country, for the purpose of administering the whole of the testator's personal estate, or so much thereof as required probate for the purpose of being administered by them, and they paid for duty on such probate the sum of £675. The duty so paid was in respect only of such part of the testator's personal estate as was at the time of his death situate in this country or upon the high seas, and which was under the value of £50,000; and the said executors have never applied for or obtained probate to be granted by any other court or jurisdiction, and have never applied for or obtained any other probate than the probate hereinbefore mentioned.

The executors have collected and administered in this country the whole or the principal part of the personal estate of the testator, whether situate in this country or elsewhere, at the time of his death, to the amount of £300,000 and upwards.

All the executors at the time of the testator's death, [86] and at the time when they took out and obtained probate, were and have continued to be resident and domiciled in this country.

On the 9th March 1832, His Majesty's Attorney-general filed an information, which was afterwards duly amended, on the Equity side of the Exchequer, against the Respondents, stating these facts, and praying that it might be declared, that a debt arose and became payable to His Majesty in respect of probate duty upon the whole amount of the personal estate and effects of the testator, including as well the personal estate and effects of the said testator which, at his death, were situate in this country or upon the high seas, as the personal estate and effects which were then in America.

The Respondents appeared, and on the 21st of May 1833 they filed a general demurrer to the information.

The demurrer was set down for argument in Trinity term 1833, and judgment was given for the Respondents.

The Attorney-general (Sir J. Campbell), and Sir G. Grey, for the Crown:—The information alleges that it was by virtue of this probate that the money here was obtained. This allegation cannot be denied by the Respondents. The property was obtained under the probate, or in consequence of the probate, and therefore it was obtained by virtue of or in respect of the probate. The other side, by demurring,

must be taken to confess the fact. If this probate had not been taken out till all this money had been paid, could it be said, because it did not happen to be actually within the diocese at the time of the death of the testator, that the probate duty need not be [87] paid. The principle laid down in *Logan* v. *Fairlie* (2 Sim. and Stu. 284), is not disputed. That case decided that where a testator died in India and left personal property there only, and the executors resided there and proved the will there, no duty was payable on a legacy remitted to a legatee in England; and the reason was, that all that was done under the authority of the probate was done in India alone, and by virtue of a probate granted in India. That principle applies to the present case, and must govern it. Here the executor acted under the authority of a probate granted in England, he lived in England, and administered in England the effects of a testator who died in England. There is no decision to show that the Ordinary is only entitled to probate in respect of such property as is locally situate within his diocese.—[Lord Chancellor: Have you any authority to show that the Ordinary is entitled not only to property within the diocese at the time of the death of the testator, but to such as may afterwards come into it?]—There is no distinct authority to show that to be the rule, but it must be so. There must be some person to take care of the property. It is property of an intestate or of a testator, and so forms part of the personal estate and belongs to the Ordinary. The executor gets possession of such property by a probate, and must therefore pay the duty. The extent of his rights is ascertained by the amount of duty he has paid on the probate: *Carr* v. *Roberts* (2 Barn. and Ad. 905).

Mr. Rolfe and Mr. Wigram, for the Respondents:—The probate duty is only payable in this country where the property administered is in this country: if the property is in a foreign country, the duty is not [88] payable. The origin of the probate duty is to be found in the rights claimed in ancient times by the church over the property of deceased persons. When a person died, the rights of the Ordinary took effect; those rights are displaced by the will, and money was originally paid to the Ordinary as in compensation for those rights.—[The Lord Chancellor: The origin of that was, that the money was paid to the Ordinary for the prayers which used formerly to be said for the soul of the deceased.]—If the rule contended for here can be supported, an estate would be liable to the payment of the duty twice over. If a man died in this country possessed of £10,000 here, and £20,000 in Ireland, the executor would be compelled to pay the probate duty here on the £10,000, he would also be compelled by the Irish statute 56 Geo. 3, c. 56, to pay in Ireland a probate duty on the property there; must he pay probate duty on the same property also when it came into this country? Certainly it could not have been intended that he should do so; yet, if the argument on the other side is right, he is liable to this double payment, for Ireland is for this purpose the same as France or America, a foreign country. Before this House suffers such a hardship to happen, it will be satisfied that the Courts repudiate the doctrine of granting to an executor living within their jurisdiction, probate of property situated in two dioceses, but which belonged to a testator who at the time of his death was domiciled within their jurisdiction.—[The Lord Chancellor: The case of *Hunt* v. *Stevens* (3 Taunt. 113), shows that the amount of the probate duty gives a certain character to the person who has the probate, and who cannot recover as executor beyond the amount [89] of the sum on which he has paid the duty.]—The property here was not possessed by virtue of the probate. That allegation in the information cannot be supported. The Courts abroad might require a man to show that he was entitled to the property by the law of his own country; so that the probate might thus be ancillary to the obtaining of the property, but it was only ancillary to it.

The Lord Chancellor:—In considering this question, it is necessary that I should remind your Lordships that this is a decision of a Court not merely entitled generally to great respect, but in this instance especially, as this is a question peculiarly within its jurisdiction. On this ground, though I have besides but little doubt in my own mind, I should certainly require something very strong to make me differ from the decision of that Court. I shall take time to consider the arguments, to examine the statutes, and further, to make inquiry among the heads of the Ecclesiastical Courts as to some matters introduced into the arguments. In the Court below, the Chief Baron said that the whole question was, whether the probate was granted in respect

of the £300,000; that if it was, the duty was payable; if it was not, then the duty was not payable. The Attorney-general admitted that construction of the Act, but said that the demurrer confessing the fact, it must be taken that it was in respect of this probate that the effects were obtained by the party, and therefore it follows that it was granted in respect of this foreign fund. I confess that I cannot go along with that argument, although it is possible that the probate granted here may have been used for that purpose elsewhere. But it is not because the executor did get in the American estate, that it can be said he got [90] it in respect of this probate. If I could be satisfied that at any time the Ecclesiastical Court so far acted with respect to property out of the jurisdiction as to draw that property over to its jurisdiction, and to get not only the property here but to extend its gripe over foreign property, or to grasp that property when it came here, that would at once displace the argument of the Respondents. I shall inquire into that matter, but I take it that the Ecclesiastical Court would reject any such jurisdiction.

The Lord Chancellor:—The case to which I shall now call your Lordships' attention to-day is one which is an appeal from the decision of the Court of Exchequer, from the unanimous judgment of the Judges of that Court, upon an information filed by the Attorney-general for the purpose of obtaining payment of probate duty upon certain property belonging to the testator at the time of his decease, and charged to be under the jurisdiction of the Court. When the case was argued, I entered at some length into the reasons which I had for not agreeing in the principal argument of the Attorney-general. I did not think that the use made of a probate was a test sufficient to denote the purpose for which it was granted. The words of the Act refer not to the use eventually made, but distinctly to the purpose for which the probate was granted, and which was in contemplation when it was granted. The question therefore is, as to the words of the Stamp Duties' Act, and to the schedule to it relating to this matter; and with reference to these, it does not appear to me that the probate was made available in collecting the foreign funds, so as to bring this case within the Stamp Duties' Act. It appears to me, on the other hand, that much must [91] depend upon the course and practice of the Ecclesiastical Courts as to granting probates. If they deal with the property before it is brought to this country so as to hold it within their reach, then it is said that the probate relates back to the property, that is, the probate duty attaches, for that the probate is granted in respect of property at the time within the jurisdiction. If that be so, then *cadet questio*, for undoubtedly the stamp duties would attach. If, on the other hand, the probate was merely granted in respect of the personalty at the time of the decease, then arises the question, whether the case comes within the words of the schedule, and consequently whether the probate duty attaches? It was maintained in the argument when the case was before the House, and seemingly upon sound principles, that probate was given by the Ordinary and taken in respect of an ancient practice in popish times, and in respect of the interest which the Ordinary had in the personalty of the individuals to be applied to pious uses for the safety of their souls. This was the origin of probates giving an interest in the personalty to the Ecclesiastical Courts. The pious uses afforded them an interest, and many masses were no doubt said, and the money was taken possession of by the ecclesiastics themselves for their own use, they doubtlessly considering this as applying it to pious uses. With that we have now nothing to do; but hence arose the practice of admitting executors to prove the will, and of granting letters of administration in cases where there was no will. Thus arose at the outset the claims of the Ordinary, which afterwards became vested in other parties. If the Ordinary only claimed, and he never did claim anything beyond the goods within his own jurisdiction, if he never claimed for foreign goods, the argument falls to the ground, for it appears that probate [92] was never granted except for goods within the jurisdiction; and if so, the right to this probate duty did not attach in the present case.

I have made inquiries of very learned parties, two very competent authorities, one the learned Judge of the Prerogative Court, and the other the King's Advocate, and they both confirm the view I take of the jurisdiction and of the nature of the Ordinary's office. This of itself would be a strong ground for affirming the decision of the Court below; but I am also supported in doing so by an argument in the case of the *Attorney-general* v. *Forbes* (*vide supra*, pp. 48, 81, 82), which was lately before

your Lordships, and in which I was assisted by the Lord Chancellor of Ireland ; I there used the same argument, and that noble and learned Lord fully concurred with me, that unless there was a clear miscarriage in the Court below, it would not be advisable to shake the decision of the Court of Exchequer upon such a question as this ; a decision pronounced after great deliberation and argument upon a revenue case, a kind of case more especially belonging to that Court. I am sufficiently confirmed in my opinion therefore, though the case may not be quite clear, and though there are two conflicting decisions upon this subject. But these are not so much decisions as *obiter dicta* obtained from the Judges in a way which I cannot explain. That appeared so in the case of *In re Ewin* (1 Tyr. 92 ; 1 Cr. and Jer. 151), the last which I argued at the bar of the Court of Exchequer. I think that there is no case made out to shake the decision of the Court below. I am satisfied therefore, and I move your Lordships, that the judgment of the Court below be affirmed, but without costs.

Judgment affirmed accordingly.

[93]

WRIT OF ERROR

FROM THE EXCHEQUER CHAMBER.

JOSE VENTURA DE AGUIRRE SOLARTE and two others, Assignees of JOAQUIM RUEZ DE ALZEDO, a Bankrupt.—*Plaintiffs ;* JOHN ARCHDALE PALMER and WILLIAM BOUCH,—*Defendants.*

[Mews' Dig. ii. 1575. S.C. 1 Bing. N.C. 194 ; 1 Scott, 1 ; and, in Ex. Ch., 5 M. and P. 475 ; 7 Bing. 530 ; 1 Tyr. 371 ; 1 C. and J. 417 ; 9 L.J., O.S., Ex. 121. Decision regretted in many cases ; *e.g. Everard* v. *Watson*, 1853, 1 E. and B. at pp. 804, 805. Explained in *Paul* v. *Joel*, 1857, 27 L.J. Ex. at p. 384, as being merely a decision on the particular facts.]

A letter from the holders of a bill of exchange to an indorser liable upon the bill, threatening legal proceedings if the bill is not paid, is no notice to such indorser of the dishonour of the bill.

This was a Writ of Error brought by the Plaintiffs below upon a judgment of the Exchequer Chamber, affirming a judgment in the Court of King's Bench in favour of the Defendants below.

The action was brought by the plaintiffs, as assignees of Joaquim Ruez de Alzedo, a bankrupt, against the Defendants, as indorsers of a bill of exchange.

The declaration contained a special count, which stated in the usual manner that the bill had been drawn on Daniel, Jones and Co., that they accepted it, payable at Messrs. Williams, Burgess and Co. : and then averred that the said bill was duly presented at the said Messrs. Williams, Burgess and Williams, for payment thereof, and payment required, but that neither the said Messrs. Daniel, Jones and Co., nor the said Messrs. Williams, Burgess and Williams, would pay the same, but refused so to do.

There was a second count on a bill of exchange, omitting the acceptance at and the presentment to [94] Messrs. Williams, Burgess and Williams. The defendants pleaded the general issue. The cause came on for trial at the London sittings after Hilary term 1828, before Lord Tenterden, when it was proved that the bill was duly presented for payment at Messrs. Williams, Burgess and Williams, on the 15th of December, the day on which it became due, that payment was refused, that the bill was returned to the Plaintiffs for nonpayment on the 16th day of December, and that the Plaintiffs, on the 17th day of December, caused to be written, by Messrs. I. and S. Pearce, the attornies for the Plaintiffs, the following letter to the Defendants :

" 17th December 1825.

" Gentlemen,—A bill for £683, drawn by Mr. Joseph Keats upon Messrs. Daniel, Jones and Co., and bearing your indorsement, has been put into our hands by the assignees of Mr. J. R. de Alzedo, with directions to take legal measures for the re-

covery thereof, unless immediately paid to,—Gentlemen, your very obedient servants, I. and S. Pearce."

Addressed, " Messrs. Palmer and Bouch."

Which letter was, on the 17th day of December, received by the Defendants.

The Lord Chief Justice delivered his opinion to the jury, that as the letter above set forth did not in terms import that the bill had been refused payment by the acceptor, it was not a sufficient notice of the dishonour and nonpayment of the said bill of exchange, to entitle the Plaintiffs to maintain and support the action against the Defendants; and with that direction left the case to the jury, who found a verdict for the Defendants. The counsel for the Plaintiffs tendered a bill of exceptions to this direction of the Lord Chief Justice.

[95] Judgment having been given for the Defendants in the Court of King's Bench, a Writ of Error was brought in the Exchequer Chamber, and Special Errors were assigned, which, in Easter term 1831, were argued before the Judges of the Courts of Common Pleas and the Exchequer, when the judgment of the Court of King's Bench was affirmed (see 7 Bing. 530).

Upon this judgment, the Plaintiffs brought the present Writ of Error.

On the 17th of June, Justices Park, Littledale, Vaughan, Gaselee, Taunton, Patteson, and Barons Alderson, Bolland and Williams, having assembled, but the Lord Chancellor not being present, nor either of the Deputy Speakers, the Bishop of Hereford moved that the Earl of Abingdon should preside as Speaker *pro tem.* The motion was agreed to. Counsel were then called in.

Mr. F. Pollock and Mr. R. V. Richards, for the Plaintiffs in Error:—The object of this Writ of Error is to bring under the consideration of the House the decision of the Court in *Hartley* v. *Case* (4 Barn. and Cress. 339). On the authority of that case, Lord Tenterden directed the jury, in the present, to find a verdict for the Defendants, but intimated a wish that the question should be carried further. That was an action where the holder of a bill applied by letter to the drawer for payment, described the bill, and expressed a hope that the drawer would discharge it, to prevent the necessity of law proceedings. The Court held that the letter was not such a notice of the dishonour as was sufficient, and therefore refused to disturb the nonsuit that had been entered. That decision has created [96] considerable surprise in the commercial world, and too much weight has been given to it in the present instance. In *Tindal* v. *Brown* (1 Term Rep. 167), Mr. Justice Buller said, " There is no prescribed form of this kind of notice; it must import that the holder considers the indorser as liable, and expects payment from him." The letter of the attornies in this case did most distinctly import that the holder expected payment from the indorser, for it threatened him with legal proceedings in case payment was not immediately made. The law as stated in *Tindal* v. *Brown* is adopted in Bayley on Bills (Bayley on Bills, 4th edit. 206). A notice that a man is called on to pay a sum of money in respect of a bill of exchange, and that proceedings will be taken against him in respect of it, is a notice that the bill has been dishonoured, for till the bill has been dishonoured the holder cannot proceed upon it.

Mr. Whateley, for the Defendants in Error, was stopped.

Mr. Justice Park declared the unanimous opinion of the Judges present, that the letter of the Plaintiffs' attornies did not amount to notice of the dishonour of the bill, as such a notice ought in express terms, or by necessary implication, to convey full intimation that the bill had been dishonoured.

The Earl of Abingdon moved that judgment be postponed till the Lord Chancellor be consulted.

Judgment was postponed accordingly.

The Lord Chancellor:—My Lords, this was a Writ of Error from the Exchequer Chamber, upon [97] a point which, as it appears to me, ought never to have found its way by Writ of Error into this place. I never saw a case which, whether regarding the facts, the principle of law, or the cases bearing upon it, was more absolutely free from all doubt. The question, my Lords, is whether the letter of Messrs. Pearse amounts to notice of the dishonour of the bill of exchange referred to in that letter. As this was a point of law, a question was put by your Lordships to the Judges, whether this was a valid notice of dishonour, so as to make the party to whom it was

directed, the indorser, liable. The Judges were unanimously of opinion that it was no notice of dishonour. I never thought there could be a doubt that that must be their opinion, and I only doubted whether we ought to trouble them to come here upon such a point. My Lords, I hold that this is no notice of dishonour; it is a threat of legal proceedings, a mere demand of payment. It is clear on authority and by decided cases that a demand of payment does not amount to a notice of dishonour; lawyers and merchants alike know this rule, and they act upon it. When the learned Judges are clear and unanimous in their opinion upon this subject, it seems superfluous in me to waste the time of your Lordships by arguments in support of their judgment; but I will say, that when I see learned counsel sign their names to reasons of appeal, and bottom those reasons upon cases and authorities, I naturally look to these cases and these authorities, to see whether they bear out the opinions for which they are cited. The case of *Tindal* v. *Brown* has been cited; and that case is in the Term Reports (1 T. R. 167), and is referred to in the fourth edition of Bayley on Bills, p. 206, which authority **[98]** is also quoted in the Plaintiffs' "Reasons." *Tindal* v. *Brown* does not warrant the purpose for which it is cited; but it is remarkable that another case should not have been looked at, the case of *Hartley* v. *Case*, which is to be found in Barnewall and Cresswell's Reports (4 B. and C. 339): if that case had been looked at, it would have been found that it was on all fours with the present. The letter there is in these terms: "I am desired to apply to you for payment of the sum of £150, due to myself on a draft drawn by Mr. Case on Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place." Lord Tenterden there said, "there is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor." His Lordship said that the letter did not convey any such notice; yet it is much more explicit than the letter in the present case. The other authority referred to by the Plaintiffs is the fourth edition of Bayley on Bills. Why not the fifth edition? For aught I know, the fourth edition was published before *Hartley* v. *Case* was decided. This I know, that if the fifth edition had been quoted, there would have been found at p. 257 these words: "and the notice ought to import that the bill has been dishonoured; a mere demand of payment is not sufficient." But it may be said that this is more than a mere demand of payment, it is a threat of proceeding, and such a threat shows that a default must have been committed, because an indorser is not liable without a default in the other parties. But let your **[99]** Lordships read the whole passage, and you will then see that such an argument cannot be used, for the passage goes on thus, "and a threat of legal proceedings is not sufficient." I feel great displeasure, my Lords, at this. Writs of error ought not to be brought for the mere purpose of delay and to subject parties to costs. This is a wrong that you are bound to visit with your just displeasure. It is not because a writ of error is competent to be brought, that therefore it ought to be prosecuted; for if that were the case, then every cause tried in the Courts below would have to be tried over again in this House. It is not because the certificate of counsel is to be obtained in the hurry of business, that therefore writs of error are to be brought here expending the time of the suitors, which is the time of the country; and if your Lordships do not visit such proceedings with your displeasure, this Court may as well cease to be a Court of Appeal, for it will become not a place of redress, but a place of vexation. No counsel ought to have signed his name to this case without reading the last edition, not the last edition but one, of Mr. Baron Bayley's work on Bills of Exchange. But be that as it may, I hold this case to be one in which for an appeal to your Lordships' House there was not a shadow of justification; and I hope that if there are other cases like this under appeal, they may be withdrawn in time, or the parties may otherwise repent of their pertinacity.

The Lord Chancellor then moved that the judgment of the Court of Exchequer Chamber be affirmed.

Judgment affirmed.

[100] The Lord Chancellor moved that the judgment of the Exchequer Chamber be affirmed, with costs not exceeding £350 (see *Duvergier* v. *Fellowes*, *ante*, vol. i. p. 39).

Judgment affirmed accordingly.

WRIT OF ERROR

From the Exchequer Chamber.

RICKETTS,—*Plaintiff;* LEWIS and Others,—*Defendants.*

[Mews' Dig. i. 350. S.C. 8 Bli. N.S. 158; 1 Bing. N.C. 196.]

The House will not receive from the agent of a Plaintiff in Error a petition to refer a case to the Judges, to consider the points of law which in his petition such Plaintiff states to be involved in the case; but if counsel do not appear to argue for him, will proceed, on the motion of the counsel for the Defendant in Error, to affirm the judgment of the Court below.

This was an action of trespass *quare clausum fregit*, and was originally brought in the Court of Common Pleas, where judgment was given for the Defendants. A writ of error was then brought in the Court of King's Bench, and the judgment was affirmed (1 Barn. and Ad. 197). A writ of error was afterwards brought in the Court of Exchequer Chamber (2 Cr. and J. 11) under the 1 Will. 4, c. 70, s. 8, but was struck out of the paper of cases in that Court, upon the ground that that statute only applied to cases originally commenced **[101]** in the Court to which the writ of error was directed. The case was now brought by Writ of Error to this House.

The Attorney-general appeared for the Defendants in Error.

Mr. Vickery, the agent for the Plaintiff in Error, offered to present to the House a petition from the Plaintiff in Error, praying that the House would refer the case to the Judges, and call for their opinions on the points of law which he stated to be involved in it.

Mr. Courtenay (Assistant Clerk of the Parliaments) reported that there was no precedent for receiving such a petition.

The Attorney-general said that he was prepared to support the judgment of the Court below. As no one was prepared to argue against it, he prayed that it might be affirmed.

The Earl of Abingdon (who in the absence of the Lord Chancellor had presided at the sitting), having consulted with the Judges, moved that the judgment be affirmed.

Affirmed accordingly (see *Gardiner* v. *Simmons*, *ante* [1 Cl. and F.], p. 35).

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[102]

APPEAL

From the Court of Chancery.

GEORGE WILFORD BULKLEY,—*Appellant;* ANNA WILFORD,—*Respondent.*

[Mews' Dig. xiii. 1436, 1441, 1469, 1483; xiv. 417. S.C. 8 Bli. N.S. 111. Cited in *Stokes* v. *Prance* (1898), 1 Ch. 224. Distinguished in *Lysaght* v. *M'Grath*, 1882, 11 L.R. Ir. 142.]

On a contract for the sale of *part* of an estate, the purchaser requiring a fine to be levied of it for the purpose of removing admitted defects in the title, the vendor employed an attorney, who was his relation, and had been professionally employed by him on previous occasions, to levy the fine and complete the contract. The attorney advised the levying of a fine of the *whole* of the vendor's estate, without telling him the effect of it; such fine was accordingly levied, and the vendor died without declaring its uses, and without re-publishing his will, previously made, by which he had devised the whole estate to his wife, who survived him. After the vendor's death the attorney claimed the estate as his heir-at-law, alleging that the will was revoked by the fine, and he brought actions of ejectment to recover possession thereof. The widow filed a bill in Chancery for relief; and on an issue directed by that Court, a jury

found that the attorney fraudulently omitted to tell the vendor what effect the fine would have upon a devise of the property comprised in it. The Court of Chancery, upon that verdict, decreed the attorney to be a trustee for the devisee of the lands and hereditaments which so descended to him as heir-at-law. The House of Lords, affirming that decree, further held, that the attorney's alleged ignorance of the effect of a fine on a will of the lands comprised in it, and his omission to inquire whether the conusor, his client, had made a will, were such professional ignorance and neglect as afforded a principle by which a Court of Equity might, independent of the ground of fraud, hold him to be a trustee for a third person, of any benefit resulting to himself from his professional ignorance or neglect, to the prejudice of that person.

The Respondent, in June 1823, filed her bill in the Court of Chancery, which was afterwards amended, against the Appellant and others, and thereby stated that Richard Rich Wilford was, at the time of making his will, after mentioned, seised in fee simple **[103]** of the mansion-house called Ranelagh house, with the land, stable and coach-house thereto adjoining, together with two pieces of land also thereto adjoining, on one whereof there were five tenements erected, and on the other one tenement; the whole of the said mansion-house, lands and tenements, being situated in Chelsea, in the county of Middlesex, and comprising about two acres: that the said Richard Rich Wilford was also in like manner entitled to another estate, nearly adjoining, commonly called the Ranelagh estate, comprising 18 acres of land or thereabouts, with 12 messuages thereon erected: and that being so seised and entitled, he duly made his last will and testament in writing, dated the 28th March 1822, and thereby devised and bequeathed all his real estates and the residue of his personal estate unto the Respondent (his wife), her heirs, executors, administrators and assigns, for ever, and appointed her, and Joseph George Brett and William Augustus Cane, executrix and executors; and the Respondent by virtue of such will was in possession of part of the testator's real estates, particularly of the said mansion-house, but the Appellant, George Wilford Bulkley, was in possession of other part thereof.

The bill further stated that the testator, previously to the making of his said will, (viz. 12th August 1820,) had entered into a contract with John Lawrens Bicknell, solicitor and agent on behalf of the then Commissioners of the Royal Hospital at Chelsea, for the sale to them of part (six acres) of the said Ranelagh estate, in consideration of £9000; and that the testator's title to some part of the said Ranelagh estate was complicated, as having formerly been held by trustees for certain shareholders therein, whose shares **[104]** were thirty-six in number, the titles to most of them being separate and distinct; and that in consequence of such complication doubts arose respecting the testator's title thereto; and it was agreed and formed part of the said contract, that the testator should, with a view to its completion, levy a fine of the land so contracted to be sold. And the bill alleged that the Appellant, who had been employed by the testator for several years before, and had done much business for him as his attorney, was the attorney employed by him on the said sale; and that from the conversations he had with the testator on the subject and otherwise, he well knew or believed that the testator had made a will, and thereby left his real estates to Respondent; and that the Appellant, considering himself to be at that time, as he actually was, the heir presumptive of the said testator, formed a scheme of causing him to levy a fine which should in law include the whole of his said property, and thus so far revoke his will; and that with such view and design, the Appellant advised the testator not to confine the fine to that part of the said premises called the Ranelagh estate, which was contracted to be sold, but to levy a fine of the whole of said Ranelagh estate.

The bill further alleged that the testator, being wholly ignorant of the effect of levying such fine, consented to act therein as advised by Appellant, and accordingly a fine *sur conuzance de droit come ceo*, etc. was by the procurement of the Appellant, acting therein as the attorney of the testator, levied in Michaelmas term 1822, of 12 messuages, 12 gardens, 20 acres of land, 20 acres of meadow, etc. etc.; and that the Appellant caused the name of said J. L. Bicknell to be inserted in the fine as the plaintiff, in order **[105]** more effectually to conceal his design from the testator and

Respondent, and that the same might appear to have arisen out of the contract, and that the Respondent might be the more readily induced to join in such fine: And that the Appellant, though he inserted in the fine such a number of acres as would in law comprise the whole of the testator's property at Chelsea, took care to insert 12 messuages only, in order that the testator, in case he should look into any of the documents, might have no suspicion that any other property belonging to him was included in the said fine than his property called the Ranelagh property, on which there were exactly 12 messuages: And in order to induce the Respondent to join in the said fine, the Appellant not only represented to her that it was necessary to confirm the title to such part thereof as had been sold, but he also represented to her, in the presence of the said testator, that it would strengthen and confirm his title to the residue of the said property; and in furtherance of such fraudulent design, the Appellant did not state to the testator that the levying of such fine would at law operate as a revocation of any will he might have made, to any extent, but concealed the same from him: That no uses were declared of the said fine; and that the testator died about the 20th day of December 1822, without having altered or revoked his said will, (save and except so far as the same was revoked at law by the said fine,) and leaving the Respondent his widow, but no children, or brothers, or sisters, him surviving.

The bill further stated and charged that, shortly after the death of the testator, the Appellant, conceiving that the fraudulent purpose he had intended to effect was completed, wrote a letter to the Respondent, in the words or to the effect following:—

[106] "Chelsea, April 3, 1823.

"Madam,—From motives of respect and delicacy towards you, and a wish to avoid the appearance of precipitancy, I have hitherto forborne making any formal entry upon a claim to the property, which, as the legal representative of General Wilford, has devolved upon me in consequence of the General's intestacy. From the same considerations, I refrained adopting certain measures which prudence and policy dictated two months ago, in support of my title; but the period is now drawing nigh beyond which longer forbearance will be impracticable, without compromising the interests of my family in a way that could not on any grounds be justified. Therefore, I now beg leave to inform you, that in the character of the General's heir-at-law, I claim all those estates in Chelsea, whereof the General died seised, and all benefit arising from the same from the day of his decease. That as to such portions of those estates as is in your occupation, I request from you either a recognition of my right, or a tender of possession, with payment of an adequate rent during the period of your occupancy. In the event of your non-compliance with either of my requests, I shall be under the necessity of making a formal entry upon the premises previous to the adoption of further measures. As to that portion of the estate, which is in the hands of tenants, I shall require of such tenants payment of their rent for my own use, and an attornment to me, in every case, for the premises they respectively occupy. I trust you will not conclude that I wish to put you to one moment's inconvenience: so far from such being my wish or desire, that I would make any reasonable sacrifice to avoid it; but the existing state of things is such, from the extreme age of one **[107]** witness, and the infirmity of another, that in case of proceedings becoming necessary, in consequence of a refusal to comply with my request, such proceedings cannot be delayed beyond the 12th instant.—I have the honour to be, Madam, your very obedient humble servant, G. W. Bulkley."

After further stating that the Appellant had continued to claim to be entitled to the whole of the real estates of the testator, as his heir-at-law, alleging that the fine operated as a revocation of the will; and that he had commenced an action of ejectment against Respondent, to recover the possession of the whole of the said real estates; the bill prayed, among other things, that it might be declared that the Appellant was a trustee for the Respondent, of the whole of the lands, tenements and hereditaments late belonging to the said testator, which had descended to him as heir-at-law as aforesaid, excepting such part thereof as was included in the said contract with the Commissioners of Chelsea Hospital; and that it might also be declared, that the Respondent, or the said J. G. Brett and W. A. Cane, were entitled to receive the purchase money of the land contracted to be sold to the said Commissioners; and that the Appellant might be decreed to join with the Respondent in conveying the same

to the surviving Commissioners; and that thereupon the said Commissioners might be decreed to pay to the Respondent, or to the said J. G. Brett and W. A. Cane, the purchase money according to the terms of the said contract; and that the Appellant might be restrained by injunction from further proceeding in the said action of ejectment.

The Appellant, by his answers to the original and amended bills, admitted that R. R. Wilford died seised of the estate in the said bills mentioned: And [108] he also admitted the will, and the contract with the Commissioners of Chelsea Hospital prior to the date of the will; and said that the said testator's title to the Ranelagh estate was very complicated, and that the difficulties and obscurities of it were not, as the Appellant believed, confined merely to that part of the estate which was contracted to be sold, but extended to the whole of the said Ranelagh estate, which estate, or some parts thereof, had become so intermixed with other parts of the testator's real estates, by the taking down of boundary fences and otherwise, as to be in many instances incapable of being separated or distinguished therefrom; and that in consequence of such complication, the doubts that arose respecting the testator's title to the land contracted to be sold, equally applied to the residue of the said Ranelagh estate not contracted to be sold: And he admitted that he had been employed by the said testator and had done much business for him as his attorney, and was the attorney employed on the said sale, but denied that the testator's will was made by him, the same being prepared and made by Messrs. Ashmore, Few and Hamilton; and he denied that he knew or believed or suspected that the said R. R. Wilford had made a will; on the contrary, he believed, until after his death, that he had not made any will.

The Appellant further answered, that at the time of levying the fine he believed that he was related to the testator, and that it was probable he was his presumptive heir, but he did not know himself to be such heir, the relationship between him and the testator being distant: And he said that the solicitors of the said Commissioners required that a fine should be levied of that part of the testator's property which he had contracted to sell to them, for the purpose of [109] removing some objections or defects in the title thereto; and Appellant, having been advised and believing that such objections or defects applied equally to the title to the whole of the Ranelagh estate, which, consisting of 18 acres, with divers buildings thereupon, lay intermixed with and could not be easily distinguished from the testator's other estates at Chelsea, consisting of nearly two acres with the buildings thereupon, in consequence of the said testator having many years ago destroyed the boundaries between them, and made various alterations therein; and being also advised, that if a fine were to be levied which should include the whole of the testator's estates at Chelsea, it would have the effect of strengthening the titles thereto, and that the expense of such fine would not be much greater than the expense of a fine which should comprise only that part which was contracted to be sold; he, under these circumstances and for these reasons, did not confine the fine to that part of the premises called the Ranelagh estate, but extended it, in the description of the parcels, to the whole of the Ranelagh estate, and all the testator's said other estates at Chelsea which lay intermixed therewith. He also admitted that no uses were declared of the said fines, by reason of the unexpected death of the said R. R. Wilford, a few days after the levying of the same; but Appellant denied that he had advised the levying of the fine with the view alleged in the bill, or that in any of the matters relating to the said fine he had formed the fraudulent designs in the bills alleged against him, or contemplated any fraudulent purpose whatsoever.

The Appellant, in his said answers, admitted that he never stated to the said R. R. Wilford that the [110] levying of a fine would at law operate as a revocation of his will to any extent, because his attention was never called to that point, inasmuch as he was ignorant that the said R. R. Wilford had made a will, nor did he know at that time that if such will existed, it would be revoked by the fine; nor did Appellant know of such effect of a fine until he was informed by a conveyancer, some days after the testator's death, that the testator's will was thereby revoked. He admitted that he wrote and sent to the Respondent the said letter of the 3d of April 1823, being upwards of three months after the testator's death, but not from any opinion that his fraudulent purpose as alleged in the bills was completed, because he denied that he had ever intended any such purpose: And he admitted that he had ever since

continued to claim to be entitled to the whole of the said testator's real estates at Chelsea, as his sole heir at law, alleging, as he was advised the truth was, that the said fine operated as a revocation of the said will; and he admitted, that the Respondent not having complied with any of the requests made by him in the said letter, he in Easter term then last commenced an action of ejectment in the Court of Common Pleas against her, to recover possession of certain parts of the said estates at Chelsea which were then in the Respondent's occupation, including the dwelling-house, garden and premises, and that he had obtained a verdict in the said action; and that a case had been reserved for the Court of Common Pleas, as to the operation of the said fine with respect to so much of the property in her possession as did not form part of the Ranelagh estate: And he denied that the said action was brought to recover the possession of the whole of the said testator's real estates **[111]** at Chelsea, inasmuch as the Appellant was then in the possession or in the receipt of the rent and profits of some portions of the said real estates: And he submitted that he ought not to be declared a trustee for the Respondent as the alleged devisee in the said will, inasmuch as the said estates having descended to him as heir at law of the said R. R. Wilford, he was entitled to the same for his own use and benefit, and the Respondent had no equity to call on him to be a trustee thereof.

On the 7th of April 1825, the Respondent exhibited her supplemental bill in Chancery against the Appellant; and thereby, after stating the original and amended bills, she further stated that the Appellant obtained a verdict in the said action of ejectment in the Common Pleas; that by the injunction of the Court of Chancery, subsequent to the said trial and verdict, the Appellant was restrained from suing out a writ of possession in the said action; and that he, with a view of taking advantage of the fine which he so fraudulently, and contrary to his duty as a solicitor, and for his own private ends, caused the testator to levy; and endeavouring to take advantage of the said injunction being confined to the action in the Common Pleas; had since commenced an action of ejectment in the King's Bench against the Respondent, for the purpose of evicting her from such part of the testator's estates at Chelsea as was not included in the said verdict, (to wit) the mansion-house, and all other the premises late belonging to the testator, at Chelsea, and not included in the said Ranelagh estate. The supplemental bill charged, that as the fine on which the Appellant rested his title was obtained by gross fraud, the Appellant ought to have been restrained from pro-**[112]**-ceeding in his said second action, and from commencing any other action for the recovery of any part of the said hereditaments: And it prayed that the Appellant might be restrained from proceeding in the said action, or at least from suing out a writ of possession on any judgment he might recover therein, and from commencing any other action against the Respondent respecting the said freehold lands, tenements and hereditaments.

The Appellant, in his answer to the supplemental bill, stated that his former answers were true, and prayed that the same might be taken as an answer to so much of the supplemental bill as consisted of a reference to or repetition of any of the matters contained in the former bills; and he admitted that he obtained a verdict in the Common Pleas. And he further stated that, by an injunction of the Court of Chancery, he was restrained from suing out a writ of possession; and he admitted that, with the view of taking advantage of the fine, (which fine he denied that he fraudulently, and contrary to his duty as a solicitor, and for his own private ends, caused the testator to levy), and endeavouring to take advantage of the said injunction being confined to his proceedings in the Common Pleas, he had since commenced an action in the Court of King's Bench* against the Respondent, for the purpose of evicting her from the possession of other of the said testator's real estates at Chelsea, (viz.) a *portion* of the mansion-house, **[113]** and the stables, coach-house, land and premises not included in the said Ranelagh estate, but mixed and blended therewith, as stated in his former answers.

The Respondent having replied, and issue having been joined between the

* This action was tried before Lord Chief Justice Abbott, at the Middlesex sittings after Michaelmas term 1825, and a verdict found for the Appellant. Upon arguments afterwards in the Court of King's Bench on the effect of the fine, it was held by the whole Court that it did not pass more than the Ranelagh estate, with the twelve messuages thereon. See 8 Dowl. and Ryl. 549-553.

parties, John Laurens Bicknell, of Greenwich, gentleman, examined on the part of the Respondent, said, he knew R. R. Wilford, about three years prior to his death; was employed by the Commissioners of Chelsea Hospital to enter into and sign the contract mentioned in the pleadings; the Appellant acted as the solicitor of R. R. Wilford on that occasion. Many communications passed relative to the levying of a fine of the land contracted to be purchased, which was six acres of the Ranelagh estate, and it was arranged between deponent and Appellant that a fine should be levied of the said land, but deponent did not understand from the Appellant that the fine was to extend to any other land. Deponent had several conversations with the Appellant shortly after the decease of R. R. Wilford; and in one of those conversations, Appellant said the fine, which was then lately levied of the estates of the said R. R. Wilford, was a revocation of his will, and that the Appellant would succeed to them as heir at law: upon which deponent said, that he, on the part of the Hospital, should require the executors of the said R. R. Wilford to call on the heir at law to be a party to the conveyance of the land purchased for the Hospital, but that, as the agreement had been executed by the said R. R. Wilford, the purchase-money would of course be personal property to be received by the executors. The Appellant said, he (the deponent) should wait until the executors communicated with him on the subject. Upon another occasion, depo-**[114]**-nent having accidentally met the Appellant, remarked to him that very great fault was found with him (the Appellant) for not having told the said R. R. Wilford that the fine he had levied was a revocation of his will; to which the Appellant replied in these words, "Why should I put a sword into the General's hands to cut my own throat?" or words to that effect; and the Appellant added, that he had no doubt that if the General had lived a short time longer, he would either have republished his will or made a new one.

The witnesses for the Appellant deposed to the effect following: Edward Coke Wilmot, of Boswell-court, conveyancer, said that about ten days after R. R. Wilford's death, the Appellant, whom he had known three or four years, waited on him on business, when deponent congratulated him on the acquisition of fortune which he was informed Appellant was to derive from General Wilford's will; upon which the Appellant expressed himself much disappointed with the disposition made by the General of his property, more particularly as he believed himself to be his nearest relative, and, as the executors told him, his heir at law. In the conversation which deponent had with the Appellant, the latter stated that R. R. Wilford had acquired the Ranelagh estate by purchasing at different times, as opportunities occurred, the respective equitable shares of the different proprietors; and he asked deponent whether the circumstance of the General's acquiring the legal estate subsequently to the execution of his will, did not amount to a revocation of the will; to which deponent replied, that he was of opinion it did not, but added, that if the General had levied a fine or suffered a recovery subsequently to the execution of his will, and without having afterwards republished the same, in that case the will would be revoked. The Appel-**[115]**-lant appeared to be astonished, and expressed a strong doubt whether the deponent's opinion on the point was correct; and added, that he never before understood that a fine or recovery would affect a revocation of a will previously executed.

Mary Frances Penstone, another witness for the Appellant, deposed that she kept a hotel in Cork-street, Burlington-gardens, and that General Wilford, whom she had known for 12 years, came to her house in November 1822, a fortnight before his death, accompanied by the Respondent and the Appellant. The deceased was then going to the house of the Lord Chief Justice Dallas; and the Appellant endeavoured to persuade him not to go then, but to defer the business to some other time, as the General was then taken ill with spasms; and the Appellant offered to go to the house of the Lord Chief Justice to put off the appointment. The said R. R. Wilford refused to attend to the appellant's suggestions, and appeared to be angry at such request, and declared he was determined to accomplish the business he came upon; and he accordingly went away after half an hour, to go, as deponent understood, to the Lord Chief Justice's house. The Respondent then assigned, as a reason for her husband's anxiety to accomplish the purpose for which he came, that he could not settle his affairs until that was done.

Edward Bulkley, son of the Appellant, in his depositions described the complicated state of the property: and added, that he was present at a conversation between the Appellant and R. R. Wilford, on the Sunday before his decease, when the latter asked Appellant when the business of the contract with the Commissioners of Chelsea Hospital would be finished, and pressed him to name a day for its completion. [116] When Appellant answered that it would be settled in ten days or a fortnight, the deceased said that that would be the happiest day he had experienced for many years; and he gave as a reason for his anxiety, that he intended to settle his affairs when the contract was completed.

William Shirkey, a pensioner of Chelsea Hospital, deposed that, on the morning of the day on which R. R. Wilford died, he was directed by the Appellant to take to the General's house a trunk, containing deeds and writings relating to the Ranelagh estate; and when he arrived at the gate leading to the house, the Appellant, who had gone there before him, after talking to a female servant at the gate, beckoned the deponent and ordered him to take the trunk back, as the General was dangerously ill; and deponent believed that Appellant was prevented by that circumstance from returning the said deeds to the said R. R. Wilford.

Two other witnesses, one a surveyor, the other a solicitor, deposed to the state of the estates; and said, that by reason of the removal of boundaries, erections of buildings, alterations and intermixture of parts of one estate with the other, it was extremely difficult, if not impossible, to distinguish between the Ranelagh estate and the hereditaments of the said R. R. Wilford which did not form part of that estate.

Hugh Smith, of Cobham, in the county of Surrey, esquire, said in his depositions that he knew the Respondent for 20 years and upwards, the Appellant for about 20 years, and R. R. Wilford, deceased, for 25 years. That the said R. R. Wilford was, in his lifetime, possessed of hereditaments situate in the parish of St. Luke, Chelsea, in the county of Middlesex, part of which descended to him from [117] his father, other part thereof by purchase from John Dixon, esquire, and other part by purchase of the proprietors of Ranelagh. That he (deponent) was from the year 1801 to 1822 in the habit of being professionally consulted as a conveyancer by the trustees of what was formerly called the Ranelagh estate, in the pleadings in this cause mentioned, in regard to the title of the said estate, and particularly whether the trustees thereof could of themselves dispose of the same without the concurrence of the several individuals equitably interested in the thirty-six parts or shares whereof the said estates consisted, and if not, to advise whether the said individuals had such titles to their respective shares as would enable them and the said trustees to convey a good title to a purchaser; and that, in order to give a satisfactory answer to the said trustees, deponent carefully examined and investigated the title of the said trustees and of the several individuals beneficially interested in the shares of the said estate, and found several of such shares very defective in title, insomuch that deponent advised the said trustees and such of the proprietors as consulted him that they (the said trustees) of themselves, nor with the concurrence of the several other persons claiming the beneficial interest in the said thirty-six parts or shares, could not, with any degree of probability of carrying a sale into execution in the then state of the title, enter into any contract for that purpose. That some time after he had given such advice, but at what time in particular deponent could not recollect, he was informed by the said R. R. Wilford, (who was himself a proprietor of one of the shares of the said Ranelagh estate,) that from the nature of the Ranelagh estate, in regard to its bearings and locality upon his other [118] property adjoining thereto and in part intermixed therewith, he had come to a resolution to purchase the whole of the remaining thirty-five shares of the different persons claiming the equitable interest therein, with the best titles they could make thereto; when deponent advised him, and also the Appellant, who then acted as his solicitor, that if he carried his said resolution into execution, it would be advisable for him, as soon as he had completed such purchases, to levy a fine of the Ranelagh property, in order to strengthen and protect his title thereto, as the title of several of the shares appeared to deponent very defective; and as a fine of the whole would not be more expensive in deponent's judgment than a fine of the particular shares wherein such defect appeared, deponent advised the fine to

comprise the whole of the shares. That he was informed by R. R. Wilford, and by the Appellant, from time to time for several years afterwards and down to the year 1822, of the progress they had made in making such purchases, many of which had been made, with the knowledge of deponent, of persons for whom deponent was individually concerned; and ultimately, in the year 1822, he was informed by the Appellant, and which information deponent believed to be true, that the said R. R. Wilford had completed his purchase of the whole of the remaining thirty-five shares of the said Ranelagh estate, and was then the sole owner thereof. That a draft of a deed, purporting to be a conveyance of the legal estate in the whole of the said Ranelagh property, was submitted to the perusal and approval of deponent by the Appellant, as the solicitor of the said R. R. Wilford, in behalf of one or more of the persons who were parties thereto; at which time he again repeated to the Appellant the advice **[119]** he had given some years before in respect of levying a fine, and advised him to lose no time in recommending and advising the said R. R. Wilford to levy such fine immediately, meaning such fine to comprehend the whole of the Ranelagh estate, and not any particular part thereof, although the defect of title only extended to some particular parts or shares of the said Ranelagh estate.

The several causes having come on to be heard before the Vice-Chancellor, his Honor, by a decree bearing date the 23d of February 1826, ordered (among other things) that the parties should proceed to a trial at law in the Court of King's Bench, on the following issues: viz. 1st. Whether the Appellant George Wilford Bulkley fraudulently induced the testator R. R. Wilford to extend the fine levied by him beyond the property agreed to be sold to the Commissioners and Governors of the Royal Hospital at Chelsea; 2d. Whether the said Appellant fraudulently omitted to inform the said testator that such fine would, as to the property comprised therein, revoke any will of the testator which might be in existence: And in such issue the Respondent was to be plaintiff, and the said Appellant was to be defendant.

The Respondent presented her petition of appeal to the then Lord Chancellor against that decree, as far as it directed issues to be tried at law. The appeal was heard by his Lordship, and the decree affirmed by an order bearing date the 5th of May 1828.

In pursuance of the said decree and order, the parties proceeded to a trial at law, at the sittings after Easter term 1829, at Westminster, before the Chief Justice of the Court of King's Bench; when **[120]** the jury, upon the first issue, found that the Appellant did not fraudulently induce the said R. R. Wilford to extend the said fine beyond the property agreed to be sold to the said Commissioners and Governors of the Royal Hospital; and on the last issue, the said jury found that the Appellant did fraudulently omit to inform the said R. R. Wilford that the aforesaid fine would, as to the property comprised therein, revoke any will of the said R. R. Wilford which might be in existence at the time such fine was levied.

The Respondent, on the 3d of July 1829, signed judgment upon the second issue so found for her. The Appellant, on the 15th of the same month, applied by motion to the Lord Chancellor for a new trial of that issue, but his Lordship did not think fit to make any order.

The causes having afterwards come on to be heard before the Lord Chancellor on further directions, his Lordship, by a decree bearing date the 30th of July 1829, declared (among other things) that, having regard to the finding of the jury on the second issue, and to the evidence produced and read in the cause, the Appellant, the heir at law of the testator R. R. Wilford, ought not to be permitted to take advantage of the fine levied by the said testator; and that the whole of the lands, tenements and hereditaments, in the pleadings mentioned, excepting such part thereof as was included in the said contract with the Governors of Chelsea Hospital, ought to be considered as having passed by his will to the Respondent; and that the Appellant should convey to her in fee, or as she should direct, all such estate, right and interest, as had descended to him as aforesaid, in all the said lands, tenements and hereditaments, not comprised **[121]** in the said contract: And it was ordered that the Appellant be restrained by injunction from commencing or prosecuting any other action at law against the Respondent respecting the said freehold lands and hereditaments lately belonging to the said testator, etc.

The Appellant presented his petition of appeal to this House from the decree of the 23d of February 1826, directing the issues; and also from the orders or decrees of the 5th of May 1828, and of the 15th and 30th of July 1829, respectively; and therein submitted that they ought to be severally reversed, and the Respondent's bills dismissed so far as it was therein prayed that the Appellant might be declared a trustee for the Respondent of the whole of the lands and hereditaments late belonging to the testator which had descended to the Appellant as his heir at law; and that he might be restrained by injunction from further proceeding in the action of ejectment in the bills mentioned, or suing out execution on any judgment he might recover therein, and from commencing any other action at law against the Respondent respecting the freehold hereditaments belonging to the testator.

Sir Edward Sugden, for the Appellant:—The object of Mrs. Wilford's bill was to make the Appellant convey to her the estates which had descended to him as heir at law of General Wilford. The Court below directed issues to a jury, in order to ascertain what, if any, fraud had been committed by Mr. Bulkley. The jury found for Mr. Bulkley on one of the issues, and against him on the other. A motion was then made in equity for a new trial, which was refused; and a decree was then made, consequent upon the finding of the jury, according to the prayer **[122]** of the bill. The object now is to review those several orders, and to show that no such orders ought to have been made upon the general equity; but if the general equity did exist, then, upon the particular facts, to insist that there ought to have been a new trial.

The first point made by the bill was, that Mr. Bulkley, knowing of the devise to the Respondent, formed a scheme to have a fine levied of the testator's property, for the purpose of revoking the will, in order that he himself might, as heir at law, acquire the estates; and that, with such a view, he advised the testator not to confine the fine to that part of the premises called the Ranelagh estate, respecting the title of which doubts had arisen, but to levy a fine of the whole of the estates. It may be necessary to state that, upon argument in a court of law, the operation of the fine has been restrained to the parts which were sold, and to the other parts of the Ranelagh estate; and it has been held that the description of the parcels in the fine did not include the whole property (see 8 Dowl. and Ryl. 549). The only part, therefore, now in question is that which is covered by the fine, namely, the Ranelagh estate.

Upon that part of the case relating to the effect of the fine, the Vice-Chancellor, in delivering his judgment directing the issues, was of opinion that it was not at all to be considered necessary, on the part of Mr. Bulkley as a solicitor, that he should know what the law was as regards that point. The question has been often tried in courts of common law, that is, whether there has been such negligence on the part of a solicitor as would enable the party employing him to recover damages: there are a great many **[123]** cases to show that he would not be liable as an attorney, for not having that knowledge which did not belong properly to his branch of the profession. This effect of a fine operating as a revocation of a will, which is now familiar to most of your Lordships, was not formerly so well understood. There is that particular instance of a former Lord Chancellor (Lord Erskine), to whom, for his patriotic exertions, a person devised a very large estate; and an attorney, also happening to have a particular friendly feeling towards that distinguished person, "to make assurance doubly sure," got that testator to levy a fine; and when the testator had done it, the attorney went to his friend whom he had intended to favour, and told him a great deal about what a kindness he had done him. Upon consulting other learned persons, however, it turned out that the effect of this attorney's kindness was to revoke the will, and send the estate to the heir at law of the testator. The anecdote serves to show that it is not generally known among solicitors that a fine has that operation. Mr. Bulkley swears, in his answer, that he had not—and it is clearly proved by evidence, as far as such a thing can be proved, that he had not—that knowledge of the law which would have enabled him to tell the General what effect the fine would have on the will, if he had known there was one: and then it was put in the issues, 1st, whether the appellant fraudulently induced the testator to extend the fine to the whole property; and 2dly, whether he fraudulently omitted to inform the testator that such fine would have the effect of revoking his will. The jury found there was no fraudulent inducement by Mr. Bulkley: it was clear, on the evidence, that he not only did not **[124]** suggest the fine, but that he actually wanted the levy-

ing of it to be delayed, in consequence of the ill state of health of General Wilford; and therefore it would have been impossible for the jury to come to the conclusion that he induced the General to extend it. The evidence of Mr. Hugh Smith showed that he had, for a long time past, suggested the necessity of levying a fine of all the property; and it is not disputed that the fine in the particular case was required by Mr. Bicknell, and never was suggested by Mr. Bulkley.

But the jury found, on the second issue, that there was a fraudulent concealment on the part of Mr. Bulkley; that he fraudulently omitted to inform the testator that the fine would, as to the property comprised in it, revoke any will of the testator previously made of that property. That finding of the jury turned upon a conversation which took place between Mr. Bulkley and Mr. Bicknell, two months after the testator's death. The Lord Chancellor, on an application made to him for a new trial on that ground, refused to grant it; and having refused that, his Lordship, as a matter of course, decreed in favour of Mrs. Wilford, on the ground of this fraudulent omission to inform General Wilford of the effect of the fine. Mr. Bulkley, by this appeal, submits that there ought to have been no issue at all directed; but the issues having been directed, and the first found for him, the second could not, as he apprehends, be made the ground for a decree against him: the evidence produced was such, and the finding, with reference to that, was such as to enable him to have a new trial, and therefore, *quacumque viâ*, there ought not to have been the decree which was ultimately made against him.

[125] As regards the general question—and a more important question never arose—it appears to us that in this case the equity has got a little wide. There is nothing like it in the books; and unless your Lordships and the Courts below stop at some well-known, clear, marked boundary, it is not easy to foresee to what extent you may go. There is nothing in the books of reports, or ever laid down, that goes beyond this—that if a testator is prepared to do a thing which he had power to do, and the person, who would take his property if he omitted to do that act, makes a representation to him to this effect, "Don't do it; I will do it myself; don't give yourself the trouble to make that charge; the property will come to me, and I will take care to do it;" upon such representation, the act not being done, because the party bound himself that he would do it, the cases go simply to show that that party shall be compelled to do what the testator would himself have done if he had not been prevented by the promise of the party who afterwards breaks his engagement: *Thynn* v. *Thynn* (1 Vern. 296), *Devenish* v. *Baines* (Pre. in Cha. 3). This cases goes infinitely beyond anything of that sort. This is not a declaration made, but an omission to make it. This is not that something has been spoken, but that an act done has an operation which has not been declared. This is the first case that ever has occurred in which a man's legal right has been taken from him—not upon anything which he has done, for the Appellant has done nothing improperly, as the jury have found—not upon anything which he has said, for he has said nothing—not upon any misrepresentation—not upon any concealment, for nobody can say he concealed anything; as nothing **[126]** was sought to be known, it was not necessary there should be any statement—but upon an omission to make a declaration, the result of which, as it has happened by a state of circumstances over which he had no control, has vested an estate in himself. There is no proof whatever that the testator himself was ignorant of the effect of the fine; there is no proof of information withheld by the Appellant, as far as he had any knowledge; there is no proof that the Appellant himself knew what the operation of the fine was, so that he could communicate it; but there is negative proof that he did not know, and he has sworn positively that he did not know its operation; there is no proof whatever that he knew a will had been executed: he swears he did not know it; and there is no proof whatever that he knew he was heir, and he swears he did not know he was.

Other solicitors (Messrs. Few and Ashmore) were concerned for General Wilford. They had drawn his will, and were concerned for Mrs. Wilford, who joined in the fine; and they had never told Mrs. Wilford or General Wilford that it would revoke the will. They knew that the will had been executed; Mrs. Wilford knew that the fine was levied. Suppose Mr. Ashmore or Mr. Few had been the heir at law, and that the estate had been devised to Mr. Bulkley, could he file a bill against Mr. Few or Mr. Ashmore, who, knowing that there was a will, and that a fine had been levied, had

not stated the effect of the fine which they did not levy? But, according to this decree, Mr. Few or Mr. Ashmore, in the case supposed, would have been bound to give up the estate to Mr. Bulkley. Nobody ever heard, in a Court of Equity, anything so wild.

By the contract with the Commissioners of Chelsea [127] Hospital, which was entered into in 1820, a fine was to be levied; it was Mr. Bicknell, solicitor for the College, and not Mr. Bulkley, who suggested and required it. On the 28th March 1822, the will was prepared by Messrs. Few and Ashmore, who had generally acted as the solicitors for Mrs. Wilford as well as for General Wilford. Mr. Bulkley had nothing to do with that will: it was cautiously concealed from him. In Michaelmas term 1832, the fine was levied, and Mrs. Wilford joined in it. Your Lordships will not have much difficulty in supposing that she mentioned that to her solicitors. But the great pressure of this case is, that the fine was extended beyond the land contracted to be sold. Now it is not easy to find a case in which, when a fine was required by a purchaser of part of an estate, the vendor did not levy a fine of the whole, meaning to declare the other uses at the time the conveyance was to be made. It was of course to make Mr. Bicknell a conusee; it was not intended thereby to mislead anybody; it is sworn by Mr. Bulkley that he had no improper motive in making him a conusee.

Let me now draw your Lordships' attention to the evidence in this case. Mr. Edward Coke Wilmot, who is a conveyancer, and the object of whose evidence was to show that Mr. Bulkley did not know the operation of the fine, states, that about 10 days after the death of Mr. Wilford, the Appellant attended the deponent on business, when deponent congratulated him upon the acquisition to his fortune from the will of Mr. Wilford; upon which the Appellant expressed himself much disappointed, more particularly so as he believed himself to be the nearest surviving relation, and, as the executors told him, the [128] heir at law also of General Wilford. The Appellant then detailed to deponent the manner in which General Wilford had acquired the Ranelagh property, namely, by purchasing the respective equitable shares of the different proprietors as opportunities occurred. The Appellant then asked deponent, whether the circumstance of General Wilford having subsequently to the execution of his will acquired the legal estate (being previously thereto owner of the equitable estate only in the respective shares of the Ranelagh property), did not amount to a revocation of his will; to which deponent replied that he was of opinion it did not, but that if General Wilford had either levied a fine or suffered a recovery subsequently to the execution of his will, and without having afterwards republished the same, in that case the will would have become revoked. Upon making that observation, the Appellant appeared to be astonished, and expressed a strong doubt whether the opinion given by deponent upon the latter point was tenable; and he added, that although he had been in practice many years, he had never before understood that the circumstances of a fine levied or a recovery suffered by a testator after the execution of his will, would effect a revocation of such will. So that as far as negative evidence can go, it is proved that the Appellant did not know this effect of a fine; and your Lordships will always bear in mind, that he has purged his own conscience by swearing over and over again (the question has often been put to him) that he was not aware that that was the effect of a fine, nor that a will had been executed.

The evidence also shows, that there was a disposition on the part of the Appellant to prevent the General from levying the fine. Mrs. Penstone, who [129] kept an hotel in Burlington-gardens, deposed "that R. R. Wilford was at her house, accompanied by the Respondent and Appellant, about a fortnight previous to his death; that he was very much indisposed; that he was on his way to the house of the Lord Chief Justice, as he then informed deponent; that the Appellant endeavoured to persuade him not to proceed at that time on the business but to defer it to some future period, assigning as a reason his being so much indisposed; that he refused to attend to the request of the Appellant, and appeared to deponent to be very angry at such request, and declared that he was determined to accomplish the business on which he had set out; and the Respondent gave as a reason for the anxiety her husband expressed to accomplish the purpose, that he could not settle his affairs till that was done." This settling of his affairs meant the making of his will; and that the

General was anxious to make his will is evident from the conversation between him and the Appellant, as stated in the depositions of the Appellant's son, "that General Wilford asked the Appellant when the business of the contract would be done, and repeatedly pressed him to name a day for its completion; and the Appellant answered that he thought it would be settled in ten days or a fortnight, to which General Wilford replied that that would be the happiest day he had for many years; and gave as a reason for his wishing to know when it would be, and to have it completed without loss of time, that he intended to settle his affairs when the contract was completed." His object then was to hurry the thing as much as possible, in order that he might settle his affairs. To settle his affairs, was of course to make his will. It is proved by another witness, that he was directed **[130]** by the Appellant to take the deeds home; that when he arrived with them at the gate leading towards the General's house, at that moment he was informed the General was just dead. That is only proved in order to show a fair and *bona fide* winding up of the matter on the part of Mr. Bulkley; that he was entirely closing, as far as regarded himself, the whole transaction. As to the description of the property, there is the evidence of Mr. Hugh Smith, which was afterwards read at the trial, to show that he was the person who originally advised, and who afterwards repeated that advice to the Appellant and to General Wilford himself, to levy a fine of the whole of that property, in consequence of the different natures of the title; and Mr. Bicknell, upon his cross-examination, stated expressly that he was the person who required the fine to be levied.

As far as the evidence goes, there is nothing to show—there was nothing when those issues were directed—that the testator himself did not know what the effect of the fine was, or that Mr. Bulkley knew what its effect was; on the contrary, there is evidence to show the latter did not know it. So that everything which could lead to a fraudulent omission, supposing he was bound to declare it, every circumstance is absent. He did not know, first of all; he could not tell what he did not know, and he swears he was ignorant as an attorney of the operation of the fine; and it is proved by Mr. Wilmot that he expressed great surprise when he was told it had that operation. If, then, your Lordships should be of opinion that he did not know of its effect, as the fair result of the evidence, *quoad* this question, there was nothing to try by an issue, because he could not fraudulently omit to inform his client of that which **[131]** he himself was not informed of. Where could be the inducement for him to commit such a fraud? He did not know he was heir; if he had known that, he might then reasonably have inquired if there was a will. He knew he was a relation and an object of great regard with the General, who had provided for several of his children. If there was a will, nobody had a right to be more favoured in it than Mr. Bulkley himself. Can you suppose, therefore, if he had known there was a will, that he would have directed a fine to be levied to destroy that will? To suppose that, is to suppose insanity. He might be destroying his own prospects, for no one was more likely to be provided for than himself, under the will of General Wilford. There was no sufficient ground, therefore, to rest the case on, in order to bring before a jury a question of a fraudulent concealment.

Your Lordships are aware of the great importance of an answer in this case; because if you (a plaintiff) come to establish your title in a Court of Equity, and you ask the defendant, as you have a right to ask him, and to force him, by the penalties attached to false swearing, to state all he does know, if he swears he is not guilty of the act with which you charge him; that he has not and never had the knowledge upon which you would lay the foundation for your equity; the consequence is, you cannot fix him with that from which he has entirely purged himself, for a man has a right to have his answer read; unless you can disprove that which he swears, as your equity depends on the case you have made, and he flatly denies it by his answer, you are not entitled to a decree at all. The alleged equitable title cannot succeed, because it is not proved. It is of the essence of this case to look to what the defendant has sworn; **[132]** and I have shown to your Lordships, in answer to the several bills, that he has repeatedly pledged his oath, and there is no attempt at disproving it, that he did not know the effect of the fine as regarded the question of revocation; he did not know he was heir at law, and did not know a will was made.

My Lords, there is another point which is exceedingly important to be considered in this question as regards the propriety of the conduct of Mr. Bulkley, if he had

ever known the operation of the fine. Few and Ashmore were the General's confidential solicitors; Mr. Bulkley was a relation, and as such, an object of the General's bounty, and he was employed by him in those matters in which no confidence was necessarily placed in him; as for example, no confidence was necessary in completing the sale of part of the estate, beyond that which you would place in any respectable solicitor. But there is considerable confidence necessarily placed in the man who has the preparing of your testamentary disposition: the contract of sale may be known to all mankind, there is no reason why it should be concealed; the other is only known to yourself and your confidential solicitor, and you desire it shall not go further. Now the General did not employ his relation to draw his will, being desirous probably that he might be kept in ignorance of his testamentary dispositions. It was known that Few and Ashmore were the regular solicitors, both of the General and of Mrs. Wilford, in all confidential matters; would it not have been therefore a piece of impertinence on the part of Mr. Bulkley to have spoken to the General about his will?

The whole case before the jury on the trial of the issues, turned upon the conversation which took place between Mr. Bulkley and Mr. Bicknell, and which is **[133]** put very loosely in the depositions in the cause. It appears that there were two interviews between them; the first was about six weeks after General Wilford's death, the second was within a week after that, and did not last more than five minutes. Mr. Bicknell says, the Appellant informed him at the first interview that the fine was a revocation of the will of General Wilford, and deponent did not recollect that he did then make any remark thereon; but that on another occasion, when deponent was at the Green Man inn, on Blackheath, and just as he was entering a room there, the Appellant came up to him, and deponent then remarked that very great fault was found with the Appellant for not having told General Wilford that the fine he had levied was a revocation of the will; and in reply the Appellant said, "Why should I put a sword into the General's hands to cut my own throat?" and upon deponent's saying that he ought to have informed the General that the fine was a revocation of his will, the Appellant replied, "that he had no doubt that if the General had lived a little time longer, he would either have republished his will, or made a new one." Now is a man's estate to be taken from him for a rash observation in a casual conversation of this sort? In the first conversation, six weeks after the death, not a word is said by Mr. Bicknell in disapprobation as to the omission to state the operation of the fine: but one week after that again, which is seven weeks after the General's death, and when this matter became the subject of casual conversation, Mr. Bicknell attacks Mr. Bulkley on the ground of his not having made the communication. This conversation is made the foundation of a decree against Mr. Bulkley. Now, in the first place, does the observation itself **[134]** warrant the decree which has been made? How much might depend on the manner and tone in which it was said, the present or the past tense, with reference to the question which was asked? But what does it amount to? Mr. Bicknell thought fit to enter into a question of morals: Mr. Bulkley might very well say, "If you put it upon me as a matter of professional duty, as to whether I knew there was a will, whether I knew I was heir, whether I knew the operation of the fine, I cannot enter into all that discussion with you here; but if you are putting this as an abstract question of morals, then I say, 'Why should I put a sword into the General's hands to cut my own throat?'" Did he by these expressions admit that his acts were fraudulent? Are you to believe that a man in this casual way would make an admission which would take an estate from him? You cannot infer fraud: you must have it proved. Suppose he did express those words, they were expressed in the hurry of the moment; but when you come to interrogate the man on his oath, he swears positively that he did not know, and there is the evidence of Mr. Wilmot to corroborate that he did not know, the operation of a fine; he swears also that he did not know he was the heir, and that he did not know there was a will. Every fact from which your Lordships could infer any desire on the part of Mr. Bulkley that this fine should have the operation which it had, tends to a contrary conclusion. I submit therefore, on that part of the case, that there ought to have been no issue at all directed; but that in point of law, and upon the facts of the case, there ought to have been a decree to dismiss the bill.

The issues were, first, whether the defendant fraudulently induced R. R. Wilford

to extend a fine [135] levied by him, beyond the property sold to the Commissioners; secondly, whether the defendant fraudulently omitted to inform Mr. Wilford that the fine would revoke his will as to the lands comprised therein. On the trial of these issues, Dr. Lancy was examined, and he stated that "he attended General Wilford; that he died suddenly, not being ill more than half an hour; understood him to have a large fortune, and heard him mention Mr. Ashmore as his legal adviser." Then Mr. Few was examined, and he said, "We were the solicitors for preparing testator's will; I have attested the execution of more than one will for him. I saw him twice, the last was in November 1821; he called to re-execute the will; he called also the 14th June 1820, on account of a recent purchase of Ranelagh estates." By this evidence, it appears not only that Few and Co. were the solicitors for preparing his wills, but that the General was in the habit from time to time of republishing his will or making a new will as his property changed. Your Lordships cannot, therefore, look at this testator as a person who was not taking advice of his own confidential solicitors.

The evidence of Mary Wilcox, who was not examined in the cause in the Court of Chancery, had great influence on the jury. She said she lived in testator's service; often saw the defendant with the testator. "I was at home," she says, "with my mother, on account of my bad health;" she lived in one of testator's houses, very near to him. "Defendant called at my mother's on the Saturday after the testator's death. He came into the parlour, and said, 'Well, how do you do, Mary? So the poor General is dead; he has not left you a farthing, you will not get your fortune; never mind, there is a flaw [136] in the will; the property is mine, and I will take care of all of you.'" Here is a young woman called to prove this statement of Mr. Bulkley, in order to show that at this early period he was aware that the will was revoked, in contradiction of that which he has positively sworn, and which is corroborated by Mr. Wilmot in so strong a manner. Let us consider the probability of this; and suppose this girl was cleaning the house, and while she was scrubbing in comes Mr. Bulkley, and without the least reason in the world to induce him, he tells her and her mother that there is a flaw in the will, the property was his, and he would take care of them! But the mother does not appear to have heard a word of this; for the girl says her mother told her she did not hear it, and the girl herself never mentioned it till this cause was the subject of discussion; and her mother had in the mean time become a tenant of Mrs. Wilford's. The inference to be drawn from these facts is, that the daughter wished to benefit the mother, and trumped up this story; for it has not the slightest foundation of truth, and it would be absurd to give it credit. We had no intimation that any such evidence existed, or was about to be produced at the trial; if we had known it, we should have had no difficulty in rebutting it. If Mr. Bulkley had said all this, would she not communicate it sooner? would she not have run to her mother with breathless haste, and exclaimed, "How very fortunate! the General's will is revoked; we don't get a fortune under the will, but Mr. Bulkley is going to take care of all of us." This is a sort of declaration, which, if it had been made, she would have communicated to her mother. But she says that she only mentioned it to her a week or ten days before the trial. The mother did not recollect any-[137]-thing about it: when asked, she said that she never heard it. That there is the foulest perjury in this statement there can be no doubt whatever. It is disproved by the oath of Mr. Bulkley, made long before any such evidence was pretended to exist. It was never suggested that there was such evidence, or that such a person would be brought before the jury: and therefore I submit to your Lordships, that as this evidence had considerable effect on the jury, and came by surprise upon us, the Court of Chancery should have granted a new trial, if your Lordships should think that there ought to have been any trial at all. If your Lordships should think there was no such case made by the bill as justified the directing of the issues, then, seeing that the first issue was found for Mr. Bulkley, namely, that there was no fraudulent inducement, I submit to your Lordships that you must still dismiss the bill, because the fraudulent omission does not arise unless there was a fraudulent inducement. The two things are necessary to give an appearance of equity to the case. But if your Lordships should decide against me on that point, then I confidently submit that there ought to be a new trial of those issues, on the ground of the introduction of the evidence of Mary Wilcox.

Mr. F. Pollock, on the same side: The question here resolves itself into the equity

of the case, and the law, which is the trial of the issue. The first of those is disposed of. On the subject of the equity, I shall not, following my learned friend, trouble your Lordships at any length. I need not point out to your Lordships the danger that might ensue, if upon light grounds, if upon other than the most satisfactory and conclusive evidence, questions of this sort were to be entertained. One can easily put a variety [138] of cases where an equity might be considered to be perfectly clear. Thus, if it were made out satisfactorily that a man had sent for an attorney to make his will, who happened to be his heir at law; that, the testator being ignorant of that fact, and the attorney conscious of it, the will is made, two witnesses are sent for, the testator suggests a third, the lawyer assures him that a third is not necessary; the will is executed with two witnesses, and the testator dies. If all these facts were made out to the entire satisfaction of the Court, I can understand that it would *pro tanto* repeal the statute of frauds, and give effect to a will of real estate with two witnesses.

My Lords, I have always understood that fraud is a matter that cannot be inferred, it must be proved by distinct and clear evidence. It is not sufficient that there should rest in the mind a suspicion, there ought to be something far beyond suspicion; there ought to be grave, distinct, clear evidence that what is affirmed by the verdict of the jury on the second issue is the fact. It is not becoming a Court of Equity to send a suspicious case to a jury, in order that they may find a verdict in accordance with the secret wish of that Court, and that that verdict should be used for the purpose of doing what the Court of Equity could not have done without it. That is a very dangerous practice; and great injustice may be done unless a Court of Equity is exceedingly guarded in its appeal to a jury—with all the respect that I have for the verdict of a jury, when a matter is properly and distinctly raised before them by any pleadings, subject to the correction of a Judge, who will know when to nonsuit the plaintiff but upon an issue sent from the Court of Chancery, if there is the slightest ground of suspicion, the Judge who tries it would be bound to leave the matter to [139] the jury, and send back their opinion to the Court above; a nonsuit in such a case cannot take place, there must be a verdict for the plaintiff or defendant. If the Court of Equity was minded to obtain the verdict of a jury for the purpose of taking a course to which it saw its way in no other form, nothing would be more easy than to send any case of suspicion to a jury, and to ask them to give effect to that suspicion, by finding a verdict according to the course that the suspicion would lead to. In nine cases out of ten, on any such question as this, the verdict must be for the plaintiff, with the advantage of an opening speech, and with the advantage of a reply if the defendant gives any answer by evidence. I must say, from all the experience I have had, if questions of this description be so sent for the decision of a jury, that the rights of the subjects of this country would not be safe.

My Lords, I can hardly conceive a more unfortunate sort of issue than this, or one in which a common lawyer, acquainted with the practice and the course of proceeding before juries, would not anticipate the same result which has occurred. If they had brought this issue to me, I should have said, "Is there the slightest pretence for suggesting,—is there a point of the weakest sort on which you can hang a suspicion? if there is, take that issue to a jury, and I am certain the verdict will be against Mr. Bulkley." I would appeal to any common lawyer, whether a man ever has a fair trial in an indictment for a conspiracy or a fraud, with the opening speech stating and aggravating all the circumstances. The defendant by his counsel states his case, and what he has in answer, and then comes the reply. I am appealing to the experience of your Lordships on the subject; and if this be a notorious fact in the history of the administration of the law with respect to mat-[140]-ters sent to a jury to try in cases of fraud and suspicion, it is a reason why a Court of Equity should be very cautious in sending a matter of this sort to a jury to deal with those suspicions which, if I may with all respect say, the Court of Equity wishes to act upon, but feels that it dare not: whenever there is a case of suspicion, I should say to the Chancellor, "If there be only suspicion, send the case to a jury, and you will immediately get what you want,—the verdict of a jury that the suspicion is well founded." The point that I would present to your Lordships' attention is this, that an issue, such as this, so vaguely stated for the consideration of a jury, whether a man did do or omit to do something from a fraudulent intention,—an issue more

fraught with danger, more calculated to work injustice, and to put it in the power of a Court almost to make what decree it pleases if founded on the verdict of a jury, can hardly be imagined to have occurred in the history of the law.

Let us now consider the question of fraud: what is the evidence of that? nothing but some declarations that Mr. Bulkley is supposed to have made after the whole thing had been consummated, and which, if taken as they are proved, are perfectly reconcileable with Mr. Bulkley's entire innocence of the charge imputed to him. It is perfectly consistent with all expressions that fell from Mr. Bulkley after the testator was dead, and that he was entirely unimpeachable in the transaction, that whatever knowledge he had, he had acquired after the testator's death. What is the effect of the finding that the defendant did not fraudulently induce the testator to extend the fine? As compared with the other issue, and the finding of the jury upon the one and the other, is not this the result: that wherever you have legitimate means of getting at Mr. Bulkley's conduct and intention, [141] you discover them to be honourable; and it is only where you are not guided by evidence and conducted by fact, but left to suspicion, that you can impeach his character? When the jury are bound to acquit him of the substantial part of the charge, how monstrous it seems that they should convict him when there is nothing but suspicion. The jury find that, because he was in a situation to be benefited, he fraudulently omitted to do some act, which act is the cause of any benefit that could accrue to him. Upon the trial of these issues, there was no distinct evidence upon which a jury could safely act.

My Lord, it is suggested to me, and being in connexion with the trial before the jury, I would just mention, that Lord Tenterden laid it down as a maxim of law, and told the jury distinctly, that they ought to presume that Mr. Bulkley knew the effect of the fine. For many purposes undoubtedly it may be taken that the attorney ought to have known that, but there was not a tittle of evidence to prove that he did know it.—[Lord Wynford: Did not Lord Tenterden say he ought to have known it?]—I recollect perfectly well that his Lordship told the jury to presume that Mr. Bulkley knew the operation of the fine.

The Earl of Eldon: That is a question of great importance. I confess myself, I should have thought, and I hope it will turn out to have been argued in the Court of Chancery, that the Court would hold the doctrine, that an attorney should not have the benefit of anything, where he derives that benefit from ignorance of that which he ought to know.

Sir Charles Wetherell: That was argued in the Court below.

[142] The Earl of Eldon: For that reason, I confess I should hesitate for a long while before I sent an issue at all. I believe I am speaking in the presence of gentlemen who know (whether I am right or wrong in that, is perfectly immaterial) I generally decided everything myself that I could decide. You see it is a very different thing to say that a man has been acting fraudulently; that is what one would hesitate a long time before imputing it to anybody. But if you can sustain it,—I mean if you can take this as a general principle, that an attorney shall not be heard to say that he did not know what he ought to have known; that may happen to a man, perhaps, whose moral conduct in the transaction may be as pure as possible.

Mr. F. Pollock: I was stating what fell from Lord Tenterden on this subject. He said, "you ought to assume that the defendant did know what the effect of a fine was." Now the Vice-Chancellor (the present Master of the Rolls) said that was a question for the jury, and accordingly sent it to a jury: when we got to the jury, Lord Tenterden said, "No, that is matter of law, we ought to presume as against an attorney." I can understand the equity that one of your Lordships has alluded to. Whenever an attorney has been concerned in any transaction, be it conveyance, fine, will, or anything else, he shall never, as against his client, or any person claiming or to claim under the client, have any pecuniary benefit from that transaction, either by commission or omission. That is quite intelligible; and if that be the ground on which this case is put, that is a question for my learned friend Sir Edward Sugden to grapple with; but in the meantime, I do hope your Lordships will think [143] that that is a question that should have been disposed of by a Court of Equity: that the issue ought not to have been directed; that, being directed, it ought not to have been so found upon the evidence that was produced before the jury, and therefore that the verdict so found ought not to have been acted upon.

Sir Charles Wetherell, for the Respondent: We have *ab initio* protested against an issue being granted, as it placed the trial of the question upon a much more favourable footing for the Appellant than we could consent to; for if he could have shown on the trial that he was morally guiltless, that is, did not *ex animo* perpetrate a fraud, it was possible the result might have been different from what it now is. Fraud, as applicable to a case of this sort, is twofold; as first, if a man meditating a fraud knew that there was a will, and knew that the fine would revoke it, and also being heir at law, knew that unless the will was republished the fine would bring the property to him as heir, and take it away from the devisee; assuming these as facts proved, we say they would constitute one of the grossest cases of moral fraud that can be stated. But assuming, in the alternative, that the individual did not know that he was heir; did not know that a fine would revoke a will and bring the property to himself, and that therefore his conscience was exempt from moral turpitude, still we hold that there is a second view of fraud in the contemplation of the law; a constructive fraud, depending upon the legal principle, that if A is bound in his professional duty to give B advice to do a particular thing, and is so ignorant of his profession that he advises B to do a thing which B would not do except under that advice, and which even upon that **[144]** advice he would not do if he were informed of the consequence of the act, this ignorance of A, of the effect of an act which he is bound to know, simple ignorance, free from moral turpitude, in legal construction constitutes a fraud.

My Lords, at the time the fine was levied, the property is represented to have been worth about £30,000. The portion sold to the Chelsea Hospital for £9000 amounted to about six acres, or less than one third of the whole; so that the question is, whether it is the advantage of ignorance or premeditated fraud that has operated to bring into the pocket of the Appellant, who gave this advice, property which was worth £20,000; a tolerably good douceur, a pretty smart bonus for a man's ignorance! Who would not be ignorant of the law of fines and recoveries; what man would perfect his knowledge; who would ever look into the books, and disadvantageously throw away his time, if he is to obtain so very considerable a remuneration for his ignorance of his duty! I acquit Mr. Bulkley of being the perpetrator of that inceptive fraud of representing a fine to be necessary. The fine being proposed, and being undoubtedly necessary in respect to the land which the Hospital had purchased, I will not make against the Appellant the uncharitable insinuation of representing that there may not have been a considerable colour for him to have said to his employer, "Why, if you are levying a fine of a part of the Ranelagh estate, it is not amiss that you levy a fine of the whole." Your Lordships are aware that a part of the estate at Ranelagh was not held under this complicated title which was formerly vested in 36 proprietors. The mansion house, and some other property, consisting of land and messuages, were not embar-**[145]**-rassed with that difficulty; but when the fine came to be levied, the descriptions not only embraced that portion which was sold to the Hospital, but the whole of the property held under this divided and split title, and also the other property at Ranelagh which was not subject to any difficulties or complication of title. It is admitted by the Appellant in his answer, that he never informed his relation, whose confidential adviser he was, that this fine would revoke his will; —the antecedent will, which, as your Lordships know, gave the whole of the General's real estates to his widow. I wish here also not to do Mr. Bulkley any injustice; he had not made the General's will, he had no participation in the making of the will. I will suppose that he had not known what the dispositions of the property were, and consequently had not used this fine for a stratagem to supplant the will. I strip the case of all those prejudices which Mr. Pollock, in his episode of misleading counsel and misled juries, tells us, nine times out of ten attend every issue in which a widow or a person standing in *misericordia* on one side makes a claim against an attorney on the other, contrary to the rules of plain justice. It is admitted by the Appellant, that no information was given by him to the General that the fine would operate as a revocation of the will. The General dies, and after that Mr. Bulkley, not immediately, but some short time afterwards, writes a letter to the widow to tell her that all the unsold property of Ranelagh is his. He does not say when this posthumous knowledge, this emanation of light, broke in upon him, that the fine had operated as a revocation of the will; but that he learned it soon after the

General's death is very evident from the date of his letter informing the widow that he claimed the whole [146] estate; and that was not an idle threat, for it was followed up by two ejectments brought by the Appellant to recover possession from her of the whole of the estates.

The line of argument in the Court below on the Respondent's bill, praying relief from the proceedings at law, was to this effect: giving up the fraud of moral turpitude, the counsel below relied on the legal construction of the facts, of the confidential attorney of a man, recommending him to levy a fine, in perfect ignorance of its operation; and of the ignorant adviser by its operation obtaining that property which he whom he advised had by his will given to another person; that that act itself constituted, by legal presumption, a fraud, and that the public policy of this country made it a fraud for all the purposes for which equitable relief could be given; a fraud as cogent on the protection of a Court of Equity as a fraud combined with moral turpitude; and the more so, inasmuch as, unless your Lordships lay down the rule, as Lord Tenterden did on the trial of the issues, that in a case of this sort the legal adviser must in law be presumed to know that which he ought to know, as a fact you could hardly go into the metaphysics of it, because as to what passes in the attorney's mind, whether he did or did not know it, would be a nugatory issue, which could not as a matter of fact in one case out of one hundred be affirmatively or negatively established.

The proof of the Appellant's ignorance that a fine operated a revocation of a will depended on the evidence of Mr. Wilmot, who stated in his depositions in the cause in the Court of Chancery, that some time after the death of the testator, he met Mr. Bulkley, whose face represented a perfect mask of surprise when he was told that this fine had that effect. It is [147] a singular thing that when this case afterwards was sent to a trial upon the issues, this person was not called as a witness to prove the fact of ignorance, on the part of the Appellant, of the legal operation of the fine. What he stated in his depositions in Chancery might have been evidence on the issues; if anything had passed in conversation on the matter, that conversation would have been evidence. This gentleman, or any one else who could have related facts from which the jury could come to the conclusion that the Appellant was really ignorant of the state of the law, ought to have been produced; and yet he, the only one who at all comes near the fact, was not called, though he was examined in the Court of Equity, and his examination had some influence with Sir John Leach in directing the issues.

My friend who last addressed your Lordships has appealed as it were to the conscience of Judges in Equity. He says there are cases in which they have not fortitude enough to come to their own conclusion, but leave it to juries to come to that conclusion which they do not dare to express themselves. We know that that very learned individual Sir John Leach has been more firm in directing issues than other Judges of Courts of Equity have been; there has been upon many occasions a marked difference between him and a noble and learned Lord now sitting on one of the benches of this House. There are cases where it is notorious that that learned and noble Lord, so long Chancellor, would not direct issues without holding that it was the bounden duty of a Judge in Equity to come to a conclusion, if he could safely come to that conclusion on the evidence before him, and not send the case to a jury. Sir John Leach, on the other hand, relaxed that rule, and granted [148] issues, where the other Judges of a Court of Equity would have refused them and assumed to themselves the task of concluding upon the facts. This issue was directed by his Honor, while we maintained throughout the proposition of constructive fraud in law, as well as the fraud founded on moral turpitude; insisting that if the Appellant knew and meant the fine to revoke the will, then it was a fraud of moral turpitude; but if he were ignorant of it, and moral turpitude did not exist in the case, that then the constructive legal fraud remained unshaken. The Appellant now contends for the proposition that no issue at all should have been directed, and that unless we can prove moral turpitude the case is not within the reach of a Court of Equity; for both Sir Edward Sugden and Mr. Pollock totally threw aside the question of constructive fraud, founded on the ground of a man's being ignorant and unable to perform his duty, and profiting by his own ignorance; and contended that from the beginning there ought to have been no issue at all granted, and that all the proceedings consequent thereon were irregular. In order to show that a knowledge of the effect of a fine was not very common among

attornies, a case has been mentioned as occurring in Lord Erskine's time, who, it is said, lost an estate because the adviser of the gentleman who gave it did not know that a fine would operate a revocation of a will. There was in that case, whether the story is true or not, an ingredient which does not occur here: though the Lord Chancellor Erskine did not get the estate himself, the ignorant attorney did not get it, as the result of his ignorance; and therefore that is a kind of case which does not help the Appellant. But we have the judgment of Lord Tenterden on the law of [149] the case, whose decision has been confirmed by Lord Chancellor Lyndhurst, in his refusal of a new trial. The case now coming here, has there been any view of it stated, any principle broached, any authority cited, to shake that decision? It is very true, as Sir Edward Sugden said, that many of the cases where a man, from being the beneficial owner, is converted into a trustee, are cases either of contract or of fraud of moral turpitude: now the jury in this case finding against the Appellant on the second issue, have affirmed the proposition of moral turpitude. It may be true that most of the cases, where a man was converted into a trustee on the ground of having meditated and completed a fraud, are cases of contract or of a will obtained either by misrepresentation or information withheld. These cases occurred frequently when Lord Hardwicke was Chancellor. In the case of *Barnesley* v. *Powell* (1 Ves. sen. 120. 284), he laid it down broadly, that not only where a will was fraudulently obtained, but that where a fine was fraudulently obtained, the person setting up a title under such fine was as much to be converted into a trustee as if it were the case of a will obtained by fraud. Lord Hardwicke, in that case, particularly refers to the case of a fraudulent fine. Mr. Pollock's argument goes almost this length, that however unconscientious, inequitable, unfair, improper, may have been the means by which the fine was recommended and levied, it is not to be disturbed in a Court of Equity. I only refer to this argument now for the general proposition of Lord Hardwicke, who says in the case cited (p. 289), "though the Court of Equity cannot set aside a judgment of a Common-law Court, obtained against conscience, yet will it decree the party to acknow-[150]ledge satisfaction on that judgment, although he has received nothing, because it was obtained where nothing was due: so it cannot set aside a fine for being obtained by fraud and imposition, as the Court of Common Pleas to a certain degree and with some restrictions may: yet on a conveyance so obtained this Court never sends the plaintiff to the Common Pleas to set aside such conveyance, but considers the person obtaining the estate, even by fine, as a trustee, and decrees him to re-convey, on the general ground of laying hold of the ill conscience of the party to make him do what is necessary to restore matters as before." It would be superfluous for me to quote cases to illustrate a principle almost co-extensive with every mode in which a person unfairly acquires title to property, whether by deed, will, bond, judgment, however externally perfect, however legally perfect, may be that title. The proposition of Lord Hardwicke is commensurate with every species of cases, and is founded on the principle that the unimpeachable legal title is an impeachable title in equity, if by forcing the conscience you can convert a man into a trustee for the person whom he has originally supplanted.

My learned friend Mr. Pollock has not troubled himself with the history of this case, but he asks your Lordships, "why not lay down the rule *à priori*, that an attorney shall never take anything from his client"? That would be a very severe rule indeed; that is not a rule of the law of England; but a rule of the law of England from the earliest times is, that he may take the gift, but he must also show that it was fairly acquired. In the French law, it is a rule of incapacity *à priori*, that a confessor, a physician, a surgeon, an apothecary, a manager or confidential person, can take [151] no property whatever from his friend, his client, his patient, if it is given at the time while that relation between the parties may be supposed to have any influence whatever. But that has never been a rule of the law of England, of which the rule has been, not that a person is incapable of taking, but that he should show that improper influence was not used. There is no rule that a trustee, even, cannot take a benefit; there is no incapacity *à priori*, but he must show that the transaction was fair. The point for consideration is this: does not the public policy of our law require that an individual, who gives advice to his client, shall not, whether from the moral turpitude of design, or from the legal fraud of ignorance, give to him that advice which is to have the effect of taking

from the client's intended devisee the property devised, and of drawing it to himself, —an effect derived solely and entirely from his ignorance? This is a case of *crassa negligentia* or *crassa ignorantia*, and it is upon that ground Lord Tenterden's opinion of it must be understood to rest; an opinion in which the late Lord Chancellor clearly concurred, in his refusing to grant a new trial of the issues.

The Appellant's counsel seem pleased to suppose that there is no parallel case to this: says Sir E. Sugden, "You must show me a case like this, if you insist on sustaining the decree of the Court below." Now it happens that we can produce a parallel case, notwithstanding the novelty of the circumstances; a case not the worse for being decided by that very eminent and acute lawyer, Sir Anthony Hart, when he was Lord Chancellor of Ireland: the very case which we are discussing here, with reference to an attorney not advising his client that a fine would revoke his will of real estate, has occurred **[152]** with reference to personalty, in the instance of a counsellor in Ireland drawing a will and being executor in it, without telling his client, the testator, that his being made an executor would, *ipso jure*, carry to himself the residue of that property. It is the case of *Segrave* v. *Kirwan* (1 Beatty, 157), decided in 1828. The marginal note to the report is this: "Personal estate not disposed of by a will drawn by the confidential counsel (the sole executor), without informing the testator of the legal effect of the will, held to be a trust for the next of kin; for it was the bounden duty of the counsel to have informed the testator that if he made no disposition of his personal estate, the law, in consequence of his being the sole executor, would entitle him to retain it for his own benefit: he was bound to inquire of the testator in plain and distinct terms, whether it was his will that he should retain the personal estate for his own benefit." In that case the next of kin appeared to have been persons of whom the testator knew nothing; certainly it does not appear from the case that he had them at all in view when he applied to the defendant, a learned counsel, to give him advice in making his will. That defendant said in his answer, that he was convinced that "the testator, in making his will, never had his next of kin in contemplation, and that he did not know even who they were; that in July 1809 he had received the instructions from the testator; that he did not commit them to paper; that he left the testator's house then, and did not return till the middle of August, when he received the same instructions, and wrote a draft of a will accordingly." So that the learned counsel was desired to make a will for the testator, and to name himself therein as **[153]** the sole executor, not a word being mentioned about the next of kin; and Sir Anthony Hart, in his judgment, declared that the defendant in that case, "should have told the testator, when he made him executor, that the constitution of that character would carry with it the residue of the personal estate." That case seems to have been very fully argued. *Barnesley* v. *Powell* [1 Ves. Sen. 120], and other cases, among which were some cases decided by Lord Eldon, were referred to, and the doctrine was gone into very fully; and Sir Anthony Hart, having gone through some of the cases of wills improperly obtained, said, "I have no difficulty in pledging myself to this principle of equity: wherever a professional man is called on to give his services to a client, whether to prepare a deed or will, the law imputes to him a knowledge of all the legal consequences, and requires that he should distinctly and clearly point out to his client all those consequences, whence a benefit may arise to himself from the instrument so prepared; and that if he fail to do so, equity will deprive him of it." The principle of law, therefore, has been practically laid down in a weaker case than the present; because, if a lawyer is sent for to make a will for a client, who says, "I will make you my executor," and does not say, "Shall I give something to my next of kin?" or has not the name in his recollection, there it is a very different case from this, in which a will having been made, there was an antecedent right, in the moral sense of the expression; an antecedent bounty, which had actually passed from the devisor; a mind made up to give to a particular individual, and that gift is supplanted by the ignorant advice of the lawyer. The case in Ireland is not so strong; it is not a case of a revocation of a will made; it is not **[154]** a case of supplanting a gift; it is the case of a man who has made no will; who sends for counsel to advise him to make his will; the thing is sketched out, the party making it not mentioning his next of kin, or any other personal legatees; the counsel made his executor; and yet the rule there laid down is stricter in principle and more extensive in its application than is required in the present case.

A Court of Law acts upon the principle of compelling compensation for mere ignorance; a Court of Equity, where the specific remedy is administered, compels a man to give up that which his ignorance acquired to him, and made another person lose. If it were otherwise, an attorney may make a will or any instrument, and the rule would be, that he is not bound to know whether the advice which he gave was to operate to displace a gift antecedently made by will or other instrument; and that the more ignorant the attorney, the better and the safer will be the enjoyment of the fruits of his ignorance. That principle would be subversive of the rules that regulate the relation between attorney and client. Unless it is conceded that the principle of equity is applicable to professional ignorance as well as to moral fraud, your Lordships will practically find that there is very little difference between ignorance and design, or in other words, that a man may be designedly ignorant.

With respect to the trial of an issue in cases like this, in ninety-nine cases out of a hundred you cannot prove one way or the other the proposition of knowledge or ignorance; it is nugatory, therefore, to try the question as a question of fact, which in such a majority of cases it is almost impossible to ascertain. A case of fraud or moral turpitude you may try; but in taking a dis-**[155]** tinction between the *res gestae* of the original design and the moral turpitude of that design, and allowing that equitable relief may be given in the one case, but denying it in the other, where the party giving the advice may shelter his conscience, and may say that in the eye of God he has not committed the fraud, because he did not know he was committing it;—a distinction between frauds profitably practised in a state of ignorance, and frauds practised under a state of the knowledge of the law;—your Lordships cannot practically enforce your own metaphysical distinction, and no certain principle can be established. I apprehend, therefore, with great deference to your Lordships, that in a case where we have the authority of principle—where we have, after full consideration of this case, the authority of Lord Lyndhurst, and of Lord Tenterden also, in his ruling to the jury on the issue; and where we have, in the case last cited, an enforcement of the same principle carried infinitely further than this case—your Lordships will feel yourselves compelled, under all the circumstances, to affirm the decrees and orders appealed from.

Sir William Horne, on the same side:—This is a case of the greatest importance, not only in respect of the amount of the property, but also of the principle involved in it. The property consists of about 20 acres; there is one title to about 2½ acres; there is quite a different title to the remaining 17½ acres. The 2½ acres General Wilford either inherited or took by devise from his father; the remainder of the 20 acres he had acquired by various purchases from different owners. Mr. Bulkley admits by his answer, that he never asked General Wilford for the title deeds to those 2½ acres; so that the General could **[156]** have no idea that the fine would affect them. Mr. Bulkley being the General's confidential solicitor in the contract with the Governors of Chelsea Hospital, the General put into his hands the business of making a title to six acres purchased by them, a portion of the 17½ acres. General Wilford did not, as was insinuated in the argument for the Appellant, want to improve his own title to any part of the estate; the demand for the fine was made by the purchasers, to whom it was a matter of the most perfect indifference in what state the title would remain to any portion of the property *ultra* the six acres purchased. Mr. Bulkley does not pretend to say, that he stated to the General that a fine was necessary to cover either the whole 17½ acres, or the whole 20 acres. No evidence is given of such statement; and the counsel at the bar have not attempted to state that any communication was made to the General, or that the General had reason to suppose that the form of the conveyance would in any way whatever affect any portion of the property, except the six acres sold. Mr. Bulkley, therefore, by extending the fine to the whole estate, took on himself to do that which unquestionably was beyond his instructions and his duty.

In his bill of costs, delivered after the General's death, which was in evidence at law, he charged the General with £75 12s., "for my time and labour in this part of the affair," (that is, as to the titles in the levying of the fine), "no regular charge in detail can be made; and therefore, as the business was done on my own responsibility, without the expense and assistance of counsel, usual on such occasions, I insert, subject to your approbation, two guineas in respect of each abstract, amounting in

the whole to £75 12s." By that the Appellant meant to say, "I honestly think myself competent to do it: I have [157] saved you the additional expense of counsel: if counsel had been employed it would have been £100; but as I have done it on my own responsibility, give me £75 12s. I have saved you the difference." Could it be possible for this gentleman, if this *item* in his bill were read to him, to say what his counsel have been instructed to say for him—that he was ignorant of the elementary principles of the law of England? But whether he was ignorant or cognizant of the law, is wholly immaterial in respect of the relief prayed against him by the Respondent.

With respect to the argument for the Appellant on that part of his answer in which he said, that "at the time of levying the fine he believed he was related to the testator, and that it was probable he was his presumptive heir, but he did not know himself to be such presumptive heir;" in that answer, taken by himself, there is enough to satisfy any Court of Justice that he did believe he was the heir; and all doubt of his belief, and knowledge too, on that subject, is removed by the evidence of Mary Wilcox, who was a witness on the trial of the issues. She swore, and she was cross-examined, and not in the least degree shaken in what she had sworn, that Mr. Bulkley, on the first Saturday after the General's death—he died on Thursday or Friday—had a conversation with her, in which he alluded to the fact of the succession of the property having fallen to him, and that he said "there was a flaw in the will." Not that there was no will; he was lawyer enough to know there could not be a flaw in that which did not exist; he knew, therefore, the next day after the death of the testator, not only that there was a will, but also that he was heir to the testator; he knew also that the consequence of the fine he had levied was to put an end to the will; for that fine was the only flaw in the [158] will, and the very flaw to which these words referred, for if they did not refer to that they were nonsense. This examination proved more than was necessary to prove; for it was not necessary in this case to prove that positive fraud which the jury have truly found by their verdict; but if it were necessary, it was proved by the evidence of this young woman, taken in connexion with the omission of the Appellant to call his own witness, Mr. Wilmot: for Respondent being plaintiff in the issue, this girl being examined for her, and cross-examined for the Appellant, why did he not then call Mr. Wilmot to contradict her? Mr. Bicknell, another witness, said, that in a conversation between himself and Mr. Bulkley, the latter being asked why he did not communicate to General Wilford that the fine would at law revoke the will, said, "Would you have me arm the General with a sword to cut my own throat?" That reply, in connexion with the evidence to which your Lordships' attention has been just drawn, proves the whole case against the Appellant. This vulgar phrase, translated into plain English, means that Mr. Bulkley, the confidential agent and solicitor in levying the fine, did not think it safe for his own interests to inform the General of the effect of the fine, as the consequence of his so informing him would be, as of necessity he knew, that the General would instantly republish his will. If, therefore, it were necessary in support of the decree below to impute to the Appellant positive fraud, the case is not wanting in evidence to that extent.

But let us consider that we are not dealing simply with evidence of fraud against an individual, but with a doctrine in equity of the greatest importance; and that the question is, whether a professional man shall be permitted, not only to go free and unpunished [159] in respect of the damage which his ignorance has done to another, disappointing altogether the hopes and the directions of his employer, but also to have the property, taken from his employer or his employer's devisee by his ignorance, transferred as the fruit of that ignorance into his own pocket? Perilous and lamentable indeed would the state of the law be, if the dealings of mankind were subjected to either of these alternatives.

Your Lordships' attention has been drawn to the difference between the two titles, the one to 2½ acres, the other to 17½ acres; but your Lordships may not be aware, that for part of the property, the very house and premises in which the testator's widow was living, and which formed a portion of the 2½ acres, this Appellant immediately on the death of the testator brought an ejectment. It is not denied that it was not the intention of the testator to include the 2½ acres in the fine. The testator disregarding intention, and taking advantage of the rule of law in his favour, brought his action, but it was found by the jury that it never was intended that they

(the 2½ acres) should be included in the fine. And yet this gentleman, standing on his character, and wishing your Lordships to do justice to him more for the sake of his character and family than of this property, thought proper to instruct his counsel to argue against the verdict in that case, being determined still to spurn at the General's (his benefactor's) intention, and to insist upon the law for turning this widow out of the habitation left to her by her husband. There was consequently a solemn argument on the doctrine of the law as applicable to the case; and the result was, that the Court of King's Bench agreed with the jury, that it was never intended to include that part of the property in the parcels, and that it ought to be [160] considered as not included (8 Dowl. and Ryl. 549). By that fortunate act of justice, this lady had at law an escape from that part of the case.

The property therefore, the right to which your Lordships are now called upon by appeal to decide, is the Ranelagh estate, exclusive of those 2½ acres; and the question is, whether the Appellant is to be the beneficial owner of the remainder, or a trustee for the Respondent! As to authority for the decree in favour of the Respondent, we have no authority of cases, for no case similarly circumstanced has ever occurred; but if authority means principle, the books of Digests and Reports are full of it. No man can contend that the form of the assurance, if it be fraudulently obtained, makes the slightest difference in respect to principle. If a man be cheated of his estate, whether by fine or recovery or release or any other conveyance, is the fraud less because the cheat had the cunning to accomplish it, or is the security to him in point of law greater? What Mr. Pollock said about perfection of title at law, is not very intelligible to persons conversant with Courts of Equity. People come into Courts of Equity, only because they have not an adequate remedy at law. The very form and mode of coming into a Court of Equity, and the substance of the relief granted there, is this, that the defendant being proved by competent testimony to have obtained the property fraudulently, that Court holds this salutary admonition, "you have got it by fraud, you shall hold it as a trustee for the man whom you have deprived of the legal title, but who still has a right in equity to the property, and therefore you shall be turned into a trustee for him." That is the doctrine which the Courts below, by the decree, declared in this case.

[161] Sir Edward Sugden in reply:—My Lords, Sir William Horne has charged fraud upon the Appellant. There is not a shadow of pretence for that charge, and there is not a particle of evidence to prove it. There were so many shares of this property, that it was almost impossible to make out a title to any part, without levying a fine of the whole. Mr. Hugh Smith advised the fine to strengthen the General's title; and in the contract with the Hospital, Mr. Bicknell peremptorily required a fine to be levied with a view to the validity of that contract. It is in evidence that Mr. Bulkley, so far from suggesting the fine, advised the General not to go to the Lord Chief Justice's to levy it. How could Sir William Horne, then, undertake to say that fraud was proved against him? But then it is said he is guilty, not of a moral fraud, but of a fraud upon public policy. When a man is acquitted of a moral fraud, it is not easy to understand how he can be charged under the same circumstances with a fraud upon public policy. It is in proof that the Appellant did not know that he was heir at law, did not know that the General had made a will, and did not know the effect of the fine.

It is alleged that if ignorance is to be an excuse for attorneys, it will also be an excuse for surgeons, and will defeat all actions against them for ignorance. There is no analogy between the cases. A surgeon is bound to know the science of his profession; if he is called in to set a man's broken leg, he is bound to do it in a scientific manner; but an attorney is not bound to know the law scientifically. Cases have arisen at *Nisi Prius*, in which it has been ruled, that if an attorney makes a mistake upon a nice point of law, not generally known to attorneys, he is not [162] answerable (see *Montriou* v. *Jeffries*, 2 Carr. and P. 113; *Potts* v. *Sparrow*, 6 Carr. and P. 749). Nothing is more dangerous than a very learned attorney, who, instead of being a benefit, may be a great nuisance. Attorneys, as a class, do not profess knowledge of the law; if your Lordships will by law impress it upon them, they will find it a very troublesome gift; it will not answer the purpose either of themselves or their clients.—[Lord Wynford: You would not require an attorney to have so much knowledge of the law as the Lord Chancellor or Lord Chief Justice; but ought we not to require an attorney to know the consequence of an act he is constantly in the habit

of doing as an attorney?]—This was a nice point of law: it is well known to your Lordships, and it is quite surprising to everybody who knows the rule perfectly, how any attorney could be ignorant of it; but most attorneys did not and do not know it. The question is whether they are bound to know it. There is no denying that a counsel well informed in one branch of the profession, may be very ignorant of questions of law which belong to another branch; then how can a knowledge of the whole range of the law be expected from an attorney, who has to go into common law and equity and into every Court? His business is to get up the evidence, and to get all the facts well together, but it is not his business to pronounce on the law.

One of your Lordships, who knows the whole history of all the cases of revocation of wills from the earliest time, and from whose judgments we all derive on that subject so much information, knows that it was not always so easy to say what would operate as a revocation of a will; some of the most learned [163] Judges doubted as to what was or not a revocation of a will, and whether or not a subsequent conveyance, although it had no operation as a conveyance, had that effect: *Lord Lincoln's Case* (1 Ab. Eq. 411; Show. P.C. 154; *Doe* v. *Otway* (7 Term Rep. 399; 1 Bos. and Pull. 576). Lord Lincoln, thinking he was going to marry, executed a settlement by lease and release, and made several limitations in contemplation of his marriage, no one of which ever took effect, because the marriage never took place; and yet that settlement was held to be a revocation of his antecedent will. The decision in *Doe* v. *Otway* was against the opinion of Lord Chief Justice Eyre; and it has been said by Lord Mansfield, that "the absurdity of Lord Lincoln's case is shocking" (*Doe* v. *Pott*, Doug. 710, 722). Would your Lordships require an attorney to know that on which the most eminent lawyers have differed? There is not one attorney in twenty employed to levy a fine, that would have told a man it would operate as a revocation of his will; they never would have thought of stating such a thing; it is not their business to point that out; they are not thinking of the man's will, but of levying a fine. Suppose this were the case of a common marriage settlement, with the usual limitations of a fee simple estate, and that the settlor had previously made a will; there is a revocation of the will by the settlement. Is there any attorney who, being employed to prepare that settlement, would have told the settlor that it was a revocation of the will, and that he must republish it? He has enough to do to execute the purpose for which he was retained, without looking to the consequences; and those who are conversant with the practice in the alienation of real property, know [164] that not one attorney in one thousand in London would tell a client, on levying a fine, that it would operate as a revocation of his will, unless his attention was called to the matter. It would, besides, have been a most indecent thing for the Appellant to have said a word about the will: he was not the person employed in the General's testamentary dispositions; and if he had ventured on that subject, the General most probably would have been more angry with him than he had been when he advised him not to go to the Lord Chief Justice's, and would have ordered him out of the room, and would have said, "What have you to do with my will? I never consulted you about my will: pray confine your advice to what I have consulted you upon."

The case of *Segrave* v. *Kirwan* [1 Beatty, 157], the only authority cited against the Appellant, is entirely different from this case. There the intimate friend and confidential counsel of the testator, had on more than one occasion drawn wills for him, and in none of these wills was he himself an object of bounty. The testator, in giving him instructions for his last will, requested him to be his executor; he consented to the request, and drew the draft of a will, in which the testator did not dispose of his personal estate; but it is clear from the statement of the case, that he did not intend that gentleman to have any beneficial interest in that estate. The result, however, of appointing him executor was in law to give him the undisposed of residue of the personalty. That result was open to many distinctions in a Court of Equity: there were many circumstances upon which that Court would hold an executor a trustee of the property; as upon the circumstance of there being a bequest of a specific legacy to the executor, or upon the circumstance [165] that a man has treated himself as a trustee, and that he was appointed to take the legal interest only; or upon a fraudulent appointment (*Foster* v. *Monk*, 1 Vern. 473; *Marriot* v. *Marriot*, 1 Str. 666); and by the late Act (11 Geo. 4 and 1 Will. 4, c. 40), the executor, in every case of a residue undisposed of, is made a trustee for the next of kin, according to the statute of distri-

butions. Now this gentleman being a counsel, was bound to know the rule of law. he did not communicate that knowledge, and the Court of Equity justly deprived him of the property which he took as executor; but if it had not done that, it would have taken away his stock in trade as a lawyer; if it had held that he did not know or ought not to have known the law, it would have destroyed him as a professional man, while it would have left him the property. But if your Lordships say that this Appellant had the knowledge, which he swears he had not, and which he is not required to have, you do not give him any benefit in that respect, while you take the property from him. It is a disgrace to a counsel not to know such a rule of law; it is dishonest not to make himself master of that on which the security of those who consult him depends, and for which the world gives him credit; therefore you cannot impute such ignorance to a counsel. He was a practising counsel, a confidential adviser, and consulted as such; he took upon himself the duty to advise. The whole case shows there was a confidence in him, and the Court of Equity acted upon that, and held him a trustee, because the testator meant to give him nothing in the shape of benefit. The party here also (the General) had no intention to give; there was no intention of one to take, or of the other to give. The taking **[166]** was the mere effect of a rule of law operating *in invitum*.

In the case in Ireland, the learned Judge referred to several cases, some of which were decided by Lord Eldon when he was Lord Chancellor; but those were cases of contract, showing how far an attorney can contract with his client; and it was held very properly in them, that if an attorney will deal with his client he must deal with him at arm's length, and show he gave him all the information which he had (*Gibson* v. *Jeyes*, 6 Ves. 226). But the case now before your Lordships is not a case of contract, but of the simple operation of the law, which, by force of the fine, vested the property in the Appellant; so that neither the principal case of *Seagrave* v. *Kirwan* [1 Beatty, 157], nor the cases cited in it, have any just application to this case.

My learned friends have declared themselves quite as strong as I am against the necessity of the issue: if then an issue was not necessary, it ought not to have been directed; and your Lordships therefore ought to decide the case now on the evidence that was before the Court below. The case made by the pleadings was that the Appellant fraudulently induced the General to levy the fine, and fraudulently omitted to tell him what its operation would be. Nobody ever thought of arguing the case in the first instance, except upon the ground and the assumption which is made in the bill —that there was a fraudulent inducement. The jury, on the trial of the issue, were asked whether the Appellant fraudulently induced the testator to do the act. The question could never have been asked, if, in the opinion of the learned Judge who directed the issue, a foundation had not been laid for it by the form of the pleadings in the **[167]** cause. The issue was whether the Appellant fraudulently induced the testator to levy the fine, and the jury said he did not. Now if he did not fraudulently induce, he did not induce at all. He could not have fraudulently induced, for it is in evidence that he was against the General's going to levy the fine. If your Lordships take away all inducement, which the jury on the evidence has done, then there is nothing to rest the case on but the fraudulent omission. What is that? A fraudulent omission to communicate, implies previous knowledge. If it be laid down as an abstract rule of law that an attorney is bound to have the knowledge and to communicate it, one can understand that rule, whether right or wrong; but one cannot understand what is the meaning of asking whether a man fraudulently omitted to make a statement, unless in the very asking the question it is admitted that he was not bound to have or to communicate the knowledge. The learned Judge who directed the issue held that he was not bound, as an attorney, to have the knowledge, and that there was no imputation upon him as an attorney that he had it not, and therefore the issue was framed with that view; because if it were asked, "did he fraudulently induce the act, and then did he omit to inform?" that would lead to a different inference; but where it was asked first, "did he fraudulently induce the act?" and secondly, "did he fraudulently omit to inform?" that form of the question showed that the mere omission amounted to nothing. He might omit because he did not know; he might omit because he did not think it material; and in neither case would the omission be a fraud. The Appellant has sworn that he did not know that which he was charged with omitting to communicate. Your Lord-**[168]**-ships.

sitting as a Court of Equity, are bound to believe what a defendant has sworn to in his answer, unless it is contradicted by one witness, with circumstances in aid of that one witness, or by two witnesses. Nobody at all has contradicted, nobody could contradict, what the Appellant has sworn, that he was not aware of the operation of the fine, and that he did not know there was a will. If ever a case was perfectly divested of all circumstances to induce a man to commit a fraud, this is the very case; for unless he knew he was heir; unless he knew there was a will devising away the property from him; unless he knew of the operation of the fine, and that it would revoke a will; there was no improper motive that he could have, not in interfering, because he did not interfere, or when he did his interference was unsuccessful, but in not informing General Wilford what the operation of the fine would be. Then on what ground is a Court of Equity to take the estate from this Appellant? It may be a case for your Lordships' compassion, when you know all the circumstances; when you are told there was a will, which gave the estate to the widow; when you are told, as the fact turns out, that the Appellant was heir to the testator; and when you are told of the fine, and find that the operation of it was to revoke the will, and devolve the estate on the heir at law. Ten thousand other wills have been revoked by similar accidents (See *Locke* v. *Foote*, 5 Sim. 618); the fault, if any, is to be charged on the law, that allows a will to be revoked without the knowledge of the testator. Your Lordships have seen so much of the effect of that law in favour of the heir, that you must know that thousands of times heirs at law take estates which **[169]** they never were intended to have. It is the common rule of law; if it is not the right one, let us have a better; but while it remains it is subject to accident, and one may win or may lose, but we must take the law as we find it.

There is nothing in this case to fix even a shade of suspicion on the moral conduct of the Appellant; and Sir Charles Wetherell acquitted him of all moral turpitude: but advantage has been taken of the words used by the Appellant, in a loose and casual conversation with Mr. Bicknell, "Why should I put a sword into the General's hand to cut my own throat?" That was a figurative expression to get rid of an improper question, on an occasion which did not give an opportunity for explanation. That was no admission that the Appellant had contemplated a fraud in the levying of the fine. The whole transaction was then long concluded, and it would be most unreasonable to suppose that a man of common sense would ever admit so unnecessarily that he had acted as a consummate scoundrel.

Independently of the Appellant's solemn declaration that he did not know what would be the effect of the fine, Mr. Wilmot's evidence also goes to show that he had not the knowledge. Then they say on the other side, "why did we not produce Mr. Wilmot on the trial at law?" Because Sir James Scarlett, who conducted the cause, was of opinion that Mr. Wilmot's evidence could not be received; for it was mere conversation between him and Mr. Bulkley; and that was the only reason why Mr. Wilmot was not called. The only question now is, whether the evidence at law altered the case made in the Court below. The witness Mary Wilcox was not examined in equity; the Respondent did not state **[170]** that she had any such witness: the Appellant was utterly taken by surprise by her improbable story. That evidence throws great discredit upon the case on the other side. Mary Wilcox, in her examination, stated that her mother was present at the supposed conversation, in which she stated that Mr. Bulkley said he would provide for them all; and that, upon speaking afterwards to her mother about it, the mother said she never heard of any such thing. How could she? No such conversation passed! The daughter invented it: the mother not only did not hear this conversation, but she never heard of it. It is impossible such an offer could have been made and such a promise given by Mr. Bulkley, without having excited great hopes in the family, and led to repeated conversations on the subject; yet not the slightest notice is taken of the promise; no application is made by these Wilcoxes for the least relief, although they were not above relief. There is not the slightest credit to be given to that evidence. It took the Appellant by surprise, as he never heard of it, and the girl did not pretend that she told any human being that such an offer had been made. She married subsequently, yet she did not communicate it to her husband. It is quite clear the young woman brought forward this testimony to please Mrs. Wilford, in whose service or in whose house at that time her mother was living, for the purpose of

doing some service to her mother. If your Lordships strike out this witness's story, as tainting and corrupting the case brought forward on the other side, then it stands only on the evidence in the Court below; but if your Lordships place the least reliance on that witness, we ask confidently for a new trial. We shall be able to prove that what [171] she stated was not true, and to satisfy the jury, if they placed any reliance on her evidence, that her story was one of her own invention. On all these grounds we hope that your Lordships will either dismiss this bill, or, if you think that part of the case has not hitherto met with a sufficient answer, that you will now direct a new trial.

The Earl of Eldon:—My Lords, this is a case undoubtedly of very great importance, and I should be extremely sorry if your Lordships were to come to a judgment on it without its being fully and clearly understood upon what principle you proceed in deciding it. My Lords, I may perhaps be wrong, but I cannot help thinking—and I am now stating only what I have often stated before, and what I again recommend in my old age, from the experience I have had in the Court of Chancery—that the habit, too much adopted, of sending matters in equity for the decisions of Courts of Law, which ought to have been decided in the Equity Court, have led, in many instances, to very bad consequences. I have the comfort of hoping that I always did my utmost to save parties from that expense; and my practice was governed by what I thought most expedient for the ends of justice.

I now come to the decree in this case, which was made on the merits in 1826. Two issues were then directed to be tried at law, but with them we have nothing to do now. The first thing for your Lordships to decide here is, whether it was the duty of the Appellant, the attorney in levying the fine, to make inquiry, when the fine was proposed to be levied, whether General Wilford had made a will or not. Your Lordships may venture to say, at least, [172] that it is a point of great importance, and that it ought to be decided one way or the other, whether the attorney should know the effect of the fine; and if he did know that, whether he was to be at liberty to take advantage of his knowledge; and if he did not know it, whether he was to profit by his ignorance; whether he was ignorant that the fine revoked the will, not whether he was to be visited with the consequences of his fraud. It is also a matter of great importance whether these points in this case—after it has travelled through Westminster Hall for 11 years—should not now be settled; and whether the Court of Chancery should not have settled them after it had all the evidence before it. My Lords, a case was cited in the argument at the bar; it was decided in Ireland: I remember having heard a great deal about that case at the time when it was decided; and I perfectly well recollect the opinions of many learned persons about that case (persons who are now sleeping in their graves), all agreeing that that case was well decided. I have since taken the liberty of asking a loan of that case. It was decided on this principle—not that there was a fraud on the part of the gentleman who was defendant in that case, and whose conduct was then dealt with; but on this principle, that a man should not take to himself the benefit of his ignorance in matters of which he ought to have knowledge. And if I remember rightly the circumstances of that case, there was no reason for saying that the gentleman who gave advice there knew that any benefit would come to himself by being appointed executor.—[His Lordship stated at length the circumstances of that case (*Segrave* v. *Kirwan*, 1 Beatty, 157).]—Your Lordships understand well what [173] a material interest the gentleman obtained by his being appointed executor, in the then state of the law; because, if there was no residuary legatee, and if no legacy was given by the will to the executor himself, he would take the whole of the residue of the testator's personal estate. The principle of the decision in that case was this, that there was no fraud, that the gentleman meant no fraud, but that it was considered as against public policy, that a man who ought to know the law which would give the executor the clear residue of the personal estate for his own benefit,—it was against the policy of the general law that he, by being made executor, should take to himself the benefit of his own ignorance. That, my Lords, is a very important case to be considered in deciding the present case; and I should like to have time to look into it, and into the law in Ireland on this subject. During 25 years that I had the honour of presiding in the Court of Chancery I carefully avoided, (I am sure I was not in the habit,—I know I meant avoiding,) whether in matters relating to bankruptcy, or any other thing that

came before me, putting the parties to the expense of trying issues one after another, visiting the parties again with further expense in moving for new trials in the Courts of Equity, just as if the case on the record did not in itself afford some principle of equity by which I might decide the case. But if the record did not allow me to decide the case upon such principle, I made it my duty, if it went to a jury, (I know I intended it to be so,) to deliver the parties as soon as possible from the protracted evils of the suit. In this case I think there ought to have been a *quietus* for the Defendant, or a decree for the Plaintiff, in 1823; but your Lordships have seen by this record what has [174] since taken place. My Lords, I should be sorry if I ventured to recommend you to give final judgment without looking into the cases which have been cited at your Lordships' bar, and such other cases as may be in my own recollection. This case has been hanging on from 1823 to 1834, yet I hope your Lordship will not think I am asking too much if I ask the short interval between this and Tuesday next to consider and dispose finally of this case.

On the motion of Lord Wynford, the further consideration of their Lordships' judgment was postponed to the Tuesday following.

The Earl of Eldon:—Your Lordships are now to pronounce your judgment in a cause which, I am sorry to say, was instituted in the Court of Chancery so long ago as the year 1823. My Lords, if the view I take of this case be correct, it appears to me that the judgment might have been pronounced long since. The circumstances of the case are these: Richard Rich Wilford was seised at the time of making his will of lands and hereditaments at Chelsea, in the county of Middlesex, consisting of a mansion-house called Ranelagh-house, with the appurtenances, together with certain pieces of land adjoining, comprising about two acres. He was likewise entitled to another estate near adjoining, called the Ranelagh estate, comprising about 18 acres. He made a will dated the 28th of March 1822, by which he devised all his real estate to his wife, the Respondent in this appeal, in fee. Before making the will he had entered into a contract with the Commissioners and Governors of Chelsea Hospital, on behalf of himself and the other proprietors of the Ranelagh estate, for the sale of part [175] of that estate to them. It appears by the pleadings in the case that the title to the Ranelagh estate was complicated, and, in consequence of that, doubts arose respecting the title to so much of that estate as was contracted to be sold; and therefore it formed part of the contract that the testator should levy a fine of the lands respecting which such doubt had arisen. It appears that the testator, upon many occasions before, had employed other solicitors than the Appellant; I think Mr. Ashmore was one. The Appellant, who is an attorney, was a relation of the testator. The necessity of levying a fine arose out of the persons, who were concerned for the Governor and Commissioners of Chelsea Hospital, thinking it would be desirable, as unquestionably it would be, to have a fine levied of those premises, in order that they, as the purchasers, might be sure of having a good title. It became therefore necessary to levy such fine. The Appellant in this case being, as I understand, an attorney, was employed for the purpose of giving a satisfactory title to those who had bought this parcel of the testator's estate.

My Lords, I observe it is stated that the Appellant either was informed, or thought it was advisable, that a fine should be levied, not only of that part of the estate which had been contracted for by the Chelsea Hospital Commissioners,—not confining the fine which was levied to those premises where necessity called for the fine, but he thought proper,—whether in consequence of its suggesting itself to him, or having it suggested by others, does not I think clearly appear,—but he thought proper to levy a fine not only of that estate, but of the estates in reference to which no contract had been entered into with the Commissioners of Chelsea Hospital, and which re[176]quired no attention whatever to be given to them. The result of that is this—that the fine that was necessary to complete the title to the Chelsea Hospital Commissioners operated in law as a revocation of the devise to the widow of the whole of these premises, a parcel of which only had been sold to the Commissioners. It turned out that the gentleman who had advised this large extent of the fine, the attorney, was himself the heir at law of the testator, though he states that he had very great doubts about it, and did not then believe that he was. I wish to put it in the strongest way for him, that he did not know and did not believe

that he was the heir at law of the testator till he made that discovery, to say the least of it, shortly after the death of the testator; and that, therefore, this misfortune to the wife in losing this property was owing to his want of knowledge that the title of heir belonged to him, for a relation he must have known himself to be. The testator had been very bountiful in his exertions to serve this gentleman; and I do not mean to say that if the testator had had an opportunity of considering and reconsidering what would be the effect of this fine, I am far from being certain that he would not have left this property even to this gentleman himself. He states that he did not know or believe, or to that effect, that he was the heir at law of the testator, and that he did not know the effect of the fine would be such as in point of law it has been; and therefore that his notion is, that he is entitled to have this property under the circumstances of this case.

My Lords, I may be mistaken, or I may have forgotten perhaps, but I have taken great pains to refresh my mind upon this subject, though I have been very much absent from matters in courts of justice for somewhat now more than seven years: I have taken [177] great pains to look into this subject, and I do profess myself, if I had heard the cause in the year 1823, it would have been utterly impossible for me to direct an issue to a Court of Law, consistently with my habit, if possible, to save parties the expense of trials of issues, if the case afforded a clear ground of equity between the parties; and in this case I think such clear ground was afforded. I should have thought it my duty, upon the principle which I am now about to state, at once to have said, "Whether you meant fraud, whether you knew that you were the heir at law of the testator or not, you who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property for the benefit of that person who would have remained entitled to it if you had known what you ought as an attorney to have known; and not knowing it, because you ought to have known it, you shall not take advantage of your own ignorance;" for I carry it so far, "you shall not take advantage of your own ignorance." It is too dangerous to the interests of mankind, that those who are bound to advise, and who being bound to advise ought to be able to give sound and sufficient advice—it is too dangerous to allow that they shall ever take advantage of their own ignorance, of their own professional ignorance, to the prejudice of others.

My Lords, this principle I find laid down by Lord Hardwicke in different cases (*Barnesley* v. *Powell*, 1 Ves. 284), and it is exceedingly well illustrated in the case stated from Ireland. I have in my possession at this moment the manuscript of that decree, which was quoted at the bar. [178] I am sure it is genuine: I know the handwriting of Sir Anthony Hart, the then Lord Chancellor of Ireland. This manuscript which I now have shows the diligence and accurate attention which he gave to the subject, having corrected and recorrected it, in order that the principle might be understood upon which the decree was made. My Lords, that case was this:—A gentleman at the bar, who appeared by the former transactions between the testator and himself to have been a very intimate friend of the testator, made himself executor to the testator under these circumstances: By the law at that time, if there was no personal estate given in legacies to other persons, or even if there were legacies given to other persons, the executor, by his appointment as such executor, would have taken the whole of the residue of the personal estate. It was not the intention of that testator to give this learned counsellor anything more than the office of executor; but he insisted that, having got the office of executor, he was entitled to the residue of the personal estate; and it turned out as a matter of fact, and the case was in this respect I believe perfectly honest, that he was not aware of the doctrine at the time that he made the will which appointed him executor, that he would be entitled to this personal estate. But what said the Court to that? The Court said, "That is what you ought to have known; you ought to have known it, and you shall not take for your own benefit that which you have derived from your professional ignorance;" and the consequence was, that he was declared to be a trustee, for the next of kin, of the residue of the personal estate; and I humbly think this Appellant is a trustee of that part of the real estate with reference to which there was no occasion whatever, in order to [179] carry the contract with the Commissioners of Chelsea Hospital into effect, to levy any fine.

This gentleman, I see, alleges that he did not know the testator had made a will; but he could not but know, considering the proposition I have stated, that if the testator had made a will, devising all the other estates to his widow—that if he levied a fine to the extent that this fine was levied, it must revoke his will. I say it was his duty to have asked the testator whether he had made a will, and not to have gone beyond the necessity that arose in that case for the purpose of making the title to the Commissioners complete, and of carrying that contract into effect; and it is as clear as the sun at noon day, at least we know nothing to the contrary, and it is but fair to say it, looking at the whole of his answer, that if he had known that the estate had been devised to the lady who had become General Wilford's widow, he would not have levied a fine of that estate, unless under a deed that should give the same effect as to her interest as she would have taken under the will. I have no hesitation, therefore, in saying that if I had heard this cause originally, I should not have directed any issues, because there is a principle of equity that considers that if there is negligence it is quite enough; but instead of that, two issues were directed, one of those issues was found for Mr. Bulkley, but the other was found against him, and that certainly does in the finding impute to him that he fraudulently omitted to do so and so.

My Lords, I should feel at my time of life, what I thank God I do not feel, deep regret, if I had ever been too quick in charging anybody with fraud. I hope I never have been; but in the present case I must go the length of saying that I cannot expound [180] that declaration which was made to Mr. Bicknell by this gentleman, Mr. Bulkley—I cannot possibly expound that, but by forming at least a conjecture that my mind does not easily get rid of, that this gentleman had at least a conviction in his mind that it was better for him to take the chance of proving himself to be the heir at law after the death of this testator, than to take the chance of his deriving a benefit from this property under the will. And really, when one attends to the argument of so able, acute, and learned a counsel as Sir E. Sudgen, and when you have nothing to meet that which is the natural effect of the declaration made at a casual meeting of Mr. Bicknell and Mr. Bulkley—when you have nothing but the reasoning that you heard from below the bar upon the subject, I cannot but persuade myself that Sir E. Sugden himself thought that the account he gave of it would have as little influence upon your Lordships' minds as it had upon his own. See what the words are. Mr. Bicknell says "Have you inquired about a will?" What is the answer? "What! was I to put a sword," mind you, "into the General's hand," those are the words, "that he might cut my throat?" What was the meaning of that? Plainly interpreted it is this, and this only—that I would not lose the chance I have, by anything being done to counteract the effect of that which I have done. And who was it that was to interfere in order to counteract that? Why it was the General himself he alludes to. "Would I put a sword into the General's hands, in order that he might cut my throat!" Is it possible to deny that there is ground for reasoning upon that declaration, that there was at that moment in the mind of Mr. Bulkley a notion that the effect of the fine would be disappointed by an act of the General himself, if he [181] were aware of its effect? My Lords, the second issue was therefore found by the jury against Mr. Bulkley, and the finding of the jury was that he did fraudulently omit to tell the testator the effect of the fine.

I am very sorry to put this case, at least entirely, upon fraud; but my opinion is this, that the safety of mankind with respect to their property depends upon your Lordships requiring from attorneys that knowledge which every attorney ought to have; because to tell me that an attorney does not know, if he levies a fine of the whole of a man's property, that it will revoke his will, is not an argument to which I would be inclined to pay attention: there may be persons in the world who are so ignorant, but you cannot act upon their ignorance. My Lords, it is impossible to follow up these cases to their proper effect, as you do in the case of trustees, unless you hold attorneys to this principle, that they shall give all the information that they ought to give; and unless you hold them also to this principle, that they shall not plead ignorance of that which they ought to know. I should have made this decree in the first instance, without troubling myself with fraud at all, by applying the very principles which have been applied to trustees, to persons who are entrusted

with the due management, in point of legal proceedings, of the property of others; and the further principle that they shall not take advantage of their own ignorance; and if Mr. Bulkley was in this case ignorant, much more, if his conduct was fraudulent—and I do not know how to set aside the finding of the jury; but I should have held that the omission to inquire whether there was a will, or the alleged ignorance that the will would be affected as to the other property to [182] which the fine was meant to apply if it went beyond that property to which the levy of the fine ought to have confined it, formed sufficient grounds of equity for a decree against the Appellant. I say that there is principle enough in the policy of the law, as administered in Courts of Equity, to say he must be considered a trustee of that property on which the fine ought not to have been levied. Under these circumstances, called upon as I have been by some of your Lordships to give my opinion in this case, such is the opinion I have formed. I think it impossible that this gentleman can hold this property, except as a trustee for the individual who was the devisee of that property under the will of the testator. My Lords, without detaining your Lordships longer—for I do not like to stand up to support by much length of argument that which I take to be a plain principle of equity—and therefore, after stating the grounds upon which I have formed that opinion, it is for my noble and learned friend on the woolsack, who has been much more acquainted with the administration of justice than I have been, to inform your Lordships whether I have taken a wrong view of the subject, or whether I am correct in the opinion I have formed.

Lord Wynford: My Lords, it is scarcely necessary to say a word after what my noble and learned friend has addressed to your Lordships. I agree with every sentence he has uttered, and I hope one of the observations he has made will have its effect upon the members of the profession of the law—that they will all know, particularly with regard to that part of the profession to which the appellant belongs, that though there is no body of men that are more honourable in the discharge of those delicate duties that are cast [183] upon them than the generality of them are, yet, notwithstanding I am satisfied of that, still I hope that the observation made by my noble friend will have its due impression upon them, that there is an established principle in the Courts of Equity that no professional man can take advantage of his ignorance, of his negligence, much less of his fraud. If there were not such a principle recognized by Courts of Equity, they would ill deserve that name. There are two cases to which your Lordships' attention has been called at the bar, which recognize that principle. In the first of them, reported by the elder Vesey (*Barnesley* v. *Powell*, 1 Ves. 284), it is distinctly laid down as a principle, that no party can take advantage even of his ignorance, or of his negligence, and still less undoubtedly of his fraud. Still more clearly is it laid down in the case upon which my noble friend has commented,—that case decided by the late excellent and learned Lord Chancellor Hart, in Ireland.

My Lords, let us see whether the Appellant in this case is not seeking to take advantage even of his ignorance, or whether he is not attempting to avail himself of his fraud. He clearly knew that he was a relation, for that is admitted; and he believed more, for he has admitted that it was probable he was the heir presumptive of the deceased. Under these circumstances he was called upon to levy a fine of a portion of the estate. At the time he levied the fine he must have known, and I will prove that presently, that there was a will, and that the fine would revoke the will. But whether he knew it or not, he ought to have known it, and every attorney ought to know that a fine would revoke the will. I say this upon authority, an authority that will ever remain unquestioned [184] in Westminster Hall—the authority of Lord Tenterden, who distinctly stated it in the direction he gave the jury in this case. I say it also upon the authority of Sir Anthony Hart, who distinctly stated that a barrister—and I know of no distincton between a barrister and an attorney in this case, except that the latter is more frequently called upon to consider cases of this sort than a barrister,—that a barrister was bound to know that the making a man an executor to a will, giving him no legacy, put under his control and power, for his own use, all the residue of the property of the testator not disposed of. Upon the authority of both these learned persons I say, and if there is any difference between the case of a man by his will making another an

executor, thereby giving him the residue of his personal property—if there is any difference between that and this case, this case of levying a fine and revoking the will by which this testator disposed of his property, is a much stronger case, because a man must be very ignorant indeed not to know that making a different disposition of the property does revoke the disposition already made. Now that being the case, is it possible to say upon what is stated in the bill, and admitted in the answer, that your Lordships would not be allowing this gentleman to take advantage of his ignorance, or, as the jury have said, of his fraud, by allowing this testator to levy fine, without informing him of the effect that that fine would have upon the will? Was not it his duty to have inquired of his client and relation, if he did not know, whether he had made a will, and to tell him that the effect of what he was doing would be completely to do away with the effect of the will?

It is not necessary to decide in this case, though I should have no difficulty in coming to a decision [185] upon the point, whether or not, supposing this gentleman to have known he was the heir, and to have intended to take advantage of it, and that a devisee under the will had been injured by it—whether an action would not have lain against him for negligence. But there is a great difference between recovering compensation for negligence, and allowing a man, upon his own oath, to take advantage of it. This is not a case to recover compensation for a wrong done; but what your Lordships are called upon to say is, whether you will allow this gentleman to take advantage of the wrong he has done, either through ignorance or fraud. I say, therefore, upon the facts as they appear upon the bill and answer, I agree with my noble friend, though I am not so conversant with equity as he is; but after the reasons he has given, which would not perhaps have occurred to myself, I should have said, this cause is at an end; there is no need of an issue. It would render all property in this country insecure, considering the confidence reposed in attorneys, if in such cases you were to allow an attorney to take advantage of his own misconduct. But the learned Judge in the Court below thought proper to direct an issue;—and I am not sorry that he did, except that the parties have been put, in my opinion, to an unnecessary expense;—for we decide this case more satisfactorily from the facts elicited from the different witnesses, by being examined before a jury; and we have the advantage of the opinion of Lord Tenterden upon the law of the case, as far as regards the obligation upon an attorney to bring a competent knowledge to the discharge of his duty; and he does not bring a competent knowledge to the discharge of his duty, unless he knows the effect of a fine in regard to the revoca-[186]-tion of a will. But there were two issues: 1st, whether this gentleman did fraudulently levy a fine with a view to his own interest? The jury have properly found that he did not, because there is not the least evidence that the fine was levied with that intent. But there is another issue, whether, supposing the fine not improperly levied, this gentleman did not fraudulently conceal from the General that the fine would have the effect of revoking the will? They have found the fraud, and I think they have done rightly. I think they could have come to no other conclusion upon the facts in the case, for these reasons.—In the first place, there is the testimony of the young woman of the name of Wilcox, who speaks of the Appellant coming to the house whilst the General was lying dead, and telling her and her mother that the General had omitted to give them any legacy in his will, as he had promised; but that the will was void; that he should be in possession, as heir at law, and that he would make up to them for the negligence of the General, and, in fact, provide for the whole family. My Lords, strong observations have been made by Sir Edward Sugden as to the improbability of that evidence. I do not go along with him. The only ground that makes it improbable is, that the mother does not hear it or recollect any such circumstance occurring. We do not know the age of this woman, or whether she is liable to the infirmity of deafness. She might not be able to speak to it, either from age or deafness: if from age, she might have forgotten it; or if from deafness, she might not have heard what the daughter did hear. But I cannot say I think this an improbable story. A person in the situation of this appellant would be very likely to reconcile himself as well as he could [187] with the different servants in the family: there were many ways in which they might do him great injury, and many ways in which they might render him service. It was not at all improbable, in my opinion, that a man who had concealed this important

fact, so operating upon the interests of the family, should attempt to obtain the favour of the servants in supporting and carrying into effect that which he had done. I think, therefore, it is far from being improbable, from the experience I have gained in courts of justice. I have known many instances of persons who have improperly interfered in making and revoking wills, and who have made use of the artifices imputed to this person to support the schemes they have undertaken in regard to making or revoking a will.

But is not this testimony of the woman supported by the testimony of Mr. Bicknell? Nay, you do not want the testimony of this woman. Mr. Bicknell proves the whole case. Mr. Bicknell proves that in the lifetime of the General the Appellant must have known there was a will, and must have known that the fine would have the effect of revoking that will. I say Mr. Bicknell proves that, because what is the conversation? He is told, "The world finds fault with you for not telling the General the effect of the fine upon his will." Supposing his present case to be true, his answer would have been, "I knew nothing of it; and if there was a will, I did not know that the fine would revoke it." Is that his answer? No; the answer proves his knowledge of the will, and that he had that knowledge while the General was alive; for he says, "Why should I put a sword in the General's hand to cut my throat?" That means, "If I had told the General that the fine would have [188] revoked the will, he would have made another will." I say that this witness most distinctly proves that this gentleman did know of the existence of this will, and did know the effect of the fine with regard to this will. How is this met? It is met by the testimony of the witnesses, who say that the General being ill upon the morning he was to attend Lord Chief Justice Dallas to levy this fine, the Appellant requested him not to go. It is not necessary that your Lordships should come to a conclusion that this man is a brute, or that he had not those feelings that a rational man ought to have, in order to decide this question. If he saw the General so ill, as it is represented he was, it was natural that he should have said, and he must have been a monster if he had not said, "Do not go this morning; you will have other opportunities. You do not know what the consequence may be." Is that a circumstance to be weighed against the evidence, taking it in the best point of view for the Appellant? But, my Lords, there is another point of view in which that may be taken; he might have thought that the taking before Lord Chief Justice Dallas a person in that state, when coming into the presence of such a person, the matter might have been explained, and his projects have been disappointed.

There was examined in the Court of Chancery a gentleman of the name of Wilmot; that gentleman was not called before the jury, where he could have been cross-examined. I do not mean to say anything disrespectful of him, but it is probable that Mr. Wilmot might have told the jury in what manner it was the Appellant expressed his ignorance of the effect of this fine; but Mr. Wilmot was not called. It is said he was not called because Sir James Scarlett was of [189] opinion that his evidence ought not to be received. I agree with Sir James Scarlett; but, agreeing with Sir James Scarlett, I would have tendered that witness, and have seen whether he was objected to: as he was not objected to in the Court of Chancery, and as the rules of evidence are the same in Chancery as in Courts of Common Law, I do not think he would have been rejected in a Court of Law, but he ought to have tendered that evidence. That is wanting; but with the evidence to which I have adverted, the jury could come to no other conclusion than that which they expressed, and which is, not that this concealment was through ignorance, but through fraud. I confess, if Mr. Bicknell's evidence be true, and no doubt it is true, I think the jury have come to a right conclusion, and that we cannot speak of this transaction in any other terms than those which are recorded in the verdict of the jury.

My Lords, this is an important case to the parties themselves, but it is of infinitely greater importance to the public; and if your Lordships should be disposed to affirm the recommendation of my noble friend, and of the humble individual now addressing you, perhaps imperfectly, after the learning you have heard from my noble friend, you will give security to property; and it will tend to inform every one that if an attorney should, with a view to his own particular interest, be induced to do acts injurious to the property of others, he is not to derive advantage from them. Therefore, concurring with my noble friend, and as he has not made

any motion to your Lordships, following up the speech he has made with so much ability on these great questions of law and equity, I humbly move your Lordships that this appeal be dismissed with costs.

[190] I find there will be no occasion for any taxation of costs. I humbly move your Lordships to give £50 costs, and then the judgment will take effect immediately.*

Judgment below affirmed, with £50 costs.

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[191] IN THE MATTER OF THE LONDON AND WESTMINSTER BANK.

[Mews' Dig. i. 349. Followed in *M'Naghten's* case, 1843, 10 Cl. and F. 200. And see *Wensleydale Peerage Case*, 1854 ; 5 H.L. 958 ; *Bright* v. *Hutton*, 1852, 3 H.L. 341 ; *Stephenson* v. *Higginson*, 1852, 3 H.L. 638 ; *Egerton* v. *Brownlow*, 1853, 4 H.L. 1.]

The Judges will decline answering a question put by the House of Lords, if that question is not confined to the strict legal construction of existing laws.

Certain persons having united themselves together under the name of the London and Westminster Bank Company, applied to Parliament for a bill to incorporate them under that name. The bill passed the House of Commons, and on being brought up to this House was read as a matter of course a first time. When it stood for a second reading it was moved and agreed to, that counsel should be heard at the bar of the House on the subject of the bill. It was then moved and agreed to, that the Judges be ordered to attend the House. The order was dated on Monday the 16th June 1834, and was in the following terms:—

[192] "Ordered, by the Lords Spiritual and Temporal, in Parliament assembled, that the Bill intitled, 'An Act to enable the Company, called the London and Westminster Bank, to sue and be sued in the name of one of the Directors or of the Trustees, or any of them, or of the Manager or Managers, or any of them, of the said Company,' be taken into the consideration of the learned Judges, on Friday next, on this question: 'Are the provisions of this Bill inconsistent with the Bank of England's rights, as secured to it under the following Acts: 5 W. and M. c. 20, 8 and 9 W. and M. c. 20, 6 Ann. c. 22, 15 G. 2, c. 13, 21 G. 3, c. 60, 39 and 40 G. 3, c. 28, and 3 and 4 W. 4, c. 98?'"

On Friday, the 20th, the Judges attended; Lord Wynford sat as Deputy Speaker. The Lords present, besides his Lordship, were the Duke of Cumberland, the Marquis of Bute, the Marquis of Bristol, the Earl of Stradbroke, Lord Bexley, and the Bishop of Hereford.

The Judges were Lord Chief Justice Tindal, Mr. Justice Park, Mr. Justice Littledale, Mr. Justice Vaughan, Mr. Baron Parke, Mr. Justice Taunton, Mr. Justice Patteson, Mr. Baron Alderson, Mr. Baron Bolland, and Mr. Justice Williams.

Mr. Harrison, Sir E. B. Sugden, and Mr. Law, appeared on behalf of the Bank of England; and Mr. Follett, Mr. Wrangham, and Mr. Shee, for the Petitioners in support of the Bill.

Lord Wynford, interrupting Mr. Harrison in the course of his argument, said, that the Judges had communicated to him that they felt some difficulty as to the possibility of their answering the question which [193] had been submitted to them by their Lordships. He moved that they should retire, for the purpose of considering whether they could answer the question.

The Judges having retired, remained absent above three quarters of an hour, when

Lord Chief Justice Tindal, on their return, said, "His Majesty's Judges, after

* The Lord Chancellor, as also Lord Lyndhurst, declined to take any part in the adjudication of this case, both having been formerly counsel for the parties respectively, in the action of ejectment, and in the subsequent motion in the Court of King's Bench for a new trial of that action. See *Denn* v. *Wilford*, 2 Carrington and Payne, 173. 175; S.C. 8 Dowling and Ryland, 549.

considering the question which has been proposed to them, find it proposed in terms which render it doubtful whether it is a question confined to the strict legal construction of existing Acts of Parliament; and they therefore, with great deference and respect to your Lordships, request to be excused from giving an answer."

Lord Wynford intimated that he had before thought it doubtful whether the Judges could answer the question.*

[The further consideration of the bill was then adjourned.]

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[134] APPEAL

FROM THE COURT OF CHANCERY.

JULIA LANGSTON, an Infant, by her next Friend; MARIA SARAH LANGSTON; CHARLES BARTER the Elder, and Wife; and CHARLES BARTER the Younger, an Infant, by his next Friend,—*Appellants;* JAMES HAUGHTON LANGSTON, Sir CHAS. MORICE POLE, Bart., and HAUGHTON FARMER OKEOVER,—*Respondents.*

[Mews' Dig. xv. 707, 1846, 1847; S.C. 8 Bli. N.S. 167; and, in Court below, *sub nom. Langston* v. *Pole,* 9 D. and R. 298; 5 Bing. 228; Taml. 119. Discussed and explained in *Grant* v. *Grant,* 1875, L.R. 5 C.P. 735; and see *In re Thomson's Trusts,* 1870, L.R. 11 Eq. 148. Distinguished in *Locke* v. *Dunlop,* 1888, 39 Ch. D. 387.]

J. L. devised his manors and hereditaments to trustees upon trust to convey the same to the use of J. H. L. (his eldest son) for life; with remainder to trustees to preserve contingent remainders; with remainder to the use of the *second,* third, fourth, fifth, and *all and every other* the son and sons of the body of J. H. L., severally and successively in seniority of age and priority of birth, in tail male; remainder to the use of devisor's second and other sons successively in tail male; remainder to the use of J. H. L.'s first, second, third, fourth, fifth, and all and very other daughter and daughters successively, in tail general; remainder to the use of devisor's eldest daughter, M. S. L. for life; remainder to trustees to preserve, etc.; remainder to the use of the *first,* second, third, fourth, fifth, and all and every other son of M. S. L. successively, in tail male; remainder to her first, second and other daughters successively, in tail general; with divers other like remainders to the devisor's other daughters and their issue, and various intermediate terms in trust.

There was no express limitation to J. H. L.'s first son, nor any provision for him made or referred to in the will; but the trust of the first term directed to be contained in the settlement to be made by the trustees was declared to be, in *case there should be no son of J. H. L.,* for raising portions for his daughters, *except an eldest or only daughter;* and the trusts of the other terms were to be for raising por-[195]-tions for the younger children of the successive tenants

* Mich. 27 Geo. 2. A question having been started, on occasion of the late Act of Parliament concerning the naturalization of the Jews, which Act was repealed this session, whether Jews are entitled to purchase and hold lands in England, Lord Temple, after the repeal of the Act, moved in the House of Lords that some method might be taken to ascertain this question, and that for this purpose the Judges might be desired to attend and give their opinions upon it; which was opposed, and the motion rejected, for many reasons, but particularly because the Judges are not obliged to give their opinions to the House upon such extra-judicial questions, and where no bill is depending; and the Duke of Argyle mentioned a case in Queen Anne's time, where such a question being put to the Judges, Lord Chief Justice Holt, in the name of himself and the rest, insisted that they were not obliged to give their opinions on any such question; and his objections thereto were allowed by the House.—Mr. Cove's MSS. E. E.

for life, *in case there should be no issue of the body of J. H. L.*: and a power was directed by the devisor to be inserted in the settlement to enable J. H. L to charge the devised estates with portions for his children other *than an eldest or only son*. Held, that the first son of J. H. L. was entitled to have an estate tail in the devised manors and hereditaments, expectant on the death of his father, limited to him in the conveyance directed to be made by the trustees.

The decree under appeal in this case was made in a suit instituted for the purpose of establishing a will, which, as far as it is material to set it forth here, was to the following effect:—

John Langston, late of Sarsden House, in the county of Oxford, esquire, being seised in fee of considerable estates in Middlesex and Oxfordshire, and being also seised to him and his heirs of several copyhold estates in the same counties, duly made and published his will in writing, bearing date the 28th of July 1801, and signed and attested in the manner by law required to pass freehold estates; and he thereby devised "all his freehold and copyhold manors, messuages, farms, lands, tenements, tithes and hereditaments, situate in the said several counties, or elsewhere in England, (except his shares in the New River Company), unto J. P. Bastard, esquire, J. W. Hope, esquire, and C. M. Pole, esquire, (now Sir Charles Morice Pole, bart. one of the Respondents), their heirs and assigns, upon trust during the minority of the testator's son, the Respondent James Haughton Langston, (who was then about the age of five years,) to receive the rents and profits thereof, and to dispose of the same for the purposes in the said will mentioned: And upon this further trust, that when the said J. H. Langston should attain the age [196] of 21 years the said trustees or the survivors or survivor of them, or the heirs or assigns of such survivor, should by good and sufficient conveyances and assurances in the law, convey, settle and assure the same manors, messuages, etc. and hereditaments, in such manner as that the same should continue and be for and upon the several uses, trusts and purposes, and subject to the several powers, etc. and declarations therein and partly hereinafter mentioned and declared of and concerning the same, or such of them as should be then subsisting or capable of taking effect, (that is to say): To the use of the said testator's said son J. H. Langston, for life; and from and after the determination of that estate, to the use of trustees (to be named in such settlement) and their heirs, in trust to preserve the contingent uses and estates to be thereinafter limited; with remainder to the use of *the second, third, fourth, fifth, and all and every other the son and sons* of the body of the said J. H. Langston, lawfully to be begotten, severally, successively, and in remainder one after another as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons and the heirs male of his body to be always preferred and to take before the younger of such son and sons, and the heirs male of his and their body and bodies issuing."

The question for decision was whether, under the terms of this limitation, the *first* son of James Haughton Langston, who, for the purpose of raising the question, was supposed to have two sons, took any and what estate in the devised manors and hereditaments.

[197] The will continued, after the above limitation, "With remainder to the use of other trustees to be named in the said settlement, their executors, administrators and assigns, for the term of 500 years, upon the trusts and for the intents and purposes thereinafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of the said J. H. Langston severally, successively and in remainder, in tail general; and in default of such issue, to the use of other trustees to be named in the said settlement for 99 years, upon the trusts thereinafter mentioned; with remainder to the use of the testator's eldest daughter, the Appellant Maria Sarah Langston, for life, with remainder to trustees to preserve, etc.; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the testator's said daughter, severally and successively and in remainder in tail male; and for default of such issue, to the use of other trustees to be named in the said

settlement for 600 years, upon trusts after mentioned; with remainder to the use of testator's said daughter's first, second, third, fourth, fifth, and all and every other her daughter and daughters, severally, successively and in remainder in tail general."

The testator, after directing by his said will like limitations in remainder to be contained in the said executory settlement for each of his four younger daughters, Elizabeth Catherine, Caroline, Agatha Maria Sophia and Henrietta Maria, for life, severally and successively, (with remainders interposed to trustees to preserve, etc.), with like remainders in tail male and tail general to their respective children, with remainder to his sixth and other daughters thereafter to be born, successively in tail general, with ultimate [198] remainder to his sister, Mrs. Cazalet, in fee, proceeded to direct the trusts of the above-mentioned terms of 500 years and 99 years and 600 years, and also of five other terms of 700 years, 800 years, 900 years, 1000 years and 1500 years, which he by his said will directed to be severally interposed, in the settlement to be executed by his said trustees, between the said limitations in remainder to his said daughters and sister respectively.

And as to the said term of 500, the testator directed that the same should be limited upon trust that, in case there should be no son of the body of the said J. H. Langston, nor future son of the testator's body, or there being such son or sons, if he and they should die without issue male before any of them attained the age of 21, and there should be two or more daughters of the said J. H. Langston, then the trustees of that term should, after the decease of J. H. Langston, by mortgage or sale of all or any of the premises comprised in the said term, or by other means, raise for the portion and portions of all and every such daughter and daughters, other than and besides an eldest or only daughter, such sum or sums of money as in the said will mentioned; (that is to say), in case there should be one such daughter, not being an eldest or only daughter, the sum of £20,000 for her portion, to be paid as therein mentioned, and if there should be two or more such younger daughters, then the sum of £40,000 for their portions, payable at such times, in such shares, and subject to such conditions as the said J. H. Langston should appoint, etc.; but the payment of such portion or portions should be postponed until the end of 12 months next after the decease of the said J. H. Langston, and failure of issue male of his body and of the testator's [199] body as aforesaid: And upon this further trust, that the trustees of the said term should, after the decease of the said J. H. Langston, and such failure of issue male of his body and of the testator's body, raise for the maintenance and education of all and every such younger daughter and daughters, until their respective portions should become payable, sums equivalent to the interest thereof, to be paid quarterly, the first payment thereof to be on the feast or day of payment that should happen next after the decease of the said J. H. Langston, and such failure of issue of his body.

And as to the said term of 99 years, the testator directed that the same should be limited upon trust that, in case there should be no son or daughter of the body of the said J. H. Langston, nor future son of the testator's body, or there being such son or sons, daughter or daughters, if all the sons should die without issue male, and all the daughters without issue, before any of them should attain the age of 21, then the trustees of the said term should, after the decease of the said J. H. Langston and such failure of issue as aforesaid, by mortgage or sale of all or any of the premises comprised in the said term, or by other means, raise for the benefit of the testator's younger daughters hereinbefore mentioned, or such of them as should not be in the actual possession of the said lands and hereditaments under and by virtue of the limitations directed to be contained in the said settlement as aforesaid, for their lives respectively, the annuities in the said will mentioned, in the manner therein mentioned: and in case there should be no son or daughter of Maria Sarah Langston, or there being such son or sons, daughter or daughters, if the son and sons should die without issue male, and the daughter and daughters should die without issue [200] before any of them should attain the age of 21, and if the testator's three younger daughters or any of them should be then living, then the trustees of the said term should, after the several deceases of J. H. Langston and Maria Sarah Langston, and failure of all such issue as aforesaid, raise for the benefit of the said younger daughters the further annuities in the said will mentioned.

And as to the term of 600 years, the testator directed that the same should be

limited upon trust that, in case there should be no son or daughter of the said J. H. Langston, nor future son of the testator, or there being such, etc., if all such, etc. should die without issue before the age of 21 ; and also in case there should be no son of the testator's said daughter Maria Sarah, or there being such, etc., if they should die without issue male before the age of 21, and there should be two or more daughters of the said Maria Sarah ; then the trustees of the said term should, after the several deceases of the said J. H. Langston and Maria Sarah Langston, and such failure of issue as last aforesaid, by mortgage, etc. raise for the portion and portions of all and every such daughter and daughters of the said Maria Sarah, other than and besides an eldest or only daughter, that is to say, in case there should be one such daughter not being an eldest or only daughter, the sum of £20,000, etc. ; but if there should be two or more such younger daughters, then £40,000 for their portions.

The testator then directed in like manner the trusts of the several terms of 700 years, 800 years, 900 years, and 1000 years, for raising portions for the younger daughters of the testator's other four daughters before mentioned, respectively, in case [201] there should be no son or daughter of the respective bodies of the said J. H. Langston or Maria Sarah, etc. after the several deceases of the said J. H. Langston, and Maria Sarah and Elizabeth Catherine, etc. and such failure of issue as aforesaid. And as to the term of 1500 years, the last term by the said will directed to be limited to trustees in the said executory settlement, the testator directed that the same should be limited upon trust that, in case there should be no son or daughter of the body or respective bodies of the said J. H. Langston, or of any of the testator's then present daughters before mentioned, nor any future son or daughter of the testator's body, or there being such son or sons, daughter or daughters, if all such sons should die without issue male, and all such daughters should die without issue before attaining the age of 21 years, then the trustees should within the space of 12 calendar months next after the several deceases of J. H. Langston and the testator's then present daughters, and failure of all such issue aforesaid, by mortgage or sale of all or any of the premises comprised in the said term of 1500 years, or by any other means, raise the sum of £80,000, and pay the same in manner in the said will mentioned ; that is, one moiety thereof to the testator's sister, Mrs. Arnold, the other moiety to his nephew, the Respondent Haughton Farmer Okeover.

The testator then directed that in the settlement so to be made as aforesaid should be inserted several powers, one of which was to enable his said son, J. H. Langston, in case there should be any child or children of his body lawfully begotten, other than and besides an eldest or only son, to charge the said devised manors and hereditaments with the payment [202] of any principal sum or sums, not exceeding in the whole £25,000, for the portions of any one, two or more of J. H. Langston's younger sons or daughters, to be paid at such times, in such shares, and in such manner as the said J. H. Langston should appoint. And the testator directed a like power to be inserted in the said executory settlement, to enable his said daughters, when and as they should respectively be in the possession of the said devised estates, in case there should be any child or children of their respective bodies, lawfully begotten, other than and besides an eldest or only son, to charge the said devised estates with the payment of the like sum of £25,000 for the portion or portions of any one, two or more of their respective younger children.

The testator, after other directions not necessary to be here recited, and after a bequest of the residue of his personal estate upon trust for his said son J. H. Langston, appointed the said J. P. Bastard, J. W. Hope, and C. M. Pole, his executors. He afterwards made three codicils, bearing date respectively 21st June 1808, 6th March 1811, and 21st December 1811, but did not thereby or otherwise alter or revoke the said will as above recited, further than by appointing the Respondent, Haughton Farmer Okeover, a trustee and executor thereof, in the place of J. W. Hope ; and the testator died on the 12th of February 1812, leaving the Respondent, J. H. Langston, then an infant, his only son and heir at law ; and his said four daughters, and no other son or daughter.

Elizabeth Catherine Langston, the second daughter, married the Appellant Charles Barter, in 1817, and the Appellant Charles Barter the younger is the eldest son of that marriage. Caroline Langston, [203] the third daughter, married Sir

Sandford Graham, in 1819; and Agatha Maria Sophia, in 1820, married Samuel T. Kekewich. The other two daughters of the testator, Maria Sarah and Henrietta Maria, remained unmarried.

James Haughton Langston attained his age of 21 years in 1817, and in June 1824 he filed his bill in Chancery against the surviving trustees of the said will, and against Maria Sarah Langston, Mr. and Mrs. Barter, and their said infant son, who was then the first tenant in tail *in esse* of the manors and hereditaments devised in trust to be settled as aforesaid.

The bill, after stating the will more at large, and to the purport and effect hereinbefore stated, charged that it was the testator's intention that his will should contain a direction that the settlement so directed to be made as aforesaid should contain a limitation to James Haughton Langston's first son in tail male, immediately after the limitation to trustees during his life to preserve contingent remainders, and immediately before the limitation to his second son; and that the testator accordingly gave instructions to his solicitor to prepare a will containing a direction to insert such a limitation in the settlement so directed to be made; and that in pursuance of such instructions a draft of his will was prepared, and such draft contained a direction that such a limitation should be inserted in the said settlement, but that in the ingrossment of the will such direction was omitted to be inserted by the mistake of the person who ingrossed the will; however, it was submitted that the said will contained within itself sufficient evidence of the testator's intention being that the settlement so directed to be made as **[204]** aforesaid should contain such a limitation in favour of the Respondent's eldest son in tail male. The bill prayed that the said will and codicils might be established, and the trusts thereof (so far as respected the settlement and conveyance of the manors and hereditaments of the said testator devised as aforesaid to the said trustees) might be carried into execution by a settlement and conveyance to be made by the said trustees of the same manors and hereditaments, to the uses, upon the trusts, and for the intents and purposes, and subject to the powers and declarations to, upon, for, and subject to which the same were by the said will directed to be settled and conveyed, or as near thereto as the deaths of persons and circumstances of the case would permit; and especially that, in making such settlement and conveyance, a limitation might be inserted therein whereby the said manors and hereditaments might be limited, settled and assured to the use of J. H. Langston's first son in tail male in remainder, immediately after the limitation to the use of trustees during the life of J. H. Langston to preserve contingent remainders, and immediately before the limitation to the use of his second son in tail male.

The Defendants appeared and put in their answers, stating (except Charles Barter the younger) their belief that the testator intended that his will should contain the direction referred to, in favour of J. H. Langston's first son in tail male.

The cause having come to be heard in February 1826, before the late Lord Gifford, then Master of the Rolls, a case was ordered to be sent for the opinion of the Court of King's Bench; and in pursuance of the order so made, a case was prepared containing a statement of the limitations of the said will in the **[205]** form of legal limitations, and a general statement of some other parts thereof, and assuming and stating as a fact that J. H. Langston had lawful issue two sons, Henry his first-born son, and Edward his second son; and the question proposed was, "whether the said Henry, the first son of the testator's son J. H. Langston, takes any estate under the said will." That case was argued before Mr. Justice Bayley, Mr. Justice Holroyd, and Mr. Justice Littledale, three of the Justices of the Court of King's Bench, in the absence of the Lord Chief Justice; and they by certificate, dated the 30th of April 1827, certified their opinion to be that "the said Henry Langston, the first son of the testator's son, J. H. Langston, did not take any estate under the said will." (See *Langston* v. *Pole and others*, 9 Dowl. and Ryl. 298, where the case sent is fully set forth.)

The cause having come to be heard for further directions on that certificate, in March 1828, before Sir John Leach, then Master of the Rolls, his Honor ordered a case for the opinion of the Court of Common Pleas. A case was accordingly made for the opinion of that Court, stating the limitations of the will as legal limitations, and setting forth other parts of the said will more fully than had been stated in the former

case; and likewise assuming as a fact that the said J. H. Langston had two sons, Henry, the first, and Edward the second born son; and the question proposed was, "whether the said Henry Langston, the first son of the said testator's son, J. H. Langston, takes any and what estate under the said will." That case was argued before the four Justices of the Court of Common Pleas; namely, Lord Chief Justice Best, Mr. Justice Park, Mr. Justice Burrough, and Mr. Justice Gaselee; and they by **[206]** their certificate, dated the 28th of November 1828, certified their opinion that the said Henry Langston, the first son of the testator's son, J. H. Langston, takes an estate in tail male under the said will, expectant on the death of his father, the said J. H. Langston. (See *Langston* v. *Pole and others*, 5 Bing. 228, where that second case is fully set forth; and S.C. 2 Moore and P. 490.)

The cause came to be heard before the Master of the Rolls for further directions, upon the last-mentioned certificate; and his Honor by his decree, bearing date the 28th of July 1829, ordered that the said certificate be confirmed, and he declared accordingly that the said will ought to be established and the several trusts thereof carried into execution, etc. according to the prayer of the bill. (See *Langston* v. *Pole*, 1 Tamlyn, 119. 129, where the difference between the two cases sent to the Courts of Law is pointed out.)

Shortly after the filing of the said bill, and before any further proceedings were had in the cause (viz. in the month of July 1824), James Haughton Langston married the Hon. Julia F. Moreton, and since the last-mentioned decree the Appellant Julia Langston was born of that marriage; and she becoming the first tenant in tail in *esse* of the devised estates directed by the said will to be settled as aforesaid, was made a party Defendant to the suit, by a supplemental bill filed by the Respondent J. H. Langston, in February 1830, praying against her and the other Defendants the benefit of the former proceedings and decree. The cause was heard on the supplemental suit on the 5th of March following, by the Master of the Rolls, who made a decree therein of that date, according to the prayer of the said supplemental bill, **[207]** and in the terms, or to the purport and effect, of his former decree.

His Honor, in pronouncing these decrees, in conformity with the certificate of the Court of Common Pleas and against that of the Court of King's Bench, expressed an opinion that the trustees would be justified in not executing the settlement, without the sanction of the House of Lords as to which of the two decisions of the Courts of Law was the right decision.

The Appeal was brought against so much of the decree of the 21st of July 1829 as declared that the first son of the said testator's son, the Respondent J. H. Langston, would take an estate in tail male under the said will, expectant on the decease of his father, and that Sir Charles Morice Pole and Haughton Farmer Okeover, the surviving trustees of the said will, should convey and assure the said manors, messuages, lands, tenements and hereditaments, so as to limit the same to the use of the first son of the Respondent J. H. Langston in ta.. male in remainder, immediately after the limitation to the use of trustees during the life of the Respondent; and also against so much of the said decree dated the 5th of March 1830, as declared and directed to the same purport and effect.

Mr. Knight and Mr. Wray, for the Appellants:—This case arises on the construction of the will of Mr. Langston; the principal Appellant is the daughter of his only son; the Respondents are that son and the surviving trustees of the will. The two Courts of Common Law certified contrary opinions, and the question now to be decided is which of those **[208]** Courts came to the right conclusion. The effect of what the Court of Common Pleas and the Master of the Rolls did, was to insert the word "first" before the word "second," so as to give an estate to the first son, which the Court of King's Bench declined to do. Lord Gifford settled the first case; Sir John Leach was dissatisfied with the certificate of the Court of King's Bench on that case, and sent to the Court of Common Pleas another case, which is longer, but there is no substantial difference between the two cases. Both cases and the arguments on them are reported (9 Dowl. and Ryl. 298; 5 Bing. 228, and 2 Moore and P. 490), but the reasons for the opinions of the respective Courts are not given.—[The Lord Chancellor: No, they never have been given of late, in cases sent from the Court of Chancery. I have had communication with some of the learned Judges upon that subject, and I hope that practice, for the reasons I stated the last time (Vide *supra*,

pp. 74. 80) I was here, will be altered.]—[Lord Wynford: I felt very desirous, when I was upon the Bench, that the reasons should be given; the other Judges differed with me, and I gave way.—[The Lord Chancellor: The reason the Judges give for withholding their reasons in those cases does not apply, namely, that they are afraid of their judgments being pulled to pieces in the Court of Chancery; whereas they will be pulled to pieces in a greater degree, for their reasons not appearing. Some of Lord Kenyon's most valuable judgments, were judgments giving reasons for his opinion on such cases.]—There was no reason given for this judgment in any Court; for the Master of the Rolls [209] merely confirmed the certificate of the Court of Common Pleas, expressing his opinion to be in conformity with it (1 Tamlyn, 153), and suggested an appeal to this House; and there was no intermediate appeal to the Lord Chancellor.

The first part of the will is plain and clear; but the Judges who have had to consider the matter, other than the Judges of the Court of King's Bench, have conceived that the trusts created, and the language of the terms and of the powers, warranted them in adding to the words of the will; and therefore, to prevent the testator from making an unusual, but not absurd disposition, they have made a will for him. The language by which the estate is given is this, "To the use of the *second*, third, fourth, fifth, and all and every other the son and sons of the body of him my said son, lawfully to be begotten, severally, successively and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons," etc. Both Lord Gifford and Sir John Leach were of opinion, in sending the cases, that the construction was to be that which would apply to immediate legal limitations; and that the circumstance of the limitations being contained in a will, which, vesting the legal fee in trustees, directed a settlement to be made by them, was not material to the construction of the will, and therefore deserved no consideration in the argument. Supposing, then, that there had been immediate devises, carrying with them the legal estate, your Lordships have to decide what would be the [210] proper construction of this will; whether you are to insert the word "first" before the word "second." There is but one argument for that construction—an argument entitled to great consideration, because five learned Judges in different Courts have adopted it—the only argument is, that the testator in his will has created terms and given powers which would be capricious and unusual, unless the word "first" be inserted in the foregoing part of the will. Capricious and unusual they are admitted to be, but there is no absurdity in them. The language in the foregoing part of the will is clear and free from ambiguity. The words of the limitation referred to, if they stood alone, would not admit a doubt. If the will had stopped there, the Courts below must have held the second, third, fourth and fifth son to take before a first, notwithstanding the words "all and every other," which must, according to their collocation, and to the ordinary use of the terms, mean all and every other after the second, third, fourth and fifth son. To save the trouble of enumerating further, the testator says, "all and every other," that is, all and every other subsequent to the last enumerated. The only possible different construction from that would be, that the eldest son should come in after the fifth and before the sixth, if there was a sixth, which would be an extremely capricious and violent construction; whereas the construction, that "all and every other" mean those only that follow the fifth in the order of birth, is natural and orderly. But the Court of Common Pleas and the Master of the Rolls have placed the first son, not after the fifth, but before all the sons enumerated. As it probably did not occur to any of the learned Judges below that, [211] if they did not place the first son at the head, he could be placed anywhere, it may not be necessary to trouble your Lordships with any argument on the placing him after the fifth, anticipating arguments which may not be made.

The part of the will on which alone a difficulty has arisen, is the language in which the terms and powers are created. The term of 500 years is, "Upon trust that in case there shall be no son of the body of my son J. H. Langston, nor no future son of my body, or their being any such son or sons, if he and they shall all die without issue male before any of them shall attain the age of 21 years, and there shall be two or more daughters," then there is a provision for younger daughters. The question

is, whether this trust involves any necessary implication of an intention to give an estate to the first son of J. H. Langston. There may have been reasons to induce the testator not to give portions if there were any sons; he had a right to restrict the conditions on which the portions should arise, and to say that if there were any sons there should be no portions for daughters. It may be urged as unreasonable that a portion should not be payable, if there was any son, unless that son was found to be included in the limitations of the estate; but still no necessary implication arises; all that can be said is, that it is a capricious condition; it is only a provision of an unusual nature, a delay of portions or a restriction upon the portions for which a reason cannot be now given, but for which the testator may have had a sufficient reason; and caprice is a sufficient reason for a testator to act upon, but has it ever been held before that that is a test of judicial decision? Or can it be safely held, that because one provision in a will is capricious [212] when compared with another, you must therefore alter the other in order to make a second provision not capricious?

The trusts of the terms and the powers are such as one would naturally expect to find in a will providing for a first son; that is admitted, and in that consists the whole of the argument of the Respondents, who say, it will be better if your Lordships will make the provisions for C and D more consistent with what is reasonable, by altering the first provision. But that there may be some inconsistency in the subsequent directions of the testator, is no reason for altering language, plain, clear and intelligible, in the first part of a will (Vide supra, *Thornhill* v. *Hall*, pp. 36. 38, 39). The Master of the Rolls and the Court of Common Pleas have in effect said, "you cannot reasonably impute to a testator the intention of leaving in a certain event part of his family unprovided with portions;" in other words, you cannot impute to him a capricious restriction upon the manner in which the portions are to arise.—[The Lord Chancellor: Is there not a case in which "second" was read "first;" an estate to A and to his other sons?]—The cases of *Doe* v. *Hallett* and *Clements* v. *Paske* (1 Maule and Selw. 124, 130; vide *infra*, p. 230) were cases of necessary implication, no case has gone the length of this; here is in one part of the will a provision for A B clear and intelligible, no ambiguity whatever, and it is a case in which, if the will had stopped there, no one could have entertained a doubt on it. In another part of the will the testator has made provisions for other persons, which, upon one view of the case, are capricious; but suppose he had said, "I choose the second son; I know I have omitted the first; I know I have [213] begun with the second, and yet I choose that portions shall be so and so limited."—[Lord Plunkett: Are you quite right in saying that the first words are perfectly clear and free from ambiguity, in which the limitations are made to the second, third and other sons?]—[The Lord Chancellor: Take the words "other son."]—The word "other" is to be understood according to the literal and common sense, and legal construction; it may include the first, only that the testator would so bring in the first out of his order.—[The Lord Chancellor: Then that would be a capricious thing in a testator to express himself in that way; for if you admit that he is brought in after the youngest, you are taking liberties with the literal meaning of the words.]—The second, third, fourth and fifth must come before the first; they are mentioned first. They must be taken in order; the first is not mentioned, and he can be brought in only, if at all, under the word "other."—[The Lord Chancellor: We take it for granted that it is not in the case, or it would have appeared if there was any other settlement.]—It does not appear one way or the other; it is sufficient for the purpose of our argument that it may have been so. Supposing your Lordships were to include the first under the word "other," and there were ten sons, where could your Lordships place him? next after the tenth, or next after the fifth, or the sixth? It would be difficult to come to that conclusion against the plain import of the word "other," which, after an enumeration of several successive sons, must be taken to mean other younger, subsequent in birth to the last enumerated. The testator has introduced into the will provisions which are inconsistent with placing the first son either sixth, or seventh or last; the trusts of the terms and the [214] powers are irreconcileable with that construction, and the only construction consistent with them is to place the first son first, which is prohibited by the terms in which the testator has expressed himself.

No case has gone to the dangerous length to which it is sought to carry this. The case of *Doe* v. *Hallett* (1 Maule and Selw. 124) does not apply. There John James devised his manors and hereditaments to trustees, to the use of his wife for life; and after her death, "to the use of William Head, *only surviving son* of Sir Thomas Head, until he should attain the age of 24 years, and after 24, then to the use of the said William Head for life: and after the determination of that estate, etc., to the use of trustees, to preserve contingent remainders: and immediately after the decease of William Head, to the use of the first, second, third, and of all and every the other son and sons of the body of William Head, according to their priority of birth, and the heirs male of the body of such first and other sons respectively issuing; and in default of such issue, to the use of the first, second, and of all and every other son and sons of Sir Thomas Head, *lawfully to be begotten*, according to their priority of birth, and the heirs male of the body of such first and other sons respectively issuing; and in default of such issue, over." The fact was, that there was a second son of Sir Thomas Head, born before the date of the will, and he was personally known to the testator; and it was decided that that second son was capable of taking, notwithstanding the words "lawfully to be begotten," on the ground of the misdescription of the first son, and on the rule that the words "begotten" and "to be begotten" are of the same import in law. Lord Ellenborough, in giving **[215]** his opinion on that case, after ascribing the difficulty of the question to the blunder of the testator and the neglect of his attorney, said, "I disclaim all considerations of that sort in the present instance, and am willing that the conjoint omissions of the testator and his attorney should have full legal effect. The *will must stand or fall according to the language of it*; but I think that language will not, on a fair construction of it, disappoint the intention of the testator. The first mistake is in the description of William Head as the only surviving son; for there was another son living of the age of nine years; but how does that mistake affect or control the subsequent limitation? That limitation is to the use of the first, second, and all and every other son and sons, etc., that is, who at the death of William Head would become first son. Then came the words 'lawfully to be begotten,' which would give rise to a material question, if it had not been settled by a series of authorities, and impeached by none, that 'to be begotten' means 'begotten,' embracing all those whom the parent shall have begotten, *quos procreaverit*." The case of *Clements* v. *Paske* [2 Cl. and F. 230, *n.*] is cited in that case, and nowhere else reported. That was also a case sent from the Court of Chancery to the Court of King's Bench. It was a devise to A for life, and after his decease, to the first and eldest son of the body of the testator's nephew, lawfully issuing or issued; and for default of such issue, then likewise to the second, third, and every other son of his nephew successively and in remainder, as they should be in seniority of age, and the several and respective heirs male of the body of every such son or sons successively in tail male, etc. It was there decided that the nephew took an estate tail by im-**[216]**-plication, in order to effect the general intent, and let in the descendants of his first son. In this case there is not any general intent. The decision in that case was not that the words gave an estate to the eldest son, but that they gave an estate tail to the nephew: the Judges made him tenant for life by the will, in order to let in the intention which they collected from that will. It is not suggested that any such construction can be put on the will of Mr. Langston. The case of *Hay* v. *The Earl of Coventry* (3 Term Rep. 83) is well calculated for a test of the rule of construction. There Sir Robert Worsley being seised in fee, devised his hereditaments upon trust to raise the sum of £5000 for his grand-daughter, Lady Frances Carteret, and subject thereto, upon trust that the trustees should stand seised of the premises to the uses of his grandson Robert Lord Carteret for life, remainder to trustees to preserve contingent remainders, remainder to *first and other sons* of Lord Carteret in tail male, remainder to Lady Frances Carteret for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Lady Frances in tail male; and in default of such issue, to all and every the daughter and daughters of the body of Lady Frances Carteret, as tenants in common, and not as joint tenants; and in *default of such issue*, to the use and behoof of his own right heirs for ever. Lord Kenyon, in stating his opinion that the daughter of Lady Frances Carteret took an estate for life only, said, "The general rule as laid down in the books, and on which alone Courts can with any safety pro-

ceed in decisions of questions of this kind, is to collect the testator's intention from the words he has used in his will, [217] and not from conjecture, etc. It is not necessary that any technical or artificial form of words should be used in a will; but we must collect the intention of the testator from those words *which he has used, and cannot add words which he has not used*, etc. The testator has not used words signifying his intention to give an estate of inheritance to the daughters, and we cannot supply them." That rule applies to this case. We may conjecture from other parts of this will, and from its provisions applicable to other objects, that there was a mistake, but cannot carry it further than as a conjecture: the words themselves are plain, and at the utmost we can only guess that the testator omitted a particular expression by mistake: conjecture will not warrant a Court in supplying the word.

It is singular that another view of the case has not suggested itself to the Master of the Rolls and the Judges of the Court of Common Pleas. If they were to alter the intent and matter of the will, the most flexible for that purpose would be the words which have created all the difficulty. The testator may have had a good reason for excluding the first son: there is no evidence that he was not otherwise provided for. It would be a hard thing to give him a double provision upon mere guess. Suppose that the trusts for portions and the power had been taken from a precedent, adapted to a case where the first son was not excluded, and unguardedly used in a will where the first son was excluded: is not that case possible? If that is possible you at once have the whole accounted for, and on principles more reasonable, at least more probable, than any that have been suggested on the other side. What is there to prevent the Court from construing [218] the words "no son or no eldest son," in the trusts of the terms and the powers, as if they were, "no son entitled under the limitation hereinbefore contained?" That would be a construction infinitely less violent than that to which the Court has arrived; for that would not be to insert a word in the prior part of the will, but simply to read consistently with it the language in which the testator has described certain events that are to precede the vesting of the respective portions.

This is the first case in which an attempt has been made to supply words in a will, in order to raise a case of necessary implication in the face of an express devise. There must be some words amounting to words of gift to constitute a case of implication; words from which you can infer either that the testator has actually given, though by imperfect language, or that otherwise the estate would be clearly undisposed of.—[The Lord Chancellor: Or that he proceeds on the belief that it is given.]—And that it is undisposed of, must appear. There is no case of implication that has not those ingredients to imply the gift of an estate. The implication must be necessary, and the estate undisposed of; and unless the implication be raised, if there is an heir at law, he will take the estate. There are cases in which the Courts, in order to effect the testator's manifest intention, holding the form of the gift to be forbidden by law, give effect to it *cy pres;* not executing the very words of the will, which would be void by law if it were so to stand, but doing something as near the intention as they can; and that is often called necessary implication. This is a case in which that is attempted to be done, not because the estate is not disposed of, but in the face of an ex-[219]-press estate devised to a party who can take. The doctrine of necessary implication which is laid down in *Gardner* v. *Sheldon* (Vaugh. 259), *Faulkner* v. *Faulkner* (1 Vern. 21), *Bamfield* v. *Popham* (1 P. Wms. 54), *Newburgh* v. *Newburgh* (5 Madd. 364), and *Dashwood* v. *Peyton* (18 Ves. 27. 40), cannot be brought to apply to this case. Necessary implication means, not natural necessity, but so strong a probability of intention that an intention, contrary to that imputed to the testator, cannot be supposed; *Wilkinson* v. *Adam* (1 Ves. and B. 422. 466). In all the cases under the head of implication there was a suspension of the estate given, and the question was between the heir at law and the party during whose life it was suspended. Here the estate is expressly devised, and portions are afterwards directed to be raised in the event and upon the condition that the testator's son should leave no son, nor the testator a future son. The raising of portions is a mere possibility, is postponed to the happening of a remote and uncertain event, and is a different operation from a dealing with the estate. No estate by implication can arise from subsequent limitations in a will, so as to alter or take away an estate expressly limited in the preceding part of it. *Bamfield* v. *Popham* (1 P. Wms. 54); *Allanson* v. *Clitherow* (1 Ves. sen.

24). The rule of construction in all the cases is, first of all, to see what is the ordinary legal sense of the words used. Did any conveyancer ever use the words in the sense here contended for? Is it the standard and established meaning and use of words, that "first son" should be included in the rotation "second, third, fourth and fifth? If not, is he to be considered as included in the words "all and every other?" Is it the common sense or the [220] legal meaning?—[The Lord Chancellor: I suppose this is an amicable suit?]— It is, as far as we are concerned. There is no first son born: the only reason for deciding the question now is, that the trustees must act.—[The Lord Chancellor: Why did not they wait until a son should be born? This is purely an imaginary case.]—There is a daughter of J. H. Langston, and she is the Appellant. Every party who takes an interest in the will might open the question: the only ground upon which a decision could be come to in such a case is, that this party has a right to call for a settlement, and the trustees have a right to the direction and protection of the Court of Chancery.

The Solicitor-general (Sir C. C. Pepys), and Mr. Jacob, for the Respondents: When this case first came for further directions before the Master of the Rolls, his Honor stated his opinion to be so clear against the conclusion to which the three Judges of the Court of King's Bench had come, that he should have taken on himself, if he had not thought great deference due to them, to decide contrary to their certificate. One circumstance which may explain how it happened that they came to an opinion contrary to that expressed by the Judges of the Court of Common Pleas and the Master of the Rolls is, that the case for their opinions was defectively stated, omitting all those parts of the will on which the main argument arises, and which are most important to be attended to for the purpose of seeing what the testator's intention was. Your Lordships, attending to the trusts of the terms, will find that not one of those terms can have effect if the construction contended for by the other side take place. And this, which is said to be an extremely [221] well-drawn will, and it is so if the eldest son takes, is the most absurd production that ever issued from a conveyancer's office, if he is not to take. There are eight terms created to raise money, according to different situations in which the family may be placed, and not one of them is to be brought into operation in the event of there being a first son of J. H. Langston; and that first son, it is contended, is himself to take nothing. Taking the words as they stand in the clause where the estate is given, your Lordships, it is true, will not find the word "first" there, but looking to all the words of gift you will see that they are sufficient to carry an estate to the first son. When we find words sufficient, and from other parts of the will collect a manifest intention of the testator that his estate should go according to the ordinary way in which limitations are introduced into wills and settlements, we have the only two things necessary, viz. the intention manifest, and the words sufficient to carry it into effect. We require no words to be introduced, but the original and obvious meaning to be given to the words we find. But on the other side, your Lordships are asked to depart from the words of the will and to introduce the word "younger." The directions of the will are, that the trustees shall convey, first of all, an estate for life to Mr. J. H. Langston, the son of the testator, and then to the uses of the second, third, fourth, fifth, and all and every other son and sons of the body of him, etc. Under these words how can any one son be excluded? There is a gift to "all and every;" the eldest son surely comes under that description, and is entitled to the benefit of the gift, because he answers that description of the class to which the estates are limited. The Appellants say your Lordships cannot go out of [222] the will, yet they have gone out of it and supposed a prior settlement to provide for the first son. We, following their example, may suppose that in the copying of the will the word "first" was left out. If we are to go on speculating on what may have given rise to the omission, we find on the face of the instrument enough to prove that there has been a mistake. [The original draft of the will was handed up to the Lord Chancellor, his Lordship having asked for it. It was stated at the Bar that it had been settled by the late Mr. Shadwell, the Vice-Chancellor's father.] There is an erasure, and "first" stands the only word not erased in the line, so that the copier passed over the whole line so erased, leaving out the word "first," and going to the second, third, etc. We cannot have any benefit from this mistake, nor was it necessary to explain it, for it is quite manifest: and we admit

that a manifest mistake will not enable your Lordships to introduce a limitation into a will. That is not required here; for if the word "first" is not in the will, there are the words "all and every other," under which, to make this a consistent will, the first son may be included. Suppose there was no enumeration of one, two, three, etc., which are perfectly useless—a mere luxury of words in which conveyancers sometimes indulge—and that, instead of that enumeration, the testator had said, "all and every the son and sons of my son." The limitation would have been just as good, and the legal effect just the same; there would have been an estate given and a sufficient description of the class, and every individual of the class would have been entitled. Unnecessary and useless words cannot vitiate a written instrument.—[The Lord Chancellor: Suppose the words had been, to the "first, second, *third, fifth,* [223] sixth and other sons, it would be much easier to say the *fourth* should be brought in, and no doubt he would.]—There your Lordship supposes the general description to include the *fourth*, though you cannot find him in the particular enumeration. In the case your Lordship has put, nobody could contend that the *fourth* would be excluded. Is the rule to be applied as against the eldest, and not against the fourth?—[Lord Chancellor: The testator might have had in contemplation a shifting use, or some other estate which would come to the eldest son.]—In every will of that description, where the eldest son is intended to be excluded on account of some other provision for him, some words are found to indicate that intention. Here there is a total silence of such intention, or of a shifting use. In this well-drawn will the form and phraseology are entirely different from that which a conveyancer would adopt, if he desired to carry into effect an intention of excluding the eldest son; he would find in his precedent book a clear and well-known form adapted to that purpose, and the mode of expression would be, "to the use of the second, third, fourth, etc., and all and every other son and sons, *other than and except an eldest or only son.*" That is the form which conveyancers and testators usually employ when intending to effect the exclusion of an eldest son; and it is a form of limitation which necessarily does effect that object, because it plainly expresses that meaning; but when, after an enumeration of such sons, we say "every other son," it does not mean an exclusion of the eldest son unless some other words be found to exclude him. There are several other parts of this will in which the testator, making limitations in favour of younger children, has used the proper form of ex-[224]-clusion; as "such daughters or sons, *other than and except an eldest daughter,*" or "*other than and except an eldest or only son.*" To provide for the younger daughters of the testator's eldest daughter, he creates the term of 600 years, which is "for the portion and portions of all and every such daughter and daughters of my said daughter Maria Sarah Langston, *other than or besides an eldest or only daughter.*" The same form of expression again occurs as to the portions for his daughter Elizabeth Catherine Langston's daughters, "*other than and except an eldest or only daughter:*" and again, in a manner still more pointed, in the power given to Mr. J. H. Langston to charge portions for his younger children.

We are not asking your Lordships to do violence to any words that are in the will; we are not asking you to supply any; we are asking for a construction of the words which we find. We ask you not to exclude the first son, contrary to the general description of the persons who are to take estates, but to include him if he answers the description of the class, though not before expressly enumerated in it. The clause consists of two parts; first, the description of the persons to take under it, namely, the "second, third, fourth and fifth, and all and every other the son and sons of the body of him my said son lawfully to be begotten." These words express the persons whom the testator intended to take; and then follows the second part of the clause, which describes the manner and form and order in which these persons are to take, "severally, successively and in remainder one after another, as they and every of them shall be in seniority of age and priority of birth." The particular form and order of enumeration, the third after the second, and the fourth after the third, is a matter wholly im-[225]-material. It can have no effect whatever in the construction of the will, whether the testator mentions the second before the third, or the third before the second. If the will had stopped with the first part of the clause, and there had not been the addition of those words which point out the form and manner and order of taking, "severally, successively and in remainder, as they and every of them

shall be in seniority of age and priority of birth," the effect of that limitation alone would have been that the second, third, fourth, fifth, etc. would have taken the estate as joint tenants, or as tenants in common, there being no words of severance; and if there had been no words of inheritance, they would have taken as joint tenants for life. They were not, therefore, intended to take together, but one after another, and then the question arises in what order they are to take? They are to take "successively as they and every of them shall be in seniority of age and priority of birth." These words apply to and govern the mode of taking with respect to the second, third, fourth, and fifth sons who are specifically named, as well as with respect to "all and every other the son and sons." The second son undoubtedly takes before the third; but he does not take before the third because he is mentioned before the third, but because the testator has said they shall take successively as they are in seniority of age. The words "second, third, fourth, and fifth" are little more than surplusage, meaning exactly the same as if the testator had said merely "all and every son and sons." Some conveyancers in a limitation would enumerate "first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth, and all and every other son and sons;" others, less prodigal of words, would say only "first, second, [226] third, fourth, fifth, and all and every other;" while other conveyancers, still more moderate, would limit the enumeration to the use of the first, second, and all and every other the son and sons, or would content themselves with saying "to the use of all and every the son and sons successively;" and the meaning in all the cases would be the same. If the testator here, instead of enumerating the second, third, fourth, and fifth, etc. had inverted that order, and put it to the use of the fifth, fourth, third, second, and all and every the other son and sons, or if he had varied the order in any other mode, still the result and meaning of the words would have been precisely the same, in connection with the other part of the clause. But it is said that the natural construction of the word "other" is subsequent; there is no authority to show that by the word "other" is meant subsequent or younger. If any one were to enumerate the Judges of the land, although it might seem somewhat whimsical to begin by mentioning first some of the junior Judges but if any one speaking of them were to mention Mr. Justice Bayley, Mr. Justice Holroyd, and Mr. Justice Littledale, (who signed this certificate), and "all other the Judges of the Courts of Common Law," would there be a doubt that the Chief Justices and all other Judges of those Courts would be included?

We take the benefit of all those arguments that have been used against construing the will by implication, or giving to words a signification different from that which they literally mean. The Appellants resort to implication, and they desire the word "younger" to be introduced into the will. We are not driven to contend that the word "first" is to be supplied, unless they succeed in persuading your [227] Lordships that the word "younger" is to be implied; nor is it necessary for us to go to any point of mistake, we suppose that there is none. If it were necessary to interpolate "first," there is enough on the face of this will to authorize it. Our argument is one of the simplest character; we have only to bring in aid the arguments of the Appellants against unnecessary implication. We say that here there is no necessity for altering the language of the will; we are to take these words as they stand, without interpolating others; without giving to those words any other sense than that which they bear in the English language, holding that "all" comprises "all," and that "other" means "other," and does not mean "younger" or "subsequent." As to the hypothesis that the testator had intended, for a particular reason arising from settlements of other property, to exclude his eldest son, there is nothing whatever affirmatively on the face of this will to countenance any such supposition. Cases of that kind continually arise, in which an eldest son is excluded by reason of being otherwise provided for; but in almost every case of that description, in the beginning of the will or settlement there is some reference made to that other provision; as a recital, that "whereas my eldest son is provided for by, etc. etc. therefore I devise," etc.; but nothing of that sort is found here. In wills and settlements of that description is also found another clause, which is to the effect, that in case the second son shall come to be owner of that property in respect of which the exclusion takes place, that second son shall take no longer under the will, but there shall be a shifting use, by which it shall go over to the third. In this case there is an absence of that provi-[228]-sion, and there is nothing from which it can be inferred.

Your Lordships may have observed, that after the limitations that follow one another in this will to the different members of the testator's own issue, the ultimate limitation, after the failure of all the issue, is to the use of the testator's sister, Sarah the wife of Peter Cazalet, esquire, her heirs and assigns for ever. The testator did not intend in that case that Mrs. Cazalet should be the only sister benefited by the property, because in the latter part of his will, having given a term of 1500 years to take place in that event, the trusts of that term are, "that in case there should be no son or daughter of the body or respective bodies of his said son, J. H. Langston, or of his said then present daughters or any of them, nor any future son or daughter of the testator's body, or there being any such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue before any of them should attain the age of 21 years, then they, the trustees, should within the space of 12 calendar months after the several deceases of the testator's said son, J. H. Langston, and his said present daughters, and failure of all such issue, levy and raise the sum of £80,000, and should pay one moiety thereof to the testator's sister Mary Ann, the wife of George Arnold Arnold, her executors, administrators and assigns, and the other moiety thereof to his nephew Haughton Farmer Okeover, his executors, administrators and assigns." If, according to the arguments of the Appellants, the testator's son had left an eldest or first son, and if that first son left other children **[229]** in existence, but all the testator's other sons and daughters and all their issue had died, so that there would be a failure of the limitations of the will, and Mrs. Cazalet would become entitled to the estate; in that event Mrs. Arnold and Mr. Okeover would not be entitled to the £40,000 each, directed to be raised by that term. The existence of a first son of J. H. Langston would prevent the raising of that sum for those relations; though he is to take nothing he is to prevent others from taking. The trusts of most of the other terms are equally embarrassing and equally inoperative, if this first son is not to take an estate under the first limitation in remainder. But there is also a power for raising £25,000 for the younger children. What would be the consequence of this provision? It would be, that if there was one son and one daughter of J. H. Langston, the daughter, according to the argument of the Appellants, would take the whole estate, and the father would have power to raise £25,000 for her out of her own estate. Is not that perfectly inconsistent with the eldest son being excluded? Is it not obvious that the eldest son is the party to take, inasmuch as the father is to have a power, out of the estate of the son, of raising £25,000 for the younger children. If the son take an estate, nothing is more rational or more according to the ordinary mode of practice than to raise a sum out of the estate for the daughters.

It is hardly necessary to resort for aid here to any of those cases tending to show that, where there is a mistake, either apparent on the face of the will, or to be collected from the will in connection with other circumstances which the Courts think themselves justified in looking at, that mistake may be corrected. But there are cases of that kind going much farther **[230]** than is asked for by the Respondents, such as *Doe* v. *Geary* (1 Ves. sen. 255), and *Garvey* v. *Hibbert* (19 Ves. 125). In the latter case a testator gave to the three children of D. D. £600 each; but there being four children at the date of the will, the fourth was declared entitled to the like legacy, on the ground of the omission being an evident slip of the testator.

In the argument of the present case before the Court of Common Pleas, Mr. Justice Burrough cited from a manuscript note the case of *Clements* v. *Paske*,* **[231]** much more fully than it is given in the report of *Doe* v. *Hallett* [1 M. and S. 124]. There

* The Reporters have been furnished by Mr. Bowker, the solicitor for the appellants, with a copy of the short-hand writer's note of this case, as stated by Mr. Justice Burrough:

"CLEMENTS *v.* PASKE.—J. C., great uncle of the plaintiff, was seised in fee of premises, part copyhold and part freehold, and on the 28th February 1766, having previously surrendered his copyhold to uses of his will, he made a will, now revoked, but still uncancelled, by which he devised all his real or leasehold estates, not otherwise disposed of, to trustees for the life of J. C., his nephew, to support contingent remainders, and to permit J. C. to receive the rents, etc. for life, remainder to the

was a prior will, which, how-[232]-ever could not be looked at for the purpose of construing the existing will. In the first will the testator gave his real and leasehold estates, not otherwise disposed of, to trustees for J. C. (his nephew), for life, to permit him to receive the rents, etc. for his life; remainder to the first and eldest son of his (the nephew's) body lawfully issuing, and to the heirs male of the body of that first son lawfully issuing or issued, with remainder to J. C.'s second son, and the first and eldest son of his body, etc. In the second will, on which the judgment of the Court was pronounced, the words giving the estate of inheritance, "and to the heirs male of the body of such first son lawfully issuing or issued," were omitted. Lord Mansfield, in giving his opinion said, no one could doubt that it was a slip of the pen: the testator meant to make a limitation in strict settlement, and to give the first son the same estate he gave the second son. That was a case much more difficult to deal with than the one now before your Lordships: there was an omission of all limitation, and nobody could doubt that, taking the whole together, it was an accidental omission, although there were not other parts of the will showing a manifest intention of the testator, as in this case: [233] there were not those eight terms, all and each assuming that the eldest son was to take; there was nothing to explain the omission; the words of gift were wanting, but the gift was inferred: but here we have the words, the issue of the eldest son, frequently occurring; and if there be no words in the first limitation importing a gift to the first son in direct terms, there are words implying that he was intended to take an estate: all the subsequent provisions of the will go on the assumption that the first son was to have the enjoyment of the estate; from every part of the will we collect words of gift and the intention manifest.

Mr. Knight, in reply:—The question for decision resolves itself into two heads of consideration: first, what would be the effect of the limitation to the second and other sons, if it stood alone? and, in the next place, what is the effect of the other parts of

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first and eldest son of his body lawfully issuing, or that is lawfully issued, *and to the heirs male of the body of the first son lawfully issuing or issued*, and for default of such issue, then *likewise* to the second, third and every other son of the said J. C., successively and in remainder, etc., and the several and respective heirs male of the body of every such second, third, or other son; and in case of such issue failing by J. C., remainder over to the first and eldest son of his (testator's) nephew, M. C., (as before); and in case of such issue failing by Matthew C., remainder to all and every daughter and daughters of J. C., and their heirs, as tenants in common, etc.; and in default of such issue, remainder to Elizabeth W. and Mary K. before mentioned, etc., subject to two legacies; proviso containing a power for persons in possession to lease for 21 years, at the best rent." This is not the will in question, and the Court had no right to look at it. The will in question was stated in a case from the Court of Chancery, for the opinion of the Court of King's Bench, to this effect: "The testator, by his last will, first of all revoking the former, and mentioning his intention of disposing of his worldly estates, and devising some real estates to the said J. C. in fee, and giving several legacies, devised all other his real and leasehold estates to, etc. in the same words as in the former will, except that after the devise to the eldest son of J. C., the words '*and to the heirs male of the body of such first son lawfully issuing or issued*,' were wholly omitted. The testator died in May 1767, leaving the said J. C., the father of the plaintiff, his heir-at-law, who entered under the will and possessed during his life, and died intestate in March 1779, leaving the plaintiff, aged 23, his only son by his first wife, and heir at law, and leaving also one son and five daughters by a second wife, all now living. The plaintiff was the only son of J. C. at the making of both those wills: he entered on his father's death, and suffered a recovery to his own use in fee, and was admitted to *the copyhold*, to the use of himself, his heirs and assigns. The question is, what estate the plaintiff took under the devise in the said last will?" The Court said they would certify; and in the next term Lord Mansfield gave his opinion in these words: "The Court took time to consider this case, and to avoid one of two extremes in the construction of wills: *first*, that there may not be an arbitrary latitude in determining what the testator meant when he omits the expressions necessary to explain his will; *secondly*, that there may not be such a strictness when the testator slips in technical or positive expressions: for if his meaning is to

the will on that limitation? Your Lordships have looked during the argument at the draft of the will, which I am satisfied will not make the slightest impression on your Lordships, as it formed no part of the evidence in the cause, either at law or in equity. The first part of the argument for the Respondents is, that " all and every other " include the first son, because the words are general. In the second part of the will your Lordships will see that the testator perfectly well knew how to use the word " first," for after the 500 years' term, he says, " to the use of the first, second, third, fourth and fifth, and all and every other," etc. The testator did not there trust to the general nature of the word " other." These are the limitations to the sons and daughters of J. H. Langston. Then the testator takes up the children of Maria Sarah Lang-[234]-ston, to the use of the first, second, third, fourth and fifth, and all and every other ; and he uses the word " first " in the subsequent limitations to the children of his other daughters.

The case of *Doe* v. *Hallett* [1 M. and S. 124] was decided upon the ground that the law had affixed to a particular phrase a sense that was not to be altered. There is another rule of construction, with regard to which the Courts have uniformly acted ; that is, not so to construe the general expression occurring at the end of an enumeration, as to include that which, according to the natural order, ought to be in the beginning. That is a general rule applicable to Acts of Parliaments and all other instruments. What is the common case of a bequest of household furniture, goods and all other effects in and about a house? The word " effects " is restrained from its naturally general meaning to things *ejusdem generis;* because the testator commencing his enumeration with a particular class of things, is not to be held to have meant to extend it (see *Jones* v. *Lord Sefton*, 4 Ves. 166 ; *Stuart* v. *Marquis of Bute*, 1 Dow. 73 ; *Michell* v. *Michell*, 5 Madd. 69). What shall we say to the received construction of the Act 13 Eliz. c. 10, as to " deans, parsons, vicars, and all other persons having ecclesiastical promotion?" Is it not law as old as the time of Lord Coke, and

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be collected from the will itself, then the will ought to prevail. No one can doubt here that it was a slip of the pen : he means to make a limitation in strict settlement, remainder to the first and eldest son of the body of the said J. C. lawfully issuing, or that is lawfully issued ; and for default of such issue, then likewise to the second and third sons, etc., and the several and respective heirs male," etc. He added, " Both from the general tenor and the particular expressions, no man alive can doubt but that he meant a strict settlement to James Clements and every other son. Suppose he had devised to the second son, as he now has, and had then said, ' I mean the *same estate* for my eldest son ;' this would certainly have been sufficient. So it will in the present case ; for he gives it to the first and eldest son, J. C., and for default of such issue, then *likewise*, etc. : he meant to give the first son the same estate he has given to the second son. We have so certified."

Mr. Preston has done the Reporters the favour of noticing in the above statement an omission of an important part of the will, viz. " The eldest of such sons and the heirs male of his body," etc., as distinguished by *italics* in the following MS. note of the case in his own possession, which he has kindly communicated :

" The testator devised to one for life, and after his decease, to the first and eldest son of the body of his said nephew, James Clements, lawfully issuing or issued ; and for default of such issue, then *likewise* to the second, third, and every other son of his said nephew James Clements, successively and in remainder one after the other, as they shall be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of every such second, third and every other son or sons, *the eldest of such sons and the heirs male of his body being always preferred and to take before any of the younger sons and the heirs male of his body:* and in case of such issue male failing by my said nephew, James Clements as aforesaid, then I give and devise," etc.

" It was decided that James Clements, the nephew's son, took an estate tail by implication.

" The question put to the Court was, what estate did James Clements, the nephew's son, take under the devise in the testator's will?"—Trower's MSS.

" Mr. Maddocks and Mr. Fearne were of opinion the eldest son of the nephew took an estate tail."

universally recognised, that you cannot include in the general words last mentioned, persons of higher degree than those before mentioned? (Archb. of Cantb. case, 2 Co. Rep. 46, Thomas and Fraz. edit. vol. 1, 557). There is a case of recent occurrence, where a particular Act of Parliament connected with the customs contained a provision respecting the importation of iron, copper, and all other metals, etc. Gold and silver had been [235] imported in bars, and it was argued that gold and silver were included under the general expression "all other metals." "No," said the Judges, acting on that universal rule of construction which has prevailed in the English law, "that is not a sound rule of construction; we cannot hold that general expression to include something higher and greater, and which in its natural order would have gone before." If the language of the first limitation stood alone, no Court could have held that the "first" was included under the general and inferior term "other;" then the only question is whether your Lordships are driven by necessary implication from what follows, to say that a different rule of construction ought to be applied. The principal cases under the head of implication have been already cited, and no one has been found to sustain this decree.

The Lord Chancellor: My Lords, in consequence of the peculiar nature of this case I shall refrain from calling on your Lordships for immediate judgment on the important question that has arisen in construing this will; important in almost every view of the case, but more particularly as there has arisen a marked difference of opinion between the two eminent tribunals to which the Court of Chancery successively sent cases for opinions. The Court of King's Bench certificate had not the authority of the whole Court, certainly; but it was not because the learned Chief Justice did not concur with the other three Judges; he did not hear the case argued, in consequence of an arrangement forced upon the Court by extreme pressure of business, by which the most important matters were decided in a chamber near the Court by three puisne Judges, and the [236] least important matters during term were decided by the whole Court: that is the reason that the name of Lord Tenterden is not to the certificate; we have no knowledge whatever what his opinion might be on the case. The Master of the Rolls appeared to have been dissatisfied with that certificate, and therefore sent a case—more fully, it is said, but we should look into that among other things—to the Court of Common Pleas, and that Court came to the resolution contained in their certificate unanimously, without reasons assigned; that certificate is signed by the four learned Judges of that Court; and the Master of the Rolls on a further hearing decided that the eldest supposed son of James Haughton Langston took an estate in tail male, expectant on the life estate of his father. The case comes before your Lordships by appeal from the Master of the Rolls. I should wish to have an opportunity of looking into this with the assistance of some of your Lordships. I do not say now which way my opinion leans. I feel great force in the argument in support of the decision of the Court below, with the force of which it is not easy to grapple; at the same time, I feel the utmost deference and the greatest respect due to the three most eminent lawyers in the Court of King's Bench who came to a directly opposite conclusion; and undoubtedly I feel the full weight of those arguments urged here on the Appellant's side, by which in all probability those three Judges were moved to give the opinion that has been certified to the Master of the Rolls, which goes to this, that you are not to make a will; you have no right to fancy or to imply, unless there be something within the four corners of the will which is not only consistent with the implication you make, but which could hardly stand, if at all, in the [237] will, without that implication being made. That is what is called necessary implication, and legitimate implication, in contradistinction to gratuitous, groundless, fanciful implication.

My Lords, concurring entirely in that principle, and only doubting whether the learned Judges had not allowed it to shut their eyes to what was within the four corners of the will, expressing no more at present than my doubt whether that principle had not carried them so far as to make them rather disregardful of the rest of the instrument which seemed to supply that matter of necessary implication according to fair construction, I should, out of great respect and deference to the learned Judges who so held in the Court of King's Bench, suggest the propriety, before coming to a decision either way, of having the matter a little further considered. If, upon consideration, I should not feel that entire confidence which would justify me in advising you to affirm the decision below in the face of the

certificate of that most justly venerated part of the King's Bench, I should be very much disposed to suggest to your Lordships the expediency of having this case argued by one counsel of a side again, before such of the learned Judges who have not hitherto heard it—great changes have unhappily taken place, Mr. Justice Holroyd is no more, and Mr. Baron Bayley is no longer on the Bench—but before such of the learned Judges as were not then in that Court, and the Judges of the Court of Exchequer, who formed no party in those stages of the case. It is only, however, in the event of my not having a very clear opinion, or of feeling so much distrust in that opinion that I cannot put it forward, though supported by the Court of Common Pleas, against the [238] great authority of the learned Judges of the Court of King's Bench—it is only in that event I should feel disposed to put the parties to the expense and your Lordships to the delay of further argument.

The Lord Chancellor: In this case, my Lords, a question arose upon the construction—or rather, if any way were open to us of supplying a defect in the construction—of the will of the late Mr. Langston. And the question assumes an importance beyond even what naturally belongs to it, when we consider that, two cases having been sent for opinion from the Court of Chancery to two different Courts, the higher Courts of Westminster Hall, those two Courts certified opinions directly in opposition to each other, but without stating their reasons; giving us occasion again to regret that practice, which has of late years sprung up, but which I hope and trust is now about to be terminated by reverting to the ancient practice. Those certificates came to the Court which sent the cases, unaccompanied by the reasons upon which they were founded. All that we know, therefore, is that the questions were argued by learned counsel in those Courts; that time was taken in each case for the consideration of the Court; and that the question being whether Henry Langston took any and what estate under the will, in the one case the Court of Common Pleas certified their opinion that Henry Langston took under the will an estate tail in tail male; whereas the Court of King's Bench certified that Henry Langston took under the will no estate whatever.

My Lords, the will contains a series of limitations: it is penned with great care; it is the production of a professional man; it is a production of great pro-[239]-fessional skill and experience; it is one of the most artificial, one of the most elaborately penned, one of the most carefully conceived instruments, which it has ever been my lot to be called upon to examine; nevertheless it does so happen, as if to confound the pride of human learning and experience in legal matters, that this production of the most practised conveyancer has as much occasion for the helping interposition of a Court of Equity or of Law before which it comes to give it effect, as if it had been penned either by an ignorant peasant, without any professional aid, or by one of those rustic artists whose partial knowledge of conveyancing—(I mean those who sometimes make wills in the country for persons a little more ignorant, and but a little more ignorant, than themselves)—and whose handywork often gives rise to much labour and to inextricable difficulties in Courts of Justice.

My Lords, no person out of Court can read this instrument without being perfectly persuaded that an accident must have happened either in the framing of it originally, or in copying the draft, whereby a line or two has been left out: either the limitation, which was intended to be inserted, and which was taken for granted to have been inserted in the draft, was by some accident omitted; or that being in the draft, a couple of lines were passed over in copying the draft into the ingrossment. For instance, to show that this must be the case, the very first person that was likely to take any estate under the will after the only son of the testator in *esse* at the date of his will, the eldest son, is disposed of by being omitted. He is not named there at all. "Then are you," say the Court of King's Bench, "to give him an estate tail, or any estate at all, when he is [240] not even named in the will? Named he is for other purposes and in other respects, but not to take anything; not to benefit under the will."

I here lay entirely out of view an incident which occurred during the argument. I had a curiosity to see the draft from which the ingrossment was made, and one party were exceedingly anxious that my curiosity should be gratified; but that anxiety was met by just an equal anxiety on the opposite side that it should remain unsatisfied. I at once, therefore, proceeded to have a still greater anxiety and curiosity,

because I plainly saw it was likely to be a decisive matter. I was aware, as a lawyer, that I had no right to look at it, but, humanly speaking, it was impossible not to wish to see whether one's extra-judicial conjecture was well founded, namely, that the whole history of this was an error in copying; and accordingly, when I looked at it, I found that there was a limitation to the first son of testator's son, James H. Langston, which the person who had made the ingrossment had, for a very obvious reason, passed over in copying it, having in his haste gone from the same word in one line to the same word in another, in mistake. I here lay that entirely out of view. It has no right to enter into the consideration of the case, and I can positively assure your Lordships that I have formed my opinion upon the instrument as it now stands, without matter *dehors*, without having recourse to the draft. I have no right to look at the draft, but anybody who reads this will — and that is my first reason for agreeing with the Court of Common Pleas rather than the King's Bench—anybody who reads this will cannot, if he has his senses about him, doubt that some mistake must have happened; and that is [241] a legitimate ground in construing an instrument, because that is a reason derived not *dehors* the instrument, but one for which you have not to travel from the four corners of the instrument itself.

The next point to which I advert, as the second ground upon which I agree with the Court of Common Pleas, and not with the King's Bench, is that, when the framers of this instrument really meant to exclude a child, or an eldest child, whether a son or a daughter, no persons knew better than they did how to effect that purpose. If your Lordships will look to the will itself, you will find that, in cases where they intended any such exclusion, no person knew better than they how to effect it. In the declarations of the trusts of the term for 800 years, for instance, "for raising the portion or portions of all and every such daughter and daughters of his the said testator's said daughter Caroline Langston, *other than and besides an eldest or only daughter;*" so also in another (the fourth,) of the eight terms created by this will, are used the proper words of exclusion, "for the portion and portions of all and every such daughter and daughters of my said daughter Elizabeth Catherine Langston, *other than and except an eldest.*" So, again, the testator uses like words where a son is to be excluded; as in the power for James Haughton Langston to charge the estates in case there should be any child or children of his body lawfully begotten, *other than and besides an eldest or only son.*" This, therefore, is a circumstance always of some weight where you find it; it is a topic always worth considering. When you find that, where the meaning is clear and there is no doubt whatever as to the intention, he adopts an effectual, clear and precise mode of [242] executing that intention; you may also safely and logically employ that to throw light on those other instances where it is doubtful, and where the question is whether he means this or that. If you find that he does not in those places use those words which he has used where there was no doubt what his intention was, you have a right to say that he did not mean the same thing, because, when he did clearly and undeniably mean this thing and not that, this was his mode of expressing himself in order to carry that intention into effect.

My Lords, the third of the reasons,—and I go over them with the less particularity, because I am now affirming the judgment of the Court below, nor should I at all go into the reasons but for the conflict between the Courts of King's Bench and Common Pleas;—the third of the reasons is one which I cannot help feeling to be exceedingly powerful, and which, upon all the views I can take of this subject, presses forcibly upon my mind. The existence of a son is to defeat no less than eight terms raised most carefully, artificially and anxiously by the persons who penned this instrument; and yet that son whose existence is to produce such an effect, to create such destruction, to deal about such havoc upon the whole of this will, is not, according to the construction set up by the King's Bench and by the Appellant, to benefit under it in the slightest degree. My Lords, it is monstrous to suppose that any rational person could really intend to make so much depend upon the event of a person coming into existence, which person, nevertheless, was to be of no force, of no effect, of no value in his eyes, except to be used as an instrument of destruction; that he was only [243] to be considered as the means of taking away the benefit of other parts of this instrument, and yet was himself to benefit nothing by that destruction.

My Lords, in the fourth place, Henry Langston's existence must be allowed,

according to the argument of the King's Bench and of the Appellants, to defeat nearly the whole of this will. There are two modes of reading an instrument: where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect (for it is a rule of common sense, which I trust is common to both sides of Westminster Hall), that you should rather lean towards that construction which preserves, than towards that which destroys. *Ut res magis valeat quam pereat* is a rule of common law and common sense; and much the same principle ought surely to be adopted where the question is, not between two rival constructions of the same words appearing in the same instrument, but where the question is on so ready an instrument as that you may either take it verbally and literally, as it is, or with a somewhat larger and more liberal construction, and by so supplying words as to read it in the way in which you have every reason to believe that the maker of it intended it should stand; and thus again, according to the rule *ut res magis valeat quam pereat*, to supply, if you can safely and easily do it, that which he *per incuriam* omitted, and that which instead of destroying preserves the instrument; which, instead of putting an end to the instrument and defeating the intention of the maker of it, tends rather to keep alive and continue and give effect to that intention. If this is a rule applicable to all cases, it surely is more peculiarly applicable to a case like the present; for I will only shortly advert to a cir [244] cumstance which weighs in my mind materially in giving a larger effect than I otherwise might feel disposed to give to these considerations, and leads me to supply more readily than I should otherwise do, the words wanting. It is, that you are here dealing not with a legal limitation, but with an executory trust. It is sufficient simply to state that, and to advert to that consideration, to entitle me to think that I may, therefore, give a larger latitude by a good deal to the construction of an executory trust, than I might have been disposed to give if it had been a strict legal limitation. Nevertheless, my Lords, I confess that, even if this, instead of being an executory trust, had been a legal limitation, the reasons I have already given and those I am about to add, and which weigh more forcibly upon my mind than those I have gone over, would have been quite sufficient to compel me to read the legal limitation as the Court of Common Pleas has read this executory trust.

I wish to call your Lordships' attention to that extraordinary effect which of necessity must follow, and which I look upon to be almost a *reductio ad absurdum*, from the construction put upon it by the Court of King's Bench; looking only to that same clause which I have already *alio intuitu* referred to, I mean the beginning of the clause where the power is to be inserted in the settlement for charging portions for J. H. Langston's younger sons or daughters, and where the exclusion of James H. Langston's eldest or only son is affected by apt and proper words. It thus appears that this monstrous conclusion indisputably follows, that if there were one son and one daughter, then there is to be charged £25,000 upon the daughter's estate for the behoof of that daughter herself! Absurdity could go no further. If the son is [245] to take an estate, that you should provide most carefully for raising £25,000 by a charge for the benefit of the daughter, is perfectly intelligible; but here, according to the construction put by the Court of King's Bench, a sum of £25,000 is to be raised; for whom? Out of what estate? Not out of the son's estate, for he does not take an estate tail, but out of the daughter's estate, for she takes it to the exclusion of the son. And for whose benefit is the £25,000 to be raised? Not for the son, but for the daughter, who takes an estate burthened with a power to raise her own £25,000! I cannot believe that this was ever argued before the Court of King's Bench: I cannot believe that it was even stated to the learned Judges. It was not argued in *Banco*, and that is one comfort for me to know; and another comfort I derive from it is, that I had the good fortune to put an end to these sittings not in Banco. A Court of three Judges, sitting in a corner of Westminster Hall, with two counsel, one on each side, is not in my mind so satisfactory a way of putting an end to disputed points of law, as where you have my Lord Chief Justice sitting as the head of his own Court, and the three puisne Judges with him, and all the Bar arranged around, witnessing the argument. That experiment of a Three Judges' Court, which was of a temporary nature, was discontinued; but it was during its existence that this case was argued. There was

no Lord Chief Justice present: there were three Judges, undoubtedly of profound learning, and who, if the case had been fully argued before them, would have had this point presented, which there is no getting over, which is a contradiction in terms, which implies what no rational being could ever have intended. If I have a son and a daughter, and I give an estate tail to the son, [246] there can be nothing more reasonable than my giving £25,000 by way of charge upon that estate while the estate tail of the son lasts, that the daughter may be provided for, inasmuch as she has no estate, but the son has it. But who ever thought of giving no estate tail to the son, but giving the whole estate to the daughter, and then raising £25,000 out of the daughter's estate, out of her own estate, for her own benefit, by way of a charge on her own estate tail in the same premises? I cannot understand how this could possibly have been overlooked if it had been stated to their Lordships; I think it must at once have disposed of the case.

My Lords, I wish to say a word respecting the force of the term upon which the argument for the Appellant mainly rests, the word "other." It is said that, if you can construe an instrument without supplying anything, omitting out anything, but upon its own terms, unaltered, unadded to, undiminished, you had better do so, as it is safer to take these terms than to introduce others. I agree with that proposition. Now it does so happen that, if you take these terms as they are here, and neither alter, nor add to nor diminish them, the words themselves that exist upon the face of the will are sufficient to carry an estate tail in the first instance to Henry Langston, and to support all the terms and other limitations. But it is said by the Court of King's Bench and by the Appellant, that "other" always means "younger," "posterior;" and no doubt I leaned at first towards that view of the subject. It is a very plausible argument, and it is true in point of fact. If anybody were to say first, second, third, fourth and other sons, it must mean the sons after the fourth; but why does "other" mean the sons after the fourth? It is be [247]-cause you have before enumerated all that come before the fourth, for you have said first, second, third and fourth. But suppose I had just happened to have omitted the first, and instead of saying first, second, third, fourth and other sons—suppose I had said, to my second, third, fourth and other sons, leaving out the first, then it is perfectly clear that "other" no longer is of necessity confined to the fifth, sixth and seventh, but "other" there *ex vi termini* includes the first, because the first is literally the one who answers the description of something other than the second, third and fourth. The word "other" would then just as grammatically, as accurately, as strictly and as correctly describe the eldest son, as it would describe the fifth, sixth or seventh son, because the eldest son is a son other than the second, other than the third, other than the fourth. The only reason why "other" in all ordinary cases and in the common strain of conveyancing means a younger son is, that in all those cases they never think of leaving out the eldest.

My Lords, these are the grounds which I have now gone over, upon which I have formed my judgment, though with great deference certainly. I have taken a long time to consider it, I have frequently spelled over the instrument and looked into the argument, of which I took a note at the time. These are the grounds upon which it would be affectation to say I have any hesitation in agreeing with the Court of Common Pleas, and differing entirely from the Court of King's Bench. My opinion is that we are to read these words as if there had not been the omission of those other words in the limitation; and that, even if we are to read them as they stand, the words are sufficient, literally and strictly construed, to carry an [248] estate tail in the first instance to the eldest son, and to limit all the other terms. I go upon the whole instrument taken together. I go upon the whole of the eight terms, and the destruction dealt out in those terms by limiting it in any other way. I go also upon the monstrous absurdity of supposing, according to the case put, that where the will has provided expressly for one son and one daughter, that the son is to take nothing and the daughter all, and yet, though she is to take the estate, she is carefully provided with a sum of £25,000 raised by a charge created upon the estate which she was to have altogether herself: nothing can be more absurd. What can be more common than to argue that words, which otherwise would give only an estate for life, give an estate in fee, if they are coupled with other words which intimate that there is to be a charge upon that estate which an estate in fee only

could support? Anything that extends beyond a life estate converts that life estate into a fee, because it is clear that the person would not have given a life estate if he had meant that any burden should be saddled upon that life estate which nothing but a fee could support. So, in like manner, when an interest is given to A, which it can only be understood that A would have any occasion for in the event of B having the estate tail, can there be a sounder reason than that for so construing the instrument as to give the estate to B and not to A? Therefore, that view is of itself decisive of this question, and it would make absolute nonsense of the will to read it in any other way. Upon the whole I must advise your Lordships to agree with his Honor the Master of the Rolls, and to affirm this judgment, which proceeds upon a preference given to Henry Langston, who was for this purpose supposed [249] to be in existence, entitling him to take an estate tail under the will. I agree, therefore, in the opinion that he took an estate tail clearly under this will, taken altogether; adding to the other circumstances this consideration, that we are here dealing not with a legal limitation, but with an executory trust. Nevertheless, further adding, that if we were dealing, not with an executory trust, but with a legal limitation, I should say that, for the several reasons I have given to your Lordships, my opinion still would be that, even taking it as a legal limitation and not an executory trust, the eldest son upon coming *in esse* would have taken an estate tail.

It is with equal satisfaction in this as in other cases that I am enabled to state to your Lordships, that my noble and learned friend the Lord Chancellor for Ireland, who heard this case, has sent to me a communication stating that he has come entirely to an opinion in accordance with the decision of the Court of Common Pleas, and that he has no doubt whatever that this judgment I am about to move is right. Whatever direction his Honor made as to the costs below must be attended to. All the costs must be paid out of the fund.

Decree of the Court below affirmed.

[250]

WRIT OF ERROR.

FROM THE COURT OF EXCHEQUER CHAMBER.

WILLIAM MARSH, JOSIAS HENRY STRACEY, and GEORGE EDWARD GRAHAM,—*Plaintiffs in Error;* ANN KEATING,—*Defendant in Error.*

[Mews' Dig. iii. 1587; iv. 1306; x. 542; xi. 1060. S.C. 8 Bli. N.S. 651; 1 Scott, 5; 1 Bing. N.C. 198; and see 1 Mont. and Ayr. 582, 592. Followed in *Reid* v. *Rigby and Co.* (1894), 2 Q.B. 40; and *Jacobs* v. *Morris and Morris*, 1901, 70 L.J. Ch. 183.]

F., a partner in a bank, caused stock belonging to a customer to be sold out by a forged power of attorney: the proceeds were paid to the account of the bank, at the house of the bank's agents, and were appropriated by F., who was afterwards executed for other forgeries. The partners of F. were ignorant of the fraud, but might, with common diligence, have known it. HELD that the customer could maintain an action against the partners for money had and received.

The Plaintiffs in Error and Henry Fauntleroy, their partner in the trade of bankers, having become bankrupts in 1824, and the Defendant in Error having proved a debt under the commissions of bankruptcy issued against them, the assignees under the commissions presented two petitions to the Lord Chancellor sitting in bankruptcy; one, stating that the said bankrupts were not indebted to the Defendant in Error, and praying, among other things, that her proof of debt might be expunged; the second, praying for leave to file a bill in Chancery for the purpose of expunging that and other proofs. The Lord Chancellor, by an order made on both petitions, and bearing date the 12th of May 1831, ordered that, for the purpose of trying the question, whether the said bankrupts were at and before the issuing forth

of the said joint and separate commissions, and still are, justly and truly indebted to the said Ann Keating in any and what sum of money, an action should be forthwith brought in [251] the Court of King's Bench, by or in the name of the said Ann Keating, against the said William Marsh, Josias Henry Stracey and George Edward Graham, for money had and received by the bankrupts to and for her use; and that a special verdict should be taken in such action by consent, on a statement of facts to be settled as therein mentioned; and that the Defendants in the said action should consent to judgment being entered up in the said Court and in the Court of Error for the said Plaintiff, for the purpose of the same being carried by Writ of Error before the House of Lords. And his Lordship ordered the said petitions and other petitions in the matter of the said bankruptcy to stand over generally; and directed the dividends on the disputed proofs of debt to be vested in Exchequer Bills, and the interest thereon to be accumulated to abide the event of the said action and the further order of the Court (see Note at the end of the Case).

An action of *assumpsit* was accordingly brought by Mrs. Keating, containing merely the common money count for money had and received by the Defendants, to and for her use; and at the trial thereof at the London sittings after Hilary term 1832, the following special verdict, as previously settled under the said order of the Lord Chancellor, was taken by consent:

By the special verdict it was found that, on the 10th of October 1819, there was standing in the books of the Governor and Company of the Bank of England, in the name of the Plaintiff, the sum of £12,000 interest or share in the joint stock called Reduced Three per Cent. Annuities, transferable at the said Bank of England; that the accounts of the proprietors of the said stock are kept in certain books [252] of the Governors and Company of the Bank of England, called ledgers, and that accounts are entered in the form of debtor and creditor accounts in the said ledgers, of the whole amount of the said stock; in which accounts the sums either subscribed or transferred to individuals are stated as items to their credit, on the one side of the account, and on the other side they are debited with all sums transferred from their names: and that certain other books are kept by the Governor and Company of the Bank of England, in which are entered transfers of the said stock from time to time, purporting to be signed by the parties transferring the same, or their attorney lawfully authorized. That upon production of the transfer books, the clerks of the Governor and Company of the Bank of England, who keep the ledgers, enter in the ledgers the sums transferred to the credit of the persons to whom the transfers are made, by adding those sums to their accounts if they already have any, or by opening new accounts with such persons if they have not already any accounts in such ledgers. That no entries in the ledgers are made without the authority of the entries which are made in the transfer books; but that, upon the production of such entries in the transfer books, the entries are made in the ledgers immediately, without further inquiry as to the genuineness thereof: and that any person on whose account any sum of stock appears in such ledger, is permitted at any time, on application at the Bank of England, to transfer the same, or any part thereof, at his discretion. That the accounts are balanced twice a year, for the purpose of making out dividends: that the aggregate amount of the balances forms the aggregate of the said stock called Reduced Three per Cent. Annuities; that such aggregate amount is transmitted half yearly to the [253] Audit-office of the Exchequer, for the purpose of ascertaining the amount which will be wanted for dividends; and that the dividends are calculated on the balance so ascertained. That an account is also once a year transmitted to the Audit-office of the Exchequer, which contains the names of all persons who appear by the books kept at the Bank as aforesaid, to be the proprietors of any part of the said annuities. That the dividends are paid twice a year to the holders of dividend warrants, which are made out from the ledgers, in the names of the persons who appear by the ledgers to be entitled thereto.

That William Marsh (one of the Plaintiffs in Error) received the dividends which became due in respect of the said sum of £12,000 in the said stock, in the month of October 1819, under and by virtue of a power of attorney dated the 7th June 1803, from the within-named Plaintiff to the said William Marsh, Sir James Sibbald, baronet, Josias Henry Stracey and William Fauntleroy, being the persons at the date thereof composing the firm of Marsh, Sibbald and Co., and paid them to the

house of Marsh and Co., bankers, in Berners-street, to the account of the Plaintiff, who had a banking account with the said house.

That on the 29th of December 1819, an entry was made in one of the transfer books of the Governor and Company of the Bank of England, purporting to be a transfer, under a power of attorney purporting to be granted by the Plaintiff to the said William Marsh, Josias Henry Stracey, George Edward Graham and Henry Fauntleroy, the persons who at the date thereof composed the firm of Marsh an[3] Co., jointly and each of them severally, of £9000 of the Plaintiff's interest or share in the said stock, unto [254] William Brackstone Tarbutt, of the Stock Exchange, gentleman, his executors, administrators or assigns. That the power of attorney under which the said entry was made was not executed by the Plaintiff, but that the signature to the said power of attorney, purporting to be the signature of the Plaintiff, was forged by the said H. Fauntleroy; that the said H. Fauntleroy had not any authority from the Plaintiff to make any such transfer; and that the Plaintiff did not ever authorize or request the said Governor and Company to make any such transfer of the said sum of £9000 in the said stock, or any part thereof. That in consequence of such entry in the transfer book, an entry was made in one of the ledgers of the Governor and Company of the Bank of England, by which the Plaintiff was debited with the said sum of £9000 Reduced Three per Cent. Annuities, and credit was given to the said W. B. Tarbutt for the sum of £9000 in the said stock; and that from that time the Plaintiff ceased to have credit for the said sum of Reduced Three per Cent. Annuities in the said ledger.

That on or about the 11th January 1820, the said Marsh and Co. purchased for the Plaintiff the sum of £3000 Reduced Three per Cent. Annuities, and caused the same to be transferred to the Plaintiff, whereby there appeared the sum of £6000 to the credit of the Plaintiff in the said ledgers kept at the Bank of England, and no more. That the said W. Marsh attended at the Bank of England in the month of April 1820, and duly received the dividend which became due on the said sum of £6000 Three per Cent. Reduced Annuities on the 5th of April 1820, and signed a receipt for the same, as the attorney of the Plaintiff. That since the 29th of [255] December 1819, very numerous transfers of Reduced Three per Cent. Annuities, of sums both great and small, had been made to and by the said W. B. Tarbutt, which had been debited and credited to him; and that in the books kept by the said Governor and Company, the said sum of £9000 Reduced Three per Cent. Annuities had become blended and mixed with other stocks standing in the said ledgers in the said W. B. Tarbutt's name, and in the said books appeared to have been transferred and assigned by him; that it was not possible to distinguish the account to the credit of which the said £9000 Reduced Three per Cent. Annuities stood, which were so carried to the credit of the said W. B. Tarbutt, and debited to the Plaintiff as aforesaid; and that no dividend warrant had at any time since the said 29th of December 1819, been made out for or in respect of the dividends on the said £9000 Reduced Three per Cent. Annuities in favour of the Plaintiff, either together with or apart from any other sum of stock, but that the dividends thereon had been ever since paid to other persons appearing on the said books to be the transferees thereof.

That the Plaintiff did not consent to, and had not any knowledge of the above entries or entry having been made in the books of the within-named Governor and Company.

That upon the 10th of September 1824, the said H. Fauntleroy was apprehended on a charge of forging letters of attorney for the transfer of certain other annuities in the Bank of England; and that the Governor and Company of the said Bank undertook to prosecute him. That the Plaintiff informed the Governor and Company of the Bank of England of the forgery so committed, as soon as the same came to [256] her knowledge. That the said Governor and Company caused several indictments to be prepared against the said H. Fauntleroy for forging letters of attorney for transfer of parts of the annuities transferable at the Bank of England, and that he was tried and convicted upon one of such indictments on the 30th of October 1824, and executed on the 30th of November in the same year; but that neither the plaintiff nor the said Governor and Company preferred any indictment against him in respect of forgery of the power of attorney hereinbefore referred to.

That Marsh and Co. kept an account with Martin, Stone and Co., bankers in the

city of London, in the usual way of a banker's account; and that a pass-book went from one house to the other from time to time, according to the usual practice between bankers. That Marsh and Co. kept a book called a house-book, in which corresponding entries to those in the pass-book ought to have been made; and that, in the due course of business, the pass book and the house-book of Marsh and Co. ought to have corresponded. That the house-book was in constant use in the banking-house of Marsh and Co., and that the pass-book was frequently brought thither from the house of Martin and Co.; but that when it was at the banking-house of Marsh and Co., the said H. Fauntleroy kept the same generally locked up in his own desk. That the said H. Fauntleroy was permitted by the other bankers to conduct the greater part of the business of the said banking-house without their interference, and they reposed great confidence in him; and that he made very many false entries and omissions in the house-book, and that the same did not correspond with the pass-book in many instances. That the said H. Faunt-[257]leroy paid into the hands of Martin and Co., and drew out of their hands, considerable sums for his own individual use, which appear respectively in the pass-book, but not in the house-book; and also made very many false entries in the other books of the firm, without the knowledge and in fraud of his partners, to a large amount.

That on the 29th of December 1819, the said H. Fauntleroy ordered one Thomas Butterfield Simpson, a stockbroker, to sell out the sum of £9000 Reduced Three per Cent. Annuities, described as standing in the books of the said Governor and Company of the Bank of England, in the name of the Plaintiff; and that the said T. B. Simpson sold the same to the said W. B. Tarbutt, for the sum of £6018 15s., which sum he received from the said W. B. Tarbutt. That according to the course of business between the said T. B. Simpson and the said Marsh, Stracey and Co., the said T. B. Simpson allowed the said Marsh, Stracey and Co. one half of the usual commission when employed by them to effect sales, and upon the said sale he allowed one half of the commission; and that the said T. B. Simpson paid the sum of £6013 2s. 6d., being the amount of the sum so received by him from the said W. B. Tarbutt, deducting one half of the usual commission, by a cheque payable to the said Marsh and Co., into the hands of Messrs. Martin and Co., to the account of Marsh and Co.; and the same was entered by them in their pass-book as "Cash per Fauntleroy," the name of Fauntleroy denoting the name of the individual by or on whose behalf the payment was made. That no entry was made, at any time, of the said sum of £6013 2s. 6d., in the house-book, or any other books of Marsh and Co., but only in the pass-book of that firm with Martin and Co.; [258] that it was the business of the said H. Fauntleroy, as between himself and his co-partners, to have entered the said sum in the house-book, if it had been intended by him for the account of Marsh and Co. That among the books kept by the said Marsh and Co., there was, besides the said house-book, a daily balancing book, purporting to contain a daily record of the amount of cash left in the drawers in Berners-street, and the amount of cash at Martin and Co.'s, as shown by the said house-book, after the conclusion of each day's transactions, accompanied by a proof of the correctness of such balance. That the said H. Fauntleroy in general made up such daily record in the said balancing-book, and the said sum of £6013 2s. 6d. was not entered in the house-book, nor in the daily balancing book, on the said 29th of December 1819, or at any other time, nor did the same ever come into the yearly balances of the said house of Marsh and Co., or in any other manner into their books. That no individual partner of the house of Marsh and Co. could draw monies out of the said account of Martin, Stone and Co., but by drafts signed in the partnership name or firm; but that the said H. Fauntleroy paid in, and by means of such drafts drew out, large sums of money for his own individual purposes; and that the account between the said Marsh and Co. and Martin and Co. was repeatedly balanced between the said 29th of December 1819, and the bankruptcy of Marsh and Co.

That on the 13th of September in the year 1824, in consequence of the discovery of the forgeries of the said H. Fauntleroy, the said W. Marsh, J. H. Stracey and G. E. Graham, became bankrupts; and a commission of bankruptcy, bearing date the 16th of the same month, was duly awarded and issued against [259] them, under which they were duly found and declared bankrupts; and on the 26th of October following the said H. Fauntleroy also became bankrupt, and a commission of bankruptcy, bearing date the 29th of the same month, was duly awarded and issued against him, under which he was on the same day duly found and declared bankrupt.

That, in the month of April 1820, credit was given to the Plaintiff, by the house of Marsh and Co., in the banking account kept by the Plaintiff with the said house, for the dividend on the sum of £15,000 Reduced Three per Cent. Annuities, £9000 stock, parcel thereof, being the £9000 Reduced Annuities before mentioned; the entries respecting the said dividends being made by the said H. Fauntleroy, or under his immediate direction; and that from the month of April 1820, up to the date of the said bankruptcy, entries were made in the books of Marsh and Co., by which the Plaintiff's account was credited with a sum of money as the dividends on the Reduced Three per Cent. Annuities then in her name, including in such account the dividends on the said £9000 Reduced Three per Cent. Annuities, as if those dividends had been regularly received from time to time, such entries respecting the said dividends having likewise been made by the said H. Fauntleroy, or under his immediate directions; and that until after the apprehension of the said H. Fauntleroy before mentioned, the said W. Marsh, J. H. Stracey and G. E. Graham, and each of them, were wholly ignorant of the said forgery hereinbefore mentioned.

That after the bankruptcy, the Plaintiff made application to the Governor and Company of the Bank of England, respecting the said sum of £9000 interest [260] or share in the said stock called Reduced Three per Cent. Annuities; and that thereupon the following letter was written to her by the attornies of the Governor and Company of the Bank of England: "New Bank Buildings, 4th December 1824.—The Governor and Directors of the Bank of England have had under their consideration your claim to have £9000 Reduced Three per Cent. Annuities, which formerly stood in your name, replaced. They find, upon inquiry, that the stock in question was sold and transferred in your name by one of the partners of the late firm of Marsh, Stracey and Co., and that the produce of the stock was paid into the funds of Messrs. Marsh, Stracey and Co.; you have, therefore, as the Bank is advised, a right to prove the amount received on your account, and to receive a dividend upon that proof under Messrs. Marsh, Stracey and Co.'s commission. And we are directed by the Governor and Directors to request that such proof may be tendered, and enforced by petition, if it should not be admitted by the commissioners: after which the Bank will be ready to replace the amount of your stock so sold, upon having an assignment of your proof; and the dividends on the stock so replaced, which accrued subsequent to the latest period at which they were credited to you by Messrs. Marsh, Stracey, and Co., will also be paid to you. We beg to add that we are ready to afford you information and assistance as to the evidence by which your right to prove will be established.—FRESHFIELD & KAYE."

"Mrs. Keating."

That on the 1st of August 1825, the Governor and Company of the Bank of England paid the plaintiff the sum of £270, on her signing and entering into the following receipt and agreement:—

[261] "Aug. 1, 1825.—Received of the Governor and Company of the Bank of England the sum of £270, being the amount which would have been payable to me by way of dividend on £9000 Reduced Three per Cent. Annuities, heretofore standing in my name, for the two half years ending the 10th day of October and 5th day of April last, if that stock had not been transferred, as I allege it to have been, without any legal authority from me. I say, received the same, without prejudice to any right I may have to prove for the produce of the said stock under Marsh and Co.'s commission, or my right to claim to have the said stock replaced by the said Governor and Company. And I do hereby engage (in case the said debt should be decided by a court of law to be proveable against the said bankrupt's estate), when required by the said Governor and Company, and at their expense, to tender or cause to be tendered, a proof to the commissioners under the bankruptcy of Marsh and Co., in respect of the produce of such stock so sold out by them; and in case such proof shall be rejected, to permit my name to be used in a petition to be presented by and at the expense of the said Governor and Company to the Court of Chancery, for the purpose of enforcing their acceptance of such proof as a debt against the said bankrupts' estate, on being indemnified by the said Governor and Company from all costs, charges and expenses which I may sustain or be put to

in respect thereof, without prejudice to my right to claim, notwithstanding such proof, to have the said stock replaced in my name by them ANN KEATING."

That the plaintiff being examined before the commissioners of bankruptcy under the commission awarded and issued against the said Marsh and Co., [262] entered into and signed by her agent, thereunto lawfully authorized, the admission following, that is to say:—" In the matter of Marsh and Co. *ex parte* Ann Keating. The said Ann Keating hereby admits that the paper-writing bearing date 22d of Dec. 1819, and purporting to be a power of attorney from her to William Marsh, Josias Henry Stracey, Henry Fauntleroy, and George Edward Graham, referred to in the examination of James Fenn before the commissioners, on the 18th of September last, and the 4th of June instant, and exhibited to the commissioners, was not executed by her or by her authority, but is forged and fraudulent. That she discovered such forgery at or about the time of the apprehension of Henry Fauntleroy, in September 1824, and gave information thereof to the Governor and Company of the Bank of England, but did not institute any criminal proceedings against any person in respect of such forgery; and further, that she has demanded from the said Governor and Company the full amount of stock in respect of which the present claim is made, and all dividends thereon, and that she intends to insist upon such demand, and to enforce the same by law, if necessary, and that £135 is the amount of the half yearly payment of the said annuity, and that she has received the same sum of £135 half-yearly from the Bank of England, from the time of Marsh and Co.'s bankruptcy, down to the present time, upon signing a receipt and undertaking, whereof the following is a copy, (as before set forth.) And the said Ann Keating further admits that this claim is prosecuted by and for the benefit and at the expense of the Bank of England; and that, whether the same shall fail or be established, she insists upon her demand on the Bank of England, as above stated."

[263] In Easter term, 1832 judgment was entered up in the Court of King's Bench, without argument, for the Plaintiff; and a writ of error being thereupon brought into the Exchequer Chamber, the judgment of the King's Bench was also, without argument, affirmed in that Court, the object of the parties being to bring the matter in issue before the ultimate Court of Appeal without delay. The Defendants below accordingly brought their Writ of Error in Parliament. The Lords having considered the case proper for the assistance of the Common Law Judges, the following learned Judges attended the House during the arguments: Chief Justice Tindal, Mr. Justice Park, Mr. Baron Bayley, Justices Bosanquet, Gaselee, Littledale, Taunton, Vaughan, J. Parke, and Patteson, and Barons Bolland and Gurney.

Sir Edward Sugden and Mr. F. Kelley, for the Plaintiffs in Error:—The first question here is, whether the Plaintiff below has sustained any damage to entitle her to this action. If she lost no money by the transaction, she has not a right to the action. She is still the proprietor of the £9000 stock; she could not be deprived of her property in the stock by the wrongful acts of other persons, without her knowledge or consent. The statutes which create and define the nature of the stock also prescribe the only mode in which it can be legally transferred, and that mode has not in the present case been adopted; her rights are therefore untouched, and her property in the stock is not divested. By the 21 Geo. 3, c. 14, s. 18 (see also 24 Geo. 3, c. 39, s. 14), the power of transferring this stock is directed to be " by entry in the transfer books kept at the Bank, which entry is to be signed by the party [264] making the transfer, or his attorney authorized by writing under his hand and seal, and by no other mode." The act which is supposed to have deprived Mrs. Keating of her property, and conveyed it to another, is merely an unauthorized entry in the Bank books, made without the knowledge or consent of the stock proprietor, and without the signature of herself or her attorney. If by such means the property in the stock could be divested, any one, or the entire body, of the public creditors, might in a day be despoiled of their whole fortunes, by the fraud or the negligence of a few clerks in the Bank of England. That Company is largely remunerated by the country for performing the duty assigned to them by the statutes; they undertake that duty, and they are bound to the due performance of it. The Bank cannot free itself from blame in keeping the public accounts so negligently, that this stock cannot be now traced, by reason of its being mixed up with other stock in

the transfer books. If the discovery of the sale of this stock, which took place in 1819, had been delayed a little longer, the Plaintiff below would be barred of all action by the statute of limitations; so that if her only remedy was by action, she would be wholly remediless. But fortunately for her, the case is otherwise. By the constitution of the public debt under the Acts of Parliament by which it is created, the Government are the debtors and obligors in the payment of the annuities stipulated to the parties entitled by original subscription or legal transfer. No act of the Government or its agents in the management of the accounts can alter the legal rights of the parties entitled, or change the right of a stockholder from a right to a parliamentary annuity into an action for damages against the Government or the Bank, or any [265] other party whatsoever. The duty of the Government or its agents is merely to conduct as instruments a transaction, founded upon a legal and valid contract, between the stockholder and any purchaser to whom he shall assign and transfer his right. According to the case found by the special verdict, the Plaintiff below neither sold nor transferred, nor affirmed any act professing to be a sale and transfer of her stock, in consequence of which the pretended transfer in the books of the Bank appears to have been made. No proposition can be more clear than that a creditor, whether of the Government or of a Company, or of an individual, cannot be deprived of his right to his stock or debt, unless by some act to which he is by himself or his agent a party, or by the express provision of an Act of Parliament.

We shall now cite to your Lordships the authorities on which we rely in support of these propositions. In the case of *Hildyard* v. *The South Sea Company* (2 P. Will. 76). South-sea stock was transferred by virtue of a forged power of attorney; Sir J. Jekyll, on a bill in Chancery by the true owner of the stock, declared the transfer void, and ordered the stock, and dividends paid on it after the false transfer, to be taken from the innocent purchaser, and restored to the right owner. In *Monk* v. *Graham* (8 Mod. 9), Mrs. Monk purchased South-sea stock, and entrusted one Ross with the minutes, to receive the dividends for her; he transferred the stock to Graham, by means of another woman, who personated Mrs. Monk, and signed the transfer, and he complied in all other respects with the requisites of the Act of Parliament applicable to that stock. Graham, after notice from Mrs. Monk of the false transfer, sold the stock, which passed [266] afterwards through many hands. In an action of trover brought by Mrs. Monk, the Chief Justice of the Common Pleas directed the Jury to find for the plaintiff, which they did. In *Harrison* v. *Pryse* (Barnadiston, 324), which was a bill in Chancery, by the widow and personal representative of Governor Edward Harrison, against the South Sea Company and the executor of another Edward Harrison, who fraudulently sold out £1000 stock of that Company belonging to Governor Harrison; after his death the widow discovered the fraud, and by her bill claimed a restoration of the specific stock, or satisfaction; Lord Hardwicke held her entitled to relief against Pryse, the representative of the other Harrison, to the amount for which so much stock would fetch at the time it was fraudulently sold out. His Lordship added, that he was inclined to think that the Company might be liable, in case there was not sufficiency of assets in Pryse's hands; and "his reason was, that the Company must be considered as trustees for Governor Harrison, whose stock was transferred without his privity." In *Ashby* v. *Blackwell* (2 Eden, 299) the point came again before the Court of Chancery. Mrs. Ashby was possessed of £1000 Million Bank Stock, which her brother, employed to receive the dividends for her, sold out by a forged power of attorney, to the defendant Blackwell. The question was, whether Blackwell or the Company were liable to make good the stock to Mrs. Ashby. Lord Northington held that the Company must sustain the loss, on the ground that they were *trustees of the stock, and bound to see to the reality of the authority empowering them to dispose of the stock.* The decree in this case was never disputed; the Company never hesitated to make good the loss. In [267] *Davis* v. *The Governor and Company of the Bank of England* (2 Bing. 393), a special action on the case was brought for breach of duty in permitting the plaintiff's stock to be transferred without his authority. On a special case argued in the Court of Common Pleas, it was held that stock placed by a forged power of attorney in the name of another person in the Bank books, is not transferred from the owner. Chief Justice Best, in pronouncing the judgment of

the Court, disapproved of the report of *Harrison* v. *Pryse* in Barnadiston, and seemed to prefer the report of *Harrison* v. *Harrison*, in 2 Atkins, p. 120, which he said was the same case. Now Atkins reports what he thought the effect of the judgment, and on looking to the Registrar's book it will be found that the report in Barnadiston is correct. Chief Justice Best in that decision examined all the cases on the subject. That judgment was brought by the Bank of England, by writ of error, into the King's Bench (the special case being converted into a special verdict), where it was reversed, not on the merits, but on the ground that as the declaration did not state that the Government had issued the dividends to the Bank, and there was no proof of that fact, the Bank was not bound to pay them until issued (5 Barn. and C. 185). There was nothing in their decision to affect the judgment of Chief Justice Best upon the merits. In the case of *Hume and another* v. *Bolland and others* (1 Ryan and Moo. 371), which was an issue from the Court of Chancery arising out of these forgeries, and tried in the Common Pleas soon after the case of *Davis* v. *The Bank of England* was reversed in the King's Bench, Chief Justice Best says he and the other Judges of that Court had no disposition to recede from their opinion, notwithstanding the reversal. The verdict in that issue was against the bank-[268]-ing partners of Fauntleroy, but it did not bear on this question. Another attempt was made afterwards by the Bank of England to get rid of their liability to the owners of stock transferred by these forgeries, in the case of *Stracey* v. *The Bank of England* (6 Bing. 754); in which, however, the point was not decided, so that the question remains as it was left by the case of *Davis* v. *The Bank of England.*

The case of *Hume* v. *Bolland* (2 Tyrw. 575), before Lord Lyndhurst and the Barons of the Court of Exchequer, may be cited against the Plaintiffs in Error, but your Lordships will see that it is not against them. The circumstances there were the same as in the case already cited from Ryan and Moody's reports, arising out of Colonel Bellis's settlement. We are left in the dark as to the opinions of the Judges; and it is a subject of complaint that we cannot, in these cases directed out of Chancery for the opinion of the Courts of Law, have the grounds of the decision of the learned Judges. In the time of Lord Mansfield the Reporter suggested what he thought the opinion of the Court was. Lord Kenyon used to state the grounds of his opinion in open Court. In this case we have only what Lord Lyndhurst throws out in the course of the argument, and as far as that goes it is in favour of the Plaintiffs in Error. The certificate returned to the Court of Chancery states that the bankrupts, (the Plaintiffs in Error here,) were not indebted to the trustees of Colonel Bellis in any sum of money sold out by Fauntleroy's forgeries. The facts of the case of *Ex parte Bolland*, in the matter of *Marsh and others* (1 Mont. and M'Ar. 315), which may be cited against the Plaintiffs in Error, differ very much from this case now before your Lordships, which is precisely the same in its circumstances as *Davis* v. *The Bank of England*, by [269] which it is clearly established that no transfer of this stock could be made without the consent of the owner.

It may be argued for the Defendant in Error that she may elect to affirm the act of transfer by subsequent recognition, although it was originally done without her authority. But in the first place no such affirmance has taken place; on the contrary the special verdict finds that the act was done without her knowledge or consent, and that she never did assent to it. To entitle her to rely on a subsequent recognition, that fact should have been found; and not being found, it cannot be inferred. Besides, Mrs. Keating cannot at once affirm and disaffirm the same act. It appears by the special verdict that she has insisted on her remedy against the Bank, and has actually received the amount of some of the dividends. If the transfer be void by Act of Parliament, is it in her power now to affirm it, and claim the produce of the stock as money had and received? The doctrine of *ratihabitio* does not apply to this case; for although a person may affirm an act done in his name, without his authority, as against the party doing the act, it is because such party is estopped from saying that he has not the authority which he pretended to have, but the person has no such right of affirmance against third persons; and therefore, even if Mrs. Keating could have affirmed the transfer as against Fauntleroy, and treated the produce as money had and received to her use in his hands, she has no such election against Marsh and Co., between whom and herself there was no privity, and who are not estopped from saying that the transfer was without authority, and therefore void. An act merely

voidable may be recognized and confirmed, [270] but the transfer here was absolutely void by Act of Parliament, and it is not in the power of the Plaintiff below to affirm it to the prejudice of other parties. It was like a lease under a power or under the enabling statutes, void, because the power or the requisites of the statutes were not complied with, and the lease is not to be set up or confirmed by any act of the lessor. Co. Litt. 215 a. 295 b.; *Jones* v. *Verney* (Willes, 177), *Doe* v. *Butcher* (Doug. 50); *Jenkins* v. *Church* (Cowp. 482); *Doe* v. *Watts* (7 Durn. and E. 83); Comyn's Di. tit. Infant, c. 7; and 18 Vin. Abr. tit. *Ratihabitio*, p. 188.

Mrs. Keating could not affirm this transfer without returning the dividends. She received them after she knew of the transfer, and she still receives them from the Bank. Her agreement with the Bank, and her continued receipt of the dividends, is a disaffirmance of the transfer of her stock. She must be held not to affirm while she abstains from any act tending to affirm. *Taylor* v. *Plumer* (3 Mau. and Selw. 562-579). If Mrs. Keating affirm part of this transaction, she must be held to affirm the whole. She cannot say the transfer of the stock is valid, without also recognizing the power of attorney, which is in fact a forgery; a felonious act which she cannot affirm. Had she been a witness on the prosecution of Fauntleroy, she would have sworn that she gave no authority either for the power of attorney or for the sale. The felonious act of Fauntleroy could not be made valid by affirmance, especially against parties not cognizant of the felony, and where the felon has not been prosecuted for such felony; nor was it competent for the plaintiff below to maintain any action, either against Fauntleroy or any person deriving [271] through him, for restitution of the property divested by the felony, or any compensation or damages in respect of the felonious act, without having prosecuted the felon. All the authorities on that point are stated in the report of *Ex parte Bolland, in re Marsh and Co.* (1 Mont. and M'Ar. 315). It was decided for the first time in *Crosby* v. *Lengs* (12 East, 409), that an action for trespass will lie for a civil injury against a person acquitted on indictment for a felonious assault. That case has no application here. The stock being sold by the means of a criminal act, without her knowledge, and she not admitting that it was sold, nor affirming the transfer, so as to put the title to the stock in the purchaser, she cannot have an action for contract or for money had and received. *Horwood* v. *Smith* (2 T. Rep. 758), *Dawkes* v. *Coveneigh* (Sty. 346), *Brewer and Gregory* v. *Sparrow* (7 Barn. and C. 310), *Wilson* v. *Poulter* (Strange, 859).

But if your Lordships should be of a different opinion, then comes the question, —is the firm of Marsh and Co. liable on this action to return the money? The facts found by the special verdict are, that the entry of the money was made in the pass-book with Martin and Co., and never entered in the house-book. To make it affect the firm, it should have been entered in the house-book. The money got out of the house of Martin and Co., as it got in, without the knowledge of this firm. There is no fact found by the special verdict to fix the other partners with a knowledge of this money being paid into the house of Martin and Co.; but it is found that Fauntleroy drew from Martin and Co. considerable sums for his own use, and made false entries in the books of the firm, without the knowledge and in fraud of his partners. We have, therefore, a right to [272] assume that this money got into Martin and Co.'s house without the knowledge of the Plaintiffs in Error. Suppose, then, a partner of a firm robs one on the high road of a bag of money, and places it in bank to the credit of the firm, and takes it out as he put it in, without the knowledge of his partners; are they to be considered as sharing in the robbery, and liable in an action for money had and received? But it is alleged that the firm received half the commission on this sale, and that that fixes them with a knowledge. That is a mistaken inference; they never had any knowledge of the wrong done, and were not entitled to any benefit from it. The dividends on the £6000 stock were received by Marsh and Co. in consequence of the false credit entered by Fauntleroy, and the firm was paying dividends on the stock in their own wrong. The proceeds of the sale were paid into Martin and Co.; but neither that nor the house of Marsh and Co. can be liable, unless it be shown they had a knowledge that it was improperly obtained; the verdict found that they had no knowledge of the guilty act. In the transaction by which Fauntleroy became possessed of the money paid into Martin and Company's as cash per Fauntleroy, he did not act as partner of the firm of Marsh and Company, nor for their benefit. Can this money, mixed as

it is with other monies received by Martin and Co. for Marsh and Co. be recovered from the innocent parties? *Clerk* v. *Johnson* (3 Maule and S. 562), *Pinto* v. *Santoz* (Cooper, 197). The money was not obtained on the authority of the partnership, nor in fact applied to its purposes; it was money which neither actually or constructively was received to the use of Mrs. Keating. It is a mere fiction to treat this money as the money of Mrs. Keating. It is an additional fiction to imply a legal contract from [273] circumstances inconsistent with the facts of the case. The money was obtained by a felonious act; the innocent partners cannot by implication of law be made parties to the wrongful act; they cannot be liable in contract without fixing them with a knowledge of the transaction; *Ex parte Aspey in re Allen* (3 Bro. C. C. 265), *Ex parte Heaton in re Moxon* (Buck, 386), *Ex parte Watson* (2 Ves. and B. 414). The real facts of the case, as found by the special verdict, negative any tortious or beneficial receipt of this money by the firm of Marsh and Co., from which a legal liability to Mrs. Keating can be implied. This being an equitable action, the Governor and Company of the Bank of England, who are the real claimants, cannot enforce against Marsh and Co. a claim which arises only by means of their own negligence; no negligence is found in Marsh and Co.; but even if there were negligence on both sides, the parties are in *pari delicto*, and the rule *potior est conditio possidentis* ought to prevail.

Mr. Serjeant Taddy and Sir James Scarlett, for the Defendant in Error:—The points for consideration are, first, whether it appears by the special verdict that any money was received by Marsh and Co. out of the produce of the stock sold; secondly, whether, if received, it was received to the use of Mrs. Keating; and thirdly, whether she has now a right of action against them for that money. The special verdict finds that Mr. Simpson, the stock-broker of Marsh and Co., sold £9000 in stock, to Mr. Tarbutt, for £6018 15s., which sum he received from Mr. Tarbutt, and paid £6013 2s. 6d. thereof, deducting one half the usual commission, by a cheque payable to Marsh and Co., into the hands of Martin and Co., to the [274] account of Marsh and Co. It is therefore found in effect, that the money, the produce of the stock, was paid to Marsh and Co. The entry in the pass-book as "cash per Fauntleroy" cannot avail them; neither can the alleged concealment of the pass-book by Fauntleroy. Mrs. Keating had no concern with the mode of transacting business between the two houses; their manner of keeping their accounts cannot affect the rights of third parties. This money was received by the agents of Marsh and Co., and entered to their credit in the accounts between both houses. The jury found by their verdict that Marsh and Co. were ignorant of the forgery—ignorant of the crime only. Mr. Wm. Marsh received dividends in April 1820 on £6000 stock, as the attorney of Mrs. Keating, having in the preceding October received dividends which became due on her £12,000 stock. In April 1820 credit was given to Mrs. Keating by Marsh and Co., in their banking account with her, for dividends on £15,000 stock, when they must have known that only £6000 stock stood in her name. We do not charge the Plaintiffs in Error with a knowledge of the forgery; but we ask how can they, in the face of these acts of Mr. Wm. Marsh, excuse themselves from any knowledge of the sale of the stock? especially when it is found that they received half of the commission on the sale, which half was paid, with the produce of the sale, to the account of Marsh and Co. into the house of Martin and Co., and the accounts between both houses were frequently balanced.

The next question is, whether Marsh and Co. have received the money arising from the sale of this stock, to the use of Mrs. Keating? Were they her agents in the receipt of the produce of the stock? It was urged that there was no privity of contract between them and her to constitute agency. It cannot be [275] denied that Marsh and Co. were her agents in receiving the dividends of her stock; and so far, therefore, there was privity between them. But then they insist that they were not her agents in the sale of the stock, which was effected by felony; and that to treat them as her agents in that transaction, would be affirming a felony, which is unlawful. The policy of the law, having regard to the general welfare, prohibits any compromise for the purpose of saving a felon from prosecution. It is not necessary to explain that doctrine, as the arguments deduced from it have no force in this case; the felon having been tried, convicted and executed for another felony. It cannot be denied, that after the felon has been prosecuted to conviction, a civil action may be maintained. *Crosby* v. *Leng's* (12 East, 409), *Dawkes* v. *Coveneigh* (1 Sty. 346).

In this last case, Rolls, Chief Justice, said, "This is after a conviction, so there is no fear that the felon shall not be tried; but if this action were before conviction it would not lie. There is no inconvenience in the action now; no danger of compounding." So in the present case, the felon being convicted and executed, this action may be maintained against his partners; they may be held liable for the money had and received by the firm, without affirming the felony, without fear of compounding, and without breaking in on the policy of the law. That matter was fully considered by Lord Chancellor Lyndhurst, in his judgment in *Ex parte Bolland* (Mont. and M'Ar. 315) in the matter of Marsh and Co.; and by Lord Tenterden, in the case of *Stone* v. *Marsh* (6 Barn. and Cres. 551).

The form of action adopted here is also objected to; but this objection also is without grounds. There are [276] several cases to show that it is competent for a party to sue for the proceeds of his property, in an action for money had and received, and wave the damages for the tort, without affirming the act of the wrong-doer; *Hunter* v. *Prinsep* (10 East, 375), *Young* v. *Marshall* (8 Bing. 43). The right to sue, at the plaintiff's option, in *tort* or contract, is as old as the law; as may be seen in Bro. Abr. tit. Action; Co. Litt. 153 b. (n. 7), and ss. 558, 559; and to this effect also may be cited Lord Mansfield's elaborate judgment in *Atkins* v. *Horde* (1 Burr. 60), distinguishing the effects of disseisin and dispossession. Lord Tenterden, in his judgment in the case of *Stone* v. *Marsh*, said, "It was not necessary for the plaintiffs to show that the sale of the stock was made with their authority; for even if made without their authority, and by an act wrongful towards them, they might by law wave the wrong and demand the money, as is done in many other cases (6 Barn. and C. p. 563)." Notwithstanding these authorities for Mrs. Keating's right to this action, it is still objected that she is estopped; that by her agreement with the Bank of England she has disaffirmed the sale, and therefore cannot now turn round and treat it as an act done with her authority; and the case of *Brewer and Gregory* v. *Sparrow* (7 B. and C. 310) is cited in support of that position; the converse only of which is decided in that case. Any treaty between Mrs. Keating and the Bank of England cannot affect the liability of Marsh and Co., who are no parties to that treaty, and have no concern with it. They may put an end to their liability by paying her the produce of this stock; after that the Bank will not trouble them.

The Plaintiffs in Error, relying on the decision of [277] the Court of Common Pleas in *Davis* v. *The Bank of England* (2 Bing. 393), say, that as all the solemnities of the statutes relating to this stock were not complied with, there was no transfer, and therefore Mrs. Keating will find her stock still in the Bank books in her name. That case, which stands alone against the decisions both in the Court of Chancery and Court of King's Bench, already referred to, does not go the length contended for. Besides, it should be recollected that it does not stand quite unimpeached (5 Barn. and C. 185). It is impossible to reconcile the parts of that judgment applying to the stock, with that applying to the dividends. The Court of King's Bench held the Bank not liable for the dividends. How could the stock, which was as it were the tree, be treated differently from the dividends, which was the fruit?

The special verdict finds that this stock, after the sale, became so blended with other stock that it was impossible to trace and identify it. If the stock could be traced after the fraudulent transfer, the holder thereof would be liable, although innocent of the fraud, which would be a hardship; but it must be admitted that in this case some hardship will appear to be done, whoever will be made liable. The question is not whether the Bank or the holder of the stock is liable. It is not necessary, as Lord Tenterden observed, in his judgment in *Stone* v. *Marsh*, (p. 563), to say whether the plaintiff had or had not remedy against the Bank of England, or against the purchaser of the stock; because, generally speaking, where an injured party has different remedies against different persons, he may elect which he will pursue. But the question substantially is, whether a party found to have received the fruits of [278] stock by means of a forged power of attorney, is not liable to the owner for the sum so received. One cannot be allowed to make title through fraud and felony. In the case of *Taylor* v. *Plumer* (3 Mau. and Selw. 562), Sir Thomas Plumer did not claim through the fraud or felony of Walsh the broker, but in defiance of them. Suppose a banker receives, under a forged power of attorney, stock belonging to any of your Lordships, is it to be held that the party who forged the power has title to the

money produced by the sale of that stock? If the party who forged the power cannot take the money, can the banker into whose house it was paid, or he to whose account it is so paid, lay claim to it, and make title through the felony? The Defendants below received the proceeds of this stock through the fraud of their partner, and it is a fallacy to say that they received no benefit from the sale. Suppose Fauntleroy still living, and that no consequence followed from this forgery, and that the money got into the hands of Marsh and Co., would they have a right to retain it against Mrs. Keating, and to say that her remedy is against Mr. Tarbutt or the Bank of England? Suppose that this was plate instead of stock, sold without the authority of the owner, the purchaser may or may not be liable for it, if it be traced to him; but could the partners of the wrong-doer retain it, if traced to them? If the money arising from this sale, and traced to the agents of Marsh and Co., had been paid to them to the private account of Fauntleroy, the case then might be different; but the facts are not so found. We submit, therefore, that your Lordships' judgment on the special verdict ought to be for the Defendant in Error.

[279] Mr Kelly, in reply:—The strongest point against the Plaintiffs in Error is the fact stated in the special verdict, of the payment of the money received from the stock, into the house of Martin and Co. to the account of Marsh and Co., by a cheque payable to Marsh and Co. That mode of payment was the machinery contrived by Fauntleroy for the better deceiving his partners. That payment was made in 1820; are the partners to be made liable in 1825 for the money so paid by Fauntleroy's direction, without their knowledge, all of which was in the mean time drawn out by him without their knowledge? If Fauntleroy had placed that money with Coutts or any other bankers, and kept up his dealings with it for four or five years, the Defendant in Error could not claim and follow the money so blended for years with other monies. *Taylor* v. *Plumer* (3 Maul. and S., 562) is a decisive authority on that point. If the money arising from the sale of this stock had been converted into American certificates, as Sir T. Plumer's money was, and those certificates placed in the banking-house of Martin and Co., it might then be traced and followed, as capable of being distinguished; but this money having been mixed up with other monies in the numerous transactions of five years, and bearing no ear-mark, could not be so distinguished.—[Sir J. Scarlett: That would be a good argument if the action here was brought in *trover*.]—The next point most urged on the other side was, that the money was received by Martin and Co. not to the use of Fauntleroy, but of Mrs. Keating; whereas the whole course of the transaction showed that it was received to the use of Fauntleroy, by whose direction it was paid in; who alone had knowledge of the payment; who alone dealt with it, [280] and drew it out for his own purposes.—[The Lord Chancellor: By the special verdict it is found that Mr. Simpson, the broker, paid the money into the hands of Martin and Co. to the account of Marsh and Co., by a cheque payable to Marsh and Co.; and the same was entered by them in their pass-book, as Cash per Fauntleroy, on whose behalf the payment was made.]—The fact was so, because he had not a private account at the bank of Martin and Co. The money was not received to the use of Mr. Tarbutt, the purchaser; but if the securities which he had purchased with it turned out to be bad, he could maintain an action for his money, and Fauntleroy, if defendant, could not have any defence to such action.

No answer has been given to the two principal points made in behalf of the Plaintiffs in Error: first, that they had no contract or connection with Mrs. Keating, and were not her agents in the sale of the stock, and therefore an action in assumpsit did not lie, but she may claim against the separate estate of Fauntleroy; and secondly, that while the authority of the case of *Davis* v. *The Bank of England* is not displaced, Mrs. Keating still has her stock in the Bank books, to which she can resort, and to which she has never relinquished her claim.

The Lord Chancellor, in moving the postponement of the case for further consideration, said:—That it appeared to him proper to recommend to their Lordships, that, as much of the argument turned on the finding of the special verdict, questions should be put to the learned Judges. A part of those findings stated, that the money arising from the sale of Mrs. Keating's stock was paid in by Simpson to the bank of Messrs. Martin and Co. to the credit of Messrs. [281] Marsh and Co., and to their account, and that the same was entered in their pass-book, "cash per Fauntleroy." Messrs. Martin and Co. were the City bankers of Messrs. Marsh and Co. There was

no precise finding of their cognizance of this payment; yet if they were not so cognizant, it was their own fault, inasmuch as the entry of the receipt of the money was in their pass-book, and made in the usual way between the two houses, and inasmuch as they allowed the pass-book to be kept in the desk of Fauntleroy; and although the house book entries did not tally with that pass-book, they not seeing nor having access to that book, allowing it to remain in the sole possession of Fauntleroy, it must be assumed that they knew of the fact, or if they did not know it, they had themselves to blame for their ignorance of that fact. But as this, among others, had been and might be the subject of argument, he thought it would be much more expedient that the whole of the findings of the special verdict should be brought to the attention of the Judges.

His Lordship then suggested the points which he recommended to be comprised in the questions, which are stated in the subjoined opinion.

Mr. Justice Park now delivered the opinion of the Judges: The question which your Lordships have been pleased to propose for the opinion of His Majesty's Judges, amounts in substance to this,—whether the produce of stock formerly standing in the name of Mrs. Ann Keating, the Plaintiff below, but transferred out of her name on the 29th of December 1819, without her authority, and under a power of attorney which had been forged by one of the partners of the Defendants below, the bankers of Mrs. [282] Keating, which partner has been since convicted and executed for another forgery, can, under the circumstances stated in the special verdict, be considered as money had and received by the surviving partners to the use of the Plaintiff below, and be recovered by her in that form of action. And after hearing the argument at your Lordships' bar, and consideration of the facts stated in the special verdict, all the Judges who were present at the argument, including the Lord Chief Justice of the Common Pleas, who is absent at Nisi Prius, and Mr. Baron Bayley, who has resigned his office since the argument, agree in opinion that such question is to be answered in the affirmative.

The first objection raised against the Plaintiff's right to recover, and upon which great reliance has been placed at your Lordships' bar, is an objection which, if allowed to prevail, would be equally strong against the Plaintiff's right to recover damages in any form of action and against any person. It is objected that the Plaintiff below has not sustained any damage by the alleged transfer of the stock, for that the power of transferring stock is a power given by statute, and the exercise of such power is expressly restrained by the statute to one mode only, viz. "by entry in the transfer-books kept at the Bank," which entry, it is enacted, "shall be signed by the parties making such transfers, or their attornies, authorized by writing under their hand and seal," and that no other method of transferring stock shall be good. Inasmuch, therefore, as the supposed transfer of the stock in question has not been exercised by that mode, the entry in the transfer-book kept at the Bank not having been signed by the party making the transfer, nor by any attorney authorized by [283] writing under her hand and seal, it is contended that it is altogether inoperative; that the stock is not taken out of Mrs. Keating's name, but still remains hers as fully as if no transfer whatever had been made thereof; and the case of *Davis* v. *The Governor and Company of the Bank of England* (2 Bingh. 393) is cited and relied upon as an authority directly in point in support of such proposition. But we hold it to be altogether unnecessary, on the present occasion, to discuss the proposition above advanced, or the authority of the case cited in support of it; for although the proposition may be true to its full extent, and the authority of the case above cited in support of it may be free from all doubt or difficulty; still, under the circumstances stated in the special verdict, we are of opinion that the Plaintiff below is at liberty to abandon and give up all claim to her former stock so standing in her name, and to sue for the money produced by the sale of such stock as for her own money, which we think has been sufficiently traced into the hands of the Defendants below.

It is unnecessary to enlarge upon the extreme difficulty, or more properly, impractibility, under which Mrs. Keating would be placed, if, as matters now remain, she should elect either to receive the dividends, or to sell her stock; it is sufficient to observe, that the special verdict finds, "that when stock is sold, an entry of the transfer is made in the Bank books, and the name of the purchaser substituted for that of the seller. The dividend warrants are thenceforth made out in the purchaser's name, who

receives the dividend, and the seller's name is no further noticed." Now it is obvious that a transfer under a forged power, or by an impostor, has all the appear-[284]-ance, and unless impeached by the genuine stockholder to the extent to which the same can be impeached, the same consequences, as a genuine transfer: the transferee's name is entered in the Bank books as the stockholder; the dividend warrants are made out in his name; and he, as holder of the warrant, has the right to insist upon the payment of the dividends; and in this particular case the special verdict finds, "that it is not possible to distinguish the accounts, to the credit of which the Plaintiff's stock, so sold under the power of attorney, now stands." If the Plaintiff below, therefore, were to apply to receive payment of the dividends, or to sell the stock, she would be met with a difficulty, insuperable in fact: although the stock may, in contemplation of law, still be vested in her, it is certain that she could not either receive the dividend or sell the stock, until she had first compelled the Bank to purchase, *de novo*, in her name, an equal quantity of the same stock.

Is she compelled to adopt this circuitous process; or is she at liberty to abandon all further concern with her stock, and to consider the price which was paid by the purchaser for that which was her stock, to be her money, and to follow it into the hands of the present Defendants below?

This, as before stated, appears to us to be the question reserved for our consideration; and upon this question, we think her at liberty to give up the pursuit of the stock itself, and to have recourse to the price received for it, unless any of the objections which have been urged at your Lordships' bar should be allowed to be available under the particular circumstances of this case. The general proposition, that where a party who has been injured has different remedies against different persons, he may [285] elect which of them he will pursue, is not called in question. If the goods of A. are wrongfully taken and sold, it is not disputed that the owner may bring trover against the wrong-doer, or may elect to consider him as his agent, may adopt the sale, and maintain an action for the price; but it is objected that such general rule will not apply to the present case, on various grounds of objection which have been advanced on the parts of the Defendants in the action.

Those objections appear to resolve themselves substantially into four: first, it has been urged that the transfer in this case being an act not voidable only, but absolutely void, it is incapable of being confirmed by any voluntary election of the party who has made it; secondly, that at all events, in this case such election is taken away, upon grounds of public policy; for that the sale of the stock having been made through the medium of a felony, to allow the maintenance of this action would, in effect, be to affirm a sale completed through a felony, and would give the Plaintiff a right of action arising immediately out of the felony itself; thirdly, that it does not appear from the facts found in the special verdict, that the money produced by the sale of stock came into the hands of the Defendants below under such circumstances as would constitute it money had and received by the Defendants below to the use of the Plaintiff; and lastly, that by the subsequent transactions between the Plaintiff and the Bank of England, she has lost any right of action against the Defendants, if she ever possessed it.

The first objection appears scarcely to apply to the present state of facts. It is urged at the bar, that a lease under a power being void, on account of a non-[286]-compliance with the terms of the power, or a lease under the enabling statutes being void on account of the non-observance of the requisites contained in those acts, such void lease cannot be set up or confirmed by any act of the lessor. But these instances only prove that acts done to confirm the lease itself are nugatory, and that the estate of the lessee remains precisely the same as before such acts of confirmation. Here the former owner of the stock does not seek to confirm the title of the transferee of the stock. No act done by her is done *eo intuitû*; it is perfectly indifferent to her, whether the right of the transferee to hold the stock is strengthened or not. She is looking only to the right of recovering the purchase money; and if, in seeking to recover that, she does not by her election make the right of the purchaser weaker, it can be no objection that she does not make it better. In fact, however, the interest of the purchaser of the stock is so far collaterally and incidentally strengthened, that after recovering the price for which it was sold, she would effectually be stopped from seeking any remedy against, or questioning in any manner, the title of the purchaser of the stock.

As to the second objection, it may be admitted that the civil remedy is, in all cases, suspended by a felony, where the act complained of, which would otherwise have given a right of action to the Plaintiff, is a felonious act. Upon this ground Mrs. Keating would have lost any right of action, which she could otherwise have had against Fauntleroy for the wrongful sale of her stock, without her authority, by reason of the felony committed by him as the means of selling the stock. But this principle does not apply to the present case, upon two grounds: first, none of [287] the present Defendants below had any privity or share whatever in the felonious act. There is, therefore, no felony committed by them, in which the civil right arising against them, supposing it to exist, can merge or be suspended; they are innocent third persons. And secondly, Fauntleroy, the person guilty of the forgery had suffered the extreme penalty of the law before the action was brought, not indeed for the commission of this particular forgery, but of another of the same nature; and the present Plaintiff having given to the Bank all the means in her power for prosecuting the felon, it became impossible, without any default in her, that he should be prosecuted and punished for this felony. The case, therefore, falls within the principle laid down by, though not within the precise circumstances of, the two cases that were cited at the bar, *Dawkes* v. *Coveneigh* (Styles, 347), and *Crosby* v. *Lengs* (12 East, 409). As to the argument, that to affirm this sale is to affirm a felony, that point may be considered to have been decided in the cause of *Stone and another* against *Marsh and others* (6 B. and C. 551), with which decision we entirely concur. Lord Tenterden, in giving the judgment of the Court of King's Bench in that case, puts the question, in page 565 of that report, in so clear a point of view, that it will be better to transcribe his words:—"It was contended, that the maxim of ratifying a precedent unauthorized act, and taking the benefit of it, cannot apply to a void or felonious act; and that here the plaintiffs were seeking to ratify the felonious act of Fauntleroy, and were making that act the ground of their demand. In this latter assertion lies the fallacy of the defendants' argument. The assertion is incorrect in fact; the plaintiffs do not seek to ratify [288] the felonious act; they do not make that act the ground of their demand. The ground of their demand is, the actual receipt of the money produced by the sale and transfer of their annuities. The sale was not a felonious act, neither was the transfer nor the receipt of the money. The felonious act was antecedent to all these, and was complete without them, and was only the inducement to the Bank of England to allow the transfer to be made." We think, therefore, upon the reason above given, that this second objection falls to the ground.

But it is objected, thirdly, that the proceeds of the sale of the stock never came into the hands of the Defendants below, so as to be money received by them to the use of the Plaintiff; and the consideration of this objection involves two questions: First, did the money actually come into the possession of the Defendants? Secondly, if it ever was in their possession, had the Defendants the means of knowledge, whilst it remained in their hands, that it was the money of the Plaintiff and not the money of Fauntleroy? As to the first point, the special verdict finds expressly, that Simpson, the broker, paid the sum of £6013 2s. 6d., being the amount of the sum received from Tarbutt (deducting one half of the usual commission), by cheque payable to Marsh and Co., into the hands of Martin and Co., to the account of Marsh and Co., at the precise time of such payment; therefore, there can be no doubt but that it was as much money under their control as any other money paid in at Martin and Co.'s, by any customer under ordinary circumstances. The house of Marsh and Co. might have drawn the whole of the balance into their own hands: if the same money had been paid into Martin and Co.'s, as the produce of the Plaintiff's stock, sold under a genuine power of [289] attorney, it would unquestionably have been received by all the Defendants to the use of the Plaintiff. It would not the less be money received by the partners of the firm, because (as found in the special verdict) it was entered in the account as "Cash per Fauntleroy;" or because it never appeared in the house-book or any other book of Marsh and Co., but only in the pass-book of that firm with Martin and Co.; or because it never came into the yearly balancing of the house of Marsh and Co., or in any other manner into their books. Those several circumstances prove no more than that Fauntleroy, one of the partners, deceived the others, by preventing the money from being ultimately brought to the account of the house: but as between them and the person by the sale of whose stock it was produced, we think the fraud of their partner Fauntleroy, in the sub-

sequent appropriation of the money, affords no answer after it had once been in their power; and that it was so, appears to be distinctly stated in the special verdict.

But it is urged, that the present Defendants had no knowledge that the money was the property of the Plaintiff, being perfectly ignorant, as the special verdict finds, of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale into their account at Martin and Co.'s. It must be admitted, that they were so far imposed upon by the acts of their partner, as to be ignorant that the sum above mentioned was the produce of the Plaintiff's stock; but it is equally clear that the Defendants might have discovered the payment of the money, and the source from which it was derived, if they had used the ordinary diligence of men of business. If they had not the actual knowledge, they had all the means of knowledge; and there is no principle of law upon which they can succeed in [290] protecting themselves from responsibility, in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires.

As to the last ground of objection to the Plaintiff's right to recover, it is argued, that by the agreement into which she entered with the Bank, and under which she has received, from the time of the sale, the dividends which would have become due, she has disaffirmed the sale with a full knowledge of all the facts, and therefore cannot now be allowed to set it up as a valid sale. But it appears to us that it is sufficient to look at the terms of such agreement to give an answer to the objection. That agreement expressly reserves to Mrs. Keating the right to have recourse either to the Bank or the present Defendants for her remedy, as she may be advised. It therefore leaves the question whether the sale is affirmed or not, completely in uncertainty, until she makes her election to have recourse to the one or other: and the agreement is one which causes no disadvantage to the right of the Defendants, who, if liable, can only be liable once to the payment of the money actually received, whether the Bank have in the mean time advanced the dividends or not.

Upon the whole, therefore, we beg to state our opinion to be, that upon the question which has been proposed to us by your Lordships, Mrs. Keating has the right to recover the produce of her stock against the surviving partners of the firm who received it, under the circumstances stated in the special verdict in an action for money had and received to her use.

The Lord Chief Justice of the Common Pleas desires it to be expressly understood, that he fully concurs in the opinion now delivered.

[291] The Lord Chancellor, coming into the House after the learned Judges had given their opinion on another case, said:—I was not present when the learned Judges gave their opinion in the case of *Marsh* v. *Keating*, which was a case of considerable importance, and on that account was very fit to be brought here; and it was in consequence of that I recommended it should come here, when it was before me in the Court of Chancery. The learned Judges have all agreed in opinion, in support of the judgment below. I therefore move your Lordships that that Judgment be affirmed; but at the same time without costs, in consideration of the importance of the question, and the opinion of the Court below having been in favour of taking the sense of your Lordships' House.

Judgment affirmed without costs.

IN CHANCERY.—Before the LORDS COMMISSIONERS. (11 July 1835.)

Ex parte HARE and others, assignees: in the matter of MARSH, STRACEY and GRAHAM.

Mr. Montagu called the attention of the Court to the petitions which stood in their Lordships' paper for hearing, in this matter. There were nine altogether, but he would only trouble the Court with the last; the object of which was to put an end to the litigation arising out of the forgeries of Fauntleroy. The judgment of the House of Lords in *Marsh* v. *Keating* did not decide the question in dispute between the Bank of England and the assignees of the bankrupts, inasmuch as the special verdict on which that judgment was pronounced, did not state a most material fact, viz. that the Governor and Company of the Bank of England had in January 1830, caused Mrs. Keating's £9000 stock to be again credited to her in their ledgers, and that from that time she had credit for the same. That fact was not submitted

to the learned Judges or the House of Lords. The assignees and the creditors of the bankrupts have, after being well advised on all the circumstances, agreed with the Bank Directors upon a compromise; and this petition prayed the sanction of the Court to the agreement. He then read the material parts of the petition, which, after stating the proceedings in this Court and in the Court of King's Bench, in respect to Messrs. Gahagan and Stone's and Mrs. Keating's [292] proofs of debts against the bankrupts, further stated,—

That all the claims proved and made against their joint estate, in respect to the forgeries of Fauntleroy, amounted to £266,500; and that the dividends declared on those proofs in 1831 were £95,559, which sum was then vested in exchequer bills, in pursuance of the order (*Vide* supra, p. 251) of this Court.

That in August 1834 the Bank of England presented a petition to the Lord Chancellor, stating among other things, that the creditors who proved those debts had assigned their proofs to the Bank for valuable consideration; and praying that the said dividends of £95,558, with the accumulations of interest thereon since May 1831, might be ordered to be handed over to the Bank.

That the assignees had at the same time (August 1834) presented a petition, referring to the opinions which were given by the Judges who attended the House of Lords upon the argument of the special verdict; and stating that the said Ann Keating never had abandoned or given up her claim to her stock, but on the contrary that she, acting for the benefit and at the expense of the Bank of England, made the proof of debt in question with the full understanding, and upon the undertaking of the Bank, that such proof should not be a release of, or in any way lessen their liability to replace the stock in specie, and expressly reserving to herself her demand against the Bank, whether the proof should fail or be established. And further stating that the Bank of England, being liable in respect of the said transfer in their books, *did, on the 21st January* 1830, *cause the* £9000 *Three per Cent. Annuities to be again credited to the said Ann Keating in one of their ledgers, and that since that time she has accordingly had credit for the same; which fact was not submitted for the consideration of the Judges or Peers in the House of Lords, the same not having been known to the assignees at the time when their original petition to expunge the debt of the said Ann Keating was presented;* and the petitioners therefore, by their said supplemental petition, prayed that their former petitions might be again set down for hearing along with that supplemental petition, and that the said Ann Keating's proof might be expunged.

That neither the said last-mentioned petition nor the said petition of the Bank of England had yet come on for hearing; but the same, and also the said four other petitions (mentioned in the order, p. 251 supra) of the assignees for expunging other proofs of debts, were still pending.

That a treaty of compromise had lately been entered into by the petitioners with the Governor and Company of the Bank of England; and after much discussion, it had been ascertained that the said Governor and Company were willing to forego all further claim upon the estate of the said bankrupts, upon receiving out of the funds set apart under the order of the Lord Chancellor before men-[293]-tioned, the sum of £95,000; and would thereupon consent that the whole of the said proofs and claims made or to be made in respect of the proceeds of stock sold out under powers of attorney alleged to have been forged, should be expunged and released.

That a meeting of the creditors who proved their debts under the said commission was held on the 16th day of June last, in pursuance of advertisement, in order to receive the report of the assignees in regard to the proceedings which had been taken in resisting the claims against the bankrupt's estate, in respect of the proceeds of stock sold under powers of attorney alleged to have been forged, and to assent to or dissent from an agreement or compromise proposed to be made with the Bank of England, under which the assignees would abstain from further resisting the proofs made against the estate of the bankrupts, in respect of such proceeds as aforesaid; and the said estate would be wholly released from all further claims, upon payment of a certain sum out of the funds set apart by order of the Lord Chancellor, to answer the dividends already declared in respect of such proofs.

That 126 creditors of the said bankrupts who had proved debts under the said commission attended the said meeting, and all of them, except one, agreed to the

resolutions here set forth; and that the debts of the creditors so agreeing amounted to £217,191 2s. 1d., and the debt of the only creditor attending who dissented amounted to the sum of £583 8s. 10d.

That the following are the resolutions so agreed to: "That this meeting assents to the assignees agreeing with the Governor and Company of the Bank of England to pay to the said Governor and Company the sum of £95,000 out of the proceeds of the funds, part of the bankrupt estate, vested in exchequer bills, under the order of the Lord Chancellor of the 12th May 1831; upon and in consideration of the Governor and Company releasing the assignees and the estate and effects of the said bankrupts from all dividends already declared or hereafter to be declared, and all other claims and demands whatsoever in respect of the various sums proved under the commission against the joint estate of Marsh, Stracey, Fauntleroy and Graham, in the names of various persons, amounting in all to the sum of £234,213 16s. 1d., in respect of the proceeds of stock sold out under powers of attorney alleged to have been forged; and also in respect of a further debt of the like nature, amounting to £10,778 13s. 10d., and intended to have been brought forward for proof in the names of Sir Edward Stracey and Josias Henry Stracey, and also in respect of two other like debts, amounting together to the sum of £18,221 12s. 6d., proved against the separate estate of the said Henry Fauntleroy: or in respect of any other debt, claims or demands whatsoever, against the joint or separate estates of the said bankrupts, any or either of them, for the proceeds of stock sold out under powers of attorney alleged to have been forged. And this meeting hereby fully authorizes and empow-[294]-ers the assignees to take all such measures as they shall in their discretion think fit for carrying such agreement as aforesaid with the Bank of England into full and complete execution.

That the total amount of debts proved under the said commissions, exclusive of the said sums proved, as hereinbefore is mentioned, in respect of forged stock, is the sum of £563,637 or thereabouts; and the total number of creditors who have so proved is 1050 or thereabouts.

The petition prayed their Lordships to confirm the said resolutions, and to order and direct that the petitioners should, out of the said sum of £95,559 8s. 1d., and the exchequer bills wherein the same or any part thereof was invested, and the profits, interest and accumulations thereof, pay to the said Governor and Company the sum of £95,000 upon and in consideration of the said Governor and Company, and all other necessary parties, releasing the petitioners and the estate and effects of the said bankrupts from all claims and demands whatsoever in respect of the premises, in the manner mentioned in the said resolutions. And that the petitioners might be at liberty to take all proper and necessary measures for carrying the said resolutions into effect, and that all the surplus and remainder of the said sum of £95,559 8s. 1d. exchequer bills, profits, interest and accumulations, might be transferred and paid to the petitioners as part of the estate of the said bankrupts.

The Lords Commissioners said that they did not see any objection to the prayer of the petition, and they assented to it.

[295]

APPEAL

From the Court of Chancery.

HIS MAJESTY'S ATTORNEY-GENERAL, at the Relation of EDWARD, LORD SUFFIELD, and ALEXANDER NOWELL, Esq.,—*Appellants;* The PRINCIPAL and SCHOLARS of KING'S HALL and COLLEGE of BRAZEN NOSE, in OXFORD, GOVERNORS of the FREE SCHOOL of QUEEN ELIZABETH, in MIDDLETON,—*Respondents.*

[Mews' Dig. iii. 279; S.C. 8 Bli. N.S. 377; and in Ch., 1 L.J. Ch. 66. Followed in *A.-G.* v. *Trinity College, Cambridge*, 24 Beav. 400.]

Where a fund is given to the members of a corporate body as trustees for the maintenance of a school, if such fund is not given out and out, but only as the

trustees may think best to apply it for the advantage of the school, the surplus, after satisfying the exact charge first created upon the fund, belongs to the trustees.

The manner in which the donor of the fund, who was the first trustee under the grant by which the school was provided for, conducted himself in the distribution of the fund, is very strong evidence of intention, and may be so treated by the Court in construing the grant itself.

This was an information filed by the Attorney-general in the Court of Chancery, at the relation of the Appellants, against the Respondents, on the 18th of June 1827, to obtain the decree and directions of the Court for the better maintenance and augmentation of the Free School of Queen Elizabeth, at Middleton, in the county of Lancaster; and for the application of the surplus rents, and the fines arising from the charity estates in question in the cause, to those purposes, such surplus income being alleged to be unlawfully applied by the Respondents to their own use, or for their general corporate purposes.

[296] The case stated by the information was in substance as follows:—That by letters patent, bearing date on or about the 11th of August 1572, and in the fourteenth year of the reign of Queen Elizabeth, after reciting that Alexander Nowell, clerk, Dean of the Cathedral Church of St. Paul's, London, had humbly prayed that, whereas within the parish of Middleton aforesaid, a certain Grammar School anciently held and used, then, from the smallness of the stipend of the headmaster of the same, had been deserted, and almost reduced to nothing, she, for the re-establishing the same school, and also for the better information, instruction, and education in literature of boys and young men dwelling in Middleton aforesaid, Preswick and Oldham, and the other places thereunto adjoining, should think fit to erect, found and establish a certain free and perpetual Grammar School, which should last for ever, constantly in the same village of Middleton; she, of that singular care which she had for the pious and liberal bringing up of the youth of her kingdom, and of the benevolence with which she cultivated literature, which was of the greatest assistance in imparting and cultivating virtue, and the pursuit of science as well, did will, grant and ordain, that by virtue of those her letters patent, there might and should be for ever, within the aforesaid village and parish of Middleton, a certain free and perpetual Grammar School, for the education and instruction of youth therein, and in the neighbouring places dwelling, in grammar, which should remain for ever, and be called the Free School of Queen Elizabeth, in Middleton; with one master or pedagogue, and one under-master; and whensoever the office or place of master or pedagogue should in future become void, Her Majesty willed and ordained that then and so often the aforesaid Alexander Nowell, during his [297] life, in the manner therein mentioned, should nominate and appoint; and after the death of the said Alexander Nowell, the principal and scholars of King's Hall and College of Brazen Nose, in Oxford, and their successors, or the principal and the majority of six senior scholars, fellows of the same King's Hall and College for the time being for ever, in the manner therein mentioned, should choose and appoint a man, honest, learned, and fit for the office of master or pedagogue of the Free School aforesaid: also her said Majesty did make, nominate, constitute and incorporate the persons, when so nominated or elected and appointed as masters or pedagogues of the Free School aforesaid, in form aforesaid, masters thereof for ever; and that the said masters or pedagogues of the Free School aforesaid, might and should be one body corporate in themselves in deed and name, by the name of the Master of the Free School of Queen Elizabeth, in Middleton; and that by the same name they might plead and be impleaded, and every of them might so do in all Courts. The said Alexander Nowell in his life-time, and the principal and scholars of the said College after his death, were declared entitled to nominate and appoint the under-master. And moreover she did will, ordain and grant, that the principal and scholars of King's Hall and College of Brazen Nose, in Oxford, and their successors, should be governors of the Free School aforesaid for ever; and that they and their successors, governors of the aforesaid Free School, in deed, fact and name, should be one body corporate and politic in themselves, for ever, by the name of principal and scholars of King's Hall and College of Brazen Nose, in Oxford, governors of the Free School of

Queen Elizabeth, in Middleton, incorporate and established. The principal and scholars were for this purpose incorporated and [298] made capable of taking lands, etc. and were to have a common seal, etc. And she did will and ordain, that further there should be, of her own foundation, in the aforesaid King's Hall or College of Brazen Nose, in Oxford aforesaid, above the ancient and accustomed number of scholarships and scholars established in the same King's Hall and College of Brazen Nose, in Oxford, six scholarships or places for scholars, to continue for ever; and that six proper youths, who should have perfectly learned the rudiments of grammar, (either in the Free School aforesaid, which she chiefly desired, if so many from time to time therein should be found who should have been in the same school for three years at the least; or otherwise in the schools of Whalley or Burneley, in her said county of Lancaster, if so any in the same or any other of them should be found fit, who had been in any other of them for three years at the least; or otherwise, in any other grammar school in her said county of Lancaster,) should be joined to the said King's Hall and College aforesaid, from time to time, and unto the same scholarships or places for scholars from time to time should be appointed and constituted, and should enjoy the same for six years and no more, and should be called scholars of Queen Elizabeth, in King's Hall or College of Brazen Nose, and should have a perpetual succession; and that the nomination of such six scholars, from time to time to be chosen into the said King's Hall and College of Brazen Nose aforesaid, should belong and appertain to the said Alexander Nowell as long as he should live, and after his decease to the said principal and scholars of the King's Hall and College of Brazen Nose aforesaid, and their successors for ever, to be nominated and elected in the manner and form in which the then present scholars, fellows of the same [299] King's Hall and College, were nominated and chosen. The letters patent then directed the manner in which the presentation of the said scholars should be made, and commanded that they should be subject to the same statutes and ordinances as the other scholars of the College, with which College they were incorporated. The letters patent then recited Alexander Nowell's purpose to establish more scholarships, and gave license to the said Alexander Nowell, his heirs, executors, administrators and assigns, that he or they, or any one of them, might, and might be able to make, found, erect and establish seven scholarships or places for scholars (besides the aforesaid six scholarships thereby established, and above the accustomed number of scholarships, in the aforesaid King's Hall and College aforesaid, of old appointed), either all together or at different times, in the said King's Hall and College for ever, and to all future times to continue. These scholarships were to be under the same regulations as those previously established, and the said seven scholars were to be elected from Middleton school, or from the schools of Whalley or Burneley, or any other grammar school in the county of Lancaster. Their stipends to be fixed by Alexander Nowell, his heirs, etc.: and power was granted to Alexander Nowell during his life, and to the principal and scholars afterwards, to make ordinances touching the governing and directing the masters, etc., and touching the stipends and salaries of the said master and undermaster of the Free School aforesaid; and of the scholars in King's Hall and College aforesaid, as well founded as aforesaid or to be founded, and every of them; and also every other thing whatsoever, signified or to be signified, touching and concerning the same Free School, and the scholars of the same for the time being, and the order, govern-[300]-ance, preservation and disposition of the rents and revenues for the support of the said Free School and scholars, so that the said ordinances and statutes should not be contrary to the ordinances in those her letters patent expressed; which said statutes and ordinances, so to be made, she did will, grant and command, firmly and inviolably to be observed from time to time for ever. Her Majesty then granted certain lands to the principal and fellows, governors of the Free School of Queen Elizabeth, for the purposes of the school. The premises granted extended to the value of £28 7s. 2d. per annum: to hold to the principal and scholars, governors of the Free School, and their successors, in free alms, paying to the Queen the yearly rent of £8 7s. 2d. To this intent, that out of the premises thereby before granted, and of other lands, tenements, rents and hereditaments in future, to the use of the Free School aforesaid, and * the scholars aforesaid, and granted to the use of the aforesaid

* The passage here was said to be incorrectly translated, the words being "*Eâ*

principal and scholars of King's Hall and College of Brazen Nose, in Oxford, governors of the Free School aforesaid, or their successors, to be given and granted, the said principal and scholars of King's Hall and Brazen Nose, in Oxford, go [301] vernors of the Free School aforesaid, and their successors, should pay, or cause to be paid, annually for ever, a certain annual stipend of 20 marks, at the least, of lawful money of England, to the aforesaid Edmund Ireland, the then master of the Free School aforesaid, and his successors for the time being; a certain annual stipend of 10 marks, at the least, of lawful money of England aforesaid, to the aforesaid under-master of the aforesaid Free School, for the time being, at the feast of St Michael the Archangel, and the Annunciation of the Blessed Virgin Mary, or within four weeks next following the said feasts, by equal portions; and to each of the six scholars, by her as aforesaid founded, and to be chosen and elected into King's Hall and College aforesaid, from time to time, five marks of lawful money of England, annually payable at the four periods of the year, etc. And moreover, she gave and granted to the aforesaid principal and scholars of King's Hall and College of Brazen Nose, in Oxford aforesaid, governors of the Free School aforesaid, and to their successors, special and free licence, etc. to receive to them and their successors, after the date thereof for ever (above the premises thereby granted, and above the lands, tenements and hereditaments whatsoever received, or to be thereafter received, by the aforesaid principal and scholars of King's Hall and College of Brazen Nose, in Oxford, by virtue of any letters patent, by her progenitors, or any of them, or by their licence to the same principal and scholars thereinbefore granted) as well for the better support and maintenance of the Free School aforesaid, and scholars aforesaid, those as well thereby founded as those in future to be founded, as for the support of poor students in the said King's Hall and College of Brazen Nose, in Oxford aforesaid, and for further augmenting the number of scho-[302]-lars or students, as well of her, her heirs and successors, as of the said Alexander Nowell, his heirs, etc. or of any other persons or person whatsoever, any manors, etc. within the kingdom of England, or elsewhere within her dominions, which were not held immediately of her, her heirs or successors, *in capite* or otherwise, by military service, if only they did not exceed the clear yearly value of £100, beyond all burthens and reprisals, according to the true yearly value of the same; and to the same Alexander Nowell, his heirs, etc., and to any persons whomsoever, that he or they might give, etc. the manors, etc. which were not held for her, her heirs or successors, immediately, *in capite* or otherwise, by military service, of the clear yearly value of £100, beyond all burthens and reprisals, according to the true ancient value of the same, to the said principal and scholars of King's Hall and College of Brazen Nose, in Oxford aforesaid, governors of the Free School aforesaid, and to their successors, for the use aforesaid, for ever; by the tenor of those presents likewise she gave special licence to have, hold and enjoy, and in mortmain, to the said principal and scholars of King's Hall and College of Brazen Nose, in Oxford aforesaid, governors of the Free School aforesaid, and their successors, to possess for ever as therein mentioned.

The information then stated certain deeds creating the funds necessary for carrying into effect the intention expressed in the letters patent; most of these were deeds relating to lands which Dean Nowell had himself purchased. These lands were granted by Dean Nowell to the Queen, and by her second letters patent were granted by her for the purposes of the charity. This course was adopted in order to avoid the statutes of mortmain.

[303] And the information further stated, that by letters patent, dated 25 June 1579, it was witnessed that her Majesty, of her special grace, etc. and also at the

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tamen intentione," and it was said that the word *tamen* was put in opposition to the words, "*ad proprium opus et usum.*" The whole passage stood thus in the original: "praedict' principali et scholaribus Aulae Regiae et Collegii de Brasen Nose in Oxon', Gubernatoribus liberae scholae Reginae Elizabeth, in Middleton praed', et successoribus suis, imperpetuum ad propriu, opus et usum eorundem principalis et scholariiu' ejusdem Aulae Regiae et Collegii de Brasen Nose, Gubernatorum liberae scholae praed', et successorum suorum imppm. Eâ tamen intentione quod et praemissis concessis etc. ad usum liberae scholae praed', et discipulorum praedcorum, praedictis principali et scholaribus Aulae Regiae, Gubernatoribus, etc."

humble petition of the said Alexander Nowell, gave and granted to the principal and scholars of Brazen Nose, governors of her said Free School in Middleton, all that the said lordship and manor of Upbury, and other the hereditaments and premises mentioned and comprised in a certain deed-poll therein referred to, all and singular which premises her said Majesty then lately had, to her or her heirs and successors, of the gift and grant of the said Alexander Nowell, as by the writing of the said Alexander to her made, and in her Chancery enrolled, of record more fully was manifest and appeared, as fully and freely, and wholly, as any person or persons theretofore having, holding, or being seised of the same, or any parcel of the same, ever had, or ought to have held or enjoyed the same, or any parcel of them; to hold in perpetual mortmain, to possess the said manors, etc. with their appurtenances, to the said principal and scholars of King's Hall and College aforesaid, governors of her said Free School in Middleton, and their successors; to hold of her said Majesty, her heirs and successors, in free, pure and perpetual alms, for ever. And her said Majesty willed also, that the aforesaid principal, and every one of the fellows of the College aforesaid, when they should receive the said letters patent of her Majesty's said gift, should each separately take an oath in their public assembly, that they would *pay over* * the rents and sums of money which from the said **[304]** manor of Upbury and rectory of Gillingham should come into their hands, unto and for the purposes thereinafter set forth, for ever, in all times then to come; that is to say, that they would pay every year to each of her said Majesty's thirteen poor scholars, elected out of her Free School in Middleton aforesaid, or other schools in her said county of Lancaster, according to her foundation of the said school, *for their support*,† £3 6s. 8d. of lawful money of Great Britain; and to the master of her said Free School in Middleton, 23s. 4d. per annum; and to the under-master of the said school, £3 6s. 8d. per annum; as an augmentation or increase of their stipends, by equal portions, every period of three months, or usual quarters of the year. Also, as she understood that the stipends of the principal and fellows of the said College were very small, her said Majesty willed, that out of the said rents and sums of money they should pay 6s. 8d. every week, for the improvement of the commons of the said principal and fellows, who shoul l be present in the said College during those weeks, or should be absent on college business; of which sum, every week, 16d. should be given to the principal, if present; 10d. to the vice-principal, if present; and the other 4s. 6d. to the fellows who should be present, for the increase of their commons; but if the principal, vice-principal, fellows or fellow, should be absent, and that absence be not on the business of the College, then her Majesty willed that they should give them no part of the said 6s. 8d. for the time of such absence; but when the principal should be absent, and not on the business of the College, then her Majesty willed that they should give no part of the said 6s. 8d. for **[305]** the time of such absence; but when the principal and scholars should be absent, and not on the business of the College, the vice-principal then present should receive 16d.; and when the vice-principal should be absent, and not on the business of the College, the senior of the fellows who should fill his place should receive 10d. above and beyond his share of the said 4s. 6d: moreover, her Majesty willed that every principal and fellow at the time of his election or admission, or afterwards, severally should take an oath at the public assembly of the fellows of the College aforesaid, that they would *expend* ‡ the said rents and sums of money for the purposes aforesaid; and also should take an oath that, as often as any fellowship or fellowships should happen to be vacant, they should choose and admit him or them from among her said scholars aforesaid, who should either be superior or equal to the other competitors in erudition, probity of conduct, or piety, into such fellowship or fellowships.

The information stated that the rents under the indenture of 26th October 1574,

* This expression, it was contended, on the part of the Respondents, was improperly translated. The word was *impendent*, which was said by them to mean not to "pay over," but to "bestow" or "employ."

† The words here were *ad ipsorum victum*, which the Respondents contended meant "towards their living."

‡ This was another instance of the alleged inaccuracy of the translation. The verb was *impendo*, which it was urged meant to "apply, bestow or employ."

together with the conventional rent of £4 13s. 4d., amounting together to £33 0s. 6d., were for several years received by the principal and scholars, and applied by them in payment of the stipends under the letters patent. But that after the year 1590, the rent of £4 13s. 4d. ceased to be so applied, but was applied by them to their own use, they alleging that it was the intention of Alexander Nowell that the same should be unappropriated, and fall into the general revenues of the College. That there was no evidence of such intention in the letters patent. **[306]** That the principal and scholars, for several years after they entered into receipt of the rent of £66 13s. 4d., applied the same in payment of the stipends, except certain portions during non-residence, which were improperly applied to their own use. That at Michaelmas, 1686, the principal and scholars entered into possession of the manor of Upbury, and granted leases for short terms, reserving the old rent, and took fines upon renewals, and applied the fines and surplus rents to their own use. That for several years after the date of the letters patent, the surplus rents were applied in payment of the stipends in support of the thirteen scholarships; but that in 1700, these thirteen scholarships were reduced and consolidated, notwithstanding which, there had been a deficiency of candidates for the scholarships. And that the stipends unappropriated were applied by the principal and scholars to their own use, or to the general benefit of the College. The information then stated the particulars of what the trust estates consisted, the manner in which the value of those estates had increased, and in which the income had been applied. The information alleged that the school-house had been built at the expense of Alexander Nowell, and that it was now in a ruinous state and condition.

The information further stated, that the school consisted of, and was divided into, an upper and a lower school; whereof the upper school contained about forty or fifty boys, who were for the most part taught only reading, writing and arithmetic, a very few, if any, of the boys being instructed in classical learning, according to what appeared by the letters patent to have been the primary intention of the said establishment, but which had for a great many years past been wholly, or almost wholly, neglected **[307]** and abandoned; that the lower school contained about sixty or seventy boys and girls, who were taught only reading and writing; and that for their education in the upper school the boys paid to the said head-master the sum of £1 1s. each per quarter; and that for their education in the lower school, the boys and girls paid to the said under-master, in some cases the sum of four-pence, and in other cases the sum of two-pence each by the week; all which payments, together with the subjects and mode of instruction, were alleged by the information to be contrary to, or wholly inconsistent with, the charitable intents and purposes of the founders.

The information further stated, that no scholars had been elected from the school at Middleton for several years past; that the purposes of the charity were neglected, notwithstanding the funds were amply sufficient. It alleged that the Respondents were trustees of the whole surplus income, for the benefit of the free grammar school at Middleton, and such other objects of the founder's bounty as were still capable of being carried into effect. But that they had for a century ceased to apply the income of the charity, except to pay the stipends of the master and under-master.

And the information therefore prayed, that the rights of the charity, in respect of the several matters mentioned in the information, might be ascertained and declared; that all proper directions might be given for the establishment and maintenance of the charity, and for the increase and augmentation of the said establishment, by and out of the charity estates; and that an account might be taken of the estates belonging to the charity, or which were then subject to the trusts thereof, and of what was due in respect thereof from the Respondents, in their capacity of **[308]** governors of the Free School of Queen Elizabeth at Middleton; and that what should be found due from them might be answered and paid by them; and that it might be referred to one of the Masters of the Court to approve of a scheme for the application thereof, and for the better regulation of the charity in future, and the administration of the charity estates, and the application of the funds and income of the charity to the purposes so to be declared respecting the same; and that in the mean time a receiver might be appointed of the charity estates, with the usual directions.

The answer of the Respondents admitted the letters patent and other documents, and admitted the possession of the estates. The answer then stated that the rents.

amounting to £20 per annum, under the first letters patent, were applied in payment of the stipends of the master and under-master. That from 1589, the rent of £66 13s. 4d., which was also reserved on the subsequent lease, was also duly applied, except as to some parts of such stipends, which were allowed to fall into the general revenue of the college; and afterwards the disposition thereof was regulated by A. Nowell. That the endowment of thirteen scholars failed of taking full effect. That there was no time when the scholarships were filled from Middleton school. That in consequence of that circumstance, other students were nominated by Nowell; and that as early as 1609, birth in Lancashire became a sufficient ground of eligibility. That as the Respondents believed that the number of scholars could not by any remedial means be kept full, they did about the year 1700 effect a consolidation of twelve of the scholarships into one; that the consolidated stipends were paid, except during vacancies. **[309]** That the thirteenth scholarship was usually vacant; and that the surplus, after answering the prescribed payments, was used for the general benefit of the college, in the same manner as it had been during the life of Dean Nowell himself.

The answer further stated, that the rent of £4 13s. 4d. was applied towards the finding of the Queen's scholars until 1590, when the principal and scholars came into possession of the rents and profits of the manor of Upbury, when Dean Nowell considering it unappropriated, allowed it to fall into the general revenues of the College; and afterwards, in 1590, 1591 and 1592, Dean Nowell applied to the principal and scholars to pay it to one of his relations, and which was done for those three years, and the money itself had been ever since disposed of as part of the unappropriated revenues of the College.

The answer further stated, that the defendants had constantly allowed the Master of the school to hold and enjoy the lands attached to it. That the stipends to the master and under-master had been duly and regularly paid. That no scholars had been elected from Middleton to Brazen Nose during the last twenty years; but by reason that the registries of the said College, though they regularly noticed the elections and dates of the elections of scholars, did not, except occasionally, indicate from what school they came, the Respondents did not know and could not set forth whether, during the space of the last century, any scholars had been elected from the said school at Middleton to Brazen Nose College aforesaid; but they believed that in all such elections a preference had been given to such candidates, if any, as presented themselves from schools within the scope and directions of the said **[310]** grant. And the Defendants stated they did not believe that it was the intention of Queen Elizabeth or of Dean Nowell that the whole of the trust property should be applied for the sustentation of the school, but that Brazen Nose College was an equal object of Dean Nowell's bounty; and they supported this allegation by reference to the conduct of Dean Nowell himself, with respect to the appropriation of the funds. They further alleged that Alexander Nowell was educated at Brazen Nose, was a fellow of the College, and subsequently to the second letters patent became principal thereof, and during the time he was such principal the surplus of the rents was taken by the College for its own proper use. They submitted that he purposely limited the stipends, in the expectation that the rents would not be increased, nor the stipends altered; and that he meant and intended that the contingent advantage which might accrue from a fine upon the renewals of the lease of the said estates, in case the same should progressively increase in value, would and should be retained by the principal and scholars of the said College, and applied to the general use and benefit thereof; and therefore that he gave no direction for the application of any future surplus. And that accordingly, the surplus of such rents and profits had from the very earliest time, when the said principal and scholars of Brazen Nose became possessed of and entitled to the same, been applied and administered for the general benefit of the said College, and its advancement as an institution of classical learning, without control or opposition by the said Alexander Nowell during his lifetime, and without being at any time challenged or called in question. And the said Defendants did humbly insist upon such uniform enjoyment and administration as evi-**[311]**-dence of the intention of the said grant, and of the founder of the said charity; and they did submit that such use and administration was an application thereof to a charitable purpose and consistent with the general purposes of the said grant, and ought

not to be disturbed. And the Defendants by their answer further stated, that the oath in the said letters patent of 1579, required to be taken by the principal and fellows of the said Hall and College of Brazen Nose, had never been taken; and that the same so far as regarded a preference to be given to the said Queen's scholars in the election of fellows of the said College, was inconsistent and irreconcileable with the original statutes of the said college and the oath required by the founders thereof; and that accordingly another form of oath was, as appeared by the said registry, substituted by Dean Nowell, in lieu of that directed to be taken by the letters patent.

That the charity estates were considerable, but not of the value of £3000 per annum: that Nowell treated the chapel of Lyginge as the property of the College: that the Defendants were not intended to be trustees of the estates for the benefit of the school, beyond the amount of the several stipends: that the trust property had never been misapplied: that it was the universal practice of Colleges to apply for their general corporate purposes the surplus arising from grants to them, after payment of the particular charges thereon; and any interference with this rule, established for centuries, would cause great confusion and distress in all the older Colleges of both Universities. That such application ought not to be disturbed.

The answer of the principal and scholars to the amended information, stated that arrears of rent were remitted by the College to the tenants, at the request of Alexander Nowell: that scholars were admitted on [312] condition that they should not be entitled to any salaries until the same should be received by the College: that Nowell in his life-time always treated the College as the chief object of his bounty: that when he was alive, the College with his consent took the surplus rents, and applied them to the general purposes of the College: that Nowell introduced the custom which had since always been followed, of electing students from other places than those mentioned in the letters patent: that the thirteen scholarships continued to be filled for some time with persons either elected from the school or substituted according to the intent of Nowell: that for a considerable time previous to 1712, there had been a great deficiency of candidates, and about that year, the principal and scholars did consolidate the stipends of twelve of the scholarships, which they might have retained on the ground of their being vacant: that they reserved the thirteenth as evidence of the original stipend: that 109 persons had been in the enjoyment of the charity between the years 1700 and 1799: that the school house was built originally by Dean Nowell, but had since been repaired by the parish of Middleton: that the funds of the charity had always been applied to purposes consistent therewith. That the evidence of Dean Nowell's wishes was to be found in the letters and petition of Alexander Nowell, now in the British Museum, and to which they referred. These letters were set out in an appendix; the strongest expressions in them were quoted in the course of the argument.

A replication having been filed to these answers, issue was joined; and on the 16th December 1831, the Master of the Rolls dismissed the information without costs. The case was then brought by appeal into this House.

[313] Mr. Bickersteth, and Dr. Lushington, (with whom was Mr. Blenman,) for the Appellants: The Respondents are not entitled to apply the surplus of the rents to their own use, but are bound to apply them to the purposes specified in the letters patent; and the matter ought to be referred to the Master, to approve of a proper scheme for the application of these funds. That is the object of the present information; and if it is not intended that the principal and scholars of Brazen Nose College should take the rents for their own profit, in opposition to the direct terms of the charter by which the school was founded, the decree of the Master of the Rolls must be reversed. By the letters patent, thirteen scholarships were instituted: these have been consolidated by the College into two; one scholar only has been appointed, and the remaining scholarship has been vacant for a great length of time. The question is, whether such an appropriation of the funds can be sanctioned by law: the solution of that question must depend on the contents of the letters patent. The circumstances under which the letters patent were granted, will perhaps assist in their construction. At the time they were granted, Brazen Nose College was a body corporate. It was unnecessary therefore, for the purposes of the College itself, to declare it a body corporate, since it had long borne that character: these letters patent created it a body corporate for the special purpose of its becoming the perpetual trustee of this school. There had been an ancient school in Middleton, at which Dean Nowell and his brother

had been educated. Dean Nowell afterwards became principal of Brazen Nose College, and died in 1602. At his instance the power of the Crown was put in motion, and the great and leading object he had in view, was to restore and re-establish [314] the ancient Grammar School to which he had formerly belonged. The letters patent show this intention, for they recite that in consequence of certain circumstances the school had decayed. For the purpose of restoring it, certain lands were given, and certain powers were vested, first in Dean Nowell, and afterwards in the College of Brazen Nose. The College was established as a body corporate, but it was so established with regard to the school, solely for the purpose of executing these powers. Its corporate capacity, so far as the school was concerned, was expressly given to it for the purposes of the school, and for no other purposes whatever. The College could not be intended to be benefited by the grant of these powers, since they were given to it, not in its ancient collegiate and corporate character, but given to the principal and fellows in their special corporate character, as governors of the Free School of Queen Elizabeth in Middleton. This is an important circumstance, and yet the Master of the Rolls has treated it in his judgment as a matter more of form than of substance; and with the single observation that it is so, has dismissed it from his notice. It is clear, however, that the College, in its ancient corporate character as one of the Colleges of the University, is perfectly distinguishable from the College in its new corporate capacity, as the body entrusted with the maintenance of Middleton school. What is the natural inference from the manner in which the six scholarships are appointed, and then the seven more, and then the directions as to the way in which the scholars shall be selected, and the schools from which they shall be selected, and also as to the power of disposing of the revenues? Any one who reads these parts of the letters patent, must be satisfied that the [315] stipends should at a future time undergo such alterations as circumstances should render necessary. The concluding part of the passage as to the disposition of the revenues, shows that Brazen Nose College was not to take any part for its own advantage, but that such revenues were to be wholly applied for the support of the Free School and scholars of Middleton. The plain meaning of this part of the letters patent is, that the principal and fellows of the College became the trustees for the support of the Free School. The next passage states the amount of the rents to be £28 7s. 2d., and grants them to "the principal and scholars of the College of Brazen Nose, governors of the Free School of Queen Elizabeth, in Middleton, for the proper advantage and use of the said principal and scholars, governors of the Free School aforesaid." In that passage the principal and scholars of Brazen Nose are not spoken of merely as such, but as governors of the Free School, in which latter character, and in that alone, these revenues were granted to them. It is the same in other parts of the letters patent. The limitation of 20 marks to the master and 10 marks to the under master, by the addition of the words "at the least," was not meant to be a limitation applicable for ever, but was made at that moment because of the smallness of the sum then capable of being appropriated to the support of the school. There is in the letters patent, a permission to take other lands besides those originally granted, of the clear yearly value of £100 a year, "as well for the better support and maintenance of the free school aforesaid, and scholars aforesaid, those as well thereby founded, as those in future to be founded, as for the support of poor students in the King's Hall and College of Brazen Nose." It is not possible to contend that the College is to [316] take the whole of this sum, when the chief part of it is thus distinctly given for a specific purpose. It is erroneously imagined that the letters patent are silent as to the distribution of the fund. There are, on the contrary, most distinct declarations in them upon that subject. The second letters patent, granted in 1579, must be taken as forming part of the same instrument with those which preceded them. The estate of Upbury was purchased by Dean Nowell out of his private funds; he leased it out, and was desirous of applying its revenue to the benefit of this school. To secure the proper administration of these funds, an oath is required from the principal and fellows of Brazen Nose, that they would pay over the rents and sums of money for the purposes thereinafter set forth, for ever. What were those purposes? The payment of a master and under-master, and the support of the Free School at Middleton. A small sum only, after these other payments had been made, was devoted to the purposes of Brazen Nose College; a sum to be used when the other payments had been made, and not till then. The rents last granted by the charter must be considered

as a mere addition to the sum previously given; but the grant of them cannot be treated as an extinction of the power and authority already created, and the duty already imposed on the College. Contemporary usage signifies little if unwarranted by the terms of the grant. (The Lord Chancellor: In the Thetford case, the distribution of the property was clearly provided for, and the case went on that ground. That case is not so well reported in Duke's Charitable Cases as in Coke's Reports. The parenthesis in your second reason endeavours to avoid all the effect of that case, as to the consequence of there being a sum greater [317] than that which is specifically appropriated. Contemporary usage is not always *optima interpres legum;* but if it is shown, as it seems to be here, that the donor permitted, without objection, a certain usage with regard to the surplus funds for a number of years, that is rather strong proof of what was intended.) But in this case it is not conclusive proof; for the donor here allowed the sum of £4 13s. 4d. to be given for a period of three years to one of his poor relations, yet he did not intend to make such a gift perpetual to any relation or the descendants of any relation. Recourse must therefore be had to the instrument itself, which will show the intention of the donor to have been to provide for the maintenance of this Free School, in preference to any other object. Besides, whatever may have been done with these surplus funds in past times, if done contrary to the provisions of the letters patent, it is an abuse and cannot be supported. The statute of limitations will not run against a charity, and therefore no right can be established as against it by mere usage.

Sir E. Sugden and Mr. Bethel, for the Respondents:—In the construction of an ancient instrument, contemporary usage ought to be taken into consideration where ambiguous expressions are used. The donor in this case manifested his intentions not only by his own application of these funds, but by documents relating to them. In the appendix there is a letter from him to Lord Burghley, in which the donor uses these expressions: "I do beseech your Honor to finish this good work, and at your convenient leisure to move her Majesty to license the same of one hundred pounds, or so many marks at the least, by me and others to be purchased in mortmane, for the increase [318] of the stipends of the schoolmaster and usher, and of the number and exhibition of the said scholars, and the better relief of the great company of that poor College." And in p. 44, in another letter, he says, "I have dealt with my Lord Cheney to purchase his interest for the term of his life, that I might put the College in full possession as well of the rents as of the lands." All these things show that the great object of Dean Nowell was to benefit the College, with which he was at the time more immediately connected than with the school. The rent of £4 13s. 4d., and the right of presentation to the vicarage of Lyginge, were both treated by Dean Nowell himself as belonging to the College; for he requested the College to grant the first for three years to a relative of his own, and he asked for one turn only to be allowed by the College to present to the vicarage; thus in both instances treating the right of disposition as in the College alone. It must be admitted that much depends on the construction to be given to the second letters patent; but what is the effect of that construction here? The object of the first letters patent was to make a new endowment for the Grammar School. It was not a new foundation: independently of the second letters patent, a provision had already been made for it. It is quite clear that the nature of the school could not be altered; yet if persons did not choose to send their sons to this school, the number of scholars going from it to the College must of course be but small. As however it could not be converted into a school to teach anything but what the letters patent described, the College is not to be reproved for the fact that it received but few scholars from the school. Indeed, as scholars did not come in the manner anticipated, the College took the 12 scholarships and consolidated them into one, and left the 13th as it was, in the hope [319] that some would come for the two exhibitions. The College, therefore, executed the donor's intent *cy près*. One scholarship was left open for any one to come and take it, yet none came. The first letters patent had for their object to increase the income of the master, but they do not bear the construction now attempted to be put upon them as to this point. The letters themselves define the amount which shall be allowed to the master; and the clause relating to this matter only directs the manner in which this purpose shall be executed, but gives no power to the College to appropriate all the revenues for the accomplishment of the object. If there had been any intention to dedicate the whole property to a particular charity, that might have been effected by half a dozen words. That

however has not been done; nor is it shown how those who are to have the power to make statutes for the regulation of the school, are to give up all that power. It is clear that this power was, after Dean Nowell's death, always to be vested in the hands of the principal and scholars of Brazen Nose. The title of the principal and scholars of the College being confirmed by the Queen, they received from her a license to hold the lands in mortmain. This shows the intention to invest them with a permanent property in the lands, and authority over them.—[The Lord Chancellor:—Both the Dean and his brother expressed their especial favour towards Brazen Nose College, and requested the Queen not to forget it.]—The object of providing for the poor scholars was best obtained by enriching the College on the foundation of which these poor scholars were to be supported. The whole amount of the profits under the first grant was very small, being little more than £24 [320] and a fraction: under the second grant the revenue was much improved, but in those letters patent the Queen only acted ministerially. The external circumstances may be looked at by the House, but we do not contend that violence must be done to the particular instrument; that is not necessary here. In construing these letters patent, regard must be had to the intention of the donor: this intention is manifested by his acts. If both the intention and the words agree, the intention may be at once effectuated. Now what was the intention of Dean Nowell, after the first provision for his wife? he knew that he was settling property which would not in the first instance do more than answer the object of the particular donation he had in view; but when his wife's interest fell in, that there would be more than sufficient to effectuate that object. There was but a limited provision at first, but afterwards the beneficial interest was secured entirely to the College. These acts must be allowed to have great weight and force in the construction of the instrument. The intention of Dean Nowell is shown by the terms he uses: when he speaks of a general expense, he then says *impendere;* but when he speaks of a particular application of the funds to the object of the scheme, he says *solvere.* In the oath again, the word *impendere* is used, and it is used in the same sense. In *The Attorney-general* v. *The Mayor of Bristol* (3 Madd. 319), which depended on a gift by Sir Thomas White, Sir John Leach, then Vice Chancellor, established the right of the charity in the property; but his judgment has since been in effect overruled by that of Lord Eldon (2 Jac. and W. 294). Even the Vice Chancellor, however, recognized the difficulty arising from the fact that all the fund was not dis [321]-posed of, and said (3 Madd. 351), "The present case differs from the Thetford School case and the Coventry case, in this, that the whole actual rents and profits were there in the first instance applied: here the covenant is to apply less than the actual rent." When the case came before Lord Eldon, he said (2 Jac. and W. 307), "In former times the Court acted upon principles in the construction of deeds and wills, when charity was the object, which, if they could be reconsidered, would not now be adopted. If the doctrine of resulting trusts had then been understood, the right of the heir would never in all probability have been got over." His Lordship added, "The doctrine in the Thetford case, which has been adhered to since, was, that if the whole land, and rents of it at the time, are given for a charity, those to whom the lands are given must, if there is an increase in the rents, apply them to the charitable purpose." There is no clause in the present case giving the whole of the lands, and the rents arising from them, to the school alone; and therefore the argument founded on it cannot apply here. Then as to the usage here not being a bar to the claim: As to the question of usage, in *The Attorney-general* v. *The Mayor of Coventry* (3 Madd. 368), Lord Holt observed, "My brother Powell says, that there is no statute of limitations which runs against a charity. I do agree there is no statute of limitations shall bar a charity but in a thing that is obscure and dark; and there hath been an enjoyment for a long time: I think an enjoyment for a long time, without interruption, is a great evidence of a right." In *The Attorney-general* v. *The Mayor of Bristol*, Lord Eldon, speaking on the same subject (2 Jac. and W. 314), adopted [322] the same view, and said, "If between the periods I have mentioned the surplus was applied by the corporation to their own use, the construction of this deed, by which it was contended that no more was meant by it than that these particular disbursions and payments should be distributed to these respective corporations, would receive consistence from the prior enjoyment." And again (2 Jac. and W. 381), after reading the case of *The Attorney-general* v. *Coventry*, from Vernon's Reports, he said, "The

statute of limitations undoubtedly does not apply; but length of time (though it must be admitted that the charity is not barred by it) is a very material consideration as to what is the effect and true construction of the instrument." The practice which has so long prevailed with respect to the funds in this case, a practice beginning with the life of Dean Nowell himself, must, under these authorities, be taken into account in construing this instrument. That practice is warranted by the declared objects of the instrument itself. The first of these objects was to confer a benefit on the principal and scholars, by the improvement of their commons; and instead of allowing the stipends of the absent scholars to be forfeited, Dean Nowell suggested that the stipends of the absent scholars should make those of the resident scholars more rich. That fact shows that the late dealing with the revenues was neither improper in itself, nor unwarranted by the donor's intention, nor by the ancient practice. On every mode of looking at the case: first, upon the general doctrines of the Court; secondly, upon the authority of the particular cases referred to; thirdly, on the plain construction of the letters patent; fourthly, on the expressed intention of the founder; fifthly, on [323] the contemporaneous conduct of the parties in the application of the property; and lastly, on the undisturbed enjoyment of this property for so long a period: it is impossible to find any ground on which the prayer of this bill can be held to be sustained.

Mr. Bickersteth, in reply: This is a case in which the whole of the property given for the purpose of maintaining a particular charity, is not applied to the purpose intended by the donor. Mere usage, however long existent, is not sufficient to defeat a clearly expressed intention. In the cases referred to, where the usage was employed to assist in the construction of the instruments, it was so employed because the instruments themselves were not clear and distinct as to the appropriation of the surplus. That is not the case here. Even the letter to Lord Burghley, quoted on the other side, shows what a strong feeling Dean Nowell had for the school at which he had been educated; and the lands are given to the College, not for the benefit of the College, but for the purposes of the school. The bounty of the College must be viewed with reference to the maintenance of the school. It never was the idea of Dean Nowell to allow the school to go to decay; his first wish was to provide for that; and the school being provided for, he was willing that the College should receive some advantage from his bounty. But he required first that the school should be well provided for, and even the powers given to the College were given with the sole view of being used for the benefit of the school.

The Lord Chancellor: My Lords, the case of *The Attorney-general* and *Brazen Nose College*, is the first of those which now stand in the list for judgment. [324] It was argued with the fulness and learning and ability which your Lordships are accustomed to see applied to cases at your bar, and the application of which was specially merited by the importance of it; the case not only involving a question of considerable interest to the College, but also a matter of principle, not only important in itself, but doubly so as being likely to operate by way of precedent in other cases. It will not be necessary for me to enter very minutely into the argument, because on the whole, I agree without hesitation in the decision of the Court below; nevertheless, I shall state my reasons why. The charity was founded as far back as the 14th of Elizabeth, the 11th of August 1572, and it may be said to have been in some sort a joint foundation by Alexander Nowell, Dean of St. Paul's, a great benefactor of it, and one of its governors and visitors; and by her Majesty Queen Elizabeth. The object of the foundation was the restoration and the reinstatement of the school of Middleton, in Lancashire, as a Free Grammar School; and this is effected by making the master and the school a corporate body, and by appointing governors and visitors, namely, the master and six senior scholars, fellows of Brazen Nose College, Oxford, and making them also a body corporate, under the title of the master and six senior scholars, fellows of King's College, Brazen Nose, Oxford, Governors of Middleton Grammar School. The charter then points out that six scholarships shall be appointed to Brazen Nose, either from Middleton school, the school of Whalley, in Lancashire, or the school of Burneley, in Lancashire; and failing all those three, from other schools in Lancashire: that they shall be chosen by the master of the College; and that then there shall be power given to this master, [325] and six senior scholars, fellows of the College, the governors of the school, with Dean Nowell during his life-time, and by themselves after his decease, solely to make ordinances for govern-

ing the school and scholars, and concerning and touching the stipends and salaries of the said masters of the Free Grammar School aforesaid; and also touching anything whatsoever relating to the said school, in the order, governance, receiving and disposition of the rents and revenues for the support of the school and scholars. This is a very important part of the endowment; for it appears to me, upon the authority and principle of adjudged cases, one which I very lately decided (in Chancery) proceeding on the same principles, the Atherstone School case, in which I reversed the judgment of the Court below, where due attention had not been given to such provisions as appeared to me of the utmost possible importance to the main question, which was similar to that now in agitation between these parties, to wit, whether the whole was given to the school out and out, or whether the school had only a charge upon the revenues in a certain way, but at the discretion of the governors, so that the surplus would belong as property to the governors. It then gives rents of considerable value to the governors, *eâ tamen intentione*, with this intent however, that out of the same they give to the master 20 marks by the year, "at the least," to the undermaster 10 marks by the year, " at the least," and to six poor scholars 5 marks by the year, but not " at the least." That is, the minimum is to be 20 and 10 marks respectively, as a yearly stipend to the master and usher of the school, but there is no minimum fixed as to the scholars: it is stated to be five marks to the scholars; and so far I mention this, as operating to a certain degree (though [326] it was not much relied upon at the bar) to a certain degree in favour of the argument of the Respondent. Nevertheless it is nothing decisive, for it must be observed that these scholars had nothing to do with Middleton Grammar School at all; nothing exclusive, for they may belong to Whalley, or Burneley, or in the event of neither Whalley nor Burneley furnishing objects of charity to make scholars to Brazen Nose, sufficient exhibitions and scholarships should be given to whomsoever (that has been the practice formerly) the masters should so choose; they have the choice. There is then a very important liberty to be observed upon; liberty is further given to hold other grants in mortmain, not exceeding £100 a year, in the usual way, for the support of the school, but not of the school alone, but also for the support of the poor scholars of the said College of Brazen Nose. That is also the second observation which I have to make on the distinct contemplation by the Queen and the founder, of its not being confined to the school of Middleton, as it is now contended the endowment does confine it. Now when I have stated these facts, and one other thing, I think I shall have stated the whole case, and shall have disposed of it; that during Dean Nowell's life he acted as visitor, and he was to a great degree the founder; and during the whole of that time, with his knowledge, with his consent, and with his participation, the surplus was applied to the use of the College; and even the stipends of the scholars, when there was a want of objects, that is to say, when they could not get in any way six poor scholars, the profits of those poor scholars were applied to the use and benefit of Brazen Nose College, without the least reference to Middleton school. One other fact being stated, I shall have done as regards the [327] facts of the case. The rent was at that time, at the very least (for that is the minimum) £66 13s. 4d. a year, by the foundation accounts; summing them up, you will find that sum: the charges upon it were not £66 13s. 4d. but £65 3s. 4d., leaving a clear surplus ungiven away, unappropriated by the foundation, not referred to in anyway by the gift, except by a resulting gift to the donee, to the governors I mean, and visitors, namely, £1 10s. This is said to be a trifling amount. I do not consider it a trifling amount; now it may be so; but it was no such trifling amount then, when you find that that which was £66 13s. 4d. in the 14th of Elizabeth, is now by the very contention on the part of the Appellants, on which they rely mainly, swelled to somewhere between £700 and £800 a year. I must consider that we are to multiply £1 10s. by something like 14 or 15, and that brings us up to between £20 and £30. Now not only is it not inconsiderable then, regard being had to the value of money, but you must consider the proportion it bears to the whole income, and it is somewhere about a thirtieth or fortieth part of the whole income.

Upon all these grounds, therefore, I found my first observation; namely, that this is not within the principle, within the rule, of the Thetford case, the celebrated case, now the governing rule in all such cases, and reported in Lord Coke's Reports, but which is also to be found reported in Duke, though not so correctly; and I use this remark for this reason, because Lord Eldon, in some of the charity cases which

came before him, commenting on the Thetford case, is led into an error respecting the nature of that case; and when you come to examine the error, it is quite clear he is led astray by having taken the case from Duke and not from Coke: thinking that Duke gave the [328] report (as he generally does) the same as Lord Coke does, Lord Eldon conceived he might safely take it there. It is accurately given in Coke, it is not so accurately given in Duke; and upon the difference between the two reports, hinges almost entirely, in my opinion, what I venture, with great respect to that noble and learned Lord, to state to be an erroneous view which he took of the Thetford case. The Thetford case goes on this principle, that where nothing is said of surplus, (for it is only in cases where nothing is said that the question can arise), where nothing is said of surplus, then you may safely assume that it is given to the charity out and out, and not to the trustees, if it is not exhausted by the gift to that charity. Suppose for instance, as in the Thetford School case, I give land to the amount of £20 by the year (stating the revenue) to A. and B. in trust for the charity C.: if I give £15 to one, £3 to another, and £2 to a third master or other party in the charity, and will and declare that those three sums of £15 a year, £3 a year, and £2 a year respectively, shall at all times be paid to such persons; as those all taken together amount to £20, I must be taken to give all that to the trustees A. and B. for the sole use of the charity. The rule of the Thetford case under such circumstances is this, that this exhaustion of the fund indicates the founder's intention that the whole shall be charity fund, and none should be beneficiary to the trustees. It disposes therefore of the whole, and raises no implied trust *quoad* the surplus in the trustees for the school; it disposes of all possible surplus, and leaves no question of this description ever in such a case to arise. But it is very different, when instead of giving £15, £3, and £2, I give £15 and £3, and leave £2 unappropriated. There the rule of the Thetford case [329] does not apply at all; there you have given £18 out of the £20, and the whole argument and the principle and the rule in that case consequently does not apply. Therefore, my first argument on the present appeal is, that the defalcation of the £1 10s. not given, takes it out of the rule in the Thetford case, and leaves it to rest on the other and general principles governing such questions.

Now then, what is the intention in the second place? I infer that intention from the two circumstances I have already stated, namely, that the Middleton school is not the only object of the bounty of the founder, but the six scholarships to Brazen Nose are included therein; and those six scholarships to Brazen Nose are not to be taken from Middleton school lads solely, but may be filled from the schools of Whalley and Burneley, which are not mentioned in the endowment; and failing Whalley and Burneley, may also be taken from other schools. The other circumstance of a similar description is, that the poor scholars are to receive the benefit of Brazen Nose quite independently of Middleton, or even Whalley or Burneley, or even Lancashire scholars at all; they are to receive the benefit of the other lands to the amount of £100 a year; to take which in mortmain, and hold which in mortmain, license is also given.

Then the other circumstance which I have to state, my Lords, is this, that the rules and regulations and ordinances which the governors are empowered to make, are perfectly general; all matters touching the school and its concerns, are from time to time to be varied by those ordinances; and they are to be specifically directed to the revenues, receipt, management and disposition of the said revenues.

Last of all, my Lords, comes the lapse of time. Two [330] hundred and fifty years have elapsed since the foundation of this charity, and there is no trace pretended to be visible of any other application of the surplus except to Brazen Nose College. This may not be decisive, but it is a very strong circumstance in the case, as I shall have occasion to show in the case of the *Attorney-general* v. *Hungerford* (post. 357), to which, therefore, I adjourn that remark. It raises not an absolute bar, but a great obstacle, to any alteration to be made in the practice of disposing of the fund. My Lords, the Coventry case (2 Vern. 397; and afterwards in the House of Lords, 7 Bro. Parl. Cas. 235), the case of *The Attorney-general* v. *The Mayor of Bristol*, and other cases to which I might refer, both more and less recent, clearly bear out the principle on which this decision has been come to; and therefore I have no hesitation whatever in moving your Lordships, That this decree be affirmed, though without costs.

Decree affirmed accordingly.

[331] IN ERROR

FROM THE COURT OF KING'S BENCH.

The MAYOR and BURGESSES of LYME REGIS,—*Plaintiffs in Error;* HENRY HOSTE HENLEY, Esq.,—*Defendant in Error.*

[Mews' Dig. iv. 577, xii. 672; S.C. 8 Bli. N.S. 690; and, in Courts below, 3 B. and Ad. 77; 5 Bing. 91; 3 Moo. and P. 278. Discussed in *Gibson* v. *Preston (Mayor of)*, 1870, L. R. 5 Q. B. 221; *Winch* v. *Thames Conservators*, 1872, L. R. 7 C. P. 470; *Hudson* v. *Tabor*, 1877, 2 Q. B. D. 293; and see *A.-G.* v. *Tomline*, 1879, 12 Ch. D. 231.]

The King granted by letters patent to the Mayor and Burgesses of Lyme Regis, the borough so called, and also the pierquay or cob, with all liberties and profits, etc. belonging to the same, and remitted part of their ancient rent payable to the King; and he willed that the Mayor and Burgesses, and their successors, all and singular the buildings, banks, sea-shore, etc. within the said borough, or thereto belonging, or situate between the same and the sea, and also the said pier, etc., at their own costs and charges thenceforth for ever should repair, maintain and support.

Held by the Lords, affirming the judgment of the Courts of C. P. and K. B., that the Mayor and Burgesses, having accepted the letters patent or charter, became legally bound to repair the buildings, banks and sea-shore; and that this obligation being one which concerned the public, an indictment would lie against them in case of non-repair, and an action on the case for a direct and particular damage sustained by any individual.

Action on the case by the Defendant in error against the Plaintiffs in error, for damages sustained by him through their neglect to repair, according to their charter, certain sea-banks, etc. The declaration in the first count stated that on the 20th of June, in the 10th year of the reign of Charles I., that king by his letters patent did, for [332] himself, his heirs and successors, (amongst other things) give, grant and confirm to the mayor and burgesses of Lyme Regis, and their successors, the borough or town of Lyme Regis, and also all that the buildings, called pierquay or cob of Lyme Regis, with all and singular the liberties, privileges, profits, franchises and immunities to the same town, or to the said pier-quay or cob, in any wise belonging; to have, hold and enjoy the aforesaid, etc., to the said mayor and burgesses, and their successors, to the only and proper use and behoof of them and their successors, in fee farm for ever, yielding of fee farm to the said sovereign lord Charles I., his heirs and successors, of and for the aforesaid borough or town, with its liberties and franchises, as in the said letters patent in that behalf mentioned: And the said sovereign lord Charles I. did further, for himself, his heirs and successors, pardon, remise and release to the said mayor and burgesses, and their successors for ever, 27 marks, parcel of 32 marks of the farm of the said borough and the liberties thereof, anciently by letters patent, or in any other manner due, the said lord king Charles I. willing not that the same mayor and burgesses, or their successors, or either or any of them, should be charged of the further portion of the aforesaid farm of 32 marks, besides the aforesaid five marks; but that they and their successors, against the said king Charles I., his heirs and successors, should be thereafter acquitted, and from time to time for ever discharged of the aforesaid yearly 27 marks, any statute, act, ordinance, provision, charters or letters patent theretofore made to the contrary thereof in any wise notwithstanding: And that the said mayor and burgesses, and their successors, all and singular of the buildings, banks, sea-shores, and [333] all other mounds and ditches within the said borough of Lyme, or thereto in any wise belonging, or situate between the same borough and the sea, and also the said building called the pierquay or cob, at their own costs and expenses thenceforth from time to time should well and sufficiently repair, maintain and support, as often as it should be necessary or expedient: And the said king Charles I., by his said letters patent, did grant to the said mayor and burgesses, and their successors, that the mayor of the same for the time being for ever thereafter should be clerk of the market within the said borough, and the

liberties and precincts of the same; and that the said mayor and burgesses, and their successors, all and singular the fines, amercements and sums of money before the said clerk of the market, by either or any of the inhabitants of the borough or town aforesaid, after the date and making of the said letters patent, forfeited or thereafter to be forfeited and assessed in the same borough, should have and enjoy to the use of them and their successors for ever, without account, or any other thing for the same to the said king Charles I., his heirs or successors, in any wise to be rendered or paid: And the said king Charles I. did by the said letters patent, for himself, his heirs and successors, give and grant to the said mayor and burgesses, and their successors, full power, authority and license from time to time for ever to dig stones and rocks in any places whatsoever, within the borough and parish of the town aforesaid, out of the sea and on the sea-shore, in the borough and parish aforesaid, adjoining to the said borough or town, for the reparation and amendment of the port and building called the pierquay or cob, and other necessary reparations and common works of the same town and borough, and belonging [334] and appertaining to the buildings aforesaid: And the said king Charles I. did also, by the said letters patent, will and grant to the said mayor and burgesses, and their successors, that they should have, hold, use and enjoy, and might and should be able fully, freely and entirely to have, hold, use and enjoy for ever, all the liberties, free customs, privileges, authorities, acquittances and licenses aforesaid, according to the tenor and effect of the said letters patent, without the let or impediment of the said king Charles I., his heirs or successors, or his or their justices, sheriffs, escheators, bailiffs or ministers.—Which said letters patent the mayor and burgesses aforesaid duly accepted, and the same thence hitherto have been, and still are, one of the governing charters of the said borough; and the said mayor and burgesses, from the time of their acceptance of the said letters patent, hitherto have had, held, received and enjoyed all the benefits, profits and advantages granted to them by the said letters patent.

The declaration further stated in the first count, that before and at the time of the committing of the grievances as thereinafter mentioned, the said Plaintiff (the Defendant in error) was lawfully possessed of and in divers messuages, buildings and closes of land, with the appurtenances, situate in the borough aforesaid, and was entitled in reversion to divers other messuages, buildings and closes of other land, with the appurtenances; all which several messuages, etc., with the appurtenances, before and at the times of the committing of the several grievances thereinafter mentioned, were abutting in or near the sea-shore, at the parish aforesaid; and that before and at the time of sealing of the said letters patent, and acceptance thereof, as aforesaid, by the said mayor and burgesses, [335] and also at the time of the committing of the several grievances by the said Defendants (Plaintiffs in error) as thereinafter next mentioned, divers buildings, banks, sea-shores and mounds, had been, and were then respectively standing and being within the borough of Lyme Regis aforesaid; and divers other buildings, banks, sea-shores and mounds, had been and respectively were belonging and appertaining to the said borough; and divers other buildings, banks, sea-shores and mounds, had been and were at those times respectively standing and being and situate between the said borough and the sea, in the borough aforesaid; all which said buildings, banks, sea-shores and mounds respectively, at the times of the committing of the several grievances by the said Defendants, (Plaintiffs in error), were near to, and then and there constituted and formed, and were a protection and safeguard, and still of right ought to form and be a protection and safeguard to the said several messuages, buildings and closes of land, with the appurtenances aforesaid, and then and there hindered and prevented, and still of right ought to hinder and prevent, the sea, and the waves and waters thereof, from running or flowing in, upon, against or over the said several messuages, buildings and closes of land; and all which buildings, banks, sea-shores and mounds, the said Defendants, (Plaintiffs in error), at the times of the committing of the several grievances by them as thereinafter mentioned, were, under and by virtue and in pursuance of the aforesaid letters patent, and the acceptance thereof as aforesaid, liable, and ought, at their own proper costs and charges, well and sufficiently to have repaired, maintained and supported, and still are liable, and ought, at their own proper costs and charges, well and sufficiently to

repair, [336] maintain and support, when and so often as it should or might have been, or shall or may be necessary or expedient so to do, so as to prevent damage or injury to the said messuages, buildings and closes of the said Plaintiff, by the sea, or the waves or the waters thereof.

Breach, that the said Defendants, well knowing the premises, and not regarding the said letters patent, nor their duty in that behalf, but contriving, and wrongfully and unjustly intending to injure, prejudice and aggrieve the said Plaintiff, and to deprive him of the use and benefit of his several messuages, buildings and closes; and also to injure, prejudice and aggrieve him, the said Plaintiff, in his revisionary interest of and in the said messuages, buildings and closes above mentioned, wrongfully and unjustly suffered and permitted the said buildings, banks, sea shores and mounds to be and continue ruinous, prostrate, fallen down, washed down, out of repair, and in great decay, for want of due, needful, proper and necessary repairing, maintaining and supporting of the same; by means of which said several premises, the sea, and the waves and waters thereof, ran and flowed with great force and violence in, upon, under, over and against the said several messuages, buildings and closes of the said Plaintiff, in which he was so interested as aforesaid, and thereby greatly inundated, damaged, injured, undermined, washed down, beat down, prostrated, levelled and destroyed the said several messuages and buildings; and the materials of the same, together with divers cart-loads of earth and soil, and divers acres of the said several closes, were washed and carried away; by means of which said several premises, the said Plaintiff not only lost and was deprived of the use, benefit and enjoyment [337] of his said messuages, buildings and closes in this count first above mentioned, but was also thereby greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said several messuages, buildings and closes in this count secondly above mentioned.

There were other counts stating a liability to the same repairs by prescription, and others stating it by reason of the possession of certain closes. The Defendants below pleaded the general issue.

The cause came on to be tried before Mr. Justice Littledale, at the spring assizes for the county of Dorset, in 1828, when the jury found a verdict for the Defendant in error, on the first count, with £100 damages, and were discharged from giving any verdict upon the other counts. In the following Easter term, a motion in arrest of judgment was made in the Court of Common Pleas, but judgment was given for the Plaintiff below (5 Bing. 91).

The Defendants below thereupon brought a writ of error in the Court of King's Bench, where the judgment of the Court of Common Pleas was affirmed (3 Barn. and Adol. 77); and upon that judgment the present writ of error was brought in the House of Lords.

The following Judges of the common law courts, besides Lord Denman, attended in the House when the case was argued, viz.: Chief Justice Tindal, Mr. Justice Park, Mr. Baron Bayley, Justices Bosanquet, Gaselee, Taunton, J. Parke, Patteson and Alderson, Barons Vaughan and Gurney.

Mr. Serjeant Merewether, for the Plaintiffs in error: There is nothing on the face of this record to show that the Defendants below were liable, by reason of [338] tenure, to the repairs of the sea-shore. The passages cited from Callis, in his treatise on Sewers, and urged in the Court below, with a view to fix the liability of the Defendants *ratione tenurae*, are doubtfully expressed and cannot be deemed authority. He says, "in cases of the sea and royal rivers, the property of the banks and grounds adjoining belong to the subject whose lands do butt and bound thereon, but the soil of the sea and royal rivers appertains to the King," etc. "and it *seems* that the frontages are bound to the repairs, and that *he whose grounds are next adjoining to a highway is bound to repair the same.*" The last clause of the sentence is stated too broadly, and is not the law; and the former part of it, which applies to this question, is an expression of doubt, and is much weakened by passages in other pages (see Callis, pp. 2, 115, 117, 118).

The chief question here is, whether the King can by his letters patent or charter create a new duty? It does not appear who, or that any one, was compellable to repair those walls and banks before the date of Charles the First's charter. Did the King's charter create a new duty, and impose on the corporation of Lyme the

charge of repairing the sea-walls, subjecting them to an indictment or action at the suit of any person whose property in Lyme might be damaged in consequence of the non-repair? The liability to such action or indictment could arise only in one of four ways, viz. by reason of *prescription*, *tenure*, *Acts of Parliament*, or *nuisances to public rights*. There is no case or other authority to show it could arise from the acceptance of a grant from the King. The cases cited in the Court below, in the judgment for the Defendant in error, applied to liability by prescription, tenure, Act of Parliament, or public nui-[339]sance; such as *Rex* v. *Kerrison* (1 M. and S. 435, and 3 M. and S. 526), *Paine* v. *Partridge* (Carth. 191; S.C. Show. 255), 12 Hen. 7, fol. 18, *Rex* v. *Inhabitants of Kent* (13 East, 220), *Rex* v. *Inhabitants of Lindsay* (14 East, 317), *Rex* v. *Stoughton* (2 Saund. 157, 160). If the charter annexed to the grant an obligation to repair the sea-walls, the King may withdraw the grant if the grantees do not perform the condition, *Roll. Abr. tit. Franchise*, *Com. Dig. Franchises;* so that the obligation is not a matter of public duty, but a covenant between the King and the corporation, which a stranger to it cannot have a right to enforce by action or by indictment. The liability of the Plaintiffs in error to an indictment for non-performance of the repairs in question, is assumed in the judgment below, as the ground on which the right of action for special damage rests (3 Barn. and Ad. 93). According to Callis (p. 115), the occupiers of lands abutting on the sea are primarily liable to protect them from the sea, and the liability of the Plaintiffs in error to protect the Defendant, if such exists, arises from their agreement, implied from their acceptance of the charter of Charles the First: but no agreement to become liable to do that for which others are primarily liable will subject a party to an indictment, though the party be a corporation aggregate, and though a sufficient consideration for the agreement be shown, and the public interest be concerned, *Rex* v. *Mayor of Liverpool* (3 East, 86); nor will such agreement release those in whom such primary liability exists, *Regina* v. *Duchess of Buccleugh* (1 Salk. 358). The charter here is at most only a covenant between the King and the corporation; it is not denied that an obligation is thereby imposed on the [340] corporation, but there is no duty of a public nature imposed, so as to render the corporation liable to an indictment for neglect. There is no authority for holding that any one of the King's subjects, who may sustain damage by reason of the non-repair, can indict the corporation for their neglect, or have an action against them for the damage. The claim of the Defendant in error is new and unwarranted by law; and that no precedent is found for the right claimed by him, is a matter which ought to have great weight. The case of *Popham* v. *Prior of Breamore* (11 Hen. 4, 82), and *Keighley's case* (10 Rep. 139a), do not appear to sustain this action, as they turned on the principle of liability by prescription. In the case of the *Mayor of Lynn* v. *Turner* (Cowp. 87), on which reliance was placed on behalf of the Plaintiff below, and which was a writ of error to the King's Bench, the corporation of Lynn was sued for not repairing a creek of the sea, being charged to be liable thereto by *prescription* and by *immemorial usage*, two material distinctions between that and this case. More weight has been given to the words of Lord Mansfield, in giving judgment in that case, than is properly due to them. It would appear from the argument in *Churchman* v. *Tunstal* (Hardr. 162), that an action or indictment lies against a common ferryman if he does not keep his ferry in good repair, but that a private ferryman is not so liable; a distinction which is analogous to this case. But that case and *Paine* v. *Partridge* (Show. 255; Carth. 191) were cases of liability from prescription in respect of ancient ferries, which most materially distinguished them from this case. It may be supposed from an expression used in *Russell* v. *The Men of Devon* (2 T. R. 667), that the action there for not repairing a county [341] bridge would well lie if the Defendants had been a corporation. That was a mere *dictum*, urged in that case beyond its merits, and it is opposed to *The King* v. *The Mayor of Liverpool* (3 East, 86), and to *Harris* v. *Baker* (4 M. and S. 27).

There was another class of cases cited below, relating to the liability of officers in public offices, as the Bank, Post-office, etc.; but as the liability of these officers arises under Acts of Parliament, it is not necessary to examine such cases, which have no bearing upon the liability to which it is attempted to subject the Plaintiffs in error, by virtue of the King's charter within time of memory.

The proper remedy for the injury sustained here would be by information at the

suit of the Attorney-general, or by application to the Court of Chancery, under the Act 43 Eliz. c. 4, which enables the Lord Chancellor, where lands have been granted for reparation of sea-walls, etc., to issue a commission to inquire and direct the funds to be appropriated to the purposes to which the grant was destined; or by proceeding on the part of the King for a forfeiture. 4 Vin. 476; Com. Dig. tit. Franchises.

Mr. Erle rose to argue on the same side, but the Lord Chancellor suggested that the House should hear the counsel for the Defendant in error, and Mr. Erle should have the reply. The counsel agreed to that course, and Mr. Bere, who was second counsel on the other side, did not address the House.

Mr. Follett, for the Defendant in error:—The first point made in the argument for the Plaintiffs in error is, that no condition to repair was imposed as a matter of public duty on the Mayor and Burgesses by [342] the grant; and that the charter contained merely an expression of the King's will, that they should repair and maintain the banks and sea-shore. It is impossible for any person, attending to the nature of the grant, the remission of 27 marks of the ancient rent, the grant of the fines and amercements, and the license to dig stones within the town for the reparation of the port and pier, to hold that the charter did not annex to these grants the obligation to repair. The corporation having accepted the charter, and having ever since enjoyed the privileges conferred by it, must also take the burden imposed. The benefits that were granted were the consideration for the performance of the duty. The corporation shall not be at liberty to accept the grant, and refuse the burden; *King* v. *Westwood* (4 Barn. and C. 781), *Brett* v. *Cumberland* (Cro. Jac. 599, 521). Lord Tenterden, after citing this last case in his judgment in the Court below, adds, "so here, though the letters patent import only that it be the King's will that the corporation should repair, yet they, having accepted the letters patent, and enjoyed the benefits and advantages granted thereby, have testified their assent that this shall be considered as a condition or obligation, and must be bound accordingly; and in that view it becomes immaterial to inquire whether or not, before the grant, the King himself was bound to keep the banks and sea-shores in repair" (3 Barn. and Ad. 92).

The plain argument upon which the Defendant in error relies is, that where the King by his grant imposes a public duty on a corporation or on an individual, the public become interested, and have a right to see that the duty is performed, and an indictment [343] will lie for the neglect; or an individual, if a direct injury is in consequence sustained by him, has a right of action. This last position was admitted in the case of *Paine* v. *Partridge* (Shower, 255; S.C. Carth. 191), and is well warranted by the cases of *Churchman* v. *Tunstal* (Hardr. 163), *Herbert* v. *Paget* (1 Lev. 64), *Mayor of Lynn* v. *Turner* (Cowp. 86), *Lane* v. *Cotton* (1 Salk. 17), and Comyn's Digest, title Action on the Case, A 2, A 3. The recent case of *Peter* v. *Kendal* (6 Barn. and C. 703) applies to every offence and grant of a public nature, and shows that wherever such a grant is made, there a duty is imposed, and an indictment will lie against the grantee for a public injury arising from his neglect or non-performance of the duty; or an action on the case may be brought against him by any individual sustaining a particular injury. The doctrine laid down in these cases is not shaken but rather confirmed by the case of *Russell* v. *The Men of Devon* (2 T. R. 667), which was an action against the inhabitants of a county for an injury sustained by an individual in consequence of the non-repair of a county bridge, and it was held not to be maintainable; but it was there said that such an action would well lie against a corporation.

The next question for consideration is, whether the declaration here sufficiently alleges that the Defendants below were bound to repair *ratione tenurae*. There is no magic in these words. They were in the possession of the borough, and of the walls and banks; that cannot be denied after the verdict. By reason of their ownership and possession they became liable to the repairs (Callis, 115, 117), and the declaration sufficiently alleges that liability to have been created by the [344] charter, and does not aver an obligation more extensive than the duty required by the charter. The case of *Rex* v. *Kerrison* (1 M. and S. 435), cited on the other side, favours the Defendant in error. The indictment there charged the owner of a navigation with the liability to repair a bridge by reason of ownership, without showing any contract or obligation annexed to the grant of the navigation, to induce a liability to repair;

but here the grant, and the condition on which the charter was granted, are set forth in the declaration; and whether the duty is cast on a party by prescription, which supposes a consideration, or by an existing grant showing the consideration, if the party bound do not repair, an action equally lies at the suit of the party injured by the neglect. *Keighley's case* (10 Rep. 139a). These cases are strongly applicable to this, and they, as well as most of the authorities to be found in the old books of reports, are against the interpretation which was given by the counsel for the Plaintiffs in error to the statute of Sewers (23 Hen. 8). There is a case in Hardres (p. 169), (the *Earl of Devonshire* v. *Gibbons and others*), referring to that statute: it was a bill reciting articles of agreement made between the King and others, for draining Hatfield-level, by which the King was to have a third part of the lands obtained, the drainers a third, and the tenants and commoners a third. The plaintiff, who was not a party, or deriving from a party, to the articles, was assessed towards maintenance of a certain sewer for his lands in Yorkshire, and his bill prayed relief from the assessment, according to the equity of the statute of Hen. 8, on the ground that he was "aggrieved by the assessment, through those not repairing the banks, who were obliged to repair by the articles." And the Court [345] seemed to be of this opinion, "because in effect the articles were made for the relief of all that were to receive any damage by the draining; and being made *pro bono publico*, all persons are parties: as if one man should take upon himself to repair a public causeway which the country ought to repair, by this means he makes himself liable to the whole county if he do it not." There is a clear distinction between the liability of an individual and of a corporation; that is laid down in Callis, p. 117, (where it is said an obligation may exist by covenant as well as by tenure), and is noticed by Lord Mansfield in his judgment in the *Mayor of Lynn* v. *Turner*. An individual is bound by reason of tenure of his land; but a corporation accepting a grant is bound to perform the duty annexed to it, without any land. It is not therefore necessary that the obligation to repair should be in this case coupled with land; but if it were, the charter does grant land, it grants the borough and cob: so that if it were necessary to prove that the corporation are bound *ratione tenurae*, that proof is not wanting.

Mr. Erle, in reply:—The Plaintiffs do not contend that the covenant contained in the letters patent did not, by the acceptance of them, impose an obligation on the corporation; there may be a process against them for the forfeiture of the franchise, or other proceedings before referred to, but they are not liable to an indictment or action at the suit of an individual who is a stranger to the covenant. There is no case, though many have been cited, to show that any one of the King's subjects can have an action against a corporation for not repairing sea-walls, through the non-repair of which his property sustained damage. The [346] case of the *King* v. *The Mayor of Liverpool* shows that an agreement to repair a road did not subject a corporation to an indictable liability to repair. That case is a sufficient answer to the inferences drawn from Callis and from the old authorities. In all the cases respecting the duty of public officers there were known relations and duties between them and the public, defined by Acts of Parliament, and they have no analogy with this case. The charter here cannot have a greater force than an Act of Parliament; but if this duty was imposed in those general terms by Act of Parliament, the corporation would not be indictable for an injury to a private individual. The banks and mounds in question were stated in the declaration to have been a protection to Mr. Henley's property, and not to the houses and property of the public. It was scarcely possible at any expense to repel the encroachments of the sea on these banks; if the funds of the corporation were to be applied to the protection of one individual, they would not be sufficient for that purpose, and the other inhabitants would be without protection.

The Lord Chancellor suggested a question for the learned Judges, and the further consideration of the case was adjourned.

Mr. Justice Park delivered the following opinion of the Judges:—The question proposed by your Lordships for the opinion of the Judges is as follows: "The declaration in an action on the case against the corporation states, that before the committing of the grievances by the said Defendants, the King, by his letters patent duly sealed, did give, grant and confirm to the corporation and their successors the [347] borough or town of Lyme Regis: also all that the building called the pier quay or

cob of Lyme Regis, with the liberties, franchises, privileges and immunities to the same town, pierquay or cob, in any wise belonging, to the only proper use and behoof of the corporation in fee farm for ever, yielding of fee farm to the King as in the letters patent mentioned; and that the King thereby released to the corporation part of an ancient farm of a sum of money due from them annually, willing that the corporation should be thereof acquitted, and that the corporation and their successors all and singular of the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough in any wise belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pierquay or the cob, at their own costs and expenses thenceforth from time to time for ever should well and sufficiently repair, maintain and support, as often as it should be necessary or expedient. That the King also by the same charter granted fines and amercements before the clerk of the market, without account; and a license to dig stones within the borough and parish of the town, out of the sea and on the seashore, for the reparation and amendment of the port, and the said pierquay or cob, and other necessary reparations and common works of the same town and borough, and belonging and appertaining to the buildings aforesaid. The declaration then avers that the charter was duly accepted, and from thence hath been and still is a governing charter of the borough, and that the corporation from the time of that acceptance hitherto have had, held, received and enjoyed all the benefits, profits and advantages granted to them by the said letters patent. It then proceeds to state that [348] the Plaintiff was, at the time of the committing of the grievances, lawfully possessed of a messuage and land in the county aforesaid, to wit, in the said borough, which were before and at those times abutting on or near the sea-shore. That a building, bank and sea-shore within the borough, a building, bank or sea-shore belonging and appertaining to the borough, and a building, bank or sea-shore situate between the said borough and sea, all which were there at the time of the sealing and acceptance of the letters patent, and at the time of the committing of the grievances, and at the last-mentioned time, were near to, and constituted and formed, and were a protection and safeguard, and still of right ought to be so, to the Plaintiff's messuage and land aforesaid, and then hindered the sea from flowing upon and over that messuage and land; and which buildings, bank, sea-shores and mounds the Defendants were at those times, by virtue of the said letters patent and acceptance, liable to repair at their own proper costs and charges, as often as it might be necessary and expedient to do so.

"A breach is then assigned, that the corporation wrongfully permitted the said buildings, banks, sea-shores and mounds to be out of repair, for want of due, proper and necessary repairing of the same; by means of which the Plaintiff's house and land was inundated and injured.

"After a verdict upon a plea of not guilty, is this declaration good, and does it disclose a sufficient cause of action by the Plaintiff against the corporation?"

In order to make this declaration good, it must appear, first, that the corporation are under a legal obligation to repair the place in question; secondly, that such obligation is matter of so general and public [349] concern that an indictment would lie against the corporation for non-repair; thirdly, that the place in question is out of repair; and lastly, that the Plaintiff has sustained some peculiar damage beyond the rest of the King's subjects by such want of repair.

The third and last requisites are admitted to be averred in this declaration, and with sufficient words, at least after verdict. The doubt in the case arises upon the first and second requisites. With regard to the first, it is argued that the corporation have not by the acceptance of the charter stated in the declaration incurred any legal obligation whatever as to the repair of the place in question; that the charter does not contain a grant on condition that the corporation shall repair, but merely an expression of the King's will that they shall repair.

Looking at the words of the charter, as stated in this declaration, we are of opinion that it does cast upon the corporation an obligation to repair; which they, by accepting the charter, have adopted. The King grants and confirms to the corporation the town or borough and pier, with the liberties, franchises and privilges, and immunities to the same belonging, in fee farm for ever, yielding of fee farm to the King as therein mentioned; and the King remits part of an ancient rent, willing that the corporation should be thereof acquitted; and then the charter

goes on in these words: "And that the corporation and their successors, all and singular of the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough in any wise belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pier-quay or the cob, at their own proper costs and expenses thenceforth from time to time for ever [350] should well and sufficiently repair, maintain and support as often as it should be necessary or expedient."

Now these words are undoubtedly an expression of the King's will that the corporation should repair; but they are not the less a condition on that account; on the contrary, they show the consideration for the grant, the motive inducing the King to make the grant, and consequently the terms and conditions on which the grant was to be accepted. What effect such words might have in a grant from one subject to another it is not necessary to determine; such a grant between subjects is a matter of contract and bargain, strictly so speaking; but a grant from the King to a subject is a matter of favour, and the language used will be found to vary accordingly. Independently of authorities we should have come to this conclusion, but the case of *Sir John Brett* v. *Cumberland* (Cro. Jac. 521) seems to us to be decisive of the question. That was an action of covenant by the assignee of King James I. against the executors of the lessee of a mill under letters patent of Queen Elizabeth, sealed with her seal only, and containing these words: "Et praedictus Willielmus, executores et assignati sui, praedictum molendinum et domus et aedificia inde sufficienter reparabunt." The first question was, whether these words in the letters patent to which the Queen's seal only was affixed, shall enure as a covenant to bind the lessee and his assigns; and it was resolved "that it should, for the lessee takes thereby, because it is a matter of record: although in show they be the words of the lessor only, yet he accepting thereof and enjoying it, it is as well his covenant in fact and shall bind him as strongly as if it had been [351] a covenant by indenture." So in the charter in question, the words are in show the words of the King only, but the corporation having accepted the charter and enjoyed the benefits of it, as is averred in the declaration, they are as strongly bound as if they had covenanted expressly by an indenture.

The second requisite is, in truth, that upon which this case wholly turns; viz. that the obligation must be matter of so general and public concern that an indictment will lie for the breach of it. Now this depends principally upon the construction which ought to be put upon the words of the charter. They are undoubtedly of a very general nature,—"All and singular the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough belonging, or situate between the said borough and the sea." It is asked, do these words embrace every little ditch or bank within the limits of the borough, whether public or private; and if not, where is the limit? The answer is, that they embrace only such buildings, banks, sea-shores, mounds and ditches within or belonging to the borough, or situate between the borough and the sea, as form part of the defences and safeguards of the borough against the encroachments of the sea. This may be gathered from the context, from the word "sea-shores," from the expression "situate between the borough and the sea," and from the obvious intention and scope of the charter, as stated in the declaration. It seems to us that such construction and limitation of the words is necessary in order to give this part of the charter any meaning, and that no violence is done either to the grammatical or reasonable sense of the words by such construction.

If so, the next question which arises is, whether [352] the keeping up the sea defences of a town or borough is a matter of general and public concern. It is said that the repair of a highway or a bridge is matter of public concern, because all the King's subjects may have occasion to use it. And why may not all the King's subjects have occasion to reside in, or to pass through, the borough of Lyme? It may be difficult to define precisely over what quantity of land, or to how large a district, any benefit must be extended in order to render such benefit a matter of general and public concern; but surely no danger or inconvenience can arise from holding that it is sufficient if such benefit extended to a whole town or borough.

But it is said that, even if the repair of the sea defences of a town or borough be matter of general and public concern, yet that the declaration in this case does not show that the particular "buildings, banks, sea-shores, mounds or ditches," alleged

to be out of repair, are part of the sea defences of the borough, nor is it expressly averred that the public had any interest in them. The answer is, that the buildings, banks, sea-shores, mounds or ditches in question, are described in the declaration in the very words used in the charter, as set out in the declaration, and are expressly averred to have been in existence at the time when the charter was granted and accepted; and it is also expressly averred that the corporation were liable under the charter to repair them. Now these words in the averments of the declaration must be understood in the same sense as the same words in the charter; and as we are of opinion that the true construction of them in the charter is to understand them as limited to the sea defences of the borough, so we think they are to be taken to have the same meaning in the declaration, **[353]** and to have the same effect as if the buildings, banks, sea-shores, mounds or ditches in question, were expressly averred to be part of the defences and safeguards of the borough and town against the encroachments of the sea. And this opinion is further strengthened by the circumstance that the present objection arises after verdict. The effect of a verdict in curing defects in the pleadings at common law is stated correctly in one of the last cases on the subject, viz. that of *Jackson* v. *Pesked* (1 Maule and S. 234). There Lord Ellenborough said:—"Where a matter is so essentially necessary to be proved, that had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided that it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by verdict; and where a general allegation must, in fair construction, so far require to be restricted, that no Judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed, after verdict, that it was so restrained at the trial; but unless the allegation is of such a nature that it would have been doing violence to the terms, as applied to the subject-matter, to have treated it as unrestrained, we are not aware of any authority which will warrant us in presuming that it was considered as restrained merely because, in the extreme latitude of the terms, such a sense might be affixed to them." Here we think that the allegations of the declaration, as applied to the subject-matter, do by reasonable intendment show that the buildings, banks, mounds and ditches in question were part of the defences and safeguards of the town and borough against the encroachments of **[354]** the sea, and particularly of that part of the town and borough in which the Plaintiff's property is situated. The declaration, therefore, shows a charter casting an obligation on the corporation to do repairs of general and public concern, and avers that they have omitted to do such repairs, and that the Plaintiff has thereby sustained special damage. It is not, indeed, shown that the Plaintiff's house existed at the time when the charter was granted; neither can this be necessary; for if the obligation to repair be of a public nature concerning the whole borough, the whole borough has a right to be protected, and it is immaterial whether the inundation affects the lands, or houses at any time erected on those lands.

It is, however, further urged, that whatever engagement the corporation may be under as between them and the Crown, so as to render them liable either to forfeiture of their charter, or any other proceeding by the Crown, yet that no stranger can take advantage of such engagement and maintain an action. It is admitted that if their liability arose by prescription, they would be indictable, and also an action would lie for special damage, as in *The Mayor, etc. of Lynn* v. *Turner* (Cowp. 86), *Churchman* v. *Tunstal* (Show. 255; Carth. 199), *Paine* v. *Partridge* (Hardr. 162), and many other authorities, which it is unnecessary to cite, because it is clear and undoubted law that, wherever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage. Now, we are unable to see any sound distinction between a liability by prescription, and a liability arising within time of memory, but legally created. We do not say that prescription necessarily implies a charter or grant, but it necessarily implies some legal origin, **[355]** and charter would be a legal origin. Suppose that a prescriptive obligation were alleged, and that a charter granted before time of memory were produced, and so the legal origin were shown, would that destroy the prescription? Certainly not. Would the obligation arising from that charter have been less binding within a few years after it was granted, than it is now, after a great lapse of time? Certainly not. If then, the origin be legal, how can it

be important when it took place? We do not go the length of saying that a stranger can take advantage of an agreement between A. and B., nor even of a charter granted by the King, where no matter of general and public concern is involved; but where that is the case, and the King, for the benefit of the public, has made a certain grant, imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured, by action. If it were otherwise, many inconveniences would follow; and among them, in the case in question, is this; that as the duty and the right to repair the sea defences of the town and borough are cast upon the corporation, no other person would be justified in interfering and doing repairs, however necessary; or, at all events, not until the corporation had been called upon, and neglected to do them; *The Earl of Lonsdale* v. *Nelson* (2 B. and C. 302; S.C. 3 Dowl. and R. 556); and it is doubtful whether he would be justified even then, the proper remedy being, as there stated, by indictment or action; for nuisances of omission cannot in general be abated.

Two of the Judges have entertained considerable doubts whether the declaration contains sufficient **[356]** words in this case to show that the mounds or banks were of such public benefit as that an indictment would lie for not repairing them: but agreeing in the general view of the law, they, as well as the rest of the Judges who heard the argument, are of opinion that the question proposed by your Lordships must be answered in the affirmative, and that the declaration is sufficient.

The Lord Chancellor said, after the unanimous judgment of the Court of Common Pleas, and the concurring judgment of three of the Judges in the Court of King's Bench upon the writ of error brought there, the fourth Judge giving no opinion, it was matter of satisfaction to him that all the Judges now agreed in the opinion which their Lordships heard now delivered. Two of the learned Judges entertained some doubt upon the pleadings, in respect to a point which did not affect the main question. He should move that the judgment of the Court below be affirmed; but although the two Courts below concurred in the judgment, yet it was not a case in which costs ought to be charged against the Plaintiffs in error, as there was some doubt, and the question was one of difficulty.

Lord Wynford concurred in these observations.

The judgment of the Court below was affirmed, without costs.

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APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

HIS MAJESTY'S ATTORNEY-GENERAL of IRELAND, at the Relation of WILLIAM CHARLES QUINN, Esq. Secretary to the Commissioners of Education in Ireland,—*Appellant*; THOMAS WILLIAM HUNGERFORD and Others,—*Respondents.*

[Mews' Dig. iii. 270; S.C. 8 Bli. N.S. 437. See *A.-G.* v. *Pilgrim*, 1840, 12 Beav. 57; and *Magdalen College, Oxford* v. *A.-G.*, 1857, 6 H.L. C. 189.]

If the trustees of a charity estate make a lease upon terms, which, at the time of making it, appear to them *bona fide* to be the best that can be got, a subsequent alteration of circumstances shall not affect such lease.

In such a case the question of provident or improvident management is entitled to peculiar consideration. The length of time during which the property has been occupied under the lease, is also to be taken into consideration.

On the 26th of March 1703, an indenture of that date was made between certain persons therein described as surviving trustees, nominated and appointed for putting in execution the powers and authorities of an Act of Parliament, made in England, in the 11th and 12th years of king William the Third, intituled, "An Act for granting an Aid to His Majesty, by sale of the forfeited and other Estates and Interests in Ireland, and by a Land Tax in England, for the several purposes therein mentioned." of the one part; and Alan Brodrick, esq., her Majesty's then Solicitor-general in

Ireland, and Lawrence Clayton, of Moy-[358]-allow, in the county of Cork, esq., of the other part; whereby, after reciting that the Right Honourable Elizabeth Countess of Orkney, before her marriage with the Earl of Orkney, by indentures of lease and release, dated respectively the 22d and 23d of November 1695, (the release being made between the said Countess by her then name of Elizabeth Villiers, of the city of Westminster, spinster, of the first part; the said Earl, by his then name of Lord George Hamilton, of the second part; and Lord Viscount Villiers and Thomas Brodrick, of the third part), did convey to the said Lord Viscount Villiers and Thomas Brodrick, and their heirs, all and every the honors, castles, manors, lordships, liberties, rectories, towns, lands, tenements and hereditaments whatsoever, of her the said Elizabeth Villiers, in the kingdom of Ireland, with the appurtenances, to the use of the said Lord Viscount Villiers and Thomas Brodrick, and their heirs; but upon the trusts declared and agreed in and by an indenture, bearing even date with the said indenture of release, and made between the same parties: And after further reciting, that by an indenture, bearing even date with the same indenture of release, and referred to by it, it was declared and agreed by and between the parties to the same, as to the several lands, etc., therein mentioned, that the trust and meaning of the said indenture of release was, that Lord Villiers and Thomas Brodrick, and the survivor of them, and the heirs and assigns of such survivor, should from time to time make and execute such conveyances of all or any parts and parcels thereof, to and for the benefit of such person or persons, and for such estate and estates, etc. as the said Elizabeth Villiers from time to time, whether under coverture or sole, by any writing, etc., should [359] direct and appoint: And after further reciting, that by indentures of lease and release, bearing date respectively the 22d and 23d days of October 1696, the release being made between the said George Earl of Orkney, of the first part; the said Elizabeth Countess of Orkney, of the second part; the said Edward Lord Viscount Villiers and Thomas Brodrick, of the third part; and the said Alan Brodrick and Lawrence Clayton, of the fourth part; (reciting that the said Countess was purposed and resolved to erect and found a school-house, with all suitable conveniences, at or in the town of Middleton, in the barony of Imokilly and county of Cork, and to establish a Free School there, and to endow the same with a perpetual maintenance for the good instruction and education of youth, with exhibitions to be allowed to certain persons in the University, who should have had their education at the said school in the manner therein mentioned; and that the said Countess had determined that the several towns, lands, tenements and hereditaments, in the said indenture of release after-mentioned, and intended thereby to be conveyed, and the rents, issues and profits thereof, should be settled and applied to the good and charitable uses and purposes therein mentioned; and that in the first place, the rents, issues and profits thereof should immediately go and be applied towards the purchasing and preparing a fitting and convenient place, and materials necessary for the placing, erecting and building of a school-house, and other fitting houses, outhouses and conveniences for a master, usher, reception for boarders, and such other buildings, and for and towards the placing, erecting and building the same in such part of the said town of Middleton, and after such manner and form, as she the said Countess, or [360] such other persons or person whom she had deputed or should depute for that purpose, should order and direct): The said Countess of Orkney, for the attainment of the good, charitable and useful purpose aforesaid, with the consent of the said Earl, did direct, that Lord Villiers and Thomas Brodrick, and the survivor of them, and the heirs and assigns of such survivor, should grant, etc. unto the said Alan Brodrick and Lawrence Clayton, and their heirs, the lands, etc. therein mentioned, formerly leased to Sir John Meade, knt., by the late King James the Second, when Duke of York, or his agents or commissioners, at the rent of £100 per annum; and the lands also therein mentioned, formerly let unto W. Worth, esq., by the late King James the Second, when he was Duke of York, or by his agents or commissioners, at and under the yearly rent of £104: To hold to the said Alan Brodrick and Lawrence Clayton, their heirs and assigns for ever: upon trust that they, their heirs, etc., should from time to time for ever, employ, dispose and bestow the rents, issues and profits arising from the same premises, towards the purchasing and finding a convenient place, materials and necessaries for the erecting and building, and towards the erecting and

building of a school, school-house, and other fitting outhouses and conveniences for a master, usher, reception of boarders and scholars, and such other suitable accommodations and buildings within the said town of Middleton, and in such manner and form, as should from time to time be ordered and directed by the said Countess, or by such person or persons as should be deputed or nominated by the said Countess for that purpose; and after the said school and school-house, and other buildings and accommodations had been erected and finished as aforesaid, and the [361] charges thereof fully satisfied and discharged, then for and towards the payment and discharge of the respective allowances, salaries and pensions thereinbefore mentioned, until such time as the same should respectively be lawfully and according to the true intent and meaning of the said last-recited indenture of release, altered or changed: and from and after such alteration, towards the payment and discharge of such new and other allowances, salaries, pensions and payments as should from time to time be substituted in the place of such payments wherein such alterations should be made as aforesaid. And the Countess did thereby further direct and appoint, that certain persons therein named should be governors of the said school, and of the revenue above mentioned; and she invested them with the necessary powers for the management of the same. And the said Countess did hereby declare, consent and agree, that the said conveyance so made or to be made unto the said Alan Brodrick and Lawrence Clayton, and their heirs, to the purpose and for the trusts aforesaid, or the said trust, should not nor were to be liable to any revocation, or controllable in the whole or any part thereof, by her the said Countess, her heirs or assigns, or by any person or persons claiming by, from or under her. And the Earl of Orkney ratified and confirmed the said Countess's grants; and the title of the trustees being afterwards confirmed by Act of Parliament, they accepted these trusts, and entered into possession of the estates, and made leases thereof for lives, with covenants for renewal.

In 1710, Alan Brodrick and Lawrence Clayton proposed to demise certain parts of the trust estate to Francis Daunt, for lives, with covenant for perpetual renewal, provided Daunt would pay a fine for [362] such lease, and a renewal fine on the falling in of each life; to which proposal Daunt agreed, and consented to accept of certain parts of the said lands described as having been formerly leased to Sir John Meade, knt., at £100 per annum, and to pay the like annual rent for the part to be demised as the said Sir John Meade, knt., had paid for the whole, together with a fine to the amount of three years' rent, and a renewal fine on the falling in of each life equal in amount to a quarter of a year's rent.

An indenture of demise, dated 19th October 1710, was accordingly made, by which A. Brodrick and L. Clayton, in consideration of a fine of £300, demised to Daunt the said part of the estates for three lives, at the yearly rent of £100. F. Daunt covenanted to pay the rent, etc., and there were the usual remedies of distress and entry. A. Brodrick and L. Clayton covenanted with F. Daunt, that on the death of any life, they, their heirs and assigns, would make to the tenants in possession proper deeds for continuing the said lease, upon the payment of a fine of £25 for every new life: and F. Daunt covenanted, that within 12 months after the death of any life, he would apply to have a new life added, and pay the fine for renewal. And it was further provided, that if no such application was made, and no fine paid, the said F. Daunt should forfeit 5s. for every month after the 12 months aforesaid; and that A. Brodrick and L. Clayton might enter and distrain for the forfeiture. Covenant for titles by A. Brodrick and L. Clayton. This demise was duly registered in 1712. F. Daunt entered into possession, and expended considerable sums in improving the estate; and he and his tenants have remained in possession, and duly paid the proper fines, till within the last 12 years. [363] The widow of Francis Daunt was entitled to the lease on his decease: and two of the lives having died, she tendered proper fines for renewal.

There being disputes at the time between the co-heirs and the then governors of the charity, as to whether the co-heirs were entitled to the renewal fines, or whether the same should go to the benefit of the said school, the co-heirs refused to grant a renewal of the said lease: whereupon Mary Daunt presented a petition on the Equity side of the Court of Exchequer, in Ireland, against the co-heirs, for the purpose of enforcing performance of the said covenant for renewal; which was dismissed, upon

the ground that the proper mode of proceeding for that purpose was by bill, and not by petition. The co-heirs afterwards agreed to grant such renewal, but before execution one of them died. Afterwards W. Fuller became entitled to the said lease, and he paid the fines for renewal, which were duly receipted. In 1755 the suit of Mary Daunt was revived by W. Fuller, who presented a memorial to the governors of the charity, who recommended to the co-heirs to comply with his demand. In consequence of this recommendation a renewal of the lease was granted to W. Fuller, for the lives of George Daunt, W. Fuller, and Thomas Bowes Austen. W. Fuller died; the fine was duly paid, and the lease renewed for the additional life of W. Fuller Daunt. T. Bowes Austen died; and George Daunt and William Fuller Daunt paid the renewal fine, and obtained an indenture of renewal, dated 13th June 1782, to hold for the lives of the said George Daunt, William Fuller Daunt, and for the additional life of his late Majesty George IV., then Prince of Wales.

[364] On the 5th of May 1814, George Daunt died. On the 28th May 1814, W. F. Daunt died; and the lease having devolved on Joanna Hungerford, who died in January 1817, the whole interest became vested in the Respondent.

The reserved rent was duly paid till 1814, when the Commissioners of Education disputed the said lease. Thomas Hungerford, in right of his wife Joanna, applied for a renewal upon the deaths of G. and W. F. Daunt, and by order of the governors paid the renewal fine into the mercantile house of Morris, Leycester and Call; he also caused a deed of renewal to be prepared, and tendered the same for approval.

On the death of Joanna Hungerford, her husband Thomas Hungerford, as the guardian of the Respondent, wished to pay the reserved rent, but a prohibition from the said Commissioners prevented him. This was in 1817. In 1821 he received the following letter from the master of the said school:

"Middleton, July 20th 1821.—Sir: As it is not the intention of the Lords Commissioners of Education to disturb the leases by which you, as guardian of the minor of the late William Daunt, esq., hold the lands belonging to Middleton School, you are requested forthwith to pay to me the rents and arrears of rents due thereon, up to the 1st May last. May I request, therefore, to know when and where it will be your convenience to pay me the same, and you will oblige your obedient servant.—Richard Grier."

The solicitor for the Commissioners then directed the reserved rent to be paid into the Bank of Ireland, where it was accordingly paid.

The rent has since been either paid to the master of the school, or into the Bank.

[365] On the 16th April 1828, an information was exhibited by the Appellant against Respondent and others, setting forth the lease of 19th October 1710; and alleging the same was at under-value, and that the same, and also the lease of 13th June 1782, had been made in violation of the trusts of the charity; and alleging that the said school and charitable establishments must remain entirely useless, if the said leases should be allowed to stand and be perpetually renewed. The information prayed, that the lease of 19th October 1710, and also the renewal of 13th June 1782, might be set aside, and decreed fraudulent and void, and in violation of the trusts reposed in the persons who made the same, and be ordered to be delivered up to be cancelled; and that an account might be taken of the rents, issues and profits of the said lands, from such period as it should appear that the rents thereof had been received; and that if necessary, new and additional governors might be appointed, according to the provisions of the said deed of 1696, and the trusts thereof carried into full and complete execution; and that the said lands might be set again for proper terms of years, at a full and fair value; and that the rents in arrear, and the rents to be received in future on the new letting, might be applied first in setting the said school in repair, and afterwards to keep it in good repair, and to the other purposes mentioned in the said deed of 1696; and that pending the cause, a receiver should be appointed to receive the rents, issues and profits of the said lands; and that, if necessary, it might be referred to one of the Masters of the said Court, to approve of a proper scheme for the management of the said school, and the application of the said rents, issues and profits. And that the informant might **[366]** have such further, and other relief as the nature of his case might require, and should be agreeable to equity and good conscience.

The cause was set down for hearing by the Appellant, without having made any of the persons holding by lease under the Respondent parties to the cause, and also

without making the representatives of Samuel Daunt, who was entitled to a perpetual rent-charge of £85 out of the said lands, parties.

The cause was heard before the Lord Chancellor of Ireland, on the 19th and 20th December 1831; and on the 30th January 1832, his Lordship decreed, that as between the Appellant and Respondent, the said information, and all and every the matters and things therein contained, should be dismissed without costs; and that as to the defendants, the governors and trustees of the said school, the said defendants, the governors and trustees of the said school, should have their costs of the said suit against the Appellant or Relator.

Sir Edward Sugden, for the Appellant:—The powers vested in the trustees must be viewed with reference to the object for which they were created. Lands vested in trustees, for the support of a school or any other charitable establishment, cannot be disposed of in this manner, without defeating the purpose for which the trust was created. Such a disposition of them is, therefore, a breach of trust. In the present instance, instead of these lands ever being capable of being made the subject of leasing, at an improved rent, the trustees have by one act rendered the rent fixed and unvarying for ever. The covenant here is for the perpetual renewal of the lease at the same rent which the trustees were enabled to obtain [367] for the lands in 1710, and the renewal is to take place, not on the payment of a considerable fine, varying with the increased value of the property, but on payment of a fine, small in itself, and fixed like the amount of the rent. The trustees have bound themselves, their heirs and assigns, by a covenant to grant a perpetual renewal of the lease on these terms. Such a lease is void in Equity, and the covenant, and all renewals granted under it, are also void. The general principle on which the Appellants rely is distinctly stated in the judgment of Lord Eldon, in *The Attorney-general* v. *Brooke* (18 Ves. 326), where his Lordship, on reviewing a former judgment in the case of *The Attorney-general* v. *Owen*, repeated, as his judicial opinion, the proposition he had previously stated; and went on to say, in express terms, "It is impossible here to contend, that trustees for a charity can make a lease with covenants for perpetual renewal. Lord Thurlow frequently said, that that contract should never have been performed between man and man: but that trustees of a charity can part with the estate for ever, for a consideration not shown to be equivalent to the inheritance, is a proposition not to be endured here." The principle, and the specific instance here put, are alike fatal to the validity of the lease in the present case. The trustees have no power to make a lease, with covenants for perpetual renewal; but even if such a power could, under any circumstances, be permitted them, the consideration which could alone be sufficient to justify it, would be one that was equivalent to the value of the inheritance. There is no such consideration in the present case: here there is a parting with the inheritance without a sufficient consideration, and the charity is for ever debarred of [368] the possibility of obtaining any increase in the value of the land. The authority that will probably be relied on to support the judgment in this case, is the opinion expressed by the Master of the Rolls, in *The Attorney-general* v. *Warren* (2 Swanst. 302), where he says, "There is no positive law which says, that in no instance shall there be an absolute alienation. An alienation, not improvident, but beneficial to the charity, and conformable to the rule which ought to guide the trustees, may be good." With respect to that case, it may in the first place be observed, that this opinion of the Master of the Rolls was not required by the circumstances of the case, the decision of which rested on other and perfectly satisfactory grounds; and in the next place, that the cases referred to in support of that opinion disclose circumstances which made it undoubted that the interests of the charities in those cases could only be served by this alienation; circumstances which, in one instance at least, amounted almost to an absolute necessity to alienate. Here no such necessity is shown to exist, and the transaction indeed, so far as the taking of fines is concerned, is contrary to the express provisions contained in the conveyances of 1696 and 1703. The deed of 1696 gives the trustees the power of applying the "rents, issues and profits" of the estate to the purpose of purchasing and preparing a fit and convenient place, and materials necessary for erecting a school-house;" but it gives the trustees no power to raise money for such a purpose by fines upon leases, renewable for ever, upon terms such as these. If the trustees have this power, so as to be able to make a lease with a perpetual covenant of renewal on the payment of a

fixed fine and a fixed [369] rent, they would have a power to alienate in any other manner, and thus the object of the charity might be at once defeated.

Mr. Knight and Mr. Walpole, for the Respondent:—This covenant is valid, and can be supported in Equity. In *The Attorney-general* v. *Backhouse* (17 Ves. 283, 294), a lease of charity estates, alleged to be fraudulent, was absolutely supported as to the interest of a sub-lessee; and as to the original lease, the Court granted an inquiry to ascertain whether the circumstances were such as to constitute fraud; and the Lord Chancellor, in directing the inquiry, said, that the question whether the lease was fraudulent or not, must depend on the degree of the unreasonableness in the circumstances, and that it must appear to be unreasonable to a high degree for the Court to infer that it was fraudulent. That case shows, that the length of the term in a lease of charity estates is not of itself sufficient to justify the interference of a Court of Equity. The same principle was in effect recognized in *The Attorney-general* v. *Owen* (10 Ves. 555), where a lease for an unusually long term, with common husbandry covenants, was set aside; and in *The Attorney-general* v. *Green* (6 Ves. 452), where a building lease for 999 years was held bad, because it was in effect parting with the property. All these cases show that, before the leases can be set aside, the Court must be satisfied that there is fraud in the grant. Even the case of *The Attorney-general* v. *Brooke* (18 Ves. 319) shows, that the question of supporting or setting aside a lease of charity property depends on the circumstances under which it was granted. The judgment there contains, in its [370] language, qualifications of the general proposition: the Lord Chancellor says (18 Ves. 326), "It is incumbent on a lessee, taking a term of long duration, to show a consideration making that a proper lease." This brings the question, therefore, to the single point, whether the circumstances of the present case do not afford a sufficient justification to the trustees for what they have done. The first object of the trust was to purchase a place and materials for the building of a school-house. It was impossible to attain that object solely by employing the ordinary rents and profits of the estate, without waiting for a period of some few years during which they might accumulate. Instead of waiting for this length of time, the trustees raised a sum of money at once; the alleged breach of the trust, therefore, is, that the trustees began to effect the purposes of the trust too soon. In *The Attorney-general* v. *Cross* (3 Mer. 524), where a lease for a long term of years had been granted, the Master of the Rolls, proceeding on the custom of the country, upheld the lease, and said, "I am not aware of any principle or authority on which it can be held that such a lease is, on the face of it, an abuse of the trust." In *Ex parte Skinner*, in the matter of the Lawford Charity (2 Mer. 453), it was held that the tenant of a charity estate, provided he has acted fairly, is not to be turned out of possession, or to have his lease set aside, merely on the ground of inadequacy of rent to the value of his estate. In *The Attorney-general* v. *Price* (3 Atk. 108), Lord Hardwicke, in a case of this kind, directed an inquiry whether the leases granted were or were not such as ought to have been made; and said (Ibid. 110), "I will leave it to the Master to inquire whether letting on [371] improved rent, or leasing upon fines, be for the benefit of the charity, since a great deal depends upon the custom of the country." This was the principle that was afterwards adopted by the Master of the Rolls, in *The Attorney-general* v. *Cross*; and both these cases proceeded upon the rule, that the circumstances under which the lease was granted, and not the mere length of the term or the amount of the rent, must be held to decide whether the lease was good or not. In the present case, the situation of the trustees, the necessity of carrying into effect the object of the trust, and the want of means to do so, compelled the trustees to grant this lease; and these circumstances justify them in having granted it. No breach of the trust has been committed, and this lease must be supported.

Sir E. Sugden, in reply:—It is not proved in this case that the money alleged to be the consideration for this lease was ever really advanced to the charity. It is true that there are cases of perpetual renewals in this country, but they are in evasion of the law; and the first example of them was set by the Roman catholics, who had recourse to these perpetual renewals to avoid the consequences of the law against their holding freehold property. Such dispositions of property really amount to a sale, and the disposition of the property in the present instance must be taken to be a sale; and as the trustees had no right whatever to sell the property, this disposi-

tion of it must be treated as invalid, and set aside. The inheritance has been parted with, and there is no security for the rent; and if the disposition of the property amounts, as we say it does, to a sale, then we contend that, in the first place, the trustees had no authority to sell, [372] and in the next, that there was no consideration given sufficient to be the purchase-money of the property.

The Lord Chancellor:—This is a case of first impression, and therefore I should like to take time to consider it. In England such a lease would not stand for 24 hours; it may, however, be different in Ireland. I must see the grounds on which the Chancellor of Ireland decided.

Lord Chancellor:—My Lords, in the judgment in *The Attorney-general* v. *Brazen Nose College*, I stated to your Lordships that I should have occasion, in advising your Lordships upon this case, to mention more specifically the true effect, in contemplation of the law as administered in our Courts of Equity, of lapse of time in matters of charity; and this opportunity is afforded me on the facts of the present case. This is an appeal from a decree in the Court of Chancery in Ireland, dismissing without costs an information filed there; that information having been filed by his Majesty's Attorney-general, on the ground of the loss incurred by the charity from the grant of a very long lease; a lease for three lives, with a covenant for perpetual renewal. Now the question which was raised by this decree is, and the question which was before the Court below was, whether such a lease is good, or void, or voidable, and, regard being had to the circumstance that the land leased is charity land, whether the lease can be sustained or must be set aside in a Court of Equity?

My Lords, I stated at the conclusion of the argument, that it certainly had a strange aspect to my mind, accustomed to the course of proceedings of English Courts, and accustomed to the manner in [373] which the lands are leased, whether by lease or by fines, in this country, to find a charity lease sustained which was in fact a perpetuity. I nevertheless then said, that though this gave me an impression not so favourable as I could wish to have of the judgment of the Court below, it might be very possible for me, upon examination, to find it bottomed upon the truest principles; for that in Ireland, and in that part of Ireland in which these lands lay, at the time in which this lease was granted, this might be a provident and right lease. This supposition or anticipation of mine has been amply confirmed by the examination I have given of the charity; and I am prepared to move your Lordships to affirm the judgment, upon the grounds which I shall now state.

My Lords, this was a lease granted in the year 1710; and the first point made, or attempted to be made, was to show, that it was granted at an undervalue. I am clearly of opinion that there is no foundation for this point, and that I could not take upon myself to say in the year 1834, nor could the Court of Chancery in Ireland undertake to say in the year 1832, on the case that was then before the Lord Chancellor of that country, that this land was let at an undervalue at the time it was leased; for there was a fine taken of £300, and there was a rent reserved of £100 a year, with a fine of £25 upon each and every life dying, payable upon each subsequent renewal. Now, at that time the interest of money was eight per cent. in Ireland; who, then, shall take upon himself to say, that if he had been dealing with the property at that time, he would have thought he gave it away, or squandered it away, or improvidently dealt with it, by leasing it at an undervalue? If he took £300 money, bearing eight per cent. interest, and [374] £100 for the rent, and the fines upon each renewal, I am not prepared to say that he would have been undervaluing the land; on the contrary, it appears to me that the lease was granted on an adequate value.

Then, in the next place, we come to the duration of the term, and I am not sure that it is law, founded either upon principle, on statute, or on authority, to lay down the proposition, that all leases such as this, that all perpetuities such as this, even that all alienations, if it can be said that this lease amounts to an alienation, are therefore, as such void or voidable. There is no warrant of principle for holding that; each case must depend upon its peculiar circumstances. I put the case where even an alienation might be fit; not only justifiable, not only harmless, as regards the breach of trust, or abuse of trust, by the trustees, but might be a fit course for them to adopt. [See Sugden, Law of Property, 535.] I will even put the case, which I

can well conceive, where they could not do their duty to the charity if they did not alienate a part of the land; and I threw out, in the course of the argument, an observation to which I found no answer to be given, for indeed it was admitted on the other side, that supposing there was a small piece of land, a corner of land, or an outlying estate, property of the charity, and for which there could be got, as the price for the sale of it, on account of its peculiar situation, so large a sum of money as to put the charity in possession, we shall say of £1000, though the whole of the rents and profits of that land, let in the ordinary manner, might never exceed £1 a year, or 10s. a year, it would be perfect madness in the charity, as well as in an individual, not to obtain that sum, and sell the land for the £1000. In all these cases much depends upon the circumstances; and the question is, whether or not there has [375] been a provident or an improvident management of the charitable fund? If the management has been such as I have described, provident, then that is justifiable; nay, I go further, and state, that in the case I have supposed, the trustees would have been guilty of an abuse of trust, if they had hesitated to part with the land upon these terms; and that an information at the suit of His Majesty's Attorney-general, or of any relator, might well have been maintained against them, to compel them to do that which was for the real benefit of the charity.

My Lords, that which I have stated to be the rule of provident and improvident management, has the sanction of full authority. I refer to the *Attorney-general* v. *Cross* (3 Mer. 524), where the Master of the Rolls holds that there is no authority for saying that such leases are, on the ground of the length of time alone, void, as an abuse of trust. I refer again to what Lord Eldon said, (but that applies to another part of the case, that where a tenant gets at a low rent the charity lease,) this of itself, without other circumstances, is not enough to authorize the Court to turn him out, because it is a charity estate. That applies to this case, because you are not only asked to make the lease void, as in favour of the lessor, but against the lessee. You are taking the land from the lessee; though Lord Eldon states that the length of the lease granted by the charity to the tenant, if the tenant is guilty of no misconduct, and if he has behaved with honesty, is ground for turning him out. I refer also to the case of the *Attorney-general* v. *Warren* (2 Swanst.), a case accurately reported. It is there laid down by a great Judge, I think by the late Master of the Rolls, Sir Thomas Plumer, that the trustees [376] are bound to a prudent administration of the trust, and that there is no positive law or rule of the Court which says that there shall be no long term, or even that there shall be no alienation, if the alienation is for the benefit of the trust.

Let us come then, my Lords, a little closer to the facts of the lease; and let us, in the first place, observe whether or not it was a provident bargain. At that time, in Ireland, the course was to let leases upon lives, with covenants for perpetual renewal; in a word, to let leases such as this is, renewable for ever on a fine received at the time of each of the renewals, with a certain rent besides. This practice was said to have been very much adopted; and I see the Lord Chancellor of Ireland, in a note that I am favoured with, says that the Duke of Ormond introduced this plan for the sake of obtaining more solvent and better tenants, and above all, Protestant tenants. The Duke of Ormond's example was followed by others, and it became the usual practice to grant such leases, with perpetual renewals. Now, my Lords, that being the case, what have we here but the ordinary mode of management in that country? for the reason I have mentioned, such a lease was held beneficial, and none of us can say, that if he had been alive about that period, he would have done otherwise with his own estate. The trustees of the charity were bound to do what a prudent and provident landlord with his own estate would do; and I think such a landlord, acting at that time, would have granted this lease; it is past all doubt that he would have done so. My Lords, no trustee is bound to be a prophet; he is bound to act with providence and foresight to a reasonable extent, but he is not bound to an absolute foreknowledge, which no man can have, of events that [377] afterwards do occur. The event has proved that it would have been more provident not to have granted such a lease, because the lease has a great deal more time to run, and it would be better if it had expired; but we are not to judge of it by the state of things now, but as they were at the time. The very word "provident," which the law uses in the decisions referred to, shows by its own proper force that you are to look forward, but not to look for-

ward with an indefinite or with a prophetic eye, but in the way in which a reasonable man of common sagacity and prudence might do. Such a man would adapt his conduct to the facts; would look at the facts and circumstances in which he lives, and at the result likely to happen from those facts and circumstances, as far as he could easily and with reasonable certainty decide on them. The complaint of abuse must not be simply that he has not selected that mode by which the lease, if granted now, would be rendered most profitable. Events have happened, but who was to know that they would happen? consequences have taken place, but who could tell that these would be the result of the course which has been adopted, 120 years after the date in question? We, enlightened by those events, and having the benefit of those events, can tell, and any child can tell very easily, what would have set at nought the knowledge of the wisest and most far-sighted individuals then living, even to have the slightest idea about them.

For these reasons, therefore, I am certainly of opinion, that regard being had to the circumstances of the times, and to the usual practice of landlords in dealing with large estates at that time in that country, that this was not such an improvident lease [378] that, even in the case of charity property, your Lordships can be satisfied of an abuse having taken place.

Then with respect to the time, to which I said I should address myself, of 120 years, during which nothing has been done; 52 years have passed since the last renewal; would it not be monstrous to call upon the landlord to turn out the tenant, after £300 had been paid for the fine in the first instance, after £100 had been paid for the rent, after £25 had been paid upon the renewal; all paid upon the faith of the bargain standing firm, and all paid upon the faith, between the tenant and the charity, that this was a valid lease perpetually renewable? It has been truly said, and repeatedly said, that time is no bar in the case of a charity; and among other cases to that effect, *The Attorney-general* v. *Warren* is cited; but then, if the Statute of Limitations is in such a case no bar, it is at all events a circumstance which produces a very powerful obstacle, not easily got over, in the way of any Court of Judicature that may set aside what has stood so long, and may have been made the subject of so many arrangements. Would they not have a right to complain? might not the tenant well say, I did not mean to give £300 in those days, when that would be worth £3000 now; or, my ancestor did not mean to give £300 for a lease not renewable for ever; or, he did not mean to give £100 a year; he was losing for the first 10 or 12 years, but he thought he should repay himself by a longer renewal, and in contemplation of that he paid the fine?

Upon the whole therefore, my Lords, I am clearly of opinion in this case, that the Court of Chancery in Ireland has come to a sound decision; and therefore I have great satisfaction in moving your Lordships [379] that this decree should be affirmed: but, for the reasons that induced his Lordship not to give costs, I move your Lordships that the costs should not be given, though I do not advise your Lordships to pay the costs out of the charity estate.

Judgment affirmed.

APPEAL

FROM THE COURT OF CHANCERY.

WILLIAM NOTTIDGE and RICHARD BLACK (Surviving Executors of Sir Thomas Maryon Wilson, Bart.,—*Appellants;* GEORGE PRICHARD,—*Respondent.*

[Mews' Dig. i. 365; x. 444. S.C. 8 Bli. N.S. 493; and in Ch. *sub nom. Pritchard* v. *Draper*, 1 Russ. and M. 191. As to admission by partner binding firm, see now Partnership Act, 1890, s. 15. As to authority of partner to receive debts after dissolution, adopted in *Piercey* v. *Fynney*, L. R. 12 Eq. 69; and see now Partnership Act, 1890, s. 39.]

Two solicitors in partnership had a bill of costs and disbursements against a client; one of the partners, after the dissolution of the partnership, continued to be the solicitor of the client, and received his rents, out of which he retained

the amount of the partnership debt; and he stated that he did so on the understanding that the debtor should have credit for the sum so retained, and that he considered that debt to have been satisfied by the monies retained; but no account had been settled between him and the debtor, nor had he specific directions to appropriate the monies retained to the payment of the partnership debt. HELD, that as against the other partner, the debt to the partnership was not to be considered as satisfied.

The Respondent and Carter Draper, carrying on business in partnership as solicitors and attornies, were in that character employed by Sir Thomas Maryon Wilson, bart., by whom, in the course of [380] such employment, a bill of fees and disbursements to a large amount was incurred. The partnership of the Respondent and Draper was dissolved in 1817, and Sir T. M. Wilson continued to employ Draper alone as his solicitor, and also as the receiver of his rents, until the month of September 1820. In July 1818 Draper enclosed in a letter to Sir T. M. Wilson, a bill of fees and disbursements due to the late partnership, amounting to £867 5s. 6d., from which, as he stated in the letter, some payments on account were to be deducted. In February 1821, the Respondent served on Messrs. Stride and Lyddon, then the solicitors of Sir T. M. Wilson, a notice in writing not to pay Draper the balance of any bill of costs due from Wilson to the late firm of Prichard and Draper. By articles of agreement, dated the 22d of February 1821, executed by and between the Respondent and Draper, after reciting that, upon examination of the accounts, Draper was indebted to the Respondent (besides the Respondent's share of the partnership debts) in the sum of £750, for money advanced on his behalf; it was agreed that he should give the Respondent his bond for that sum, payable with interest, by instalments; and that, as a further security, he should assign to the Respondent all the partnership debts which then remained outstanding and due. A copy of this agreement was on the same day delivered by the Respondent to the solicitors of Sir T. M. Wilson; and a few days after the Respondent wrote and sent to him a letter, demanding payment of the balance of the bill of fees and disbursements, due to the late firm.

In May 1821 the Respondent filed his bill in Chancery against Sir T. M. Wilson and Carter Draper, stating the above facts, and charging, among [381] other things, in answer to pretences suggested in the bill, that Draper was not employed as the solicitor and agent of Wilson subsequent to the dissolution of the said partnership, until after Wilson had notice of the said dissolution, and that any debt incurred by Draper to Wilson in the course of that employment could not be set off against the partnership debt due to Prichard and Draper; and also that Wilson could not retain a moiety of the bill of costs due to the firm, on account of any separate demand he might have against Draper alone. The bill prayed against Sir T. M. Wilson an account of what was due and owing from him to the partnership at the time of its dissolution, and that he might not be allowed any credit or set-off therein in respect of any money received, or pretended to be received by the defendant Draper for or on account of Wilson since the dissolution of the partnership.

The answer of Carter Draper stated that the bill of fees due to himself and the Respondent, from Sir T. M. Wilson, had been satisfied to him out of the monies of Sir T. M. Wilson retained by him.

Sir T. M. Wilson died without having put in his answer. The bill was revived against his executors and personal representatives, viz. the Appellants and John Stride, since deceased, who had been for some time the solicitor of Wilson. They in their answer, put in in February 1822, stated, among other things, that they had been informed and believed, that Draper admitted that all the said bills or accounts delivered by or on the part of the Respondent and himself as partners, to Sir T. M. Wilson, had been satisfied to him, Draper, out of and by monies of Sir T. M. Wilson; that they had heard and believed that such bills and accounts were all paid and satisfied [382] previously to February 1821; and submitted, that no part of the said debt alleged to be due from Sir T. M. Wilson, remained a debt still outstanding and due to the firm of Prichard and Draper; that Draper, from about Michaelmas 1818 to about Michaelmas 1820, received the rents of the estates of Sir T. M. Wilson, greatly (as they believed) exceeding the amount of any bills of fees

and disbursements which at the time of the dissolution of the said partnership might have remained due from Sir T. M. Wilson. And they submitted, that any sum or sums of money which was or were received by Draper subsequently to the dissolution of the partnership, could be set off or applied to satisfy the debt, if any, due from the said Sir T. M. Wilson to the said partnership firm, inasmuch as Sir T. M. Wilson, as was alleged by Draper, directed him, Draper, to satisfy the bills of fees and disbursements due from the said Sir T. M. Wilson to the late partnership out of monies which Draper received on his account; and it was competent to Sir T. M. Wilson to direct Draper to satisfy such bills in that manner, and for Draper to receive payment and satisfaction for such bills. That inasmuch as the Respondent had not, from the time of the dissolution of the said partnership up to the month of February 1821, when the bills of the said partnership had been all paid and satisfied, ever given any notice or other kind of prohibition to Sir T. M. Wilson against settling with the said Draper, and paying or satisfying to him the amount of any bill of fees and disbursements remaining due to the Respondent and Draper at the time of the dissolution of their partnership, they submitted, that the Respondent must be considered to have authorized or sanctioned and allowed the making of payments by **[383]** Sir T. M. Wilson to Draper in any form or mode which he, Wilson, might think fit, on account or in respect of the said partnership demand, or any part thereof; and also submitted, that any payment to, or receipt or retainer by Draper, out of any monies of Sir T. M. Wilson, on account or in respect of such partnership demand, was a sufficient and valid payment, or satisfaction and discharge thereof, to all intents and purposes.

The Respondent filed a supplemental bill in November 1823, stating, among other things, that, it having been alleged on the part of the defendants, that no bill of fees had been delivered to them or to their testator, duly signed, according to the statute, he, the Respondent, did on the 27th of May of that year, deliver to the defendant Stride, for himself and the other executors of Sir T. M. Wilson, a bill of fees and disbursements for business done and money advanced for Wilson by the Respondent and Draper, as attornies and partners, which bill was signed by the Respondent conformably to the statute. And he prayed that he might, as against the defendants (the Appellants and the said John Stride) have the benefit of the delivery of the said bill of fees. The Appellants, and their co-executor, Mr. Stride, who died shortly after, by their answer to the supplemental bill, admitted the delivery of this bill of fees.

The cause came on to be heard in July 1826, before Lord Gifford, the then Master of the Rolls, when his Lordship was pleased to order it to be referred to the Master to tax the bill of fees and disbursements of the Respondent and Carter Draper, and to take an account of what, if anything, was due and owing from the estate of Sir T. M. Wilson, in respect of the said bill; and for the better taking of the said **[384]** account, the parties were to be examined upon interrogatories, and to produce all books, papers and writings in their custody or power, relating thereto, as the Master should direct; and the Master was to be at liberty to state any special circumstances, at the request of either party.

The Master, by his report dated 11th November 1828, found and stated, in substance, that he had taxed the said bill of fees and disbursements of £867 5s. 6d. at the sum of £768 15s. 8d., and that he had caused Carter Draper to be examined on interrogatories; and he found, that Sir T. M. Wilson had paid to Draper, on account of the said bill, several sums of money, amounting together to £326 9s., which being deducted from the taxed bill, reduced the same to £442 6s. 8d., which he found to be remaining due from Sir T. M. Wilson's estate in respect of the said bill; and the Master submitted to the Court, at the request of the Appellants, the following circumstances, (among others which are before stated):—In and previous to the year 1814, Carter Draper was the solicitor of Sir T. M. Wilson; in that year the Respondent and Draper entered into co-partnership as solicitors, and continued in such co-partnership until October 1817, when the same was dissolved, and Sir T. M. Wilson was aware of the dissolution of the said co-partnership shortly after the time thereof. On the 25th day of July 1818, a joint bill of costs was delivered by Carter Draper to Sir T. M. Wilson, amounting to £867 5s. 6d., accompanied by a letter written by Draper, (partly in these words):—" At length I am able to send

you my accounts, which are three in number; the first is due to Prichard and Draper, of £867 5s. 6d., from which I believe there have been received the several [385] sums of £50, £26 9s., £28, and £300. The second is also due to Prichard and Draper, and is the separate account of the parish of Fletching. The third account is owing to Draper and Bird," (Draper's then partner.) And in a letter written by the Respondent to Draper, the 27th of October 1818, the Respondent used the following expression, "Will Sir T. W. soon settle?" and it was admitted that Sir T. M. Wilson was the person alluded to by the style and initial leters "Sir T. W." And after the said dissolution of co-partnership, Draper continued to act as solicitor and receiver of rents of estates of Sir T. M. Wilson, until after September 1820; and on the 22d of February 1821, Sir T. M. Wilson filed his bill of complaint in Chancery against Draper; and the Appellants, as executors of Wilson, after his decease filed a bill of revivor of such suit, and it was still pending; and the Respondent had examined Draper as a party in this cause, upon interrogatories; and the Master found by his examination put in thereto, that Draper stated that he did not, since the dissolution of the said partnership between the Respondent and the examinant, settle and adjust any accounts with the late defendant, Sir T. M. Wilson, nor did T. M. Wilson ever adjust with the examinant any account in which credit was given to him for any sums of money as having been paid to the examinant expressly for or on account of any bill of costs, or for monies obtained by the examinant expressly for or on account, or in satisfaction, or part satisfaction of any bill of costs; nor did Sir T. M. Wilson, to the knowledge and belief of examinant, ever debit the examinant with any sum or sums of money expressly on account of any bill of costs. And the examinant stated, that Sir T. M. Wilson did not ever, in writing, [386] expressly allow to the examinant any sum or sums of money expressly in payment and satisfaction, or in part payment and satisfaction, of any account; and the examinant stated that his accounts with Sir T. M. Wilson had not been settled. And the Master further certified, that the Appellants had also examined Draper as a party in this cause, upon interrogatories; and he found that Draper, by his examination thereto, stated, that he did receive from Sir T. M. Wilson the whole amount of the bill of costs of the late partnership between the examinant and the Respondent, due from Sir T. M. Wilson at the time of the dissolution of the said late co-partnership; and the examinant stated, that he received the amount thereof at various times, and by various sums of money, some of which were paid to him by Sir T. M. Wilson, and others of them by monies retained by the examinant, by the direction or with the permission of Sir T. M. Wilson, out of monies belonging to him which had been received by the examinant, but he did not recollect or believe that such monies, or any part of them, were retained by him expressly on account of such bill of costs; for the examinant stated, that when he had monies of Sir T. M. Wilson in his hands, Sir T. M. Wilson told him to retain what he wanted, as money would be of use to him. And the examinant stated, that the bill of costs was in fact paid and settled on the 10th day of September 1820, when the sum of £282 17s. 5d. was retained by the examinant; and he did not recollect that anything particular passed on the occasion; but he, and Sir T. M. Wilson, as he believed, understood that credit was to be given by the examinant in his accounts with Sir T. M. Wilson, for the sums so paid and retained; and for that reason he did not give, [387] and was not required to give, any receipt for the monies which were so paid to or retained by the examinant.

The cause came on for hearing upon further directions before Sir John Leach, the late Master of the Rolls, in January 1831, when his Honor ordered the Respondent's bill to be dismissed with costs (see 1 Russ. and Myl. 191, and Tamlyn, 332). From that decree the Respondent appealed to the Lord Chancellor, who, upon the hearing of the cause in July 1831, ordered the said decree to be reversed, and that the Appellants should pay to the Respondent the said bill of costs of £442 6s. 8d., found by the Master's report to be due from the estate of Sir T. M. Wilson, together with the costs of the suit (1 Russ. and Myl. 197).

From this last decree the Appellants appealed to this House.

Mr. Pemberton and Mr. Cooper, for the Appellants:—The principal question under appeal is, whether the dealings between Sir T. M. Wilson and Mr. Draper, subsequent to the dissolution of the partnership of Prichard and Draper, worked a pay-

ment or satisfaction of the bill of fees due to the partnership, so as to exclude the Respondent from establishing that demand now against Sir T. M. Wilson's estate. That Draper received of Wilson, or retained out of his rents, a sum exceeding the partnership debt is quite certain; the question, therefore, comes to this, whether the Respondent knew that Draper was receiving rents for Wilson, and whether he authorized him to receive this debt? The inquiry made by the Respondent, in his letter of the 27th of October 1818, as set forth in the Master's report, "Will Sir T. W. soon settle?" leaves it open to be inferred, if it does not [388] prove conclusively, that the Respondent was then aware of the connection between Sir T. Wilson and Draper, and that he had authorized him to apply for, and consequently to receive, the partnership debt.

The partnership having been dissolved in October 1817, and the Respondent not having until February 1821 given any notice to Wilson not to pay the bill of costs to Draper, Wilson could not suppose that he was not at liberty to pay it to Draper. The agreement to assign to the Respondent the debts, due to the partnership, was not made until February 1821, when in fact all the fees and disbursements due from Wilson to the partnership had been paid and satisfied by Draper's retaining for that purpose the monies received by him on Sir T. M. Wilson's account. The case made by the Respondent is, that the bills of costs was unpaid at the date of the agreement to assign the partnership debts, and that Sir T. M. Wilson had subsequently made a colourable payment of them in disregard of the Respondent's notice to him not to pay Draper; the whole case stated by the Respondent is at variance with a prior payment or satisfaction of his demand, and he does not by this suit seek to set aside such payment.

The Appellants do not now question other points argued below, and decided by the Lord Chancellor; namely, the admissibility of Draper's examination as evidence in the cause, or the validity of the objection to the bill of costs, on the ground that it was not duly signed and delivered by the Respondent. One of these points was in favour of the Appellants, one was against them (1 Russ. and Myl. 198, 199, 200); nor do they claim to set off against the partnership debt any debt due from Draper alone to Sir T. M. Wilson: that point was raised on the plead-[389]-ings by the Respondent charging it, but the Appellants do not set up that defence. Their substantial defence to the Respondent's demand is, that it was fully paid and satisfied to Draper before the date of the Respondent's notice to Wilson not to pay Draper. The examination of Draper, which was held to be admissible, (and he was the only witness that could speak to the matter,) went to show that he had, prior to the agreement in February 1821, retained out of Sir T. M. Wilson's monies the whole amount of the bill of costs. But the Lord Chancellor, in giving his judgment, stated as a reason for his decree now appealed from, that although Draper admitted that he had, prior to that date, retained the amount of the bill of costs out of the monies received by him on Wilson's account, yet he did not state positively that Wilson had directed or instructed him to retain such monies for that specific purpose. Now that is not a sufficient reason for this decree, inasmuch as no such point was raised by the Respondent's bill, or ever put in issue in the suit; nor were the Appellants ever called upon to show that Sir T. M. Wilson had given such directions. If such directions had been necessary to justify the retainer by Draper in satisfaction of this debt, the decree would be still erroneous, inasmuch as an inquiry ought to have been first made to ascertain whether such directions had been given. But the Appellants submit that no particular directions were necessary. A general authority is a sufficient warrant for the payment. Sir T. M. Wilson gave a general authority to Draper to retain the money out of his rents in payment of the partnership debt; that authority is admitted and was acted upon by Draper, who swears that he retained the debt; and payment to one partner of a partner-[390]-ship debt, without fraud or collusion, entitles the debtor to be discharged; *Duff* v. *East India Company* (15 Ves. 198), *Bristow and Porter* v. *Taylor* (2 Starkie, 50). If there were fraud or collusion, it was for the Respondent to prove it.

In the dealings between Wilson and Draper, subsequent to the dissolution of the partnership, mutual debts were incurred; Draper had to account for the rents received by him; Wilson was liable for costs and disbursements made by Draper on his behalf, as his solicitor. It is admitted by Draper that he received or retained more of Wilson's monies than were necessary to pay the debt due to himself; that being a

fact not denied by the Respondent, may it not be presumed that the surplus was appropriated to the payment of the partnership debt? The law will presume more; the bill of costs due to Prichard and Draper from Wilson was an older debt than any costs incurred by him to Draper during his employment in 1820 and in 1821. A general authority being given by Wilson to Draper to retain out of the rents any demand Draper might have against him, and the question being, whether the money retained should be in discharge of the partnership debt or of the private debt, the law will presume, in the absence of evidence of any directions to the contrary, that the monies retained were appropriated to the oldest debt; *Devaynes* v. *Noble* (1 Merivale, 530, 608).

The effect of the decree of the Court below, if allowed to stand, is to compel payment a second time out of Wilson's estate, of a debt which has been already paid to a partner of the Respondent; which is contrary to the principles of equity. The circumstances of this case justify a Court of Equity in interposing to protect Wilson's estate. On the supposition that **[391]** Draper has deceived both parties, it must be held that Wilson has a stronger equity than the Respondent, who ought not to take any benefit from the misconduct of his partner, who may have acted fraudulently.

With respect to costs, whatever your Lordships' judgment may be on the merits, considering that the Respondent has established only little more than half the claim, —£412 out of £867,—and that two learned Judges in the Court below differed as to his right even to that sum, your Lordships will not think this a case that entitles the Respondent to costs.

Mr. Knight, for the Respondent:—It is admitted in the pleadings and in the argument for the Appellants, that Sir T. M. Wilson, their testator, incurred a debt to the firm of Prichard and Draper, and the Master has certified that £442 6s. 6d. of that debt remained due; and whatever the amount may be, it was wholly vested in the Respondent by the assignment of 1821. There is no evidence of any payment or discharge of that debt to the Respondent. There is nothing in the dealings or transactions which took place between Sir T. M. Wilson and Draper subsequently to the dissolution of the partnership, which amounts to a legal or equitable payment, satisfaction, or extinguishment, of the debt due to the partnership, by way of set-off or otherwise. The defence of the Appellants being reduced to a mere attempt to set off the separate debt due by Draper to the estate of Wilson, against the debt due from that estate to the partnership of Prichard and Draper, to the prejudice of Prichard, is contrary to the whole current of the decisions both at law and in equity.—

The learned Counsel was stopped by the Lord Chancellor.

[392] The Lord Chancellor:—My Lords, if any doubts had been raised in this case upon points of law, I should have wished this tribunal of appeal to be differently constituted, and to be placed upon a better footing, as I am the Judge who decided this case in the Court below, and whose decision is now appealed from. This, therefore, can be only a re-hearing. But if I found my decision was erroneous I should have no hesitation in moving your Lordships to reverse it; for I hold it that every Judge is more disposed to correct an error in his own judgments than in those of other Judges, and that it is better to correct an error when one may, than to let it go down to posterity as evidence against him. But there is no nice question of law raised before your Lordships. One point of contention in the Court of Chancery was the admissibility of Draper's examination as evidence against the Plaintiff there in respect to transactions subsequent to the dissolution of the partnership between them. Before I decided that point I consulted the Lord Chief Justice of the Court of King's Bench, and that learned Judge was clearly of opinion that the examination was admissible, and I so decided (1 Russ. and Myl. 199, 200). The next question made in the Court below was an objection that the bill of fees and disbursements, which was the subject matter of the suit, had not been signed and delivered conformably to the statute 2 G. 2, c. 23. I was of opinion that that objection was not cured by the fact of a bill of costs duly signed being, after the institution of the suit, delivered to the principal defendant, although it was put in issue in the cause by supplemental bill. Though I thought that a fatal defect in equity, as it is in law, yet as it was not taken advantage of at the first hearing before Lord Gifford, I held **[393]** that it came too late on the hearing upon further directions (1 Russ. and Myl. 198). Then came a question of set-off, which was not urged; for it is clear, that although A. may set off a debt

due from B. and C. against their joint demand, he (A.) cannot so set off against such demand money received by B. to the use of A.; which was precisely the case here, and which was a question of fact depending upon Carter Draper's evidence.

I fully assent to the two propositions of law stated at the bar: First, if there be a partnership and a dissolution of it, a debtor to the partnership may, after notice that it is dissolved, pay any one of the partners, and that partner receiving the money may well discharge the debtor. That is laid down in the cases cited at the bar; *Duff* v. *The East India Company* (15 Ves. 198), and *Bristow* v. *Taylor* (2 Starkie, 50). Secondly, if in the course of dealing between A. and B. various debts are from time to time incurred, and payments made by B. to A., and no acknowledgment is made by A., nor inquiry by B. how the payments are appropriated, the law will presume that the priority of debt will draw after it priority of payment and satisfaction, on the ground that the oldest debt is entitled to be first satisfied. That doctrine is recognised in *Devaynes* v. *Noble* (1 Meriv. 608): but the principle was never applied to cases where the obligations were *alio jure*, nor to other cases, as, for instance, where in dealings between B. and C., the latter directs B. to receive monies due to him, the law will not presume an appropriation of these monies to the payment of a debt due to A. and B. in the absence of any specific directions. Then arises the question, whether anything passed between Sir T. M. Wilson and Carter [394] Draper, to authorize the latter to retain Wilson's money in payment of the partnership debt? That question can only be solved by looking at Draper's evidence, in which he says that Wilson "did not ever, in writing, expressly allow any sum or sums of money expressly in payment or satisfaction of any account," etc. and "he did not recollect or believe," (these are his words,) "that such monies, or any part of them, were retained by him expressly on account of such bill of costs; for, when he had monies of Sir T. M. Wilson in his hands, Wilson told him to retain what he wanted as money would be of use to him, the examinant." By this part of his evidence Draper negatives both the questions, namely, whether he had instructions from Wilson to retain his rents in payment of the partnership debt, and whether they were in fact retained by him for that purpose.

I entertain no doubt on this case. As to the costs, I am at present inclined to give the Respondent the costs, but I will further consider that matter. There was a discrepancy in the Courts below: if I refuse the costs, it will be inferred that it is because that difference existed between the Courts below, and every person who will hereafter appeal to this House under similar circumstances, may be under the impression that he will run no risk of incurring costs. Now it happens that I reversed the decision of the Master of the Rolls on grounds to which his attention was not drawn; if it had been drawn to them, he probably would have decided the same way. For these reasons I shall now move your Lordships to affirm the decree; but I shall take further time to consider the question of costs, notwithstanding the affirming of the decree.

The decree below was accordingly affirmed.

[395] The Lord Chancellor:—My Lords, judgment was given by your Lordships in this case, but there was a question reserved as to the costs. I think, after consideration, it is a case in which your Lordships ought to allow the costs (they are moderate) of the Appeal. I move, therefore, that the judgment be affirmed, with costs.

Affirmed, with costs.

[396]

APPEAL

From the Court of Exchequer in Ireland.

WILLIAM BROWN, Esq., *Appellant;* WILLIAM FREDERICK FOWNES TIGHE, and DANIEL TIGHE, Esqrs.,—*Respondents.*

[Mews' Dig. viii. 818, 823, 1142; S.C. 8 Bli. N.S. 272; and in Ex. 1 Hayes, 158. See *Swinburne* v. *Milburn*, 1884, 9 A. C. 847.]

A lease made in 1663 of land in Ireland,—together with all mines thereon in the disposal of the lessor, and all timber growing thereon, to be disposed of by the lessee, he planting trees in the room of them, To hold the premises, without impeachment of waste, to him, his executors, administrators and assigns, for

98 years, at a rent therein mentioned,—contained a covenant that the lessor, his heirs and assigns, should, upon request of the lessee, his executors, administrators and assigns, from *time to time renew the said lease, and perfect such other assurances as the lessee, his executors, administrators and assigns, should reasonably require for strengthening, confirming, and suremaking the demised premises, at such rents, and under such covenants and conditions, as in the said lease were contained.* Another covenant provided that, in case of eviction, or waste by rebellion, the rent should cease and be abated. A renewal of the lease, with all the covenants, was executed in 1739. HELD by the Lords, affirming the judgment of the Court of Exchequer in Ireland, that the covenant was not for perpetual renewal, but for confirming and further assuring the original lease.

The Appellant exhibited his bill, in November 1827, in the Court of Exchequer in Ireland, against the Respondents and another, for the purpose of compelling the renewal of a lease. The bill stated, that by an indenture of lease, bearing date the 3d of July 1663, Richard Tighe, an Alderman of Dublin, demised [397] to William Wright, of Castledermot, in the county of Kildare, all the town and lands of Ballireadman, situate in the county of Carlow, and then in the possession of the said William Wright and his assigns, containing 223 acres profitable land, of Irish measure, with all other lands returned as unprofitable or waste, whether woods or underwoods, bogs or barren mountain, as part thereof, together with all warrens, water ways, etc. quarries of stone, slate, mines of coal, lead, tin, etc., or any other mines or minerals that were in the disposal of the said Richard Tighe, fishings, fowlings, etc., and also the timber then growing or lying on the said lands, and to make sale and disposal thereof as he or his executors, administrators or assigns should think fit, to his and their own proper use, without impeachment of or for any waste; they planting 500 trees of oak or ash in the room of them, and also performing the same from time to time during the said lease; To have and to hold all and singular the said premises, with the appurtenances, without impeachment of waste, unto the said William Wright, his executors, administrators and assigns, for the term of 98 years from the 29th day of September then next ensuing, at the yearly rent of £15 for the first three years, and the yearly rent of £30 during the remainder of the said term, payable half-yearly, with one sugar-loaf on the first day of January yearly. And the said Richard Tighe, by the said indenture, further covenanted and granted to and with the said William Wright, his executors, administrators and assigns, that it should be lawful for the said William Wright, his executors, administrators and assigns, to cut and dispose of all the aforesaid woods, and to search, dig and find out any quarries of stone and slate, or any other mines of coal, lead, tin, iron, brass, [398] copper, or any other kind of minerals whatsoever in the disposal of the said Richard Tighe, and the same so sought and found out to have, use, sell and dispose of, for his and their only proper use and benefit.

The lease contained the following covenants; viz. That Richard Tighe, his heirs and assigns, should and would, upon request unto him or them to be made by the said William Wright, his executors, administrators and assigns, *from time to time renew the said lease, and perfect such other (further *) assurances* as he the said William Wright, his executors, administrators and assigns, should reasonably, with their counsel learned in the law, devise, advise or require, for the better strengthening, confirming and sure-making of all and singular the said demised and granted premises, and every part thereof, unto the said William Wright, his executors, administrators and assigns, *at such rents, and under such covenants and conditions as contained in said indenture of lease;* and further, that he, Richard Tighe, his heirs and assigns, should *from time to time and at all times thereafter,* pay all quit-rents and other rents already due, or thereafter to be due, upon or out of the said demised premises, or any part thereof; and said lease, among other covenants, contained a covenant of warranty of title against all persons claiming by, from

* This word was in the counterpart, but not in the lessor's part set out in the Respondent's case.

or under the said Alderman Richard Tighe; and that, in case of any eviction by any person lawfully claiming any right to the premises, or that the premises should be wasted, destroyed or decayed, by any war or rebellion, so that the tenants could not possess the same with safety to their lives or goods, then and for so long the said rent should cease and be abated.

[399] The bill further stated that the said lessor died intestate, seised of the reversion and rent of said lands; and upon his death William Tighe, of Dublin, his grandson and heir, became seised of said reversion and rent: and that all the estate and interest of the said William Wright, by virtue of said recited lease, became, by assignment thereof, duly vested in Denny Cuffe, of Sandhill, in the County of Carlow: and that, by a certain indenture, bearing date 7th of March 1739, made between the said William Tighe and Denny Cuffe, (after citing the said original lease of the 3d day of July 1663, and also the said covenant,) the said William Tighe, at the request and desire of the said Denny Cuffe, *and in pursuance of said covenant or clause of renewal* contained in said recited lease, and for and in consideration of the rents, covenants and conditions therein contained, demised unto the said Denny Cuffe, his executors, administrators and assigns, the aforesaid town-lands and premises, without impeachment of waste, to have and to hold the same unto the said Denny Cuffe, his executors, administrators and assigns, for the term of 98 years, from the 29th of September then last past, yielding and paying therefore unto the said William Tighe, his heirs and assigns, the yearly rent of £30, and one sugar-loaf, on the 1st day of January yearly; and said indenture contained all the same clauses, provisions and covenants as in said original lease, and, amongst others, a covenant for renewal, in the same words as in said original lease.

The said Denny Cuffe died possessed of the demised premises, by virtue of the aforesaid assignment and indenture of renewal; and upon his death, Sir Jonah Wheeler Denny Cuffe, bart., his son and executor, became entitled to said premises, and en-**[400]**-tered into possession thereof: and he, by indenture of assignment, bearing date the 23d of January 1812, (after reciting the said renewal of the 7th of March 1739, and also the covenants for renewal in said deeds contained,) in consideration of the sum of £10,000, duly assigned all the aforesaid premises, and all his estate, title and interest therein, under and by virtue of the said several indentures, to Robert Brown, of Dublin, esq., who thereupon and thereby became entitled to the said several lands and premises, and entered into possession thereof, and paid the said yearly rent, and continued so possessed until the time of his death, in January 1816, having by his will, dated the 14th March 1814, and duly made and published, devised all the residue of his real and personal estate (which included the aforesaid lands and premises of Ballireadman, and all his estate and interest therein) to the Appellant, his eldest son, his executors, administrators and assigns; and appointed the Appellant and Redmond Browne, a younger son of the said Robert Browne, his executors. And the said will was duly proved, and probate thereof granted to the Appellant, who by virtue thereof and being so entitled, entered into possession of the said lands and premises, and ever since paid the reserved rent, and performed the said covenants contained in the lease.

The bill further stated, that W. F. F. Tighe, of Woodstock, in the county of Kilkenny, esq. (one of the Respondents) became seised of the rent and reversion of the said demised lands and premises; and he is heir-at-law of the said William Tighe, party to the said indenture of the 7th day of March 1739, and also heir-at-law of the said Alderman Richard Tighe, party to the said indenture of the 3rd day of July 1663, and has for several years received from the Appellant **[401]** the said reserved yearly rent payable out of said lands; and that on the said Respondent's marriage, in April 1825, a marriage settlement was executed, whereby, among other matters, the said lands and premises were conveyed by the said Respondent to the Duke of Richmond and Daniel Tighe, esq. (the other Respondent), and to their heirs and assigns, upon several trusts therein limited.

The bill then stated, that the last-mentioned lease being within a few years of expiring, the Appellant applied in March 1827, and frequently afterwards, to the said W. F. F. Tighe, pursuant to the said covenants contained in the indentures of the 3d day of July 1663 and the 7th day of March 1739, to make a further demise to him (Appellant) of the same, by way of renewal thereof, but that he declined to

execute any renewal. And it prayed that it might be declared that the Appellant was entitled to a renewal or new demise of the said premises, for the like term, and subject to the same rents and covenants, as contained in said indentures of the 3rd day of July 1663 and the 7th day of March 1739; and that the said covenant contained in said original lease was a covenant for the perpetual renewal thereof; and that the Respondents might be decreed to execute a renewal to the Appellant of said original lease.

The Respondent, W. F. F. Tighe, in his answer, admitted the seisin in fee of Alderman Richard Tighe, the indentures of 3rd of July 1663 and 7th of March 1739, and continued possession thereunder, and the payment of said yearly rent by the said Robert Browne and by the Appellant; and also that he, W. F. F. Tighe, was seised from the year 1816 of the reversion and rent of the said premises, as devisee of his father, William Tighe, who had been seised in [402] fee thereof, and who was grandson of William Tighe, party to said indenture of 7th of March 1739. But the Respondent insisted, that on the true construction of the said lease, this covenant was not a covenant for the renewal or extention of the term granted by the said lease, but merely a covenant for further assurance, and for doing such acts as might be necessary for the confirming of the said lease, during the term of 98 years thereby granted; which covenant was introduced into the said lease in consequence of the imperfect and precarious title under which the lessor held the lands thereby demised at the time of granting said lease, and the prospect he had of acquiring a perfect and sufficient title to enable him to grant or confirm said lease for the term of 98 years. For, that the said lands of Ballireadman, amongst other lands, were, in the Irish rebellion in the year 1641, forfeited to the Crown, and were, in the year 1659 in the actual possession of one Daniel Hutchinson and the said Richard Tighe, having been set out to them under the Act of Settlement, in satisfaction for provisions furnished for the supply of his Majesty's army in Ireland, in the year 1641; and it became an object to them to get their title established, by a decree of the commissioners of forfeited estates, and a grant thereupon from the Crown: they therefore in the year 1661, entered into an agreement with Colonel Thomas Piggott, who had considerable influence at that period, that he should put forward their claim to the said commissioners as a trustee for them, and, on obtaining a decree and grant thereof, he should convey said lands to said Richard Tighe and Daniel Hutchinson. The said Thomas Piggott, in pursuance of the said agreement, exhibited his petition before the commissioners of forfeited estates appointed under the said [403] Acts of Settlement; and they by their decree, dated 17th August 1666, adjudged that the said Thomas Piggott was lawfully and rightfully entitled, among other lands, to the said lands of Ballireadman; and pursuant to that decree, the said lands were, among other lands, granted to the said Thomas Piggott by letters patent, dated the 15th of January 1667, to hold to him, his heirs and assigns.

The Respondent further answered, that Thomas Piggott, having obtained said letters patent, refused to fulfil his agreement, and convey the lands to the said Richard Tighe and Daniel Hutchinson; whereupon they filed a bill against him in the Court of Chancery, to enforce the performance of the agreement; and by a decree, pronounced February 1669, it was ordered, that the said Thomas Piggott should convey unto them the lands mentioned in said letters patent passed in trust in the name of Thomas Piggott; and he accordingly conveyed the same to the said Richard Tighe and Daniel Hutchinson, to hold to them, their heirs and assigns, for ever. And by a division of the lands granted by said letters patent, the lands of Ballireadman were allotted to the said Richard Tighe as his separate property. The Respondent then submitted, that it appeared by the several matters and documents aforesaid, that although the said Richard Tighe was in possession of the said lands of Ballireadman at the time of the execution of the said indenture of the 3rd day of July 1663, yet he was not seised of any legal title in said lands enabling him to make said demise, but had merely a claim thereto under the Acts of Settlement and Explanation, and that he did not acquire a perfect title until the year 1670, and that the state of the title accounted [404] for and explained the intention of the parties in introducing into the said indenture of the 3d day of July 1663, a covenant for further assurance. The said Richard Tighe's estate and interest in said

lands afterwards became vested in his grandson, Richard Tighe the younger, who by his will, bearing date the 1st of May 1735, bequeathed his estate in the county of Carlow, including said lands of Ballireadman, to his son William Tighe for life, with remainder to his first and other son in tail-male, with other remainders over. The last-mentioned William Tighe, being only tenant for life, on the 7th of March 1739 executed to said Denny Cuffe the indenture in the pleadings mentioned, purporting to demise the said lands of Ballireadman, as described in the lease of 3d July 1663, to hold for a term of 98 years, at a like rate and under the same covenants as in said lease of 3d July 1663 mentioned; and the Respondent submitted, that for these reasons he is not bound to execute any renewal or further demise of the said premises, and that the Appellant is not entitled to any further term in the premises.

The Respondent, Daniel Tighe, by his answer, admitted that he was trustee under the other Respondent's marriage settlement, which comprised the said lands and premises. The Duke of Richmond, the other trustee, being out of the jurisdiction, did not answer.

The evidence on the part of the Appellant went to prove the several deeds of 3rd of July 1663, 7th of March 1739, and 23rd of January 1812; and the evidence on the part of the Respondent, W. F. F. Tighe, went to prove the transactions stated in his answer, between Alderman Richard Tighe and Colonel Tho-[405]-mas Piggott, and also to prove that the William Tighe who granted the renewal of the 7th of March 1739, was tenant for life.

The cause was heard on the Equity side of the Court of Exchequer, in the years 1830 and 1831: that Court, by a decree made on the 15th of February 1831, dismissed the Appellant's bill, with costs.*

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* The following observations of Mr. Baron Smith, in giving his judgment, were frequently referred to in the arguments on the appeal.

Mr. Baron Smith:—"The bill was filed for the renewal of a certain interest, and the question was, whether the instrument which conveyed the interest contained a covenant to renew it? That is, whether a certain clause, relied on by the Plaintiff, should be construed to amount to such a covenant. For a time the Court leaned to the opinion that it should, but upon further consideration this first impression was removed. We would not, however, be understood to say, that upon this question of construction, there is not room for weighty argument on both sides; nay, I believe I declare an opinion from which my brethren do not dissent, when I pronounce the case to be one of too much nicety to be free from doubt. But we think the preponderance of facts and reasons justifies a construction of this instrument unfavourable to the Plaintiff's claim. My Lord Chief Baron not having been on the Bench when this cause was heard, having been counsel in it, and not conceiving that anything material in the way of discussion can be added to what has been already urged, his Lordship feels the case to be sufficiently ripe for determination, and leaves to those who heard the argument to decide the point. He does so more especially, because the Court, as it was then constituted, was unanimous in the opinion to which it ultimately came; for it may be right to observe, that in that opinion Lord Guillimore concurred; though whether he had participated in our earlier and transient opinion the other way, my memory does not enable me with any confidence to say. The clause in question contains the word "renew," and it cannot be denied that its occurrence supplies an argument favourable to that construction for which the Plaintiff contended. But the utmost that can be contended for, I apprehend to be, that the use of this word "renew" may give rise to a presumption that the passage containing it should be construed to be a covenant for renewal; but to hold that this mere word "renew" is conclusive upon the interpretation of the clause in which we find it, would be to resist established principles and settled rules.

First, it would impugn the maxim, that all presumption is liable to be rebutted, and only becomes conclusive when no rebuttal can be found.

Secondly, it would rescind the principle which pronounces that every portion of an instrument shall be construed agreeably to the apparent intent of the party whose instrument it is, so far as this can be done without conflicting with distinct authorities, or infringing any fundamental rule of law.

The Appeal was from that decree.

[406] Mr. Pemberton and Mr. Jacob, for the Appellant:—The question turns on the meaning of the words [407] "from time to time renew;" and is, whether the covenant stated in the pleadings is a covenant for perpetual renewal, or is limited to the perfecting of the [408] original lease by further assurances? It is to be observed that the lease contains a particular covenant against eviction.—[The Lord Chancellor: Your case [409] is, that this is a covenant to renew from time to time in perpetuity, for the same rent, without any advantage to the lessor. I agree that covenants of this sort may have been common in Ireland; and the reason probably was, that in consequence of the frequent forfeitures there, purchasers of land, instead of paying down the whole purchase-money, adopted this mode of paying it by degrees, under leases renewable in perpetuity (see another reason in *Attorney-general* v. *Hungerford*, p. 371, *supra*).]—Whatever was the motive of the parties, the words of

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Thirdly, to hold a word or sentence in any clause, or even the whole of the clause itself, to be conclusive, would be to desert the guidance of that rule which says, that instead of insulating the portion which we are called on to interpret, we should, on the contrary, connect it with the entire context of whatever instrument contains it, and call the whole in aid of our construction of each part. Nor are these rules confined to wills, though familiarly and eminently applicable to them; they extend as guides of construction to all instruments. We search closely and favour strongly intention in the case of wills, but the law also consults, examines, and promotes intention in the case of deeds. If, unless as a covenant for a renewal of the interest, the clause under discussion would be quite inoperative and unmeaning, that might furnish a cogent argument for that construction which the Plaintiff sought to give it; and we must confess that this argument would be fortified by the introduction of a word so usual in such covenants, and so suitable and almost appropriate, as the word "renew." But the clause in question may, without being a covenant to renew the interest, have a meaning and effect not only consistent with the situation of the parties, but even peculiarly adapted to that situation. The title of the lessor at the time of the demise was not free from uncertainty, while at the same time it was one which not only might by events subsequent become more clear, but which even perhaps seemed likely to grow more distinct and firm. What more natural than that under such circumstances the lessee should require, and the lessor give, a covenant that whatever improvement his own title should receive, he would share the benefit with this lessee by a new demise, not enlarging his interest, but rendering that interest more unimpeachable and secure? Accordingly, if we look to the language of the clause, we find it undertaking not to renew the term or interest, but the lease. Might not the execution of a new demise, the further assuring and confirming the title of the lessee, become desirable for the security of this latter? Even in ordinary cases of title, unclouded and likely to remain so, covenants for further assurance are often deemed to be not superfluous. But this was not quite an ordinary case. The very date and area of the transaction, with reference to history, suggest to us that it was not so, and that it might not be inexpedient for a lessee to entrench and fence his title. What confusion of title, what loss of muniments, may rebellion not produce; and what on the very face of this demise do we perceive? That the parties contemplated the possibility of rebellion, and stipulated for a suspension of rent in case of its occurrence. A covenant to make a new lease might suit such a state of things. It is not enough to say that the clause in question may be construed to be a covenant for further assurance. It cannot be construed otherwise; it is such a covenant in express and explicit terms; and the only question is, whether it be not something more? Whether it be not also a covenant to enlarge the term? The covenant is to "renew the said lease, and perfect such other further assurances as the lessee, his executors, etc. shall with his counsel reasonably require, for the better strengthening, confirming and sure making of the title," etc. Now, in the first place, I take it to be unusual to incorporate a covenant for renewal with one for further assurance. The subject matters about which they are respectively conversant are different and detached. The one regards the interest presently demised, the other an equitable one to commence in future; yet here what is supposed to be a covenant for renewal, is blended and incorporated with one for further assurance. In the second place, the

this covenant import clearly an obligation on the lessor "to renew from time to time," at the request of the lessee or his representatives; *Furnival* v. *Crew* (1 Atk. 85). The lessor parts with his right to the timber, the mines, the minerals, fishery, and every other right which is generally reserved in a lease for a determinable interest. He does not provide by covenant for keeping the tenements in repair, or for [410] giving them up at the end of the lease; on the contrary, the tenant is not punishable for waste, both in the operative part of the lease and again in the *habendum*; and all the clauses are consistent with a lease in perpetuity, but not with a determinable interest.

Independently of the aid given to the construction of this covenant by the whole tenour and context of the lease, the words "from time to time renew" are free from ambiguity, and their obligation is not altered or weakened by the juxta-position of the words "and perfect other assurances," etc. The construction contended for by

promise and undertaking to renew the lease, that is, to make a new lease if required, is a promise consonant to the objects of a covenant for further assurance, which, be it what else it may, the clause before us unquestionably is. In the third place, we ought not to lay all the stress upon the word "renew," and reserve no emphasis for the words which follow it, "the lease." If the word renew informs us that something is to be renewed, the words which follow inform us what that something is; and what does this something turn out to be? Not the term, but the lease; not the interest which has been granted, but the muniment by which that interest has been created and secured: the case was more or less peculiar, and therefore perhaps the covenant for further assurance is more particular, emphatic, and defined. The interest here demised was a term of 98 years. Now to make such an interest renewable, I take to be more or less out of the common course; a deviation which ought to be proved, and will not be presumed; the presumption is the other way. This presumption of adherence to ordinary practice we may stand to until rebutted, and no sufficient rebuttal seems furnished by the circumstances of the present case. Human life is necessarily uncertain and precarious; against this uncertainty it is natural that provision should be made; and accordingly a covenant for renewal is no uncommon appurtenant to a lease *pour autre vie*. Another mode of guarding against this uncertainty, is by lease for lives or years, whichever shall last longest; but I doubt whether in a lease of this description a clause of renewal will be found. If the clause be a covenant for renewal, it is an unqualified covenant for perpetual renewal; and the lessor might, if such were his intention, have at once given the *quasi* perpetuity for a term of 900 years. Why did he not make such a lease? May not the answer be, because he did not intend to convey an interest of longer duration than 98 years? But it may be said, that he intended to grant an interest of (say) 900 years, but chose to grant it by means of periodical renewals. If, indeed, a renewal fine had been reserved, this answer might be given, and I should be obliged to admit its force, however puzzled to compute the value or inducement of a consideration which was to be paid once a century, and the first payment to be made a century after the perfection of the lease. I might think it a more rational and ordinary course to exact in the first instance a fine proportioned to the value of what, if it were not a blunder, I might call a perpetual term; and having received this adequate fine, to demise the term; but still we should have to admit that the reservation of a substantial renewal fine at once supplied a consideration, and furnished evidence of intent: even a nominal fine, although it would be no consideration, might be equivalent, as furnishing evidence of intention to "renew," and thus giving a character to the clause in which such a reservation was contained; but here there was no reservation of even a nominal fine. Does not the want of this furnish some evidence negativing an intention to renew, especially as reservations of this kind usually, I apprehend, accompany covenants to renew? On the whole, we construe this clause to have been an agreement not to grant a new interest, but, under certain circumstances, to grant a new lease confirming, not enlarging, the interest which the first had given. There is but one fact that can be called material which I have omitted to notice; I mean the subsequent grant by tenant for life. On this part of the case I shall only say, that when the cause was at hearing, the Court expressed an opinion which seemed to be acquiesced in at the time, and which it continues to entertain; namely, that the construction of the instrument in question cannot depend upon or be governed by matters subsequent and extrinsic."

the Respondents is contrary, not only to the plain import of the words, but to the sense in which their ancestors interpreted them, when the renewal of the original lease was granted in 1739. The same interpretation must have been put on the clause in 1812, when the Appellant's father gave his £10,000 for the assignment. Both parties, by their acts, have construed and given effect to the clause as a covenant of perpetual renewal; *Cooke* v. *Booth* (Cowp. 819).

The Court below received, on the construction of this covenant, much evidence which was extrinsic to the instrument, and therefore wholly inadmissible. The commencement of the lessor's title, in 1663, and the litigation with Colonel Piggott, his trustee, some time after, were not admissible to explain the terms of an indenture which did not in any manner refer to such previous circumstances, and with which the lessee had no privity. In the construction of a written instrument, where there is no ambiguity in the terms, nothing is to be considered but the instrument itself. *Smith* v. *Earl Jersey* (2 Brod. and Bing. 473); *Miller* v. *Travers* (8 Bingh. 244).

[411] The principal reason given for the decree below is, that the Judges in Ireland lean against covenants for perpetual renewal: that is a reason which ought not to influence this House. Lord Eldon took occasion to express his dissent from the opinion of Lord Thurlow, that those covenants were not to be executed, and to disavow that doctrine; *Willan* v. *Willan* (16 Ves. 72). If the meaning of the covenant be clear, specific execution ought to be decreed.

Mr. Knight and Mr. J. Jervis, for the Respondents: The law, as settled by numerous decisions in England and Ireland, leans against covenants of renewal; and Courts of Equity will not interfere to enforce the specific execution of them, unless the meaning of the parties as to the obligation to renew is clearly expressed. *Baynham* v. *Guy's Hospital* (3 Ves. 298); *Tritton* v. *Foote* (2 Bro. C. C. 636); *Moore* v. *Foley* (6 Ves. 232); *Iggulden* v. *May* (9 Ves. 332); *Harnett* v. *Yielding* (2 Scho. and Lef. 549). Renewal leases are common in Ireland, as they are in Devonshire and Cornwall, upon fines like bishops' leases; but no one ever heard of a covenant to renew a lease at the end of every hundred years, which the Appellant claims, without any corresponding advantage to the landlord; and no Court would, in a doubtful case, enforce a covenant so improvident and absurd; *Redshaw* v. *Governor and Co. of Bedford Level* (1 Eden, 346). If such a renewal had been intended by the parties to the original lease, would they not rather at once make a lease for a term of 999 years?

According to the true construction of the lease of **[412]** 1663, the covenant therein contained, and relied upon by the Appellant as a covenant for perpetual renewal, is merely a covenant for further assurance, which was made necessary by the imperfect title of the lessor. The words "from time to time renew the said lease," are followed immediately, in the same sentence, by the words "and perfect such other assurances," etc. The whole context of the clause shows the intention of the parties to be, to make further assurances "for the better strengthening, confirming and sure-making of all and singular the fore-demised and granted premises." There is no instance known among conveyancers, of a covenant for renewal being thrown into a covenant for further assurance, as this alleged covenant is; and it is remarkable that the words are not to renew the said term, but "the said lease;" upon which distinction Mr. Baron Smith laid great stress in his judgment. It is also to be observed, that the words in the counterpart executed by the tenant are, "such other assurances;" but in the part executed by the landlord, which alone binds him, they are "such other *further* assurances;" the words "other further" clearly importing, not a renewal, but additional assurances. The inference from the obligation on the tenant "to plant 500 trees of oak or ash in the room of those cut down by him, and performing the same from time to time during the said lease," is that the trees so planted were to be for the benefit of the landlord at the expiration of the lease. But if the tenant was to have a perpetual renewal without fine or other consideration, which would amount to an alienation for ever, what benefit could the lessor or his representatives have from the trust? The case of the Appellant depends in a great measure on the fact, that a renewal of the original lease, with all the cove-**[413]**-nants in it, was granted in 1739; but it appears that that renewal was granted by a tenant for life, who had no power to grant such a lease, and whose acts cannot affect the rights of the tenant in fee; *Redshaw* v. *The Governor and Co. of Bedford*

Level (1 Eden, 346); and it is a well-known rule, both at law and in equity, that written instruments are not to be construed with reference to the subsequent acts of the parties. *Baynham* v. *Guy's Hospital* (3 Ves. 298); *Moore* v. *Foley* (6 Ves. 232).

It is not competent for the Appellant now to call for the rejection of evidence admitted in the Court below. It consisted of the certificate of the commissioners for executing the Act of Settlement to Colonel Thomas Piggott, the King's letters patent to him, the decree of the Court of Chancery directing him to convey the lands therein mentioned to Alderman Tighe and Daniel Hutchinson, the conveyance by him to them, and the will of Richard Tighe, the father of William Tighe the lessor in 1739; all which were proved in the cause, for the purpose of showing the nature of the lessor's title, and the state of the property. The petition of appeal does not object to the evidence, but to the decree: the propriety of the decree is one thing, the propriety of the grounds of the decree a different thing. This being an appeal, and not a re-hearing, it is not competent for the parties to open the whole case anew; but they are confined to the matter stated in the petition of appeal. [The Lord Chancellor: In that case the House would permit the Appellant to present a new petition of appeal. The House is not bound to confine its view to the evidence presented by the parties, who cannot, by any agreement among themselves, admit or reject evidence. This House is not bound by their agree-**[414]**-ment.]—The proofs given in the Court below were clearly admissible in evidence. In the construction of written instruments you may give evidence, not to contradict or vary the terms of them, but to show the amount and state of the property of the parties, and of their power over the property. *Smith* v. *Earl Jersey* (2 Brod. and B. 473; per Justices Burrough, Park, and Bayley); *Colpoys* v. *Colpoys* (Jacob, 451); *Lowe* v. *Manners* (5 Barn. and Ald. 917. S.C. 4 Russ. 532 n.). All the cases on that point are collected in a treatise by Mr. Wigram, on the application of extrinsic evidence to written instruments. The documents put in evidence in this case showed the imperfect state of the lessor's title when he executed the lease in 1663, and left it open to the Court to judge of the true meaning of the parties to this covenant.

Mr. Pemberton, in reply: One of their Lordships has intimated his difficulty in construing this to be a covenant for perpetual renewal, because that construction would tend to the alienation of the property, without any advantage to the landlord, beyond the continued fixed rent; which would be unreasonable. It may appear unreasonable to sell an estate, with reservation of a nominal rent; but not so unreasonable, if an adequate consideration is obtained at the time of sale, although it may happen that the adequate price at that time should in the course of time turn out to be under the value. Considering the state of Ireland in 1663, a purchaser might say, "I shall not give you £2000 or £20,000 for that estate, as no man can foresee now what may happen in a few years to deprive me of it; but I shall give you what is equivalent to the full price, by a yearly payment so **[415]** long as I may hold the estate." It is quite consistent with reason, and practice in Ireland, to grant a lease of this kind for the adequate value of the lands, payable annually. The rent of the land may have been more than the interest of the purchase-money. This lease bound the landlord in perpetuity, and the tenant for 98 years. There is nothing unreasonable in such an agreement: houses are constantly let in London for a term, terminable at the option of the tenant, in seven, 14, or 21 years. This lease was to enure to both parties for 98 years, at all events; the rent to cease in case of eviction, or waste by rebellion, but with this covenant, that the tenant was to have a renewal if he wished it. There is nothing unreasonable in such an agreement; there is no ambiguity in the terms of it; for to renew the lease is to make a new lease, in substitution of one already made: the words "from time to time" confirm that view, and remove all doubt of the meaning of the clause; and they are not neutralized by the promise of further assurance. The obligation on the tenant to plant trees has been urged; but the Appellant answers that argument by saying, It is true, it was not a covenant to renew, except at the option of the tenant,; and if he should not choose to renew, then the trees would be useful to the landlord.

The Lord Chancellor: My Lords, this case presents a question of difficulty in the construction of a covenant in a deed. For that reason, and because I observe, from the opinions expressed by Mr. Baron Smith and the other Judges of the Court of Exchequer in Ireland, in a very accurate report (4 Law Recorder—Irish Reports),

which [416] has been handed up to me, that they had considerable doubts upon the case, I shall suggest to your Lordships the propriety of allowing the matter to stand over for consideration. At the same time I should not be doing justice to the parties who are here from Ireland, or to their counsel, if I were not to state my present impressions upon this question. That a covenant for a perpetual renewal must be clear, plain, and distinct, and in terms that will not bear any other construction, is a proposition which is borne out by law, and sanctioned by a series of decided cases, as *Iggulden* v. *May* (9 Ves. 325), *Harnett* v. *Yielding* (2 Scho and Lef. 557), *Willan* v. *Willan* (16 Ves. 72). It is true that Lord Keeper Henley, in the case of *Redshaw* v. *The Governor and Co. of the Bedford Level* (1 Eden, 347), expressed a strong determination not to decree specific performance of a covenant, " because, if it was a covenant for a renewable perpetuity, it was without adequate consideration to the landlord, and therefore improvident and absurd." That was carrying the leaning of the Courts against covenants for renewals too far, and that doctrine was disapproved of and disavowed by Lord Eldon in *Iggulden* v. *May*, and again in *Willan* v. *Willan*. Lord Thurlow, too, expressed himself strongly against covenants for renewal in *Somerville* v. *Chapman* (1 Bro. C. C. 61), *Rees* v. *Lord Dacre* (Cited in 9 Ves. 332, more fully stated in 1 Harg. Jurid. Arg. 438), and another case the name of which I do not remember. But it appears by the case of *Tritton* v. *Foot* (2 Bro. C.C. 636. S.C. 2 Cox, 174) that Lord Thurlow did not adhere to his former opinion. By looking into the facts of this last case, and [417] into Lord Thurlow's judgment, it may be seen that he modified his former opinion most materially, and did not hold the strong tone which he used in the preceding cases.

The law is now settled, that if parties clearly express in the covenant their intention to renew, it must be so construed and enforced. But that intention must be clearly and distinctly apparent from the reading of the instrument, and must be free from ambiguity. The construction of these covenants is the same in equity as it is at law. Damages would be given at law for not renewing, as a breach of the covenant. A Court of Equity can, on the same principle, give the thing itself—a more adequate remedy than damages—and it will effectuate the intention of the parties, and hold the lessor bound to renew according to his clearly expressed intention. There is nothing in the case of *Cooke* v. *Booth* (1 Cowp. 819) to alter or vary this doctrine. The case of Guy's Hospital also is clearly in support of it, and the same principle is recognized in *Moore* v. *Foley* (6 Ves. 232). In the report of this last case an inaccurate reference is made to the reasoning of Lord Hardwicke, in his judgment in the case of *Furnival* v. *Crew* [3 Atk. 85]. The discrepancy is very material in respect to the present case. Sir William Grant is made to say, in *Moore* v. *Foley*, " the words are not ' from time to time,' as in *Furnival* v. *Crew;* upon which words Lord Hardwicke laid great stress, as amounting to an obligation to fill up lives upon the dropping at any time "; (p. 236.) Let us now look to 3d Atkins 83, to which his Honor is made by the report to refer, and you will find the reference is inaccurate. The report by Atkins appears to be a [418] full and accurate one. In the judgment—and assuredly a very able judgment it is—Lord Hardwicke says (p. 85), " then come the following words: ' and *so to continue the renewing of such lease or leases* to Thomas Moore, or his assigns, paying as aforesaid.' " Upon the words ' from time to time ' he makes no comment, and they do not come into this part of the passage. Then follows his construction of those words, ' *so to continue*.' " It has been argued for the Defendant," says he, " that these words mean only to continue the lease by adding a new life on the death of the *first* lessees only; but I am of opinion that those words do not mean barely continuing *a new life*, but continuing and filling up the estate from time to time." Lord Hardwicke, therefore, does not lay the stress upon the words " from time to time," as the report of *Moore* v. *Foley* makes his Honor, Sir William Grant, state him to have done. Lord Hardwicke says, " The words are ' *so to continue the renewing*,' " and the inference he drew from these words, and the argument he built on them was, that the party using them meant to bind himself and his successors to continue to renew from time to time. But the material words are not " from time to time," and it does not at all follow that Lord Hardwicke would have said, if the words had been " from time to time " in the lease, without the words " so to continue," they would have raised the same inference; it is possible he might, but it does not follow as a necessary consequence. When you look at the words of the lease itself you find what has probably

led to the mistake; there are in the lease the words "from time to time," but they are not properly part of the obligation to renew. The words are, shall "execute one or more lease or leases, under the same rents and covenants, and so continue [419] the renewing of such lease or leases to Thomas Moore, or his assigns, paying as afore said to John Crew, his heirs or assigns, £68 for every life so added or renewed from time to time." Therefore it is not that he covenants to renew from time to time, but that he covenants "*to renew and continue renewing*"; and those are the words on which Lord Hardwicke rested his judgment.

As at present advised, I am of opinion that the authorities are in favour of the construction put on the covenant in this lease, by the Judges of the Court in Ireland. Even supposing that the words "from time to time" were the material words in the case decided by Lord Hardwicke, and that the words "to renew from time to time," meant generally a covenant for perpetual renewal, still all that may well consist with the judgment of the Court in Ireland; for these reasons, because, though the custom prevails in the north of England to renew, as it does in Ireland, still it is upon some consideration to the lessor; because no one ever saw, in a regular conveyance, a covenant for renewal in the middle of covenants for further assurance. And a further reason for distinguishing this from former cases is, that here the lessee is bound to plant 500 trees in the room of those disposed of. If a man lets land for 30 or 50 years, it is very beneficial to him that he should have a well-timbered estate; but if he lets the land for 1000 years, what use is it to him to have timber on the estate? I admit that the explanation on that point given by the Appellant's counsel may apply, but I do not think that that was the intention of the parties.

Again, looking at the words which immediately follow, "and perfect other assurances," I think it [420] almost impossible for any man more strongly to signify his intention to be to covenant for further assurance of the existing lease. On these grounds my opinion at present is, that the Judges of the Court below came to a right conclusion in the construction of this covenant; but I wish to have time to look into the cases, and to consider of the costs. If I find no reason to change my opinion, I may not mention the matter again.

The case was further considered, and the decree of the Court below was affirmed, with costs not exceeding £150.

[421]

APPEAL

From the Court of Chancery.

CHARLES CANDY,—*Appellant;* SIR ROBERT CAMPBELL, Bart., and DANIEL STUART, Esq.,—*Respondents.*

[Mews' Dig. x. 972; xv. 1020, 1024; S.C. 8 Bli. N.S. 469; and, in Ch., *sub nom.* *Campbell* v. *Harding*, 2 Russ. and M. 390. Discussed and followed in *Pye* v. *Linwood*, 1842, 6 Jur. 618; and *Fisher* v. *Webster*, 1872, L. R. 14 Eq. 289. But see *Ellicombe* v. *Gompertz*, 1837, 3 My. and Cr. 127; and *Hutchinson* v. *Tottenham* (1898), 1 I. R. 403; affirmed on appeal (1899), 1 I. R. 344.]

A testator bequeathed £20,000 to C. H., his natural daughter; but in case of her death without lawful issue, he willed the money so left to be equally divided betwixt his nephews and nieces, "who may be living at the time." He also left to C. A. H., his niece, £3000; but in case of her death, without issue, to revert back, and be divided betwixt his nephews and nieces, who might then be living. The residue of his property he directed to be divided into 15 shares, to be for his other 15 nephews and nieces, after the deaths of their parents respectively. C. H. and all the nephews and nieces survived the testator, and C. H. died some time after, under age and unmarried, having made a will bequeathing the £20,000. Held, that C. H. took an absolute interest in the £20,000, and that the limitation over was void for remoteness.

John Harding, of Culworth, in the county of Northampton, by his last will, dated

the 3d of January 1826, gave and bequeathed as follows: "To my adopted daughter, commonly called Caroline Harding, the sum of £20,000 Three per cent. Consuls, and my house and landed property at Culworth, also that at Morton Pinkey; *but in case of her death without lawful issue, I then will the money so left to her to be equally divided betwixt my nephews and nieces who may be living at the time;* and the land, etc. at [422] Culworth to my nephew the Rev. James Harding, and that at Morton Pinkey to my nephew Lieutenant John Harding, Madras Establishment. And I request my much-esteemed friends, Robert Campbell and Daniel Stuart, esqrs., to be her guardians, and allow whatever they please for her education annually, and after she has left school; and if she marries it must be with their consent, and the property to be solely settled upon herself and children, and in no way changed or alienated." "I leave to each niece and nephew of mine the sum of £1000, and to Charlotte Ann Harding my niece, daughter of my late brother Francis, the sum of £3000, but in case of her death without issue this £3000 to revert back, and to be divided betwixt my nephews and nieces who may then be living." The testator, after giving some other legacies, added: "What property I may die possessed of, not otherwise appropriated, I divide into 15 shares: seven of which to be for my brother William, and after him to his seven children; five for my sister Candy, and after her to her five children; and the remaining three to my sister Wright, and her children afterwards. I permit my sister to live at Culworth where she is, for the term of her natural life, if she pleases, in common with my natural daughter commonly called Caroline Harding, for in her, it is to be understood, the household furniture, wines and books are vested, only selling such property as may not be required for use. This child Caroline will not leave school for good for some years, therefore Mrs. Candy will pay for all she wants except rent for land," etc. And he appointed his brother William, his sister Ann Candy, and the Rev. James Harding his nephew, together with Robert Campbell and Daniel Stuart, his executors in this country; and his nephews, Lieute-[423]-nants George and Thomas Candy, in Bombay, his executors in India.

The testator died a few days after the date of this will, without lawful issue, and left surviving him the said Caroline Harding, the Rev. William Harding, Mrs. Ann Candy, and Mrs. Charlotte Wright, and 16 nephews and nieces, seven of whom were the children of his said brother William; five, the children of Mrs. Candy; three, the children of Mrs. Wright; and one, the only child of another brother, Francis Harding, who died before the testator. The will was proved by the executors in this country, except Mrs. Candy, to whom the usual power was reserved.

In February 1826 the Respondents and Caroline Harding, by the Respondent Sir Robert Campbell, her next friend, exhibited their bill in Chancery against the said brother (William) and sisters, and all the nephews and nieces of the testator, insisting (among other things) that Caroline Harding was entitled to an absolute interest in the legacy of £20,000 Three per cent. Consolidated Annuities, and that the bequest over of the same, in case of her death without lawful issue, was void; and praying (among other things) that an account might be taken of the testator's personal estate, and of his funeral expenses, debts and legacies; and that his personal estate might be applied in payment thereof, and that the said legacy of £20,000 might be secured for the benefit of Caroline Harding, and that she might be declared to be absolutely entitled thereto.

The Defendants put in their answers to the bill, and the cause was heard in December 1826, before the Master of the Rolls, who directed a reference to the Master to take the accounts as prayed by the bill, to approve of proper persons to be guardians of [424] Caroline Harding, to state the amount of her fortune, and to inquire what would be a proper allowance for her maintenance and education; as to which the Master was at liberty to make a separate report.

The Master, by his separate report, certified (among other things) that Caroline Harding was entitled, under the will, to an absolute interest in the sum of £20,000 Three per cent. Consolidated Annuities, subject to such direction for a settlement as is in the will mentioned. The Master having subsequently made his general report, the cause came on to be heard before the Vice-Chancellor for further directions, and a decree was made in July 1829, whereby it was (among other things) declared that Caroline Harding was, under the said will, entitled absolutely to the said sum of £20,000 Bank Annuities.

The Appellant and his wife, and Francis Candy, and Charlotte Anne Harding, four of the testator's nephews and nieces, defendants to the suit, appealed to the Lord Chancellor from several parts of that decree, more particularly from that part of it declaring Caroline Harding absolutely entitled to the legacy of £20,000.

Caroline Harding died in October 1830, an infant, and unmarried, having duly made her will, whereby she appointed the Respondents her executors, and they obtained probate thereof and became her legal personal representatives. In consequence of the deaths, and also of the marriages of others of the parties to the suit, several bills of revivor became necessary from time to time, and the appeal to the Lord Chancellor was not heard until July 1831, when his Lordship was pleased to dismiss the appeal, and to affirm the decree of the Vice-Chancellor.

The Appellants further appealed to this House from [425] so much of the decree as declared Caroline Harding absolutely entitled to the legacy of £20,000.

Mr. Twiss and Mr. Hodgkin, for the Appellant, urged the same arguments which they had before used in support of the appeal to the Lord Chancellor, and which, together with his Lordship's judgment, have (since the first part of this case was sent to press) been very fully reported under the title *Campbell* v. *Harding*, 2 Russ. and Mylne, 390. In addition to the cases there mentioned they cited in this appeal *Luddington* v. *Kime* (Ld. Raym. 203), *Sherrer* v. *Bishop* (1 Bro. C. C. 55), and *Blamire* v. *Geldart* (16 Ves. 314). The following were the propositions for which they contended: That the gift over of the £20,000 to the testator's nephews and nieces was not a limitation after an indefinite failure of issue: the directions for a settlement showed the testator to have intended that Caroline Harding should take only a life interest, with a limitation to her children as purchasers; and, in that view, the gift over on her death without issue was in effect a mere alternative or substitutionary limitation, in the event of there being no such issue: That it appeared, from the nature of the ulterior dispositions, and from the description of the persons to whom they were made, that the testator contemplated a proximate, and not a remote or indefinite failure of issue: That in construing a bequest of personalty, the law was anxious to lay hold of every expression and circumstance which might relieve the case from that technical construction of the words "death without issue," (as signifying failure of issue at any period, however remote,) which, where such expressions and circum-[426]-stances were wanting, had been suffered to creep in by analogy to the doctrine in devises of realty; and for the purposes stated, (as in every other case of construction,) recourse was to be had to all parts of the instrument which were capable of throwing any light on the intention of the testator; but the connexion of the subjects, and the order of the events, were more to be regarded therein than the position of the clauses: That in construing the will of an illiterate person, written by himself without professional assistance, (of which circumstances the present will presented internal evidence,) it was a rule that his expressions were not to be taken in their technical sense, if there were reasonable grounds for inferring that he used them in their natural and popular sense.

Sir Edward Sugden, with whom was Mr. Matthews, for the Respondent, was proceeding to support the decree of the Court below——

The Lord Chancellor: You may go on if you think proper, Sir Edward Sugden: but I tell you, that if the appeal was from any other Judge than myself, I should not think it necessary to hear you.

Sir Edward Sugden: After that intimation, and as I have not the least doubt of the propriety of the decree of the Court below, I do not think I ought to take up your Lordships' time.

The Lord Chancellor: My Lords, being aware that this case, which is an appeal from a judgment of my own, was appointed to be heard by your Lordships to-day, I took an opportunity of looking into it [427] last night, and I gave it some consideration. I had not then the opportunity of referring to my judgment in the case of *Malcolm* v. *Taylor* (2 Russ. and Mylne, 416), in which I had, in the Court of Chancery, decided a point bearing closely on the question presented for your Lordships' judgment in this case. I am now fully reminded of all the points of that case, by what has been urged at your Lordships' bar by the learned counsel for the Appellant; and I find, on looking into a note of my judgment in that case, that the main grounds of it are essentially different from those upon which I had come to a different conclusion

in the present case.—[His Lordship having stated the facts of the case of *Malcolm* v. *Taylor*, and the reasons for his judgment in it, proceeded:]—The law was formerly doubtful as applied to cases of this description; but it is now quite settled, that if a gift is made to A., and on failure of issue, or if A. die without issue, then to B., such a bequest over, whether it be of real estate or of personalty,—being taken in the legal signification of the terms to mean after a general failure of issue, a failure of issue at any time,—is void for remoteness, and the absolute interest is given to the first taker; unless there appears something in the will indicating a different intention. It is true, as has ben urged in the argument at the bar, that you are not, in construing the bequest, restricted to that part only of the will; but you may, for the purpose of collecting the testator's intentions, look to other parts of it, and to the whole context. The proof of a different intention is cast on him who would distort the words of the bequest from their general and legal signification. There is a very useful book, but to which I do not refer as authority, I mean Mr. Jarman's edition of [428] Powell on Devises, in which the editor arranges, under five heads, the law on this subject, and collects the cases applicable to each (2d vol. Treat. on the Construction of Devises, 564). I cannot lay out of my view of this case the decision in *Barlow* v. *Salter* (17 Ves. 479). No one can read that case without seeing that Sir William Grant had directed his mind to such a question as the case now before your Lordships presents.—[His Lordship stated that case, and observed,]—That was a stronger case than this for restricting the generality of the words "dying without issue," inasmuch as the gift over in that case was to four particular persons by name. The words of the bequest over here are, "In case of her death without lawful issue, I then will the money so left to her to be equally divided betwixt my nephews and nieces who may be living at the time." The words "then" and "living at the time" cannot be read so as to restrict the general words "her death without issue." I have considered this case in all its bearings, and I have no doubt that my judgment, pronounced in 1831, was borne out by law and by the authorities. I have also spoken to some of the learned Judges about it; and if they had given me reason to suppose that my judgment in it was not well founded, I would have had one of them here with your Lordships, to hear the argument. But my opinion remains unchanged, and I now move your Lordships to affirm the decree below; but,—notwithstanding that it is an appeal from two consecutive judgments, one affirming the other,—I do not say with costs.

The judgment was accordingly affirmed, without costs.

[429]

APPEAL

From the Court of Chancery.

JOHN GRAHAM CAMPBELL, Esq. and DAME MARGARET HAY, Widow, late MARGARET CAMPBELL, Spinster,—*Appellants;* ERSKINE DOUGLAS SANDFORD, Esq. succeeding to WILLIAM GRAHAM, Esq. as Administrator *de bonis non* of WILLIAM GRAHAM, late of the Island of Jamaica, Esq. deceased,—*Respondent.*

[Mews' Dig. x. 1285; S.C. 8 Bli. N.S. 622; and, in Ch., *sub. nom. Campbell* v. *Graham*, 1 Russ. and M. 453. Distinguished in *Pitt* v. *Dacre* 1876, 3 Ch. D. 299.]

A testator, living in Jamaica, gave, by his will, legacies of £1000 and £1000 to A., and of £500 each to B. and C. who also resided there, and directed that they should be paid out of the money due to him upon bonds given by the said A. The testator afterwards went to Scotland, where he died in 1790. The legatees left Jamaica in the same year. Probate of the will was granted there in 1791, and the bonds due from A. were put in suit by the executor. In 1818 the legacies given to B. and C. were purchased by A., their near relative, for £25 each. In 1821, administration, with the will of the testator annexed, was, for the first time, taken out in this country, and in that year A. filed his bill,

claiming payment of these legacies. Held that a Court of Equity might, after such a lapse of time, consider all the circumstances of the case, and presume the legacies to be satisfied.

William Graham, late of the island of Jamaica, esq., being resident in the said island, made his will dated 17th June 1768, and thereby bequeathed to John Campbell, of New Hope, in the parish of Westmorland, in the said island, esq. (since deceased) the sum of £1000 of current money of Jamaica, and to Henrietta Campbell (now deceased), and to the Appellant Margaret Hay, then Margaret Campbell, spinster, the sum of £500 Jamaica currency, each, to be paid them when they should arrive at the age of [430] 16 years: and the said testator desired that the said legacies should be paid out of the money due to him on bonds from the said John Campbell (the legatee), and his mother; and he appointed executors.

The testator afterwards made a codicil to his will, dated 13th June, 1772, giving unto the said John Campbell a further sum of £1000 current money of Jamaica.

Campbell the legatee was, in the month of October 1773, indebted to the testator in the sum of £2636 sterling money; and for securing the payment thereof, with interest, he executed a bond to the testator, bearing date 28th October 1773, in the penal sum of £5272 sterling, conditioned to be void on payment of £2636 sterling, and interest, on 28th October 1774: and in March 1774 Campbell was indebted to the testator in the further sum of £700 sterling; and for securing the re-payment thereof, with interest, he executed another bond to the testator, dated 25th March 1774, in the further penal sum of £1400 sterling, conditioned to be void on payment by him of £700 sterling, with interest, on 25th March 1775.

The testator, after the date of the codicil, quitted the island, and went to reside in Scotland, where he was domiciled at the time of his death, which happened on the 1st December 1790. The testator never in any manner revoked or altered his will or codicil.

Campbell the legatee, and Henrietta Campbell and Dame Margaret Hay, who were brother and sisters, were all born in the island of Jamaica, and were domiciled there at the several dates of the will and codicil, and also at the time of the testator's death. Margaret Hay, who was the youngest of the three legatees, attained her age of 16 years in the year 1773. All the said three legatees quitted the said [431] island in or about the month of December 1790, and none of them ever afterwards returned there.

The will was never proved by any of the executors named therein, either in Jamaica or in England, but letters of administration, with the will and codicil annexed, were on 15th August 1791 granted by the Court in Jamaica to one James Graham, but were afterwards revoked, and thereupon letters of administration, dated the 17th day of May 1793, with the will and codicil annexed, were granted by the proper Court in the island to John Graham, of the parish of Westmorland, Jamaica, surgeon.

John Graham, after obtaining these letters of administration, commenced two actions at law in the Courts of the said island, upon the two bonds, against John Campbell the legatee, and on the 2d June 1794 recovered the full amount of the penalty in each, together with £16 13s. 9d. for costs of suit in each action.

John Graham died soon after the date of the said judgments, and thereupon letters of administration *de bonis non*, dated the 30th of August 1794, with the said will and codicil annexed, were granted by the proper Court in the said island to David Home and James Graham. Both these gentlemen died in 1818, and letters of administration *de bonis non* of the testator William Graham, were granted by the proper Court in Jamaica to Wellwood Hislop, of that island.

No steps were taken in the life-time of J. Campbell, the legatee, to enforce payment of the money recovered by the judgments; and in the year 1801 J. Campbell, the legatee, died, having made his will, dated 19th July 1799, which was afterwards proved by Helen Campbell, his widow and executrix, in the Prerogative Court of Canterbury; but the executrix [432] having declined to prove the same in the island of Jamaica, letters of administration, with the will annexed, were, in October 1803, duly granted by the proper Court in the island to the Appellant John Graham Campbell, the son of John Campbell, deceased; and Helen Campbell having died before May 1810, letters of administration *de bonis non*, dated in that month, with the will

annexed, were duly granted by the Prerogative Court of Canterbury to John Graham Campbell, who thereby became the personal representative of John Campbell, the legatee, both in the said island and in this country.

Henrietta Campbell and Dame Margaret Hay, by an indenture dated the 14th day of December 1818, made between the said Henrietta Campbell, then residing at Boulogne, spinster, and the Appellant Dame Margaret Hay, of the same place, of the one part, and the Appellant John Graham Campbell, of the other part, after reciting, among other things, that the said legacies of £500 and £500, together with the interest accrued due thereon, still remained due and owing to them, they the said Henrietta Campbell and the Appellant Dame Margaret Hay, in consideration of £25 to each of them paid by the Appellant John Graham Campbell, and also in consideration of the friendship and regard which the said Henrietta Campbell and the Appellant Dame Margaret Hay respectively had for the Appellant John Graham Campbell (therein described to be their nephew), and of the benefits and friendly attention and assistance they had theretofore, on various occasions, received from him, did bargain, assign, etc. the said several legacies of £500 and £500 Jamaica currency, and all interest then accrued due and thereafter to accrue due thereon respectively, to him, his executors, administrators and assigns.

[433] In the month of August 1819, William Graham filed his bill of complaint in the Court of Chancery against the Appellant John Graham Campbell; and such bill was afterwards amended, by making James Campbell and Anna Maria Campbell co-defendants, they being the persons entitled under the will of the said John Campbell, deceased, to his real estates; and by such bill, after stating the will and codicil, and the judgments, prayed an account, and also the appointment of a proper person to collect the debts, etc. of the deceased, and for relief generally.

John Graham Campbell filed his answer in June 1820, and alleged that he was an entire stranger to the circumstances in the said bill stated, as to the said bonds and judgments, and as to the title of the Respondent to the same; and in case the Respondent should establish his title thereto, then the Appellant claimed a right to set-off the several legacies and interest.

On the 31st day of October 1821 the Appellants, together with Henrietta Campbell, filed their cross-bill in Chancery against the Respondent William Graham, thereby praying, amongst other things, that an account might be taken of what was due for principal and interest, in respect of the said legacies of £1000 and £1000 and £500 and £500 Jamaica currency, so then become vested in the Appellant John Graham Campbell as aforesaid: and that the Respondent William Graham might either admit assets of the testator William Graham, come to his hands, sufficient to pay what should be found due for principal and interest in respect of the said legacies, and might pay the same accordingly, deducting what (if anything) should be found due to him from the Appellant John Graham Campbell, in respect of the [434] matters alleged in the said bill of the Respondent, or that the Respondent might account in the usual manner for the personal estate and effects of the testator William Graham, come to his possession or power, and that the same might be applied in a due course of administration, and that thereout the Appellant John Graham Campbell might be paid what should be found justly due to him, after making all just allowances.

On the 19th day of November 1821 letters of administration of the testator William Graham, with his will and codicil annexed, were granted to the Respondent William Graham by the Prerogative Court of Canterbury, by means whereof there was, for the first time, a personal representative of the testator William Graham, in England.

On the 20th day of November 1821 the original cause of *Graham* v. *Campbell* came on to be heard before his Honor the Vice-Chancellor, and by the decree then made it was referred to Mr. Alexander, then one of the Masters of the said Court, to inquire and state to the Court, whether the estate of John Campbell, deceased, was indebted to the Respondent William Graham, as administrator of the testator William Graham, in any and what sum of money on both or either of the said judgments. On the 24th day of November 1821 the Respondent William Graham filed his answer to the cross-bill, and insisted, amongst other things, that the legacies ought to be considered as having been adeemed in consequence of there having been no bonds due from John Campbell and his mother to the testator William Graham, at his decease. He ad

mitted the possession of the personal estate of the testator William Graham to some amount, but stated that the personal estate [435] and the proceeds of the real estates of the testator William Graham were so blended together, that he was unable to set forth, with any degree of precision, the amount of such personal estate, or whether or not the same was more than sufficient to pay the legacies and the interest thereon. Master Alexander made his report in the cause of *Graham* v. *Campbell*, dated 22d May 1822, and thereby, after stating the bonds and judgments, he found that the estate of the testator John Campbell was, in respect of the two judgments for debts and costs, indebted to the estate of the testator William Graham in sums amounting together to the sum of £6703 5s. sterling. To this report W. Graham took an exception, for that the Master ought to have certified that there was due to him as such administrator, in addition to the sums above mentioned, interest at the rate of £6 per cent. per annum upon the two principal sums recovered by the judgments, down to the date of the report. The said cause, *Graham* v. *Campbell*, came on for hearing upon this exception, and for further directions, on 25th July 1822, before the Vice Chancellor, when the said exception was overruled, and it was referred to the said Master, amongst other things, to take an account of what was due to the respondent William Graham, and all other the creditors of John Campbell, deceased, and to take the usual accounts of the personal estate of John Campbell, deceased, come to the hands of the said Appellant John Graham Campbell, and also to take an account of the rents and profits of the real estates of John Campbell, deceased, received by the Appellant John Graham Campbell. On the 25th February 1823 the cross-cause of *Campbell* v. *Graham* came on to be heard before the Vice-Chancellor, when a decree was made therein, by which [436] it was referred to the Master to inquire whether the said legacies of £1000 and £1000, £500 and £500, or any of them, or any and what part thereof respectively, were then due and payable, and the said Master was to be at liberty to state any matter specially to the Court at the request of either party: and in case the Master should find that the several legacies, or any of them, or any part thereof, were then due and payable, then the Master was to take an account of what was due for principal and interest in respect of such legacies respectively.— Before any report was made under this decree, Henrietta Campbell died.

Mr. Wingfield, the Master to whom the cause of *Campbell* v. *Graham* stood transferred, made his report, dated 11th April 1829, and found, amongst other things, that the legacies of £1000 and £1000, £500 and £500, Jamaica currency, together with all interest accrued thereon, then remained due and payable and wholly unsatisfied; and the Master certified that there was then due for the principal and interest of the several legacies, to the 11th April 1829, the sum of £5243 15s. 11d.: and the said Master further certified, that the Respondent William Graham had stated and charged before him, that inasmuch as no such bonds from the said John Campbell, deceased, and his mother, as are mentioned by the testator William Graham in his said will, were found to be in existence at the time of his death, the said legacies ought to be considered as having been adeemed, or if not adeemed, that they ought to be presumed to have been paid and satisfied, or otherwise, that no interest was due upon the said several legacies, and that the principal sum due in respect thereof ought to be set-off and deducted from the amount due to the Respondent William Graham upon [437] the said bonds and judgments, as on the 1st day of December 1791, being one year after the death of the said testator William Graham, and that interest should thereafter be calculated upon the amount remaining due upon the said bonds and judgments after such deduction, until the same should amount to the said sum of £6703 5s.; and that the Court having decided (upon the said exception taken as afore said to the said report made in the above-mentioned cause of *Graham* v. *Campbell*) that no interest should be calculated beyond that amount, in respect that the said judgments were for the penalties of the said bonds, the said sum of £6703 5s. would still remain due and owing to him the Respondent William Graham, upon and by virtue of the said judgments, after deducting the amount of the said legacies, at the end of one year after the death of the said testator William Graham, in manner above mentioned: and the said Master thereby further certified, that upon consideration of the circumstances thereinbefore set forth, and of the evidence laid before him, it did not appear to him that it ought to be found that the said legacies were to be considered as having been adeemed, or that they were paid and satisfied, or that no interest was due upon the said legacies, or that the principal sums thereof should be set-off and

deducted from the amount due to the Respondent William Graham, upon the said bonds and judgments, as on the said 1st day of December 1791, and the interest thereafter calculated upon the amount which would then remain due upon the said bonds and judgments after such deduction, until the same should amount to £6703 5s.

To this report the Respondent William Graham took six several exceptions:

[438] First, for that the Master had reported the said legacies of £1000 and £1000 to be due, together with interest for the same from the 1st day of December 1791, being one year after the testator's death, up to the 11th of April 1829, the date of the said report; whereas the Master ought to have certified that there is not anything due to the said complainant in respect of the said two legacies, or either of them.

A similar exception was taken as to the report on the legacies of £500 and £500.

Third, that the Master ought to have found that the said legacies are to be considered adeemed, or otherwise that it ought to be presumed that the same were paid and satisfied.

Fourth, that the Master ought to have certified that the principal of the legacies of £1000 and £1000 should be set-off and deducted from the amount due to the said Defendant upon the said bonds and judgments as in the said report mentioned as on the said 1st day of December 1791, and that interest should thereafter be calculated upon the amount remaining due upon the said bonds and judgments after such deduction, until the same should amount to the said sum of £6703 5s.

A fifth exception was taken, in similar terms, to the Master's report as to the two legacies of £500 and £500.

The sixth exception was, that the said Master had calculated and ascertained the amount or value in sterling money of the four several legacies of £1000, £1000, £500 and £500, Jamaica currency, and the interest thereon respectively, according to the par rate of exchange between Jamaica and England, and had accordingly found that there is now due to the said John Graham Campbell, for the aforesaid several **[439]** legacies of £1000 and £1000, Jamaica currency, the principal sum of sterling money of £1428 11s. 5d., and for interest thereon at the rate of £4 per cent. per annum, the sum of £2067 5s. 11d. sterling; and that there is also due to the said John Graham Campbell, for the said two several legacies of £500 and £500, Jamaica currency, the principal sum in sterling money of £714 5s. 8½d., and for interest thereon, at the rate of £4 per cent. per annum, the sum of £1033 12s. 11d. sterling; whereas the Master ought to have calculated and ascertained the amount or value in sterling money of the said several legacies, and the interest thereon (if the said legacies and any interest thereon shall be found payable) at the rate or premium of what is called 22½ per cent. on the sterling value of bills of exchange drawn in Jamaica upon persons in England, which was the premium on such bills according to the last advices received from Jamaica respecting such premium; and that accordingly the sum of £583 1s. 9½d. is the sum which should be paid in London as the value of, and to discharge a sum of £1000 Jamaica currency; whereby the sums of £1166 3s. 7d. and £1688 10s. 6d., £583 1s. 9½d. and £844 5s. 3d. only, and not the above-mentioned sums of £1428 11s. 5d., £2067 5s. 11d., £714 5s. 8½d. and £1033 12s. 11d., would be due in respect of the principal and interest of the said legacies.

The said cause of *Campbell* v. *Graham* came on to be heard, on further directions and on the said exceptions, before the Master of the Rolls, who on the 8th March 1830 overruled all the exceptions but the fourth; and declared, that the amount of the two several legacies of £1000 and £1000, Jamaica currency, in the Master's report certified to be due to **[440]** the Appellant John Graham Campbell, as administrator of John Campbell, deceased, was to be considered as giving to the legatee a right of retainer as on the 1st day of December 1791, being the end of one year after the death of the said William Graham the testator, to the amount of the said two legacies, out of the debt due by the said John Campbell, deceased, to the said testator William Graham, upon the said bonds on which the said judgments were obtained, and to be considered as applied, first, in payment of the interest, and the remainder (if any) in payment of principal of the said debt: and that the account between the parties to the said suit was to be computed upon the principle of such retainer; and that it should be referred back to the said Master to inquire what was due upon the said judgments on the 2d day of June 1794, when they were obtained, having regard to the declaration thereinbefore contained as to the right of retainer in respect of the

said two legacies of £1000 and £1000, Jamaica currency: and that the said Master was to compute interest at the rate of £5 per cent. per annum, on what he should so find to be due on the 2d day of June 1794, upon the said judgments, from the said 2d day of June 1794 until the amount due on the said judgments, together with the costs therein mentioned, should have reached the sum of £6703 5s. sterling, being the amount of the penalties of the said bonds and of the said costs mentioned in the said judgments: and that the said Master was to compute subsequent interest at the rate of £4 per cent. per annum on the two legacies of £500 and £500, Jamaica currency, in the said report mentioned, from the time down to which he had already computed interest thereon; and that the amount which the said [441] Master should find to be due for principal and interest of the said two legacies of £500 and £500, Jamaica currency, should be set-off against the said sum of £6703 5s., the amount of the penalties of the said bonds and costs as aforesaid, and the remainder of the said sum of £6703 5s., after such set-off as aforesaid, should be considered and taken as the debt due by the estate of the said John Campbell, deceased, to the estate of the said testator William Graham, upon the said judgments, after such retainer and set-off, in satisfaction of the said four legacies of £1000, £1000, £500 and £500, as thereinbefore directed.

The present Appellant, John Graham Campbell, appealed against this order of the 8th March 1830, complaining of the allowance of the said fourth exception, and the directions consequential thereon. The Respondent, William Graham, also appealed against it, stating that the said second and sixth exceptions ought to have been allowed; and that it ought to have been declared that there was not anything due in respect of the said two legacies £500 and £500, or either of them, but that the same must be presumed to have been paid and satisfied, or if the same were not to be presumed to have been paid and satisfied, then that the amount or value thereof, and of the interest thereon, ought to have been calculated and ascertained at the rate of what is called 22½ per cent. on the sterling value of bills of exchange drawn in Jamaica upon persons in England, which was the premium upon such bills according to the last advices received from Jamaica previous to the date of the said Master's report.

Both the said petitions of appeal came on for hearing before the Lord Chancellor in the months of July and August 1831, and on the 23d day of August [442] 1831 his Lordship made the following order on the two petitions:- On the petition of appeal of the present Appellant, it was ordered that the decretal order, dated the 8th day of March 1830, should be affirmed: and on the petition of appeal of the Respondent William Graham, it was declared, that the two legacies of £500 and £500 Jamaica currency, must be presumed to have been paid and satisfied, and the said order of the 8th of March 1830, as to the said legacies of £500 and £500 Jamaica currency, and interest, was reversed: and it was ordered, that the sum of £1780 5s. 6d., being the amount which was under or by virtue of the said last-mentioned order set-off or deducted by the Master, by his report bearing date the 29th day of May 1830, for principal and interest of the said last-mentioned legacies, from the debt therein appearing to be due by the estate of the said John Campbell, deceased, to the estate of the said testator William Graham, was to be considered and taken as further part of the said debt.

After this order was made Wm. Graham died, and administration *de bonis non* of the testator was taken out by the present Respondent.

Sir J. Scarlett and Mr. Tinney, for the Appellant: —The general principle on which the Master's report is founded, and on which the decree of the Lord Chancellor proceeded, is not questioned.—[The Lord Chancellor: The only doubt I had was not on the principle or on the law, but as to the application of the law, regard being had to the want of parties.]—The lapse of time here is not sufficient to constitute a bar to the proceeding. Two bond debts were due from John Campbell, the legatee, to the testator. The will of the testator states, that the legacies are [443] to be paid out of the bond debts. At the time that that will was made no bond debts existed from Campbell to the testator. The question therefore is, whether the will of the testator could be taken to apply to debts afterwards becoming due to him from Campbell. It may be said, that although no bonds existed at the time of the will, *non constat* but that the testator might contemplate a loan and a bond, and might mean that the legacies to be given to the young ladies should be paid by Campbell. But it is highly probable that the legacies were only to be paid when the bond debts were

paid. In 1791 Mr. Campbell and his sisters were in England, and had no representative in Jamaica. The principle in Courts of Equity is, that where a rule would press hardly upon a particular party, the Court ought to adopt the exception rather than the rule. That is especially the case with regard to the Statute of Limitations. If absence would be a good answer in a Court of Law, it must surely be so in a Court of Equity; and in the present case that argument of absence applies with more force, as there was no representative of James Graham in this country. Besides, there is no proof that at any time within the period when the statute is said to have constituted a bar, there were any assets of the party here. There is no doubt that the testator had considerable real estate in Scotland, but he had no personal assets in England, which is shown by the fact that the representative did not take out administration in England till 1821, and then only did so for the purpose of recovering the debt due on these bonds. These were the only assets recoverable in England, and these Appellants, therefore, could not make any process available here. The same circumstance rebuts any presumption that these lega-[444]-cies have been paid, since there had been no person representing William Graham to pay them. The small consideration given for the legacy may be remarked upon. But suppose that none at all had been given, natural love and affection between parties so nearly related would have been sufficient. The nature of the debt and the circumstances of the parties must be taken into consideration here; and any one looking at them, must admit that there is greater reason to presume that the debts were satisfied, than that the legacies were. The parties evidently supposed that one debt could be set-off against another. The question about the exchanges cannot be brought into this case. Both the funds are in England; both the parties are here; the accounts are to be rendered here; and the legacies are not charged on funds in Jamaica, so that there is nothing to let in the question whether a debt due in Jamaica to be paid from English funds, is liable to be affected by the exchange between the two countries. If the Statute of Limitations is, by analogy, to be applied to this case, then what part of it is to be held applicable? Is it that which gives 20 years as the limited period in ejectments, or six years in simple contract debts? The only case where satisfaction was presumed, was that of *Jones* v. *Tuberville* (2 Ves. jun. 11).—[The Lord Chancellor: My difficulty is this. If you once admit that length of time, 40 years for instance, would be a bar, by operating a presumption of payment, how can you say that 27 years would not do? There are two classes of cases in which the principle of limitation has been adopted in the way pointed out in your argument.]—The question here, is not as upon a simple legacy, but as upon a legacy of a [445] particular sort, in which a question of this kind would necessarily arise. There is no ground for the presumption of payment of these legacies, here or in Jamaica. It is not likely that these ladies should go to Jamaica to sue for a legacy of £500. In *Jones* v. *Tuberville* (2 Ves. jun. 11), the bill was filed by the second husband of the legatee, and the presumption against him was therefore very strong, so that that case cannot be made an analogy for the present. In *Pickering* v. *Lord Stamford* (2 Ves. jun. 272 and 581) there was a lapse of 35 years, and that was not a case of a legacy, but of the less powerful claim of the next of kin; and yet an account was decreed, and the right of the next of kin was established. That case was much stronger than the present; there many of the parties were dead; here they are alive, and can be examined. Besides the other objections to the presumption of payment, there are no receipts, nor is any pretence set up that any such were ever given.

Mr. Knight and Mr. Simpkinson, for the Respondent:—The question as to the currency is not now under discussion. The only question is, as to the presumption of payment. There is everything here to bar the Appellant's demand. A case of a will coming into operation in 1791, and no proceedings taken under it for 30 years afterwards, is one in which, *prima facie*, the burden lies on the claimant to deliver himself from the operation of the rule of law. Has the claimant done so in the present instance? Certainly not. The youngest of the ladies attained the age of 16 in 1773. When the testator died in 1790, she was, therefore, at least 32 years old at the time of his death. It is found as a fact, that both these ladies were born in Jamaica; and what [446] is still more material, they were unmarried, were *sui juris*, were domiciled in the country of the legacy, of the testator, and of the assets, at the death of the testator in 1790. The point as to the exact time when these parties left

Jamaica, is permitted by them to remain in doubt. That being the case, they have no right to ask this House to make any presumption, depending on that fact, in their favour. The mere fact of the absence of the testator from a colony, and of his residence in the mother country, will not relieve the party from the effects of the Statute of Limitations, when suing in this country. There is nothing to show that he had abandoned his domicile in Jamaica; but at all events, those who now claim their legacies were then domiciled there. This case was not brought into the Court of Chancery till above 30 years after the death of the testator. One of the parties has left it in doubt whether she left Jamaica before or after the death of the testator; the other, Henrietta Campbell, was, no doubt, there after his death. That is sufficient against both of them; for, in fact, one was there, and the presumption as to the other, who has left the matter in doubt upon her evidence, must be taken strongly against her. The supposed assignment of these two ladies to the Appellant was made in December 1818, just at the very moment when it was most material for the present Appellant to find a reasonable answer to the demand on the bonds then set up against him by the Respondent. In point of practice, though not of law, there should be an indorsement of the consideration for the assignment of these legacies on the back of the deed. There is no such indorsement; a fact which in itself is calculated to throw a suspicion on the case. These ladies would be barred in Jamaica from maintaining the present [447] claim. They are at least equally barred in England; but if they were not, the Court of Chancery here would not allow them to proceed against the rules of an English Court of Equity, merely because they might proceed in such a case in Jamaica. This House will look at this case as an English case. How then would it stand? without the slighest pretence for being brought into a court. One excuse made for the delay is, that there was for some years no personal representative of the testator in this country. But that is not enough; for the domicile of the assets was here; and the assets being here, they ought to have applied to get some person appointed as personal representative here. It is not true that the only presumption for the Respondent is that of payment; there is also the presumption of release, and of any of those other means by which rights long neglected to be claimed may be extinguished. Lord Alvanley said, that the powers of a Court of Equity were not to be called into activity by such negligent plaintiffs. In the case of *Smith* v. *Clay* (Ambler, 645; and 3 Bro. Ch. Cas. 639, where the judgment is more fully reported), Lord Camden says, "A Court of Equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence. Laches and negligence are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court." In *Chalmer* v. *Bradley* (1 Jac. and Walk. 63), Sir T. Plumer, the Master of the Rolls, said, "The prin-[443]ciples which have governed the Courts of Equity in applying length of time as a bar to relief, do not proceed on the ground of individual hardship or loss. Public policy requires that persons should not lie by and call for accounts at a distant period. It is not as a bar, by analogy to the statute, that the length of time operates here, but it gives a ground for presuming in favour of the length of possession. It is on this principle, that in courts of law Acts of Parliament, grants and releases, have frequently been presumed." In *Jones* v. *Tuberville* (2 Ves. jun. 13), Lord Commissioner Eyre said, "It is a presumption of fact in legal proceedings before juries, that claims the most solemnly established on the face of them, will be presumed to be satisfied after a certain length of time." The same principle was afterwards adopted by the Master of the Rolls, in *Hercy* v. *Dinwoody* (2 Ves. jun. 87). The Appellants here have clearly brought themselves within this principle, and must take the consequences of it. In *Foster* v. *Hodgson* (19 Ves. 185), Lord Eldon even inclined to think that the Statute of Limitations would be a good defence by demurrer. In *Montresor* v. *Williams* (Roper on Legacies, by White, 792), the Court presumed strongly in favour of the payment of legacies, though the land sold was charged with the payment of those legacies, because there had not been any demand of them within a reasonable time. The same principle has been adopted by the Legislature in the recent statute (3 and 4 W. 4, c. 42). That statute does but embody the rules on which Courts of Equity have long acted. Every analogy of law, therefore, is against the Appellant.

Sir J. Scarlett, in reply:—There is no ground for charging laches as against the legatees in Jamaica. [449] All the parties resided in England, the property had become assets in England, and it could not be sued for except here: yet here there was no personal representative, and consequently no one against whom a suit could be instituted. There is no pretence of laches, so as to warrant the Court of Equity in treating the mere lapse of time as a bar to this suit.

The Lord Chancellor:—My Lords, this case is now, by the judicious course adopted by the learned counsel, disencumbered of some of the points on which it was argued in the Court below. The only point now relied on is that which was raised on the second exception, namely, whether a lapse of 27 years, without claim, is sufficient for the Court to presume that the legacies have been satisfied. The important object for which I recommended the appeal has now gone by, since the recent Act has embodied the principle of treating specialty debts in the same way as legacies. I am very sorry that I have not the assistance of the Lord Chief Baron (Lord Lyndhurst) on this occasion; but I had the choice of evils, that of delaying the hearing to procure his assistance, or of alone hearing the case, without putting the parties to further delay and expense. I thought it my duty to adopt the latter alternative. I shall take time to consider the judgment.

The Lord Chancellor:—My Lords, this was an appeal from a judgment of the Court of Chancery, delivered by myself upon three exceptions, upon all of which his Honor the Master of the Rolls had given his judgment in the Court below (1 Russ. and Mylne, 453). Upon all those three exceptions, those being three out of about seven, to the Master's report, the judgment of his Honor was [450] brought by appeal to the Court where I have the honour to preside. The first of the exceptions respecting the mode of taking the account and set-off, and the third of the exceptions respecting the currency in which the legacy was to be paid, came before me, and upon argument and full consideration of the case, I saw no reason, with respect to them, to differ from his Honor, and I affirmed that judgment. The second was the most material of the three objections, and upon that it was my misfortune, after the best consideration I could give to the case, to differ from his Honor; and that difference was upon the ground, not of the fact whereupon it has been judiciously rested here, but of the law in respect of the length of time, which his Honor saw no reason whatever to consider as a bar to the claim of the legacy. That length of time constitutes a bar in the legal and strict sense of the word I never asserted, and am not now prepared to maintain; but that it is to be taken into account in a Court of Equity, and, above all things, that a party shall not lie by for 27 years, and then come and claim a legacy which he might have obtained earlier by asking in the proper way; that if he does, such conduct shall be imputable to him as laches, if not for blame, at least for damnification of his case; that it shall be available to the other party, who has been greatly prejudiced by it, who has been lulled into a belief that there was no claim against him, and who having had the distribution of the fund as if none were ever to be asserted, has arranged his affairs under that belief; that he shall have a right in equity to complain of such conduct, I cannot doubt. I hold this to be so clear as not to admit of a doubt, and not to require an argument; and on the facts of this case, particularly that of this claimant being an [451] assignee, the purchaser of a legacy, one who had purchased, I think, at the rate of about twenty per cent., who had bought a £500 legacy for about £20 or £25, I cannot but feel that this objection as to a bar by time and as to laches, and lying by and sleeping over his rights, arises more strongly in a case of this sort than in the ordinary case of a first legatee, the first person beneficially interested in the bequest. I hold this proposition to be too clear to admit of a doubt, or to require a reason. My Lords, when this case was brought before me I naturally referred again to the whole of the argument, went through the authorities, tried to satisfy myself that there was some doubt of the law which I had there laid down; and when the cause came on to be argued, the first thing I heard, not to my surprize, for I knew the great skill and judgment of the very learned counsel, but to my satisfaction certainly, was an admission that they did not quarrel with the law as laid down in the Court below, that they did not maintain any other law whereupon the judgment of the Master of the Rolls might in the first instance be rested, but they denied the application of the law to the present facts of this case, for reasons which they assign: therefore, all I had to do was to

look into them, and see if I had omitted any consideration of law in giving my judgment. I resorted to my notes, made interlocularily and for the purpose of the judgment, as is my practice, during the course of the argument; I resorted also to the printed report, but chiefly to my own notes and my recollection of the case and the authorities, and I have now the most distinct recollection that my opinion was made up, both on the facts and the law, both on principles and on their application [452] to the particular case. My Lords, I do assure your Lordships that had it been otherwise, I should at once have moved your Lordships to reverse my judgment, for I think that there is no mistake so great as that of maintaining, unless most completely warranted in doing so, your own decision in the last resort; for the bare authoritative affirmance will not satisfy the profession, who are the public for this purpose, and if their opinion continues against it, the decision will have no weight whatever. But it is not so in the present case. The reflection I have given to the whole case, the admission on all hands that the law is rightly decided, that there is no doubt about that, the resting the case on the facts, my recollection that the facts had been present to my mind at the time, my refreshing my recollection, my again going through the facts of the case painfully and elaborately, and scrutinizing the application of the law (the admitted sound law) to them, has led to the result on which I am now about to ground the motion, which, without more argument, I shall submit to your Lordships, that the judgment of the Court below ought to be affirmed; but with respect to the costs, I shall not recommend your Lordships to give any costs as to the general appeal. Upon one ground I am disposed to give the costs, if there be any means of ascertaining them. I have stated to your Lordships, in the outset of my observations, that there were three exceptions decided by his Honor, and made the subject of appeal before me in the Court of Chancery; the first and the third, touching the right of set-off and touching the currency, were abandoned at the bar. The first was appealed from, and the appeal abandoned at the bar; not a word was said upon it. [453] If therefore I have any means of separating from the rest of the case the costs attaching upon that, I shall be disposed to make that exception, and give that moderate amount of costs.

Judgment affirmed accordingly.

APPEAL

From the Court of Chancery.

The Rev. BIDLAKE BRAY, Clerk,—*Appellant;* ELIZABETH BREE (late ELIZABETH MALKIN), ROBERT SHANK ATCHESON, and JOHN TOMLINSON.—*Respondents.*

[Mews' Dig. x. 1034, 1529; xv. 1639; S.C. 8 Bli. N.S. 568; and, in Ch., 3 Sim. 513. Commented on in *In re Teague's Settlement*, 1870, L.R. 10 Eq. 569; and see *Jebb* v. *Tugwell*, 1853, 7 De G. M. and G. 663.]

By indenture of settlement, a fund was assigned to trustees upon trust for all and every the child and children of a marriage, in such shares, at such age or ages, and subject to such conditions and limitations, as the wife, in case she survive the husband, should appoint. There was one child only of the marriage, and the wife surviving the husband, appointed the fund to that child for her separate use for life, and after her decease to such persons as the child should appoint, and in default of appointment, to the child's executors or administrators. The child by her will appointed to the fund, and died. Held that the power in the settlement was well exercised by the wife, and that the child's appointment by her will carried the fund to her appointee after the death of the wife.

Josiah Spode the elder, in contemplation of the marriage of his daughter, the Respondent Elizabeth Bree, then Elizabeth Spode, with Broad Malkin, secured to

her the sum of £8000 with interest, by his bond dated the 25th of November 1805; and she, by indenture of the same date, being the settlement made previous to the marriage, with the consent of her said intended husband, assigned the bond to William [454] Spode and Josiah Spode the younger, in trust, after the solemnization of the marriage, to pay the interest thereof to herself for her life for her separate use; and after her decease, in case her said intended husband should survive her, to pay the interest to him for his life; and after the decease of the survivor of them, then, as to the principal of the £8000 (subject to their joint appointment in favour of the children of their marriage), in case Elizabeth Spode should happen to survive her said intended husband, but not otherwise, " in trust for all and every the child and children of the said Elizabeth Spode, by the said Broad Malkin to be begotten, in such shares and proportions, and to be paid at such age or ages, time or times, and with such benefit of survivorship or otherwise, and subject to, with and under such conditions, restrictions and limitations over the same, (to be always for the benefit of some one or more of such child or children,) as the said Elizabeth Spode alone, at any time or times, by any deed or deeds, writing or writings, either with or without power of revocation, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of her last will and testament, to be by her signed and published in the presence of and to be attested by the like number of witnesses, should direct, limit or appoint" ; And in default of such direction or appointment by Elizabeth Spode, in the event of her surviving her said intended husband, without having jointly with him made any appointment of the said trust fund, or as to so much of the said trust premises whereof no complete direction or appointment should have been made by her, then " in trust for all and every the child or children of [455] the said Elizabeth Spode, by the said Broad Malkin to be begotten, equally to be divided amongst them, if more than one, share and share alike; and in case there should be but one such child, then in trust for such one or only child, for his and her and their portion and portions: the parts and shares thereof, or the whole thereof, to be paid to such children or child," being a son or sons, on the attainment of the age of 21 years, and being a daughter or daughters, at the like age, or on marriage with such consent and approbation as therein mentioned; but no such assignment, transfer or payment was to be made until after the death of the survivor of the said Broad Malkin and Elizabeth Spode.

The indenture further provided and declared, that in default of such direction or appointment as aforesaid, and in case any such child or children, being a son or sons, should attain the age of 21, or being a daughter or daughters, should attain the age of 21, or be married with such consent as before-mentioned before such age, then and from thenceforth, notwithstanding the postponing the payment of the said share or shares till after the decease of the said Broad Malkin and Elizabeth Spode, and the survivor of them, all and every the right and interest of the same son or sons so attaining the said age of 21 years, and of such daughter or daughters so attaining the like age, or marrying with such consent as aforesaid before such age, of, in and to the said trust, securities, monies and premises, or such part thereof whereof no such direction or appointment should have been made as aforesaid, should respectively be and be considered as a vested interest in the same child or children, and should be transmissible as such to his, her or their executors or administrators notwithstand-[456]-ing the subsequent death of such child or children in the lifetime of their said parents, or of the survivor of them.

The marriage between the Respondent Elizabeth Bree and Broad Malkin was solemnized shortly after the date of the settlement. In the year 1806 the latter died, without having joined in making any appointment of the £8000, leaving a daughter, Saba Eliza Malkin, the only child of the marriage, who, in April 1825, then in her 19th year, married the Appellant, with the consent and approbation required by the settlement, and no further settlement was made of the £8000.

By a deed poll, dated the 11th of April 1827, and duly sealed, delivered and attested in conformity with the above-recited power contained in the settlement of 1805, the Respondent Elizabeth Bree, then Elizabeth Malkin, appointed that the said trustees, and the trustee and trustees for the time being of the said indenture of settlement, should stand possessed of and interested in the said sum of £8000 secured

by the said bond, and other the securities upon which the same money, or any part thereof, should for the time being be invested (subject only to her life-interest therein), upon trust after her decease to pay, assign and transfer the same unto such person or persons, for such interest or interests, and in such parts and shares, upon such trusts, and to and for such ends, intents and purposes, and with and under and subject to such provisions and restrictions, or otherwise in such manner and form as the said Saba Eliza Bray should, at any time or times, and from time to time, during the life of her the said Elizabeth Bree, or after her decease, and notwithstanding her then present or any future coverture, by any deed or [457] deeds, or writing or writings, with or without power of revocation, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will or testament in writing, to be by her signed and published in the presence of two or more credible witnesses, direct or appoint.—It is unnecessary, in the events which happened, further to recite the deed poll.

Saba Eliza Bray, by her will, dated the 3d of January 1828, and duly signed and published as required by the last-recited power given to her by the deed poll, directed and appointed, amongst other things, that "the before-mentioned trustees, and the survivors of them, their and his executors, administrators and assigns, and the trustees and trustee for the time being of the said indenture of settlement of November 1805, should stand possessed of the said sum of £8000 secured by the said bond, and other the securities upon which the same money, or any part thereof, should for the time being be invested, from and after the decease of the said Elizabeth Bree, in trust for the absolute benefit of her dear uncle, William Hammersley, formerly William Spode (who was one of the trustees of the settlement), his executors and administrators, and upon and for no other trust, intent or purpose whatsoever." She appointed William Hammersley sole executor of her will, and died the 16th of May following, without altering or revoking the same, and it was afterwards duly proved by her said executor in the proper Ecclesiastical Court.

Josiah Spode the elder died in July 1827, having by his will appointed his sons, the said William Hammersley and Josiah Spode the younger, executors, by whom the same was shortly afterwards duly proved [458] in the Prerogative Court of Canterbury. On the death of Josiah Spode the younger, the Respondent John Tomlinson was appointed, in March 1829, a trustee of the settlement of November 1805, under a power therein contained; and William Hammersley, as surviving executor of Josiah Spode the elder, invested the £8000 in the purchase of £8521 19s. 4d. 3 per cent. consolidated bank annuities, in the names of himself and John Tomlinson, upon the trusts of the settlement of 1805.

In 1827 the Appellant filed his bill in Chancery, and thereby charged that no valid appointment of the said sum of £8000, under the power contained in the said indenture of settlement of 1805, had ever been made; and that if any instrument purporting to be a valid appointment of the said sum had really been made, yet inasmuch as Saba Eliza Bray was the only child of the marriage of the said Broad and Elizabeth Malkin (now Elizabeth Bree), she was not authorized, under the trusts and powers in the said indenture, to make any appointment of the £8000, or to appoint the same so as to give it to Saba Eliza Bray for her sole and separate use, or to give to Saba Eliza Bray a power of appointing the said sum by will; and the Appellant thereby further charged, that under the trusts of the said indenture of settlement, Saba Eliza Bray had, during her lifetime, and at the time of her death, a vested interest in the said sum of £8000, subject only to the interest of Elizabeth Malkin, during her life; and that the Appellant having survived Saba Eliza Bray, his late wife, was entitled absolutely in right of her, upon the death of Elizabeth Malkin, to the said principal sum; and he further charged and insisted that the £8000 ought to be properly secured upon the trusts in the said inden-[459]-ture of settlement of 1805, in that behalf contained, for the benefit of Elizabeth Malkin, for her life, and from and after her decease, for the absolute benefit of the Appellant; and he prayed that the trusts of the said indenture of settlement might be declared and carried into effect; and that it might be declared that he was entitled, under the circumstances aforesaid, to the principal sum of £8000, upon the death of Elizabeth Malkin, and that the said sum of £8000 might be secured and invested by and under the direction and decree of the Court, and that, if necessary, the said sum of £8000 might be raised out of the assets of Josiah Spode the elder.

The cause came on to be heard in May 1830 before the Vice-Chancellor, and his Honor dismissed the bill (see *Bray* v. *Hammersley*, 3 Sim. 513).

The Appellant presented his petition of appeal to the House of Lords in November 1830. The proceedings on the appeal afterwards became abated by the death of William Hammersley, one of the Respondents thereto; but upon the petition of his executors and personal representatives, the Lords were pleased to order that the said appeal and proceedings might stand revived against the said Elizabeth Bree, (or Malkin,) and Robert Shank Atcheson, as the representatives of the said William Hammersley.

Mr. Preston and Mr. William Russell, for the Appellant, now argued, that as the power of appointment over the £8000, given by Mrs. Malkin by her marriage settlement, was a mere power of distribution, and only to be exercised in the event of there being more than one child of the marriage, and as there never was more than one child, the exercise of [460] the power by Mrs. Malkin was not valid. And even should the words giving the power be considered capable of a construction which warranted an exercise of it in favour of a single object, yet Mrs. Malkin had so exercised it as to exceed the limit to which the power would be legally extended.

Sir Edward Sugden and Mr. Knight, for the Respondents, insisted that the power of appointment vested in Elizabeth Bree by the settlement of 1805, was in force and subsisting, notwithstanding the circumstance of there being one child only of her marriage with Broad Malkin, and such power was well exercised by the deed poll of the 11th of April 1827: and that deed poll having been effectual, Saba Eliza Bray was thereunder enabled to dispose of the property by will, as she had done, in favour of William Hammersley, who was therefore alone entitled to the trust fund, subject to the life interest of the Respondent Elizabeth Bree.

The cases cited on both sides are mentioned and commented on, in the judgment.

The Lord Chancellor:—My Lords, this appeal from a decision of the Vice-Chancellor raised a question of considerable nicety, although now, on a further consideration of it, I entertain very little doubt as to what your Lordships' judgment ought to be. The nature of the case, rather than any great difficulty that I experienced in making up my mind to advise your Lordships on it, has given rise to the intention I have of entering into the circumstances somewhat more at large than I otherwise might have done in a case where I saw no reason to differ from the Court below.

[461] Upon the marriage of Broad Malkin and Elizabeth Spode, by a settlement then made, the sum of £8000, secured by bond, was vested in trustees, subject to the joint appointment of the husband and wife among the child or children of the marriage. I need not state the terms of that power of appointment, as the question arises not upon that, but upon the several appointment of the wife, she surviving her husband; which was in exactly the same terms, word for word, as the power of appointment given to the two jointly. The fund was to be in trust for all and every the child and children of Elizabeth Spode, by Broad Malkin to be begotten, in such shares and proportions, and to be paid at such age or ages, time or times, and with such benefit of survivorship or otherwise, and subject to such conditions, restrictions and limitations over the same, (to be always for the benefit of some one or more of such child or children,) as the said Elizabeth Spode alone, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, to be by her signed and published in the presence of and to be attested by the like number of witnesses, should direct or appoint. The settlement then goes on to provide for the case of there being neither a joint appointment by the husband and wife, nor a several appointment by her, in execution of the power; in which event it provides for the transfer of the fund of £8000 to the child and children, if more than one, share and share alike, at certain ages mentioned.

Mrs. Malkin survived her husband, having but one child, Saba Eliza Malkin, and she executed the power to that daughter; she, in effect, appointed, for she appointed under certain limitations "to such [462] person or persons as she, the said Saba Eliza Bray, at any time or times, and from time to time, during my life, or after my decease, and notwithstanding her present or future coverture, should (in manner

therein mentioned) direct or appoint." So that she gave Saba, her daughter, the power of appointment; and in default of that execution of the power, she then limited the fund in a way which it is unnecessary here to state. Saba Eliza, who was married to Mr. Bray, having afterwards appointed to her uncle William Hammersley, who has departed this life since the appeal was brought, the question arises between her husband and the appointee's representatives under Saba Eliza's execution of the power; which question is, whether she took an absolute interest in the £8000 under the original settlement, in which case the fund would belong to her husband, or whether she took under her mother's power of appointment. If she did not take under her mother's power of appointment, but took under the original settlement, in that case *cadet questio*. If she did take under her mother's power of appointment, the remaining question is whether she well executed that power given to her by her mother. I have no doubt that there is a good execution of the power in that case; but the question raised, as your Lordships may perceive, is twofold: first, whether the power under the settlement of 1805, and which Elizabeth Malkin, the mother, assumed to execute, was a power of appointing, in the event which occurred, to one child, or only a power of distribution, appointing among more than one child; that is, whether it was a power of appointment, or whether only, in effect, a power to ascertain the shares which several individuals should respectively take. That is the principal question, and the only one [463] encumbered with the least doubt: on the other, that is, whether the power was well executed, I have not any doubt whatsoever.

My Lords, to these questions I will now address myself. In the first place, I am of opinion that the general intent of the parties to the settlement is clear, and that a greater frustration of their intention could hardly be imagined than such a construction of the power as would go to deprive the surviving party of the execution of that power, in an event, not at all unlikely, that there should be but one child. Can it be supposed, if any person should settle £8000 on the children of a marriage, that the children are not the objects, or that the settlor gave that power to distribute among children, without giving the power to appoint to one, if only one child? It may be said that that event is provided for by the residuary clause, if I may so call it, providing for the default of any execution; for that, in that case, the single child would take, and if more children than one, all would take share and share alike: but then this was to come into operation only from the necessity of the case, in the event of no appointment being made. The power of appointment was meant to be something more than the mere conduit through which to carry the intent of the settlor into effect. She, the wife, surviving, was to have the power of exercising her discretion "with such conditions, restrictions and limitations over the same, so that it should be for the benefit of the child or children;" consequently I infer that it was intended to put the children, to a certain degree, as is the object of all such grants and powers, under the control and at the discretion of the party exercising the power, that it might have an influence in preventing the children from rebelling against the [464] mother's proper authority; that the fund being secured under the settlement, she should have the power, according to the children's conduct, of giving more to one than to another, and if there should be but one, of making such conditions, restrictions and limitations as might suit that case. It is not to be supposed that any prudent person, in making a settlement, would not think of providing a power for that very case in which the mother is more likely to require the exercise of a discretion, especially supposing the case of a spoiled child, in which there would be more occasion for some power to be vested of controlling that child. The confining this power, therefore, to the event of there being more children than one, is, in my opinion, contrary to the plain and manifest intention of the settlor.

In the next place, my Lords, I hold this to be a very material circumstance in construing this instrument, that it affords in itself the means of its right construction, though I have no recollection of that having been much dwelt upon at the bar; but I must observe, there is more to be gathered from a nice inspection of an instrument itself, than from running away to consider cases which have not always a clear application. A very learned Judge, the late Mr. Justice Holroyd, said, it was his rule never to apply a case to that before him, until he had searched into every corner of the deed, or whatever it might be, out of which the cause arose; for he had

frequently found in doing so, that there was something in the deed which destroyed that very application of a case on which the parties relied. I most fully concur in that rule, as I do in another rule of the same learned Judge; which is, when a statute is referred to, never to be satisfied with anything except the statute itself. [465] The first of these rules applies to the present case: I wish your Lordships to look to the words themselves; you will find it is material to refer to the clause which provides for a defect of execution in the event of there being no appointment. First, these remarkable words occur: the appointment "to be always for the benefit of some *one* or more of such child or children." Now if the construction contended for by the Appellant be correct—that it was a power of distributing to several, and not of giving to one—it would have been thus framed: "to be always for the benefit of such children," in the plural number, if the settlor had not had in contemplation the case of one child; but having in contemplation the case of an appointment in favour, not only of several, but of one child, the settlor says, "such appointment to be always for the benefit of some one or more of such child or children." If it had been "one or more of such children," it might have been then said, that the object was to prevent any argument being on an illusory appointment; but the wording is not so, it is "to be always for the benefit of some one or more of such child or children." Finding, as we do, that word "child," I hold it as perfectly clear that that resolves the case, and that the power of appointment was intended to be executed for the benefit of one child, there being but one child.

But, my Lords, that is not the most material argument raised upon the face of this instrument. I am aware it may be said, that though it contemplated a number of children, still its object was to give a power of appointing the fund to all or to one of those children. But there is an argument arising upon another clause, the clause providing for the contin-[466]-gency of the power not being executed: "then in trust for all and every the child and children of the said Eliz. Spode by the said Broad Malkin to be begotten, equally to be divided amongst them, if more than one, share and share alike; and in case there shall be but one such child, then in trust for such one or only child." Now, I ask your Lordships to consider how that would be sensible, how that would be consistent with the supposition whereupon the construction contended for by the Appellant rests? According to that construction the case is not provided for, in the previous part of the settlement, of there being but one child; it is a *casus omissus;* and there is only a power of appointment given in case of there being several children. What sense is there, or what consistency is there, with that statement and that view of the subject, in saying, "I give you the power of appointing among children; but I do not give you the power of appointing at all, if there is only one;" and then adding, "but if you should fail to appoint, there being more than one, it shall go to them, share and share alike; and in case of there being but one, it shall go to that one"? That argument is totally inconsistent; for it is making the second condition perfectly superfluous and unnecessary, because the first condition was sufficient, namely, the failure of appointing among children. It is argued, that if there was but one child, then that one child, according to the construction set up by the Appellant, ought to have taken the trust fund; for there could not be an execution of the power, and there being no execution of the power, that child must take the fund absolutely. I consider these clauses to furnish a very strong and decisive answer to such an argument, spelling, as we are accustomed to do, most nicely, [467] instruments of this nature: I have consulted one of the common-law Judges, and the instant I mentioned that circumstance, he said that put an end to the question altogether.

My Lords, the execution of the power was to be such, that, under such conditions, restrictions and limitations over the same, it should be always for the benefit of some one or more of such child or children. It has been insisted that such restrictions and limitations over the same are not for the benefit of the child; and that these words, therefore, can only apply to the execution of the power of appointing among several children, whose various interests might be reconciled and the children benefited, by conditions and limitations being imposed, on their enjoyment of the property; but that such conditions could not benefit one single appointee, to whom the greatest benefit would be, the unconditional and absolute possession of the property. But the law says otherwise, and supposes that there may be a power, with these re-

strictions contained in it, and that such a power may be well executed, and yet that it may be for the benefit of the child.

Having thus disposed of the question as it stands upon the face of the instrument itself, I now come to the authorities, and I entirely accede to what has been said at the bar upon them. In *Boyle* v. *The Bp. of Peterborough* (1 Ves. jun. 299; S. C. 3 Bro. Ch. Cas. 243) this question was much considered: there the property was vested in trustees, "upon trust for the husband for life, then for the wife for life, and after the decease of the survivor, for all and every the child and children of the marriage, in such shares and proportions, and in such manner and form, and to vest at such times, as the husband and wife, or [468] the survivor, should by any deed, etc. direct, limit or appoint; and in default of appointment, and as to so much as should remain unappointed, to all equally." In that case Lord Thurlow said, "The form of it is, if no appointment, and for so much as is not completely appointed, to assign to all and every the children, if more than one, payable at twenty-one; if but one, then to that one, payable at twenty-one. If it had stopped there, I must have looked upon it to be a provision at twenty-one, after the death of the mother; but it goes on by directing, that if any such child shall attain twenty-one in the life of the mother, his or her share shall be considered as a vested interest, etc. I think that must relate to unappointed shares, and the effect of that phrase is not to bind the shares to be appointed, not to say they should vest at twenty-one, because the power being during life, would itself specify when they were to vest, and they might at any period of life, without waiting for that period; for there was no limitation upon her appointment, and her children need not be twenty-one when they were appointed: therefore I think this was intended to vest an interest only in default of appointment. That brings it to the question, whether the power has not lost its opportunity of being exercised by the death of the son, or whether there is a capacity of appointing where only one child is left; and if at all, whether it must not be with reference to the clause which provides for its going in case of no appointment. The words breed the doubt. Where there are only two children, the power, by way of exercise of discretion, is totally gone by the death of one before it is exercised; and it cannot be the same power, in point of extent, as when meant to be a distribution among several, for which it is necessary there [469] should be several. But this clause made it proper for her to express that she did intend her power to be executed. If there was no appointment, the consequence would be that each would be entitled to a moiety, because there was no appointment. In respect of that clause she had a power to appoint to one only; for though that is not a distribution, it is an expression that it shall go by appointment, and not transmit for want of it." The whole of that case, my Lords, in both branches, appears to me not distinguishable materially from the present, and it is perfectly certain that Lord Thurlow could not have decided that case without deciding the principle on which the decision now appealed from rests.

My Lords, it was said that *Alexander* v. *Alexander* (2 Ves. sen. 640) touched a part of this case; *Folkes* v. *Western* (9 Ves. 456) also was relied upon on the part of the Appellant. Much doubt has been thrown upon that case at different times; it was said there was another point in that case decided, which had been wrongly decided; but my opinion is, that *Folkes* v. *Western*, as far as it applies to this case, is rather against than for the purpose for which it was cited. My Lords, I rely upon the reasons I have given independently of authorities, particularly the first, and above all that part of it on which I have thought it right to go into greater detail; for these reasons it appears to me that the present judgment is right, and I shall move your Lordships that the judgment of the Court below be affirmed. I do not propose to your Lordships to give any costs in this case: it appears that the money went to the uncle of the wife, upon her death; the husband probably was advised that there was a se-[470]-rious question whether he was not entitled to it; and I think, under these circumstances, your Lordships are not called upon to give costs.

Judgment affirmed, without costs.

APPEAL

From the Court of Chancery in Ireland.

EDWARD HOULDITCH, JOHN HOULDITCH, JAMES HOULDITCH, and FRANCIS STUBBS,—*Appellants;* The Most Honourable GEORGE AUGUSTUS MARQUESS OF DONEGALL,—*Respondent.*

[Mews' Dig. viii. 302, 342; S.C. 8 Bli. N.S. 301; and see Beatt. 146, 390, and 1 Dr. and Wal. 461, where the history of the various proceedings in this case is traced. Lord Brougham's view (2 Cl. and F. 477) as to foreign judgments disapproved of in *Godard* v. *Gray*, 1870, L.R. 6 Q.B. 149; and see *Abouloff* v. *Oppenheimer*, 1882, 10 Q.B.D. 300; *Pemberton* v. *Hughes* (1899), 1 Ch. 781; and *In re Maudslay, Sons, and Field* (1900), 1 Ch. 611.]

The creditors of a person resident in Ireland, filed a bill in the English Court of Chancery, and obtained a decree for an account, etc., and afterwards (the property of the debtor lying chiefly in Ireland) filed a bill in the Court of Chancery there, praying to have the full benefit of the proceedings in the English suit. The Court of Chancery in Ireland dismissed such second bill as for want of jurisdiction. Held that the judgment of the Court of Chancery in Ireland was erroneous, that the proceedings in the English Court of Chancery were in the nature of a foreign judgment, and were to be treated as such in Ireland, namely, as *primâ facie* evidence of right in the party who had obtained the judgment. Held also that this House could either remit the case with directions, or appoint a receiver, and take such other proceedings as the Court of Chancery in Ireland might have done.

The Respondent, in January 1799, succeeded to his father's titles and honours, and became Marquess of Donegall, and tenant for life in possession of very large real estates in Ireland, subject to family charges, and as to part to a jointure rent-charge of £1000, to **[471]** Barbara, Dowager Marchioness of Donegall, since deceased.

Between the year 1790, when the Respondent attained his age of twenty-one years, and the death of his father, he had incurred very heavy debts, to provide means for discharging which, was, upon succeeding to his estates, one of his first cares; and accordingly, by an indenture, dated the 20th day of April 1799, and made between the Respondent, of the 1st part; James Dashwood, John Agnew, William M'George and William Lyon, of the 2d part; and Francis Const and George Downing, of the 3d part; he demised to the parties secondly named, their executors, administrators and assigns, all his real estates in Ireland therein particularly mentioned, being the estates of which he was tenant for life as aforesaid: To hold the same unto the said James Dashwood, John Agnew, William M'George and William Lyon, their executors, administrators and assigns, for a term of ninety-nine years, without impeachment of waste, if the Respondent should so long live; upon trust, after providing for costs, to pay to the Respondent an annual sum of £10,000, free, etc., for his support. And upon trust to permit the residue of such rents, issues and profits to form a fund for liquidation of the Respondent's debts as thereinafter mentioned; and the said trustees were to investigate and allow or disallow the claims of the creditors of the Respondent, and were to issue debentures for the payment of such sums as might be found due.

Debentures were issued under this deed, one of which was purchased by a Mr. Jones. On the 7th January 1802, the representatives of Jones filed their bill in the English Court of Chancery, for the purpose of having the trusts of the deed carried into effect; and **[472]** in July 1803 a decree was made in that suit, appointing a receiver.

The same parties also in 1804 filed a bill against the present Respondent, in Ireland; and in April 1807, a supplemental bill against him, he having then come within the jurisdiction of the English Court of Chancery. In July 1807, Respondent filed his answer to that bill. In February 1808, a decree was pronounced by the Master of the Rolls in this supplemental cause, directing that the Plaintiff therein

should have the benefit of his original suit, etc. No further proceedings were taken in the English or Irish suit. A person named Bennis Berry was the holder of some of the debentures issued by the trustees, and these debentures came into the possession of Messrs. Houlditch; and in May 1810, they filed a bill in the Court of Chancery in Ireland, on behalf of themselves and the other creditors of the Respondent who had established their claims in the said English suit, praying, amongst other things, that the trusts of the said indenture of the 20th of April 1799, might be fully established, and might be carried into full effect and execution: and that the other creditors of the said Respondent, who had established their demands in the said cause so instituted in England, who should contribute to the expense of the said suit, might have the full benefit of the said suit, and the several proceedings therein, at the hearing of the said cause. And that an account might be taken, etc.

The Respondent put in his answer to this bill in November 1810; and insisted on the invalidity of the debenture in respect of which this particular suit was instituted, as having been granted upon a debt originating in a gambling transaction. An amended bill and answer were subsequently filed, [473] but no further proceedings were taken in the suit. But on the 14th November 1818, Messrs Houlditch filed a new bill to enforce all their securities.

The Respondent appeared, and gave the same answer to this bill as to the former. —On the 24th of January 1821, the Appellants filed a supplemental bill in England, to have the benefit of Jones's suit. The Respondent, in May 1821, filed his answer to the said supplemental bill, impeaching the said securities, as being grounded on gambling debts and other illegal demands, and stating that in the year 1804 they had been admitted in the original suit without sufficient proof; and that the parties in that suit in England had proceeded in the Court of Chancery in Ireland, praying the same relief which was sought for by the aforesaid proceedings in the Court of Chancery in England; and that, considering the said proceedings in Ireland to be those which alone could be effectual, the Respondent's estates being all situated there, the Respondent had directed his attention principally to the Irish proceedings, and accordingly had put in an answer, and taken issue with the parties on the merits. And also, that the said Messrs. Houlditch had, in the year 1818, filed their bill in the Court of Chancery in Ireland against the Respondent, for recovery of the very same securities for which they had subsequently filed the said supplemental bill in England; in which suit, in Ireland, the Respondent had put in his answer upon the merits, impeaching the consideration for the securities, and had joined issue with the Appellants, the said Messrs. Houlditch, which suit was then pending in Ireland; and alleged that the Appellants, with the view of shutting out the merits, and procuring the benefit of the report in the English cause made on [474] the 10th day of August 1804, had filed the said supplemental bill in England.—On the 25th of November 1823, the said supplemental cause coming on to be heard before his Honor the then Vice-Chancellor, it was decreed [see 1 Sim. and St. 491], that the said decree of July 1803, the decree of February 1808, and the account and inquiries thereby directed, and the several orders and other proceedings in the former original and supplemental suits in England, should be carried on and prosecuted by and between the parties in the then pending supplemental suit, in the like manner as the said former decrees and orders might have been prosecuted between the parties thereto, if living and carrying on the same. On the 1st July 1825, Master Wingfield made his report in the English suit; and on the 18th June 1827, an order was made on further directions in that suit. On the 15th November 1827, the Appellants filed a supplemental bill in Ireland, praying to have the benefit of the English suit secured to them in Ireland, by the decree of the Court of Chancery there. The Respondent put in his answer to the Irish supplemental bill; and on the 8th December 1828, the bills of 1818 and 1827 were dismissed, and the Appellants on the same day filed a new original bill to have the full benefit of the English proceedings. On the 6th July 1829, the Respondent put in his answer to the bill of 1828; and insisted that no creditor could have the benefit of the trusts of the deed of the 20th of April 1799, except such as had availed themselves of the terms and provisions of it, and that the decree made in the said original cause in England was erroneous, in allowing all creditors, prior to the 20th April 1799, indiscriminately to come in; and that, in fact, the proceedings and decrees in the said original and supplemental suits in England were altogether

irregular [475] and erroneous, and were obtained while the Respondent was absent out of the jurisdiction; and the Respondent insisted that the said decree of the 23d of July 1803, extended the relief beyond what a Court of Equity had jurisdiction to give, in letting in all the creditors (even by simple contract) who had not performed the requisites required by the said deed; and that if the Respondent had been present, or had been afforded an opportunity of contesting the claims put in in the said cause, that he could have shown most of them, particularly those of the said Bennis Berry, to have been founded on gambling and other illegal and usurious considerations; and he submitted that the course adopted, in first obtaining a decree and report behind his back in England, and then seeking to have the benefit of such proceeding, so as to shut out all discussion on the merits or nature of the original claims, was highly objectionable, and such as the Court in Ireland should not give effect to. And the Respondent further stated the bill filed by the Appellants, E., J. and J. Houldítch, in May 1810, and the proceedings had thereon; and insisted that the answers to that bill were notice to the Appellants, Messrs. Houldítch, of the illegality and invalidity of certain debentures, so that they had purchased the same with full notice of their being impeached. And the Respondent further insisted that the fact of the Appellants, Messrs Houldítch, having left unprosecuted two suits in Ireland,—namely, the said bill of 1810, and the bill of 1818 on the same subject-matter, in which the merits of the case were in issue, and could have been gone into,—in order to prosecute the English suit, where the question upon the merits was shut out, was a manifest proof of the fraudulent nature of their demands. And the Respondent im-[476]-peached the decree, as giving to the Appellants a claim to payment to debentures as to which they had made out no title.—This cause being at issue, the Respondent on the 28th of April 1830, filed his cross bill, in the nature of a bill of discovery, putting in issue the errors and irregularities in the English proceedings, and in aid of his defence in the original cause: and the Appellants, Messrs Houldítch, put in answers thereto, before they put in a full answer: and issue having been joined, witnesses were examined, and proofs taken. Both causes were set down to be heard together, and were in hearing for several days; and on the 23d of January 1832, Lord Plunkett, the Lord Chancellor of Ireland, was pleased to dismiss the cross bill, the same having been in its nature a mere bill of discovery; and his Lordship also dismissed the Appellants' original bill.

Sir E. Sugden and Mr. Bethell appeared for the Appellants; and Mr. Knight and Mr. Rolfe for the Respondent.—[As the Lord Chancellor, in his judgment, enters pretty fully into the reasons on which his decision is founded, it has not been deemed necessary to insert the arguments of counsel.]

The Lord Chancellor:—This case is of considerable importance, with a view to the general law of the country and of all parts of this empire, and with relation to proceedings in Courts of Law, and to appeals in respect of the judgments of foreign Courts. One point of law, at least, is clear, namely, that a judgment between parties in a Court is conclusive between them and between those who are privy to the suit. But it is equally clear that a judgment in a foreign Court of Record (and in foreign countries they do [477] not know the distinction between Courts of Record and Courts not of Record) may be made the ground of proceeding in the Courts of this country; and the great rule of all civilized countries among each other is, (and the rule is equally applicable to Irish, Scotch and Colonial judgments, as to those of foreign countries,) that a judgment in any one of them may be made the ground of proceeding validly and with effect in this country; but no more. The mode of proceeding is that of an action on simple contract, an action of assumpsit. The question has been a *vexata questio* in our Courts, and numerous *dicta* have been uttered upon the point, whether a foreign judgment is only *primâ facie* a ground of action, or whether it is conclusive and not traversable. The language of the opinions on one side has been so strong, that we are not warranted in calling it merely the inclination of our lawyers; it is their decision, that in this country a foreign judgment is only *primâ facie*, not conclusive evidence of a debt. One argument is clear, that the difference between our Courts and their Courts is so great, that it would be a strong thing to hold that our Courts should give a conclusive force to foreign judgments, when, for aught that we know, not one of the circumstances that we call necessary may have taken place in procuring the judgment. In *Buchanan* v. *Rucker*

(1 Camp. 63; 9 East, 192) it was found that the judgment had been given without there having been an appearance of the party against whom that judgment was passed; and is it to be endured that the Courts of this country should be bound by that which is not founded upon any rational principle of proceeding? So with regard to other cases of decisions of foreign Courts; for the principles of the [478] law are different in each: the law of Algiers, for instance, might otherwise be held binding in our Courts; Algiers, where we have only a consul; or the law of Turkey, where we have an ambassador, might be so recognised. If that were the case, the law of a foreign country might be made to have the effect of binding land in this country. In those two countries a man is allowed more than one wife. Suppose the law of that country held conclusive here, and then you might be called on to make a declaration that the son of a second marriage was the heir, though the daughter of a first marriage, (both wives being still living,) was in existence; which would be against our law, that does not recognise a second marriage during the existence of the first; and yet the *lex loci contractûs* would say, that such a descent was valid. I give these as instances or examples of what would be the consequences of holding that foreign sentences were in themselves valid; but they also illustrate the expediency and soundness of the view, that the judgments of foreign Courts are traversable. In *Walker* v. *Witter* (Doug. 1) this doctrine was held; and when in *Galbraith* v. *Neville*, which is not reported, a *dictum* of Lord Hardwicke's was quoted, that a judgment in the Court of Great Sessions of Wales could not prevail in this country, but might be traversed, Lord Kenyon was amazed, and said that such a judgment was conclusive. Mr. Justice Buller's judgment, however, was the other way; and so was the judgment of Lord Ellenborough, in *Tarleton* v. *Tarleton* (4 Maule and Selw. 20), with which I agree; for it was held there that it was only conclusive upon a collateral matter. Mr. Justice Bayley there said (ib. 23), "How is this plaintiff to be called on to unravel these proceedings? As between [479] the parties to this suit, the justice of it might be again litigated; but as to a stranger it cannot." If Lord Ellenborough used the general expression there attributed to him (4 Maule and Selw. 22), it must have been merely from a recollection of a hasty opinion at *nisi prius*, when he said that he thought he did not sit at *nisi prius* to try a writ of error on the proceedings in the Court abroad. In fact he might have sat for such a purpose had the original parties litigated the original judgment; for I hold that such a judgment is not conclusive in all cases, and so it might have been inquired into by the Court. But for the same reason I think that the Chancellor of Ireland was wrong in this case. In *Martin* v. *Lucy* the Vice-Chancellor pronounced a decree that I could not affirm; but that at least shows that it might have been made a ground of proceeding, though it was not conclusive. The Chancellor of Ireland, however, excluded all consideration of the merits of the decree; so that the consequence was, that if one or two matters of it only had been impeachable he could not have set them right, though the party might have been right in nine parts out of ten of the whole. It is possible that the party was right in some of the points: he wanted a receiver appointed, and an injunction to restrain the other party, to which I am of opinion he was entitled. I agree with Lord Plunkett that there has not been sufficient to impeach the judgment of the Court here; and as to the rest, I am of opinion that the party applying to the Irish Court of Chancery was entitled to have its assistance. I shall not enter into reasons in support of the opinion in which we agree; I shall only state them when there is a difference of opinion. It is said that it is doubtful, if it is not altogether denied, that a [480] Court of Equity here can appoint a receiver of property abroad. The practice in these cases is strongly against any such doubt. It is said that the cases are not disputed cases; it seems to me that they are. *Hibbert* v. *Hibbert* was a disputed case; but Sir Arthur Piggott did not resist the appointment on this ground, he put it altogether on a different ground; while in *ex parte Lindesay*, Sir Anthony Hart, *amicus curiae*, suggested that such was every day's practice. The same principle was expressly recognised in *Lord Cranstown* v. *Johnston* (3 Ves. jun. 182), in Comyn's Digest (Tit. Foreclosure), and in *Lord Baltimore* v. *Penn* (1 Ves. 444). All these cases show that Courts of Equity, by acting *in personam*, may mediately affect landed property abroad; they cannot bind the land directly, but they can bind it indirectly by the person of the suitor. The judgment, therefore, that I shall suggest to your Lordships is, to reverse the decree, as far as

that decree dismisses the bill filed in the Court of Chancery in Ireland, praying that Court for the enforcement of a decree of the Court of Chancery here; and to declare that the Court below has jurisdiction to act on such a decree, but liable to the opening of the question which that decree brings before that Court. I shall take further time to consider whether I shall say that the decree was well founded in the Court below, or only to direct further consideration, and thus to set up the jurisdiction. If the Appellant is satisfied with the decree being remitted, I shall do no more; but if he is not, I shall go further, and appoint a receiver and decree an injunction.

The decree of the 23d January 1832 was afterwards reversed, and the Appellant declared to be entitled to [481] have the assistance of the Court of Chancery in Ireland for carrying into effect the order made by the Court of Chancery in England. A receiver was ordered to be appointed, and further directions were reserved to the Court of Chancery in Ireland.*

CASE of The ATTORNEY-GENERAL and The LORD ADVOCATE.

The Attorney-general of England has precedency over the Lord Advocate of Scotland, in all matters in which they may appear as counsel at the bar of this House.

The Attorney-general of England and the Lord Advocate of Scotland having been together as counsel for the same party, in the cases of *Turner* v. *Ballendene*, *Forbes* v. *Livingstone*, *Houston* v. *Duncan*, and other appeal cases from Scotland, a question arose between them at the bar on the right of precedency, and was partially argued on the several occasions.

The Attorney-general (Sir J. Campbell), in support of his claim:—The office of Attorney-general is the first in importance under the Crown, held by any member of the bar; it, therefore, ranks above all others. There are two cases which tend to prove this rank: One occurred in 1777, when Henry Dundas was Lord Advocate, in which the petition of appeal was presented to this House, and was signed, in the first instance, by the Attorney-general, and after him by the Lord Advocate. The other was a case in which the Duke of Gordon was the appellant, and the case [482] was signed first by Sir John Copley, the Attorney-general, and then by Sir William Rae, the Lord Advocate. The analogy furnished by the Act of Union between the two countries decides the question. In one of the articles of that Act † it is stipulated, that all English peers shall take precedence of all Scotch peers of their own rank, at the time of the Union: so that the holder of an English barony, created the day before the passing of the Act of Union, does take precedence of the premier Scotch baron. The same principle must be extended to this case; for the two offices, like the peerages, were in existence at that period; and supposing these law officers, being the first of their respective countries, "are of like orders and degrees," the English law officers of the Crown will take precedence of the Scotch functionaries of the same rank.

The Lord Advocate (Mr. Jeffrey):—No opportunity has been afforded to be prepared with authorities to argue this question. The cases cited, however, prove nothing; the petitions of appeal might have been signed, in the order stated, by mere accident. There is no analogy to be drawn from the articles of the Act of Union with respect to the precedency of English and Scotch peers; but even if such analogy exists, it does not apply in favour of the claim now set up by the Attorney-general: for that law officer is not the first law officer of the Crown: the Advocate-general has always led him in the Ecclesiastical Courts, and in other courts of

* See *Houlditch* v. *Donegall*, Lloyd and Goold's Cases in the Court of Chancery in Ireland, before Lord Chancellor Sugden, page 82.

† Article 23. By which it is declared, "that all peers of Scotland, and their successors to their honours and dignities, shall from and after the Union be peers of Great Britain, and have rank and precedency next and immediately after the peers of the like orders and degrees in England at the time of the Union."

[483] England itself.—[The Lord Chancellor: There was a very celebrated case in this House, which lasted some weeks, and in which the Attorney-general led the Advocate-general.]—That must have been matter of accommodation, and could only have been done under protest. The Attorney-general was not, until lately, the second law officer of the Crown in this country: according to Blackstone (3 Blac. Comm. 28), not only the Advocate-general, but the King's ancient Serjeant and the King's premier Serjeant, ranked above him.—[The Lord Chancellor: The question was mooted some years ago, and was referred to the Crown, when, in order to settle it, a warrant * was issued, deciding that the Attorney-general should lead the King's ancient Serjeants.]—That order makes no mention of any precedency given him over the Advocate-general, and the practice always has been to consider the Advocate-general as entitled to lead him. The Attorney-general is not, therefore, the first law officer of the Crown in England. The Lord Advocate is the first law officer of the Crown in Scotland: he possesses, too, a degree of power which has not been **[484]** entrusted to the Attorney-general; he may commit a man to prison, and in this respect exercises all the authority of a magistrate.† As he possesses, in Scotland, a higher degree of authority than is enjoyed by the Attorney-general in England, and as he is in Scotland the first law officer of the Crown (and these are cases of Scotch appeals), while the Attorney-general is only the second law officer of the Crown in England, the decision of this question of precedency must be in favour of the Lord Advocate of Scotland.

The Attorney-general, in reply:—The analogy drawn from the Act of Union with Scotland must decide this case. That analogy is applicable here. The Attorney-general is the first law officer of the Crown in England. The argument founded on the table of precedency in Blackstone, is in favour of the right of the Attorney-general. The King's two ancient Serjeants, and then the Advocate-general, are there all placed above him. The warrant of the Crown, the fountain of honours, changed their position entirely; it placed the Attorney-general above each of the two ancient Serjeants; and as it effected no change in the relative rank of the two ancient Serjeants and the Advocate-general, it placed the Attorney-general, by necessary and unavoidable implication, above all three. Adopting, therefore, the argument on the other side, it is quite clear that the Attorney-general is the first law officer of the Crown in England, and, as such, is entitled to the precedence now claimed The fact that the claim is now urged in cases of Scotch appeals makes no difference.

[485] The Lord Chancellor:—My Lords, in this matter, which was considered a knotty point when it was last before your Lordships,‡ (and it was several times mentioned, though not within the last few months), I have taken time to consider the question, and I have conferred on it with learned persons who had materials to form a sound opinion; and their and my opinion, after the best consideration I can give it, is that there is no doubt, nor ought there ever to have been any question upon it, that the Attorney-general of England leads the Lord Advocate of Scotland in all cases, whether Scotch or English, in the House of Lords, or in any other Court in which the Lord Advocate can practice, whether in the Privy Council Court, the Court of Delegates, the House of Commons, (supposing them not to be Members), or in the House of Lords; they lead according to rank, first the Attorney-general,

* See 6 Taunt. 424. "Whereas our Attorney and Solicitor-general now have place and audience in our Courts next after the two ancientest of our serjeants-at-law for the time being, and before our other serjeants-at-law: We considering the weighty and important affairs in which our Attorney and Solicitor-general are employed, and on which the Attorney and Solicitor-general of us, our heirs and successors, may hereafter be employed, do hereby order and direct that at all times hereafter the Attorney and Solicitor-general of us, our heirs and successors, shall have place and audience as well before the said two ancientest of our serjeants-at-law, as also before every person who now is one of our serjeants-at-law, or hereafter shall be one of the serjeants-at-law of us, our heirs or successors." This order is dated "Carlton Palace, 14 Dec., in the 54th year of our reign."

† Qu. Whether this is not merely a power possessed by him as Public Prosecutor: a character in which he unites the functions of a magistrate and a grand jury.

‡ Mr. Murray had in the meantime succeeded to the office of Lord Advocate.

and next the Lord Advocate. I threw out the reasons which induced me to think so at various times when this matter was before your Lordships. But this by no means precludes any arrangement from being made between them, for in Scotch cases it may sometimes be convenient for the Lord Advocate to go before the Attorney-general. But an arrangement of this description cannot alter the principle. If the Lord Advocate led the Attorney-general, *quasi* Lord Advocate, it might be in respect of two things; the one as to the Court in which he practised, and the other, his own office; but it never can be owing to the nature of the case: consequently, whether it be in a Crown cause, or a cause between subject and subject, and whether it be a Scotch or an English cause, it is no matter; because parties lead, [486] not on account of their being more conversant with the matter in hand, but through and by virtue of a grant from the Crown, the fountain of all honours; or what is equivalent to it in this instance, immemorial usage: that being the sole ground for leading, it has no reference whatever to the subject-matter of the case. Now what would follow if the Lord Advocate should lead the Attorney-general? I do not say that the Crown has not the right of giving the Lord Advocate precedency. But if the Crown had said to him, "You shall lead the Attorney-general in all Scotch cases and no others, and in all other cases the Attorney-general shall lead you," it would be a very extraordinary grant, for it would be like giving to a peer the rank of a marquis in all marriage processions, but directing the marquis to go behind the barons in all funeral processions; or that the marquis should have precedence in one coronation procession, and be behind the barons in another; which would be a most capricious grant. The Crown, however, could confer such a right, and in like manner could give precedency in processions, but it is quite clear there is at present no usage of these shifting rights; therefore if the Lord Advocate led at all, he led in all Courts. I will put a supposed case: the Attorney-general files a bill *ex officio* in the Court of Exchequer in a revenue case, or a criminal information in the Court of King's Bench, and he there obtains a judgment, and the case is brought under review in this House by writ of error, and the Lord Advocate and Attorney-general are engaged as counsel on the same side: there is nothing to prevent the Lord Advocate or other Scotch lawyer from appearing in this Court in any cause; Mr. Dalrymple did it in *Miller* v. ———; but it would be absurd to say that in such a case he [487] should take precedency. This Court of Appeal is an Imperial Court, and counsel who cannot practise in the Courts below may be heard here. This House is a Court of Scotch and Irish, as well as of English appeals. It may be said, that the Lord Advocate having precedency in a case in the Court in Scotland, it would be an absurdity if he should not have precedency in the same case on appeal to this House: but it would be a greater absurdity if he were to take precedency of the Attorney-general for England, in the cases I supposed. There is no precedent to justify your Lordships to come to the conclusion that the Lord Advocate has precedence over the Attorney-general, in any case that is brought to this House. On these grounds, and as I think the question raised ought to be decided and put beyond doubt, I humbly move that His Majesty's Attorney-general for England do in all cases, in this Court, take precedence of the Lord Advocate of Scotland.

The Resolution was formally moved and agreed to.

The Attorney-general for the County Palatine of Lancaster, though he would lead the King's Attorney-general in the Court of Common Pleas at Lancaster, has not precedence over any of his seniors at the Bar, in any of the Courts of Westminster.

On the 25th April 1834, another important matter of precedency was settled. By warrant from the Crown of that date, the Court of Common Pleas was opened to all the members of the Bar. As a mark of the Royal favour to the Serjeants-at-law who were thus to lose the right of exclusive practice in that Court, the warrant directed that they should, according to the seniority existing among themselves, have rank and precedence next after John Balguy, esq. (at that time the Junior King's Counsel); a favour which in effect granted to all the then Serjeants-at-law the rank of King's Counsel.

[488]

APPEAL

FROM THE COURT OF SESSION.

The Hon. Lady ANNE WARRENDER,—*Appellant;* The Right Hon. Sir GEORGE WARRENDER, Bart.,—*Respondent.*

[Mews' Dig. viii. 226; S. C. 9 Bli. N.S. 89. Among the numerous cases in which *Warrender* v. *Warrender* has been dealt with, it may suffice to refer to *Harvey* v. *Farnie* (1880-82), 8 A. C. 43; and *Le Mesurier* v. *Le Mesurier* (1895), A. C. 517, where all the principal authorities are examined. See also Westlake's *Priv. Int. Law*, 3d Ed. 65, 78, and Dicey, *Confl. of Laws*, 2nd Ed. 388.]

A Scotchman domiciled in Scotland was married in England to an Englishwoman, and by marriage contract secured to her a jointure on his Scotch estates. They went to Scotland after their marriage, and resided there a short time, when they returned to England. They afterwards agreed to a separation, and articles of agreement were executed, by which the husband secured a separate maintenance to the wife during the separation. From the time of the separation the wife resided abroad, and the husband continued to be domiciled in Scotland, where he raised an action of divorce against her, on the head of adultery, alleged to have been committed abroad after the separation. HELD by the House of Lords, affirming the interlocutor of the Court of Session, that the wife's legal domicile was in Scotland, where the husband's was, and that she was amenable to the jurisdiction of the Scotch Court; that an edictal citation, with actual intimation by serving a copy of the summons personally, was a good citation; and that it is competent to the Scotch Courts to entertain a suit to dissolve a marriage contracted in England.

This was an appeal against an interlocutor of the Court of Session in Scotland, repelling preliminary defences taken by the Appellant to an action of divorce raised against her there, in September 1833, at the instance of the Respondent. The main question, now for the first * time submitted for adjudication to [489] this House, was whether the Scotch Courts have jurisdiction to entertain suits for dissolving marriages contracted and solemnized in England, according to the law of England.

The Respondent, in the case prepared on his behalf in the Court of Session, and afterwards presented to this House for the purposes of the appeal, stated, among other things, that he was born in Scotland, of Scotch parents; succeeded to the family estates in the county of East Lothian, and acquired, by purchase in other counties of Scotland, landed property of considerable extent and value; that on succeeding to the estate of Bruntsfield near Edinburgh, in 1820, he fitted up the mansion-house there as his principal place of residence, and actually resided there from that period; that in early life he obtained a commission in the Berwickshire militia, and was still lieutenant-colonel of that regiment. In 1807 he was returned to Parliament for the Haddington district of burghs; afterwards was elected Member for an English borough, and during his attendance on his parliamentary duties, for the first five years, he lived in temporary lodgings or in hotels in London, having then no house or establishment in any part of England. In 1812, being appointed a member of the Board of Admiralty, he took possession of a house assigned to him in right of that appointment, and continued to occupy it until April of the year 1822; but in every year during that period he returned to Scotland, whenever his official duties permitted his absence from London. In October 1810, while the Respondent was residing in lodgings in London, he was married, according to the laws of England and the rites of the Church of England, to the Hon. Anne Boscawen (the Appellant), daughter of George Evelyn, Viscount [490] Falmouth, then deceased, with the consent of her guardians, she being only 18 years of age: That previous to and in contemplation of the marriage, a settlement in the English form,

* The same question was submitted in *Tovey* v. *Lindsey*, 1 Dow. 117, but was not decided.

to which the Appellant's guardians were parties, was duly made and executed, securing the interest of her fortune to herself for life; and also an ante-nuptial contract of marriage, in the Scotch form, was executed at the same time, by which it was provided that the Appellant should be secured in a jointure of £1000 a year, partly over the Respondent's heritable estates of Lochend, and partly over his lands at Goodspeed, both situated in the county of Haddington: and in virtue of the precept of sasine contained in that contract, the Appellant was afterwards duly infeft in those lands: That immediately after the marriage the Respondent, accompanied by the Appellant, returned to Scotland, and they resided together on his paternal estates there for the greater part of the two years next following; the Respondent being obliged by the duties of his office in 1812 and thenceforwards, to reside more constantly in London, where the Appellant also resided with him.

The Respondent further stated, that in the year 1814, and subsequently, differences sprung up between him and the Appellant; and that in 1819, at the solicitation of herself and her relations, he reluctantly consented to a separation. The articles of agreement entered into on that occasion, dated the 1st of January 1819, and made between the Respondent of the first part, the Appellant of the second part, and her brothers, Viscount Falmouth and the Hon. and Rev. John Evelyn Boscawen, of the third part, recited, that "Whereas circumstances have arisen which have induced the said Sir George War-[491]-render and Dame Anne, his wife, to agree to live separate and apart from each other henceforth, until these presents shall be annulled as hereinafter mentioned," etc.; and, after securing to the Appellant certain annual income, to be paid by the Respondent to her trustees, at such periods and in such manner as therein mentioned, for her separate maintenance during the separation, they contained the following clauses: "That if the said Sir George Warrender shall in any one year be obliged to pay and shall pay any debt or debts of the said Dame Anne Warrender hereafter contracted, to the amount in the whole of upwards of £1010 (the annual sum secured for her separate maintenance), then and thenceforth the covenants of the said Sir George Warrender, hereinbefore contained, shall cease and be void;" and again, "That if the said Sir George Warrender and Dame Anne his wife shall jointly be desirous of annulling these presents, and the agreements and provisions therein contained, and shall signify such desire in writing indorsed on these presents, or on a duplicate thereof, (such writing to be under their joint hands and attested by two credible witnesses,) then and from thenceforth these presents, and every article, matter and thing herein contained, shall cease, determine and be null and void, anything hereinbefore contained to the contrary notwithstanding." On the 6th of February 1819, the Respondent addressed the following letter to the Appellant's brothers, the trustees of the articles: "My Lord and Sir,—Although I have objected to have any clauses inserted in the articles of separation between Lady Warrender and myself, which should contain a permission from me to her to go and reside where she pleases, or which should preclude me from suing her in the Ecclesiastical Court for restitution of conjugal rights, I hereby [492] pledge myself that Lady Warrender shall be at liberty, during our separation, to go and reside where she pleases, and that I will not institute any suit against her, for the purpose mentioned. I am, etc., G. Warrender."

The Respondent in his case further stated, that he and the Appellant had lived separate ever since the date of the said recited articles; he continuing to reside sometimes in Scotland, sometimes in London, as required by his official situation and parliamentary duties; but that the Appellant went to the Continent, and, except one short visit to England in 1821, she had ever since resided abroad, in France, Switzerland, or Italy: that circumstances having lately come to the knowledge of the Respondent, which led him to distrust the Appellant's conjugal fidelity, he, upon an investigation directed by him, satisfied himself that she had, in 1822, formed an improper intimacy with one Luigi Rabitti, a music-master, and had been guilty of adultery with him in that year, and kept up an adulterous intercourse with him through the years 1822, 1823, 1824, 1825, 1826, 1827 and 1828, in Paris, Dieppe and Versailles, all in the kingdom of France; whereupon the Respondent instituted his suit praying for "a decree, finding and declaring the Appellant guilty of adultery, and divorcing and separating her from his fellowship and company; and also finding and declaring the Appellant to have forfeited the rights and privileges

of a lawful wife; and that the Respondent is entitled to marry any person he pleases, sicklike and in the same manner as if he had never been married, or the Appellant were naturally dead; conform to the law and practice of Scotland."

The Respondent's summons of divorce, concluding in these terms, was executed against the Appellant [493] edictically as forth of Scotland,* and a copy thereof was served personally on her at her residence at Versailles.

The Appellant appeared to process, and denying that she had been guilty of conjugal infidelity, she took three preliminary defences to the action: First, that she was not subject to the jurisdiction of the Court, being English by birth, parentage and connection, and never having been in Scotland since the date of the contract of separation; nor had she any Scotch property, except that part of her eventual matrimonial provision was secured over the Respondent's Scotch estate: her plea was, that she was not within the jurisdiction of the Court of Session, even although it were to be assumed or admitted that at the date of the marriage the Respondent was and had ever since been a domiciled Scotchman: the contract of separation, which was fully carried into effect for fourteen years, excluded the application of the Scotch legal fiction, that the domicile of the husband is necessarily the domicile of the wife. Secondly though the appellant should be held amenable to the Court, on the ground of the husband's domicile being in Scotland, and his domicile being the wife's, still she had not been properly cited even in that view: she had only been cited as "forth of Scotland;" whereas, if jurisdiction over her be claimed on any presumption that she was living with the husband in that country, she ought, besides receiving personal intimation, to have been cited as at his residence, or somewhere else in Scotland. Thirdly, that the Appellant being a domiciled Englishwoman at the time of her marriage, [494] and having been married in England according to the rites of the English church and to the English law, her marriage could be dissolved only by Parliament; at all events it could not be dissolved by a Scotch Court, when all the alleged acts of conjugal infidelity were stated to have been committed in foreign countries. The Appellant, in conclusion, insisted, that the marriage being an English marriage, and the Respondent himself being, at the date of both the contract of marriage and contract of separation, a domiciled Englishman, all questions relative to the effect of either of those contracts should be decided according to the law of England; and by that law the marriage was indissoluble, except by Act of Parliament.

The Lord Ordinary, having heard counsel for both parties in these defences, appointed them to give in mutual cases. Before the cases were lodged, the parties being at issue as to the fact of the Respondent's domicile, a joint minute was entered on the pleadings, by which the Dean of Faculty, for the Respondent, stated, "That in the cases to be lodged for the parties, he consented that the preliminary defences should be argued on the assumption that the Respondent was a domiciled Scotchman at the date of the marriage, and had been so ever since; provided always, that the facts stated in the summons for founding his domicile should not afterwards be disputed in discussing the preliminary defences:" and the Solicitor-general, for the Appellant, answered, "that he was willing to discuss the preliminary defences on that understanding, reserving the whole statements respecting the domicile, in so far as they may be of avail on the merits."

Mutual cases were subsequently lodged for the parties, and brought before the Lords of the first [495] division of the Court of Session, who unanimously pronounced an interlocutor, on the 14th of June 1834, repelling the preliminary defences, and remitting to the Lord Ordinary to proceed in the cause (12 Shaw and D. 847).

Lady Warrender appealed from that interlocutor.

The Attorney-general (Sir J. Campbell), and Dr. Addams, for the Appellant:—The Appellant has been for the last twelve years almost constantly resident in France. Denying, in the most unqualified manner, the truth of the charges imputed to her in the summons, she is ready to meet them before the proper tribunal; but she declines pleading before what is to her a foreign Court, where, for many

* An edictal citation is given to defenders out of Scotland, by proclamation at the Market-cross of Edinburgh, and pier and shore of Leith.—Act of Sederunt, 14th December 1805, s. 1; and see Ersk. B. 1, tit. 2, s. 18.

reasons, her defence must be conducted under comparatively great disadvantages: she has, therefore, taken preliminary objections to the action. In arguing those objections, the Appellant is bound to assume, hypothetically, the truth of the statement contained in the Respondent's summons, that he is a domiciled Scotchman. But it is also clear, from his summons, that, from the year 1812 until within a short period before the raising of the action, he had been almost constantly resident in England, and that the Appellant was not in Scotland during the last twenty years. With the exception of two short visits to Scotland soon after the marriage, the parties resided constantly in England until the separation in 1819. On that occasion articles of agreement were executed, and a letter was written by the Respondent, which, bearing express reference to the contract of separation, must be taken as part of that contract, and the obligations which it imposes on him must be con [496]-sidered as effectual as if they were embodied in the agreement. By these articles, which are declared to be irrevocable except by the joint deed of the parties, and by the letter taken as part of them, the Appellant was permitted to reside wherever she pleased; and she accordingly, in the terms of that permission, took up her residence in France, where, except a short visit to England in 1821, she has continued to reside up to the commencement of this action, and where also all the acts of infidelity alleged against her are by the summons charged to have been committed.

The Appellant has been, under these circumstances, advised to take preliminary objections to the action. The first objection is, that as she was not resident within the jurisdiction of the Scotch Courts, it was incompetent to insist against her there, in any action declaratory of her personal *status*. The rule of law in such cases is, *actor sequitur forum rei*. It is true that in the case of *Brunsdon* v. *Wallace* (Fac. Coll. Feb. 1789; S.C. Ferg. Cons. Rep. App. 259), where that rule may be said to have been established, there was a difference of opinion among the Judges; but that difference arose as to the effect to be given to the *forum originis*, as founding jurisdiction. All doubts upon the point were removed by the decision of this House in *Grant* v. *Pedie* (1 Wils. and Shaw, 716); so that, notwithstanding the seemingly different decree pronounced in the case of *Pirie* v. *Lunan* (Fac. Coll. March 1796; S.C. Ferg. Cons. Rep. App. 260), it may be now considered as settled law in Scotland, that even in the case of a marriage contracted in that country, the Courts there have no jurisdiction to dissolve it, unless the defender is a domiciled native, or resident within the jurisdiction for forty days before summons served.

[497] The rule having been laid down in the cases referred to, and the principle having been recognised in subsequent cases, that in all actions in which the wife is the complainant it is necessary, in order to found jurisdiction, that the husband be a domiciled Scotchman, or resident in Scotland for a certain time anterior to the date of citation: the question then is, whether, in administering the remedy of divorce, which, by the law of Scotland, is competent to the wife as well as to the husband, a different rule is to be applied in determining the question of jurisdiction when the husband is the complainant? That a wife may, in point of fact, be resident in a different country from her husband, is undeniable; but it may be maintained, as a proposition founded on principle and supported by legal authority, that as the *consortium vitae* is the object of matrimony, and as it is the duty of the parties to live together, therefore, in all cases, the Court will hold the domicile of the husband to be also the domicile of the wife. That such is the general rule of law in Scotland, as in England, the Appellant has no occasion to dispute: she is well aware of the legal maxim, and that full effect was given to it in the case of *French* v. *Pilcher* (Fac. Coll. June 1800; S.C. Ferg. Cons. Rep. App. 262); but, like every other general rule, it may be subject to exceptions, and may be qualified by the acts of the parties. It may be true that the house of her husband is the legal residence of the wife, and that, whenever it is necessary to cite the wife for her interest, a citation at the house of her husband may be a good citation. Such is the import of the case of *Chichester* v. *Lady Donegal* (1 Add. Eccle. Rep. 5-19), where a citation for the wife, left at the [498] house of her husband, with whom she was then cohabiting, was held to be a good citation. The rule obtains, too, whether the wife be, in point of fact, resident in her husband's house or not, provided there has been no separation between them, either awarded by law or consented to by the parties. Accordingly, a wife who elopes with her paramour from her husband's house in Scotland, and goes into a foreign country, is still subject to the

jurisdiction of the Scotch Courts in an action of divorce, since her absence from her husband's house is, on her part, a gross breach of duty, on which she can found no plea in aid of her defence. But the case is different when the parties are separated by voluntary agreement, or by the sentence of a Judge. In such cases, the wife, in living separate from her husband, is guilty of no breach of duty: she is entitled to acquire a domicile for herself, which, as it is her actual domicile, must also be held to be her legal domicile, in questions with third parties, and above all, in questions with her husband, the party to the deed of separation.

The application of the legal fiction, which makes the husband's house the legal and proper domicile of the wife, is excluded in this case by the deed of separation. That deed, which was executed in England, all the parties to which, except the Respondent, were English, was irrevocable except by the consent in writing of the principal parties, and the Appellant never consented to revoke it. The validity of this deed was placed beyond all doubt by the case of *Tovey* v. *Lindsay* (1 Dow, 117) in this House, and was not affected by the cases of *Beeby* v. *Beeby* (1 Hagg. 142), *Sullivan* v. *Sullivan* (2 Addams, 299), *Worrall* v. *Jacob* (3 Meriv. 256), or the passages which [499] may be cited for the Respondent from Roper's Law of Property of Husband and Wife. These cases show that a deed of separation does not bar a suit for divorce, nor alter the legal condition of the parties resulting from the state of marriage. *Marshall* v. *Rutton* (per Lord Kenyon, C. J., 8 T. Rep. 547); but they decide no question of domicile or of jurisdiction. The deeds in those cases were revocable by either party at any time, and each of them was virtually revoked by the mere act of executing the summons of divorce. It is no part of the argument for the Appellant that a separation, whether judicial or voluntary, excludes either party from the remedy of divorce for adultery: all that she insists upon is, that the trial of such action must be subject to the ordinary rules regulating jurisdiction in other matters; and that if a wife is legally resident in a foreign country, having acquired a domicile there, it is not more competent for the husband to cite her to a Scotch Court, than it would be for a wife to cite to the same Court a husband legally domiciled in England. The agreement entered into by those parties, whether it be practically productive of inconvenience to the husband or not, is a conclusive answer to all his arguments founded on the fiction of law in respect to domicile. The remedy of divorce is in Scotland, as in England, a purely civil remedy, of which the injured party may or may not take advantage; a remedy which the law will infer, from certain acts of the party, to have been abandoned or forfeited. Either party, after detecting and being in a condition to prove the infidelity of the other, may still decline to sue for a divorce, or may continue to cohabit with the other, which amounts to condonation, and excludes the right [500] to obtain a divorce; or there may be connivance at the offence, amounting to what is termed *lenocinium*, which is a complete bar to any action of the kind. If there are so many ways in which a husband may abandon his right to demand a divorce, how can it be maintained, with any show of reason, that a deed of separation is absolutely void, merely because the party chooses to allege that an adherence to its express terms will render the attainment of his remedy only a little more difficult, tedious and expensive? Questions of jurisdiction may often arise in Courts of Law, on account of the foreign residence of one or other of the parties; but of the jurisdiction of Parliament to legislate upon the rights of two natural-born subjects there is no doubt. While that tribunal, and the Ecclesiastical Courts of England, are open to the Respondent, he has no reason to complain of being remediless.

The question now at issue was fully considered, both in the Court of Session and in this House, in the case of *Lindsay* v. *Tovey* (Fac. Coll. June 1807; S.C. Ferg. Cons. Rep. App. 265). The circumstances of that case are these: Martin Eccles Lindsay, born and educated in Scotland, entered the army, and went with his regiment to Gibraltar, where, in 1781, he married Miss Tovey, an Englishwoman, and they remained there till 1784; from that time they resided together in Scotland until 1792, when they went to live at Durham. The husband soon afterwards went abroad with his regiment, his residence being regulated by the orders of his superiors. In 1802 a deed of separation was executed at Durham, by which Mrs. Lindsay accepted an annuity: the deed also declaring, that "the said M. E. Lindsay shall and will [501] permit and suffer the said Augusta Margaret Tovey Lindsay to live, inhabit and reside separate and apart from him, in such place as she shall think proper," etc. In

1804 Mr. Lindsay raised against her an action of divorce for adultery before the Commissaries of Edinburgh, Mrs. Lindsay at the time being in Durham. A preliminary objection was taken by her to the jurisdiction of the Commissaries, but they sustained their jurisdiction. The case was brought by appeal before the Court of Session. Two questions were raised in the progress of that suit: first, whether the pursuer was a domiciled Scotchman; secondly, whether, if he was, it necessarily followed that his wife was also in the eye of the law domiciled in Scotland, she being, in fact, resident in England, in the terms of the deed of separation. To the argument for the defender, founded on that deed, it was answered, that it was by its very nature a revocable deed, and was virtually revoked by the summons of divorce. The Court of Session, adopting that view, sustained the jurisdiction of the Commissaries. The interlocutor of the Court of Session being appealed from to this House, Lord Eldon said, with reference to the objection to the jurisdiction by reason of the deed of separation, "Even if the fiction or rule of law were admitted, that the *forum* of the wife followed that of her husband, so as to give jurisdiction to the Scotch Courts, still the effect of the deed must be to put an end to that rule or fiction till the deed was revoked. The husband himself had agreed that their *forum* should be different, if the wife so pleased, and then he endeavoured by this process to get rid of the effect of his own agreement" (1 Dow, 138). Lord Redesdale, **[502]** concurring in the observations of Lord Eldon, said, "When it was considered that, on the principles of this decision of the Court below, any one, from any quarter, might go and establish a domicile in Scotland, and by that means, even in the face of a deed of separation, draw his wife to a Scotch *forum*, and proceed against her for an absolute dissolution of the marriage, the question must appear to be one of very great importance. If this were to prevail, any person had it in his power to alter the nature of his solemn engagements, etc. It could not be just, that one party should be able, at his option, to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed" (1 Dow, 139).—[Lord Lyndhurst: These opinions of those eminent Judges were not delivered as a judgment, and they appear to go on a misapprehension of some of the facts.]—Their opinions are not cited as a judgment; no judgment was pronounced by this House on that case, except to remit it for consideration to the Court below, and Mr. Lindsay died in the meantime. The observations of these eminent persons have been cited as being entitled to the greatest attention, and being applicable to this case, which has this additional feature, that the deed of separation was declared not to be revocable except by the joint written consent of the Respondent and Appellant.

The Respondent has alleged, as another argument for the Scotch jurisdiction, that as the Appellant was infeft in real estate in Scotland in pursuance of her marriage contract, she must be held as domiciled there, where the subject of her settlement was situated.—[Lord Brougham: Do you, Sir Wm. Follett, **[503]** mean to support your case on that ground?—Sir Wm. Follett: Certainly not.]—That being the only circumstance that distinguished this from a purely English marriage, if the argument arising from it be abandoned, Lady Warrender is in the same situation in which Mrs. Lindsay was,—liable to be sued in England, but not amenable to the jurisdiction of the Scotch Courts.

The second plea to the action is, that even if, according to the legal fiction, the domicile of the husband should be held to be the domicile of the wife, still the Appellant has not been duly cited to appear to this action. This is a point of practice in Scotland, best known to the practitioners there. The facts agreed upon are, that the summons was executed against the Appellant edictally, as forth of Scotland; that is, by proclamation at the market-cross of Edinburgh, and pier and shore of Leith: it was also personally intimated to her, by service of a copy on her at her residence at Versailles. But if the Appellant is to be held as resident at her husband's in Scotland, it plainly follows that the summons should be served against her at her husband's house; and it is a contradiction to cite her as forth of Scotland, when it is insisted that by fiction of law she is resident in Scotland, and when it is that fiction alone which renders this action competent. This objection to the service occurred in the case of *French* v. *Pilcher* (Fac. Coll. June 1800; S.C. Ferg. Cons. Rep. App. 262), and it was stated from the Bench in Scotland, that the defender should be cited not only at the market and pier and shore, but also at the house of her husband. The

personal intimation, which may be required *ad majorem cautelam*, did not supply the want of a regular execution of the summons. The Respondent, while he [504] rested his whole case on a legal fiction, rejected the fiction altogether in the execution of the summons.

The last and main ground of objection to the suit in Scotland is, that even if the Appellant were amenable to the jurisdiction of the Court there, it is incompetent for that Court to dissolve this marriage, contracted in England, with an Englishwoman, and celebrated according to the rites of the English Church. This objection goes to the extent, that although the evidence of adultery were clear and conclusive, yet no Court of Law can dissolve this marriage; no Court of Law is competent to take cognizance of the conclusion of the summons. The general result of cases decided even in Scotland, such as *Edmondstone* v. *Edmondstone*, *Forbes* v. *Forbes*, and *Levett* v. *Levett* (Ferg. Cons. Rep. pp. 68, 168, 209), comes to this, that an English marriage cannot be dissolved for adultery by the Scotch Courts, unless the adultery was committed there, and the party cited be domiciled there. But the authority on Lolley's (Fac. Coll. March 1812, and Russ. and R. C. C. 237) case is quite decisive on this question. Lolley had been married in England: his marriage was dissolved by the Commissary Court in Scotland: he thereupon contracted a second marriage in England, for which he was tried and convicted of bigamy. In that case, which is entitled in Scotland, in the action of divorce, *Sugden* v. *Lolley* (Sugden being the maiden name of the wife), the adultery was charged to be committed in Scotland, and the defender was actually residing there; two material ingredients which do not belong to the present case. If the English Judges did not intend to break in upon the jurisdiction of the Scotch Courts, Lolley was unjustly convicted of bigamy, and was illegally sentenced to transportation. But there is no question that Lolley's case was well decided, and the principle [505] of the decision is, that the contract of marriage, like other personal contracts, is to be construed according to the law of the country where the contract was made. In Scotland, marriages may be dissolved for adultery or desertion; in Prussia, for incompatibility of temper; in France, for any cause that either party may assign; but an English marriage cannot be dissolved, except for adultery, nor even then by any principal tribunal in England; and that which was the principle of the decision of the twelve Judges in Lolley's case, has been adopted by one of their Lordships very recently, in *M'Carthy* v. *Decaix* (*vide infra*), in the Court of Chancery, and by an eminent Ecclesiastical Judge, in the case of *Beazley* v. *Beazley* (3 Hagg. 639).

It is not denied that many decisions have been from time to time pronounced in the Scotch Courts, supporting the Respondent's case to the fullest extent: but not one of those cases has been appealed from; for they were all collusive. The present case is the first which gives this superior tribunal an opportunity of settling the law. This House, having regard to the morals of the people, will be more inclined to restrict than extend the facility of divorces. The reasons given by the Court below for sustaining their jurisdiction are far from being satisfactory (12 Shaw and D. 847-854).—[Lord Lyndhurst: The Judges in Scotland hold, that if other contracts made in England are dissoluble, so is the contract of marriage.—Lord Brougham: It cannot be contended that all the effects of a contract in one country are to be attributed to it in another country: if that were so, children born before the marriage of the parents, being legitimate in Scotland, should be held legitimate in England.]—They are legitimate in England; but they are not heirs, and that is by reason [506] of the statute of Merton (*vide infra Birthwhistle* v. *Vardill*). It is not to be denied that the Scotch Courts may dissolve a Scotch marriage—a dissoluble marriage—either for adultery or for non-adherence; as in Prussia a marriage is dissoluble for incompatibility of temper. But the Ecclesiastical Courts of England have not jurisdiction to dissolve a valid marriage for any cause. The Judges in Scotland, in their reasoning in this case, evade the chief question: they have admitted that their decisions were broken in upon by Lolley's case, and the Appellant insists that the decision in her case is inconsistent with that case. Much of the fallacy in this case arises from the false assumption, that this marriage was a Scotch contract: if a native of Russia came to this country, and married here, is that contract of marriage to be regulated by the laws of Russia or of England? It is alleged that the contract was Scotch, because Sir G. Warrender says, he intended to reside

in Scotland. But in fact he did not act according to his alleged intention, for he chiefly resided in England; and an intention never acted upon must be construed as an intention never entertained; *Bruce* v. *Bruce* (2 Bos. and Pull. 229). The basis of the decision of the Scotch Court was, that there was nothing in the legal character of an English marriage that made it incapable of being dissolved by the sentence of a Court of Law; whereas it is well established in this country, that judicial indissolubility is a legal quality of every English marriage. It is true that the Scotch Courts have dissolved many marriages on the principle which they assert; but in most of these cases the adultery was charged as having been committed in Scotland; a circumstance which distinguishes this case from them.

[507] It is no argument to be addressed to this House, to say that the decisions of the Courts below have been many and uniform in support of their jurisdiction; in fact, that circumstance makes it imperative on this House to declare the law.—[Lord Brougham: I should like to have some authority for the assertion, that this House is not bound by a uniform course of decisions, not one of which has been appealed from.]—It is well known that effect had been given for two hundred years to general bonds of resignation, and that there had been a uniform course of decisions on them until the case of the *Bishop of London* v. *Ffytche* (2 Bro. P. C. 211), brought on writ of error to this House, reversed them all. The decisions in Scotland have not been uniform, as may be collected from the cases of *Gordon* v. *Pye*, *Brunsdon* v. *Wallace*, *Morcomb* v. *Maclelland*, and several others (Ferg. Cons. Rep. App. pp. 276. 259. 264). The question is now brought for adjudication to this House; it becomes necessary to settle the law; and it does not follow that, if this decision is reversed, that reversal can have any effect on a former decision which was not appealed from.

Sir William Follett and Dr. Lushington, for the Respondent:—The question put in issue by the Appellant's first plea is, whether it was competent for the Respondent to institute a suit for a divorce against her in the Scotch Courts, while she was living apart from him under a deed of separation, and actually residing in a foreign country? The Respondent is a Scotchman by birth, education, residence, and possession of property; his proper and unquestionable domicile is in Scotland. It is a fact, formally admitted in this case, that he is now and ever has been a domiciled Scotchman. The question then is, was Lady [508] Warrender domiciled in Scotland when the suit was instituted? She was, it is true, an Englishwoman up to the time of her marriage. The effect of that marriage was, that she lost her domicile of origin, and took the domicile of her husband. It is a rule of law, admitted in the municipal code of all states, that the *forum* of the husband is the *forum* of the wife. By entering into the marriage contract, the wife leaves her own family, and comes under the obligation to follow the fortunes of her husband, in whom the law vests a curatorial power over her: by the marriage her separate interests merge in those of the husband; her separate character is lost in his, and she is no longer capable of retaining the domicile which she had before the marriage, or of acquiring any other separate from that of her husband. The soundness of this principle was once questioned by the Commissary Court in Scotland, but was sustained by the Court of Session on appeal; *French* v. *Pilcher* (*Ubi supra*, p. 497). The principle has been followed ever since, not only in Scotland, but also in the Consistorial Courts of England; *Chichester* v. *Marchioness of Donegal* (1 Add. Eccl. Rep. 5-19). Although the question of domicile was not the point at issue in that case, yet the Judge observed, "Was not the Consistory Court of London the legal jurisdiction, notwithstanding her (the defendant's) actual residence, during a certain period, in Ireland? A party may have two domiciles, the one actual and the other legal; and, *primâ facie* at least, the husband's actual and the wife's legal domicile are one, wheresoever the wife may be personally resident. It is admitted that the husband's domicile is within the diocese of London." The civil law concurs with the law of England and of Scotland [509] in holding, that the domicile of a married woman depends not on the place of her own residence, but on the domicile of her husband (Cod. Lib. 10, t. 39, sec. 9; Voet ad Pand. Lib. 23, t. 2, sec. 40; Lib. 5, t. 1, sec. 101; Stair's Inst. B. 1. tit. 4, sec. 9; Loth. Consist. Law, p. 136).

The general rule is strengthened in this case by the peculiar consideration, that the husband being a domiciled Scotchman at the time of the marriage, having neither residence nor property in England, and also the wife's fortune as well as the other

family provisions being secured on his Scotch estates, the marriage must be taken to be a Scotch contract, although it was had and solemnized in England. It is clear, from these circumstances, that both the parties had a view to Scotland when they entered into the contract. Huber thus lays down the law: *Non ita precise respiciendus est locus in quo contractus initus est, etc. Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit. Proinde et locus matrimonii contracti non tam is est ubi contractus nuptialis initus est quam in quo contrahentes matrimonium exercere voluerunt* (De Conflictu Legum, sec. 10). Lord Mansfield also, in *Bland* v. *Robinson* (1 Sir Wm. Black. Rep. 258), said, "The general rule established, *ex comitate et jure gentium*, is, that the place where the contract is made, and not where the action is brought, is to be considered in the expounding and enforcing the contract. But this rule admits of an exception, where *the parties at the time of making the contract had a view to a different country.*" It is impossible to deny that the marriage of these parties was entered into *intuitu* of a Scotch domicile; and it must, therefore, be considered as a Scotch contract; [510] and consequently the Appellant must be held, in respect of her husband's admitted domicile, to be amenable to the jurisdiction of the Scotch Courts. If the cases of *Brunsdon* v. *Wallace*, *Pirie* v. *Lunan*, and *Sharpe* v. *Orde*, cited for the Appellant, have any bearing on this point, they will be found to sustain the Respondent's case.

But Lady Warrender, though she admits the general rule that the actual domicile of the husband is the *forum* of the wife, still insists that her case is an exception, inasmuch as by the deed of separation she had her husband's permission to live apart from him and to choose her own domicile, of which permission she availed herself; and for this position she relies on the observations of Lords Eldon and Redesdale in *Tovey* v. *Lindsay* (1 Dow, 117). The Respondent answers, that she had not capacity to acquire a separate domicile independent of his; there was no covenant in the deed of separation binding him to permit her to live where she pleased, or restraining him from suing her for conjugal rights. His letter bound him in honour not to interfere with her choice of residence during the separation, but it was not intended to dissolve the matrimonial engagement, and release her from all liability to answer in the *forum* of the husband. The letter was not under seal; was not part of the deed, and is not better than waste paper as affecting process or jurisdiction. Even if it had been incorporated in the deed, it would not have any effect, as the Respondent might put an end to the deed at any time, even by the summons of divorce. The principle of the law of Scotland, deduced from the cases decided there, is, that all voluntary separations are [511] revocable, although they bear to be irrevocable *ex facie* of the deeds, except where the separation has proceeded *propter saevitiam* of the husband, or is sanctioned by judicial authority. The marriage being the radical and the original contract, and separation being contrary to the implied inherent condition, and to the duties, of the married state, the law allows either party to revoke expressly, at any time, a contract of separation; and such contract is void by the fact of the parties again living together, or by either suing the other for restitution of conjugal rights, or for divorce; *Fletcher* v. *Fletcher* (2 Cox, 99), *Bateman* v. *Ross* (1 Dow, 235). So also by the law of the Ecclesiastical Courts of England, the relation of husband and wife must, notwithstanding deeds of separation, continue complete until it is dissolved by decree *à mensa et thoro*, or *à vinculo*; *Mortimer* v. *Mortimer* (2 Hagg. 318), *King* v. *Sansom* (3 Add. 277), *Beeby* v. *Beeby* (1 Hagg. 142), *Sullivan* v. *Sullivan* (2 Hagg. 239; S. C. 2 Add. 299-303). In this last case Sir John Nicholl says, "These Courts have so repeatedly said that such deeds of separation are no bars either to suits for conjugal rights or to charges of adultery, that it would be superfluous to combat this argument." (that a deed of separation was a bar to the husband's prayer for a divorce). "I see no more in this deed than the ordinary class of provisions for enforcing, as far as it may be, the continuance, and preventing the termination, of the separate state, in which the parties covenant to live, by means of a suit for restitution brought by either, which nearly in all cases find their way into deeds of this nature, though nugatory as to any binding effect [512] on the parties." Neither do the Courts of Equity give effect to deeds of separation, further than to enforce, reluctantly, during the separation, the payments stipulated by the husband to the wife's trustee, whose covenant to indemnify the husband against her debts is held to be a sufficiently valuable con

sideration; *Wilkes* v. *Wilkes* (2 Dick, 791), *Legard* v. *Johnson* (3 Ves. jun. 352), *Worrall* v. *Jacob* (3 Meriv. 256), *St. John* v. *St. John* (11 Ves. 526). Mr. Roper, in his Treatise of the Law of Property of Husband and Wife, refers to other cases, and deduces from them this general conclusion, that Courts of Equity will not infringe on the jurisdiction of the Ecclesiastical Courts, by enforcing the performance of a mere personal contract entered into between husband and wife to live apart from each other (2 Roper, 265-287). It has also been held by the Courts of Common Law, that those deeds do not affect the rights or relation of the parties, and that husband and wife cannot by any private agreement alter the character and condition which by law results from the state of marriage, while it subsists; *Marshall* v. *Rutton* (8 T. Rep. 546), *Beard* v. *Webb* (2 Bos. and Pull. 93-107). The law, as thus established in all the Courts of England as well as in Scotland, is not, in the least, affected by the case of *Tovey* v. *Lindsay* (1 Dow, 117), which differed from this case in the very material circumstance, that Major Lindsay was not held to be a domiciled Scotchman at the date of the deed of separation, or when he sued for the divorce. Lord Eldon having a doubt upon that point, being inclined to think his domicile was at Durham, and being also **[513]** impressed with the circumstance that the then recent decision of the English Judges in *Lolley's* case had not been brought before the view of the Judges of the Court of Session, recommended a remit, for the purpose of reconsideration, but there was no final decision ever afterwards pronounced here or in Scotland; so that the case so much relied upon by the Appellant, does not affect this case one way or the other. It would be great injustice to Lord Eldon to say, that if Major Lindsay had his domicile in Scotland, his Lordship could entertain any doubt that the Courts there had jurisdiction, in the face of *Lauder* v. *Vanghent* (Fac. Coll. 27th February 1692; S. C. Ferg. Rep. App. 250), *M'Donald* v. *Fritz* (Fac. Coll. 26th March 1813; S. C. Ferg. Rep. App. 273), and numerous other cases which have never been impugned. In the cases of *Brunsdon* v. *Wallace* (Fac. Coll. 9th February 1789; S. C. Ferg. Rep. App. 259), and *Morcombe* v. *Maclelland* (Fac. Coll. 27th June 1801; S. C. Ferg. Rep. App. 264), the actions were dismissed on the ground that the defenders (the husbands) had not domicile in Scotland; the attempts made in both cases to found jurisdiction on domicile *ratione originis*, failed. In the present case it is a fact admitted, that the Respondent had actual domicile in Scotland, both at the date of the marriage and of the commencement of the action.

The second plea of the Appellant is to the manner of the citation: she insists, that if her domicile be held to be at the dwelling-house of the Respondent, then she ought not to have been cited edictally, as forth of Scotland, but the citation should have been left for her at the Respondent's dwelling-house. But it is the practice in Scotland to cite a party edictally, if he or she be absent from the country above forty **[514]** days. The Appellant having been absent for that and a longer period, she was properly cited edictally; and, for the purpose of giving her actual notice of the suit, and as a measure of precaution, the summons was served personally on her, at her temporary residence in France. By the Scotch Judicature Act (6 Geo. 4, c. 120, s. 53) it is declared, "That where a person, not having a dwelling-house in Scotland, occupied by his family or servants, shall have left his usual place of residence, and have been absent forty days without having left notice where he is to be found, within Scotland, he shall be held to be absent from Scotland, and be cited according to the forms prescribed." And by the Act of Sederunt, (14th of December 1805, s. 1.) "It shall in time coming be held, that a person after forty days' absence from his usual place of residence, is forth of the kingdom of Scotland; and the citation, after that period, must be at the market-cross of Edinburgh, and pier and shore of Leith," etc. There can be no doubt that in this case edictal citation, accompanied with personal notice, was the proper course to be observed.

The third plea and ground of appeal, is the alleged indissolubility of this marriage by the Courts of Scotland. The Respondent conceiving that so much of this plea as was not contained in the first preliminary defence, was involved in the merits of the action, which the judgment of the Court below did not at all touch; and being also advised that by the 6 Geo. 4, c. 120, s. 5, any appeal against the interlocutory judgment was incompetent: presented a petition to this House against entertaining it. The Appeal Committee, to whom that petition was referred, sus-**[515]**tained the appeal, on the ground that the judgment of the Court below did decide

the principle, that an English marriage might be dissolved by a Scotch Court. In deference to that opinion of the Appeal Committee, the Respondent has undertaken to sustain the competence of the Court of Session to entertain the action. He is a Scotchman by birth and connexions and estates; he was married in England during a transient visit to that country, without any intention then or at any time to make it his permanent abode. It is evident, from the antenuptial contract, that the marriage was entered into with a view to residence in Scotland; the rights and obligations arising out of the marriage contract were to be performed in Scotland; and although England was the place of celebration, yet it was essentially a Scotch contract, and must be regulated in all its relations and consequences by the rules of Scotch law. The question for the decision of the House is not whether indissolubility is an inherent element in a marriage contracted in England between two English parties; this House, sitting on this case as a Scotch Court of Appeal, is not to consider what effect the English Courts of Law, either civil or criminal, would give to a divorce pronounced by a Scotch Court.

The argument for the Appellant on this part of her case is, that the contract of marriage is to be governed by and according to the law of the country where the contract is entered into. There is a fallacy in that argument: it is true, that in all questions of *status* or personal obligation, the constitution of the contract is governed by the *lex loci contractus;* that is, the questions whether the contract was valid or void, whether the requisite forms and solemnities for completing the contract were duly complied with, [516] must be determined by the law of the country where the contract was made: but where questions arise about enforcing or expounding the contract, or about granting redress to one party for a breach of its obligations by the other, these must be decided by the law of the country which the parties had in view with reference to its fulfilment. Marriages at Gretna Green between English parties, duly performed according to the Scotch form, are valid in England; it is the law of Scotland that determines their validity or nullity, but all the obligations arising from the conjugal relation are regulated by the laws of England; so much so, that a wife so married is entitled to dower out of her husband's English estates, though not to her terce out of his property in Scotland, if he should happen to have any there; *Ilderton* v. *Ilderton* (2 H. Black. 145). The *lex loci contractus* cannot prevail, unless the parties had, in entering into the contract, reference to the same place for the fulfilment of its obligations; for if the *forum* of the contract were to prevail against the *forum* of the real domicile, a contract entered into in a foreign country, during one day's visit, would be governed by the laws of that country, and not by those of the country of the parties' birth and permanent residence; which would be too absurd. In a recent case, *Anstruther* v. *Chalmers* (2 Sim. 1), in the Court of Chancery, it was held that the will of a Scotchwoman, who was domiciled in England, and who, during a visit to Scotland, executed there, in the Scotch form, a will of personal property, deposited it there, and died in England, was to be construed by the English law. All writers on the civil law lay it down as an acknowledged rule, that the import and effect of all ordinary civil con-[517]-tracts are to be determined by the law of the place of performance, to which alone the contracting parties are presumed to have reference. *Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit*, are the words of Julian in the Pandects (Lib. 21, tit. *De obligationibus et actionibus*). There are numerous cases decided by the Courts in Scotland, establishing the general rule, that questions relating to the negotiation of bills of exchange are to be decided by the laws of the place of payment, and not of the place of contract. *Brown* v. *Crawford* (Morr. 1587), *Stevenson* v. *Stewart* (Morr. 1518), *Watson* v. *Renton* (Bell's Rep. 103), *Armour* v. *Campbell* (Morr. 4476). The same rule has been adopted by the English Courts of Law, as in *Robinson* v. *Bland* (1 Wm. Black. Rep. 256). This doctrine applies with equal force to the contract of marriage, and it is so expressly stated by Huber (De Conflictu Leg. sec. 10), whose words, as also those of Lord Mansfield in *Robinson* v. *Bland*, have been already quoted (P. 509 *supra*). This marriage, therefore, on the authority of the civilians and of the cases cited, must be dealt with as a Scotch contract, and its obligations construed and enforced by the laws of Scotland, where they were intended to be performed. There is no reason to apprehend that the affirming of the interlocutor now appealed

from will produce any conflict between the jurisdiction or decisions of the Scotch and English Courts, as this case is distinguished from those of *Sugden* v. *Lolley*, and *Beazley* v. *Beazley*, by the material circumstance that in these the husband and wife were English, were domiciled in England, and it was there that all **[518]** the obligations arising out of the contract of marriage were to be performed.

The cases of *Ryan* v. *Ryan* (2 Phil. 332), and of *M'Carthy* v. *Decaix* (vide *infra*), cited in behalf of the Appellant, have no bearing on the question for the decision of the House. The observations attributed to a noble and learned Lord, in the latter case, were not necessary for the decision of that case, and can only have the authority of an extrajudicial *dictum*. The case of *Lolley* must be confined to the circumstances on which the twelve Judges adjudicated, and is not to be extended. Subsequently to that case, and with full knowledge of it, the Judges of the Court of Session asserted their jurisdiction over a marriage contracted in England, *Edmonstone* v. *Edmonstone* (Ferg. Cons. Rep. 168), thereby following up a long series of uniform decisions. This House, sitting as a Scotch Court of Appeal, is bound to recognize those decisions, which have never been questioned. The case of *The Bishop of London* v. *Ffytche* (2 Bro. P. C. 211) was referred to for the purpose of showing, that a judgment pronounced on the authority of decisions long acquiesced in, might still be reviewed and reversed by this House. That case, indeed, was reversed in this House, by nineteen against eighteen; all the bishops on one side, against all the lawyers, except Lord Thurlow, on the other. It is better for the Respondent that such a decision should be quoted against him than for him. If two foreigners, Prussians for instance, (with whom incompatibility of temper is ground of divorce,) met on a visit in this country, and were married here and returned to Prussia, could it be maintained that the Courts of **[519]** Prussia have not power to dissolve that marriage for any cause whatsoever, but that the parties are to be released from the contract only by Act of the English Legislature? If two English persons, travelling in France, meet and marry there, and return to this country, could not the husband, after discovering the wife's adultery, apply to the tribunals of his domicile for such remedy as they could afford him, although the Courts of the place of the contract would afford none? The law of England does not allow any valid marriage to be dissolved *à vinculo*, by the Courts of Law; but the Scotch Courts have the power to entertain those actions, and have frequently exercised it. The question here is, not what effect the divorce granted in Scotland would have in England, but it is, whether the Courts of Scotland have, by the law of Scotland, the power to divorce on proof of adultery.

Dr. Addams, in reply:—The whole of the argument for the Respondent is put on the fact of his domicile being in Scotland when the action was raised. The Appellant had not her residence then in Scotland, either in fact or in law. It is not alleged that her actual residence was there, and the fiction of law is excluded by the deed of separation, which was not revoked when the action was commenced. It is a fallacy to say that the marriage of these parties was a Scotch contract; for the marriage was performed in England, the Appellant was an Englishwoman, and the Respondent was residing in England. If a Spaniard or other foreigner came to this country and married an Englishwoman here, according to the law of England, could it be said, that that was a Spanish and not an English marriage? There cannot be a doubt, **[520]** that if the interlocutor be affirmed, the Court below will proceed, on proof of adultery, to dissolve this marriage, whether it is Scotch or English. The Commissaries in Scotland were generally inclined against the assumption of this power, but they were overruled by the Judges of the Court of Session. The case of *Gordon* v. *Pie* (Ferg. Cons. Rep. App. 276, 357) was the first English marriage over which the Court of Session assumed jurisdiction, by remitting that case to the Commissary Court, with instructions to proceed; but there were numerous cases previous to that, in which the jurisdiction was declined; *Brunsdon* v. *Wallace*, *Morcombe* v. *Maclelland*.—He further cited, for the purposes of his argument, *Dalrymple* v. *Dalrymple* (2 Hagg. 58), and *Anstruther* v. *Adair* (2 Myl. and K. 513); and many of the cases already referred to.

The Lords took time to consider the case.

Lord Brougham:—Sir George Warrender, a Scotch baronet, possessed of large hereditary estates in Scotland, born and educated in that country, and having

there his capital mansion, where he resided the greater part of the year, except when he held office or was attending his parliamentary duties in England, intermarried in London, in 1810, with the daughter of the Viscount Falmouth, Anne Boscawen, who was born and educated in England, and never had been in Scotland previous to the marriage. After that event, she was twice there with her husband, but subsequently he resided for the most part in London, to discharge the duties of Lord of the Admiralty and [521] Commissioner of East India Affairs; offices which he held from 1812 to 1819, inclusive. In the latter year, at the end of much domestic dissension, a separation was determined upon, and an agreement executed by the parties; in which, after setting forth by way of recital only their having agreed to live separate, Sir George bound himself to allow Dame Anne Warrender a certain annuity; and it was further agreed that the agreement shall only be rescinded by common consent, and in a certain specified manner. A letter was written by Sir George, bearing equal date with the agreement, and addressed to the trustees under the marriage settlement. In this he stated that he had refused to insert any provision for her being allowed to live apart, in order that he might not be precluded from suing, if he chose, for restitution of conjugal rights, but also stating that it was not his intention ever to do so, or to interfere with or molest her in the choice of a residence. The marriage settlement had secured her a jointure upon the Scotch real estates; upon which fact it is now admitted that nothing can turn, except that it may serve the better to show the connexion of the parties and the contract with Scotland.

These are the facts, and the undisputed facts of this case. I say undisputed; for the attempt occasionally made in the course of the Appellant's argument, to create some doubt as to Sir George Warrender's Scotch residence and domicile, cannot be considered as persisted in with such a degree of firmness or uniformity as to require a discussion and a decision of the point, in order to clear the way for the very important legal question which arises upon these plain and undeniable statements.

[522] In 1834, after the parties had lived separate for fifteen years, Sir George's residence being, during the latter part of the time, almost constantly on his Scotch estates, and Lady Warrender's varying from one country to another—a few months in England, generally in France, and occasionally in Italy—Sir George brought his suit in the Court of Session (exercising, under the recent statute, the consistorial jurisdiction formerly vested in the Commissaries) for divorce, by reason of adultery alleged to have been committed by his wife. Lady Warrender took preliminary objections to the competency of the suit, under three heads: First, that the summons of divorce was not served on her at her husband's residence, so as to give her a regular citation; secondly, that the Court had no jurisdiction, inasmuch as the wife's domicile was no longer her husband's after the separation;* thirdly, that even if the service had been regular, and the two domiciles one and the same, and that domicile Scotland, the marriage having been contracted in England, and one of the parties being English, no sentence of a Scotch Court could dissolve the contract. To these several points I propose to address myself in their order.

The first need not detain us long. It is clear, that if the wife's domicile is not in Scotland, her being cited or not cited at the mansion is wholly immaterial; and the minor objection of irregularity merges in the exception to the jurisdiction: and if the wife's domicile was in Scotland, it must be her husband's, which, indeed, the objection supposes; and then the [523] argument amounts to this, that Sir George should have served himself with a notice, by way of regularly serving his wife. Surely it is unnecessary to show that such a proceeding would have been nugatory, not to say ridiculous, and that the omission of it can work nothing against the validity of the notice. Lady Warrender had, it is admitted on all hands, personal service and full notice of the proceeding against her; nor was any reliance placed upon her domicile in contemplation of law, (that is, her husband's domicile,) being sufficient to exclude the necessity of bringing notice, in point of fact, home to her. If the preliminary objection to the service is good for anything, it is good to show

* The order in which these two objections were pleaded and argued is here reversed.

that the pursuer might have served a notice on her whom he knew to be some hundreds of miles distant, by leaving it for her in his own house, and then have considered this as good and sufficient service, without personally notifying his intended suit to her, or serving her with the summons which he had filed. We may therefore come at once to the serious and more substantial exceptions taken against the jurisdiction; the first of which arises upon the domicile, as affected by the articles of separation.

Secondly, It is admitted on all hands that, in the ordinary case, the husband's domicile is the wife's also; that, consequently, had Lady Warrender been either residing really and in fact with her husband, or been accidentally absent for any length of time, or even been by some family arrangement, without more, in the habit of never going to Scotland, which was not her native country, while he lived generally there, no question could have been raised upon the competency of the action as excluded by her non-residence. For actual residence—residence in point of fact—signifies nothing in the case of a married woman, and [524] shall not, in ordinary circumstances, be set up against the presumption of law, that she resides with her husband. Had she been absent for her health, or in attendance upon a sick relation, or for economical reasons, how long soever this separation *de facto* might have lasted, her domicile could never have been changed. Nay, had the parties lived in different places, from a mutual understanding which prevailed between them, the case would still be the same. The law could take no notice of the fact, but must proceed upon its own conclusive presumption, and hold her domiciled where she ought to be, and where, in all ordinary circumstances, she would be,—with her husband. Does the execution of a formal instrument, recognising such an understanding, make any difference in the case? This is all we have here; for there is no agreement to live separate. The "letter" has indeed been imported into the agreement, and argued upon as a part of it. Now, not to mention that the instrument in which parties finally state their intentions, and mutually stipulate and bind themselves, is always to be regarded as their only contract; and that no separate or subsequent agreement is to be taken into the account, unless it contains some collateral agreement; admitting that we have a right to look at the letter at all, either as part of one transaction with the agreement, or as providing for something left unsettled in the principal instrument, and so collateral in some sort to the contract itself, it does not appear that the tenor of the letter aids the Appellant's contention. For the letter sets out with expressly saying, that Sir George has refused to insert in the agreement a leave to live apart, in order to preclude all objection against his suing for restitution of conjugal rights. Is not this [525] sufficient to deprive the letter of all binding force in law, whatever else it may contain? In truth, the words which follow this preliminary statement amount only to an honorary pledge, in no legal view obligatory, even had they stood alone; but, taken in connexion with the preceding statement, they plainly exclude all possibility of construing the letter as a legal obligation. It therefore appears impossible to consider the parties in this case as living apart under a contract of separation. The agreement, by its obvious construction, only imports an obligation upon Sir G. Warrender to pay so much a year to Lady Warrender, as long as she should live apart from him. But let us suppose it to be an ordinary deed of separation; that it contained a covenant on the husband's part to permit the wife to live apart from him, and to choose her own residence; and let us consider what difference this would make, and whether or not this would be sufficient to determine the legal presumption of domicile.

First of all, it must be admitted that, even if the execution of such a deed gave the wife a power of choosing a residence, and if that residence once chosen were to be deemed her separate domicile, still this would only give her a power; and unless she had executed the power by choosing a residence, no new domicile could be acquired by her. The domicile which she had before marriage was for ever destroyed by that change in her condition. The dissolution of the marriage by divorce, or by the husband's decease, never could remit her to her original or maiden domicile; much less could this be affected by any such deed as we are supposing; for that, by the utmost possible stretch of the supposition, could only give [526] her the option of taking a new domicile, other than her husband's; and until she did exercise this option, her married or marital domicile would not be changed. Now there is no

evidence here of Lady Warrender having ever acquired any domicile after 1819, other than the one she had before the separation, that is to say, her husband's; and this proof clearly lay upon her, for she sets up the separation to exclude the legal presumption that she is domiciled with her husband; and the separation only conveying to her a power of choosing a domicile, and the production of the articles only proving that power to have been conferred upon her, unless she goes further, and also proves the exercise of the power by acquiring a new domicile, she proves nothing. She only shows, and all the ample admissions we are, for the sake of argument, making, confess that she had obtained the power or possibility of gaining a domicile other than her husband's, but not at all that she had actually gained such separate domicile. The evidence in the cause is nothing to this purpose. It is, indeed, rather against than for the Appellant's argument; it rather shows that she had done nothing like gaining a new domicile, for she was living chiefly abroad, and in different places. But there is, at any rate, no evidence in the cause of her acquiring a separate domicile, and the proof lying upon her, it follows that, for all the purposes of the present question, her husband's Scotch domicile is her own. But suppose we pass over this fundamental difficulty in her case, and which appears to me decisive of the exception with which I am now dealing, I am of opinion that there is nothing in the separation, supposing it had been ever so formal, and ever so full in its provisions, which can by law [527] displace the presumption of domicile raised by the marriage, and subsisting in full force as long as the marriage endures.

A party relying on the *lex loci contractus*, in construing the import and tracing the consequences of the marriage contract, cannot well be heard to deny that the same *lex loci* must regulate the construction and the consequences of any deed of separation between the married pair. Nor do I understand the Appellant as repudiating the English law as to the import of the separation in this case. Then what is the legal value or force of this kind of agreement in our law? Absolutely none whatever—in any Court whatever—for any purpose whatever, save and except one only—the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust*. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach—no specific performance of its articles can be decreed. No Court, civil or consistorial, can take notice of its existence. So far has the legal presumption of cohabitation been carried by the common law Courts, that the most formal separation can only be given in mitigation of damages, and not at all as an answer to an action for criminal conversation, the ground of which is the alleged loss of comfort in the wife's society; and all the evidence that can be adduced of the fact of living apart, and all the instruments that can be produced binding the husband to suffer the separate residence of his wife—nay, even where he has for himself stipulated for her living apart, and laid her under conditions that she should never come near him—all is utterly insufficient to repel the claim which he makes for the loss of her [528] society without doing any act either in court or in *pais*, to determine the separation or annul the agreement. In other words, no fact and no contract, no matter in *pais* and no deed executed, can rebut the overruling presumption of the law that the married persons live together, or, which is the same thing, that they have one residence—one domicile. In the contemplation of the common law then, they live together and have the same domicile. That the Consistorial Courts regard the matter in the same light is manifest from the strong decision given upon the 3 and 4 Geo. 4, as applicable to a case where the parties had never been near one another for ten years before it passed; yet this case was held within the provision of the statute which gives the benefit of confirmation of the marriage to all parties who have been living together at and before the passing of the Act. But we need not resort to such extreme cases, or seek support from such strong decisions. It is admitted on all hands that the Consistorial Courts never regard a separation, how formal soever, as of any avail at all against either party, nor require any person suing for his rights under the marriage, and standing on the marriage, to do any act for annulling the separation. Either party has a clear and undenied right to pass it by entirely, and proceed, whether in bringing or in defending a suit exactly as if the separation articles had no existence.

Thirdly, We are therefore, in every view that can be taken of the question, bound to regard Lady Warrender's domicile as identical with her husband's, and thus the

case becomes divested of all special circumstances, and is that of a marriage had in England between a domiciled Scotchman and an Englishwoman, sought to be dissolved by reason of the wife's adul [529]-tery, through a suit in the Courts in Scotland, the residence or domicile of the husband being *bonâ fide* Scotch; and as the determination at which we have arrived upon the question of domicile makes the *forum originis* of the wife quite immaterial, the question is in truth the general one, whether or not a Scotch divorce can dissolve a marriage contracted by a domiciled Scotchman in England, the parties to that marriage being *bonâ fide* and not collusively for the purposes of the suit, domiciled in Scotland. The importance of this question to the parties, and, considering the constant and fortunate intercourse between the two countries, to the law which governs each, cannot be denied; at the same time it is of considerably less interest than it would have been had the domicile not been *bonâ fide* Scotch, because then the more absolute question would have been raised as to the validity of a Scotch divorce generally, to dissolve an English marriage. Possibly the decisions upon the validity of Scotch marriages generally and without regard to the fraud upon the English law, practised by the parties to them, may seem to make the distinction to which I have just adverted less material and substantial; nevertheless I think it right and convenient to make it, and to keep it in view.

The general principle is denied by no one that the *lex loci* is to be the governing rule in deciding upon the validity or invalidity of all personal contracts. This is sometimes expressed, and I take leave to say inaccurately expressed, by saying that there is a *comitas* shown by the tribunals of one country towards the laws of the other country. Such a thing as *comitas* or courtesy may be said to exist in certain cases, as where the French Courts inquire how our law would deal with a Frenchman in similar or parallel circum-[530]-stances, and upon proof of it, so deal with an Englishman in those circumstances. This is truly a *comitas*, and can be explained upon no other ground; and I must be permitted to say, with all respect for the usage, it is not easily reconcileable to any sound reason. But when the Courts of one country consider the laws of another in which any contract has been made, or is alleged to have been made, in construing its meaning, or ascertaining its existence, they can hardly be said to act from courtesy, *ex comitate;* for it is of the essence of the subject-matter to ascertain the meaning of the parties, and that they did solemnly bind themselves; and it is clear that you must presume them to have intended what the law of the country sanctions or supposes; it is equally clear that their adopting the forms and solemnities which that law prescribes, shows their intention to bind themselves, nay more, is the only safe criterion of their having entertained such an intention. Therefore the Courts of the country where the question arises, resort to the law of the country where the contract was made, not *ex comitate*, but *ex debito justitiae;* and in order to explicate their own jurisdiction by discovering that which they are in quest of, and which alone they are in quest of, the meaning and intent of the parties.

But whatever may be the foundation of the principle, its acceptance in all systems of jurisprudence is unquestionable. Thus a marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question always must be, Did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than [531] as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract. If those laws annex certain disqualifications to parties circumstanced in a particular way, or if they impose certain conditions precedent on certain parties, this falls exactly within the same rule; for the presumption of law is in the one case that the parties are absolutely incapable of the consent required to make the contract, and in the other case that they are incapable until they have complied with the conditions imposed. I shall only stop here to remark, that the English jurisprudence, while it adopts this principle in words, would not perhaps, in certain cases which may be put, be found very willing to act upon it throughout. Thus we should expect that the Spanish and Portugueze Courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, though solemnized under papal dispensation, because it would clearly be avoidable in this country.

But I strongly incline to think that our Courts would refuse to sanction, and would avoid by sentence, a marriage between those relatives contracted in the Peninsula, under dispensation, although beyond all doubt such a marriage would there be valid by the *lex loci contractus*, and incapable of being set aside by any proceedings in that country.

But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its construction. If indeed there go two things under one and the same name in different countries—if that which is called marriage is of a different nature in each—there may be some room [532] for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different *status*, from Turkish or other marriages among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same every where. Therefore all that the Courts of one country have to determine is, whether or not the thing called marriage, that known relation of persons, that relation which those Courts are acquainted with, and know how to deal with, has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer.*

But it is said that what is called the *essence* of the contract must also be judged of according to the *lex loci;* and as this is a somewhat vague, and for its vagueness, a somewhat suspicious proposition, it is rendered more certain by adding, that dissolubility or indissolubility is of the essence of the contract. Now I take this to be really *petitio principii*. It is [533] putting the very question under discussion into another form of words, and giving the answer in one way. There are many other things which may just as well be reckoned of the essence as this. If it is said that the parties marrying in England must be taken all the world over to have bound themselves to live until death or an Act of Parliament "them do part;" why shall it not also be said that they have bound themselves to live together on such terms, and with such mutual personal rights and duties, as the English law recognizes and enforces? Those rights and duties are just as much of the essence as dissolubility or indissolubility; and yet all admit, all must admit, that persons married in England and settled in Scotland will be entitled only to the personal rights which the Scotch law sanctions, and will only be liable to perform the duties which the Scotch law imposes. Indeed if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by and subsisting with another, polygamy being there of the essence of the contract.

The fallacy of the argument, "that indissolubility is of the essence," appears plainly to be this: it confounds incidents with essence; it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the Courts of the [534] country where the parties reside, and where the contract is to be carried into execution.

But at all events this is clear, and it seems decisive of the point, that if, on some such ground as this, a marriage indissoluble by the *lex loci* is to be held indissoluble everywhere; so, conversely, a marriage dissoluble by the *lex loci* must be held everywhere dissoluble. The one proposition is in truth identical with the other. Now it would

[* See as to this passage an article on "Non-Christian Marriage" by Sir Dennis Fitzpatrick in *Jour. Soc. Comp. Leg.* N.S. No. V. p. 374.]

follow from hence, or rather it is the same proposition, that a marriage contracted in Scotland, where it is dissoluble by reason of adultery or of non-adherence, is dissoluble in England, and that at the suit of either party. Therefore a wife married in Scotland might sue her husband in our Courts for adultery, or for absenting himself four years, and ought to obtain a divorce *à vinculo matrimonii*. Nay, if the marriage had been solemnized in Prussia, either party might obtain a divorce on the ground of incompatibility of temper; and if it had been solemnized in France during the earlier period of the revolution, the mere consent of the parties ought to suffice for dissolving it here. Indeed, another consequence would follow from this doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the Courts, and their power of dealing with the rights and duties of the parties to it: if there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in *pais* to separate, every other country ought to sanction a separation had in *pais* there, and uphold a second marriage contracted after such a separation. It may safely be asserted, that so absurd a proposition never could for a moment be enter-[535]-tained; and yet it is not like, but identical with the proposition upon which the main body of the Appellant's argument rests, that the question of indissoluble or dissoluble must be decided in all cases by the *lex loci*.

Hitherto we have been considering the contract as to its nature and solemnities, and examining how far, being English, and entered into with reference only to England, it could be dissolved by a Scotch sentence of divorce. But the circumstance of parties belonging to one country marrying in another (which is the case before us) presents the question in another light. In personal contracts much depends upon the parties having regard to the country where it is to be acted under, and to receive its execution; upon their making the contract, with a view to its execution in that country. The marriage-contract is emphatically one which parties make with an immediate view to the usual place of their residence. An Englishman, marrying in Turkey, contracts a marriage of an English kind, that is, excluding plurality of wives, because he is an Englishman, and only residing in Turkey and under the Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England, and for English purposes; consequently the incidents and effects, nay, the very nature and essence (to use the language of the Appellant's argument) must be ascertained by the English, and not by the Turkish law. So of an Englishman marrying in Prussia, where incompatible temper, that is, disagreement, may dissolve the contract; as he marries with a view to English domicile, his contract will be judged by English law, and he cannot apply for a divorce here, upon the ground of incompatible tempers. In [536] like manner, a domiciled Scotchman may be said to contract not an English but a Scotch marriage, though the consent wherein it consists may be testified by English solemnities. The Scotch parties, looking to residence and rights in Scotland, may be held to regard the nature and incidents and consequences of the contract, according to the law of that country, their home: a connexion formed for cohabitation, for mutual comfort, protection and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union; in a word, their domicile; the place so beautifully described by the civilian: "*Domicilii quoque intuitu conveniri quisque potest, in eo scilicet loco, in quo larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, undeque cum profectus est, peregrinari videtur*" (Voet ad Pand. Lib. 5, tit. 1, s. 92). It certainly may well be urged, both with a view to the general question of *lex loci*, and especially in answering the argument of the alleged essential quality of indissolubility, that the parties to a contract like this must be held emphatically to enter into it with a reference to their own domicile and its laws; that the contract assumes, as it were, a local aspect; but that at any rate, if we infer the nature of any mutual obligation from the presumed intentions of the parties, and if we presume those intentions from supposing that the parties had a particular system of laws in their view (the only foundation of the argument for the Appellant), there is fully more reason to suppose they had the law of their own home in their view, where they purposed to [537] live, than the law of the stranger, under which they happened for the moment to be.

Suppose we take now another but a very obvious and intelligible view of the subject, and regard the divorce not as a remedy given to the injured party, by freeing him from the chain that binds him to a guilty partner, but as a punishment inflicted upon crime, for the purpose of preventing its repetition, and thus keeping public morals pure. The language of the Scotch acts plainly countenances this view of the matter, and we may observe how strongly it bears upon the present question. No one can doubt that every State has the right to visit offences with such penalties as to its legislative wisdom shall seem meet. At one time adultery was punishable capitally in England; it is so, in certain cases, still by the letter of the Scotch law. Whoever committed it must have suffered that punishment, had the law been enforced, and without regard to the marriage, of which he had violated the duties, having been contracted abroad. Indeed, in executing such statutes, no one ever heard of a question being raised as to where the contract had been made. Suppose again that the proposition, frequently made in modern times, were adopted, and adultery were declared to be a misdemeanor, could any one, tried for it either here or in Scotland, set up in his defence, that to the law of the country where he was married there was no such offence known? In like manner, if a disruption of the marriage tie is the punishment denounced against the adulterer for disregarding its duties, no one can pretend that the tie being declared indissoluble by the laws of the country where it was knit, could afford the least defence against the execution of the law declaring its [538] dissolution to be the penalty of the crime. Whoever maintains that the Scotch Courts are to take cognizance of the English law of indissolubility when called upon to inflict the penalty of divorce, must likewise be prepared to hold that, in punishing any other offence, the same Courts are to regard the laws of the State where the culprit was born, or where part of the transaction passed; that, for example, a forgery being committed on a foreign bill of exchange, the punishment awarded by the foreign law is to regulate the visitation of the offence under the law of Scotland. It may safely be asserted, that no instance whatever can be given of the criminal law of any country being made to bend to that of any other in any part of its administration. When the Roman citizen carried abroad with him his rights of citizenship, and boasted that he could plead in all the Courts of the world "*civis Romanus sum*," his boast was founded not on any legal principle, but upon the fact that his barbarian countrymen had overrun the world with their arms, reduced all laws to silence, and annihilated the independence of foreign legislatures. Their orators regarded this very plea as the badge of universal slavery, which their warriors had fixed upon mankind. But if any foreigner had come to Rome, and committed a crime punishable with loss of civil rights, he would in vain have pleaded in bar of the *capitis diminutio*, that citizenship was indelible and indestructible in the country of his birth. The *lex loci* must needs govern all criminal jurisdiction, from the nature of the thing and the purpose of that jurisdiction. How then can we say, that when the Scotch law pronounces the dissolution of a marriage to be the punishment of adultery, the Scotch Courts can be justified in im-[539]-porting an exception in favour of those who had contracted an English marriage; an exception created by the English law, and to the Scotch law unknown?

But it may be said, that the offence being committed abroad, and not within the Scotch territory, prevents the application to it of the Scotch criminal law. To this it may however be answered, that where a person has his domicile in a given country, the laws of that country to which he owes allegiance may visit even criminally offences committed by him out of its territory. Of this we have many instances in our own jurisprudence. Murder and treason, committed by Englishmen abroad, are triable in England and punishable here. Nay, by the bill which I introduced in 1811, and which is constantly acted upon, British subjects are liable to be convicted of felony for slave-trading, in whatever part of the world committed by them. It would no doubt be going far to hold the wife criminally answerable to the law of Scotland, in respect of her legal domicile being Scotch. But we are here not so much arguing to the merits of this case, which has abundant other ground to rest upon, as to the general principle; and at any rate the argument would apply to the case most frequently mooted, of English married parties living temporarily in Scotland, and adultery being there committed by one of them. To such a state of facts the whole argument now adduced is applicable in its full force; and without admitting that application,

I do not well see how we can hold that the Scotch legislature ever possessed that supreme power which is absolutely essential to the very nature and existence of a legislature. If we deny this application, we truly admit that the Scottish Parliament had no right to punish the offence of adultery by the penalty of divorce. Nay, we hold [540] that English parties had a right to violate the Scotch criminal law with perfect impunity in one essential particular; for, suppose no other penalty had been provided by the Scotch law except divorce, all English offenders against that law must go unpunished. Nay worse still, all Scotch parties who chose to avoid the punishment had only to marry in England, and then the law, the criminal law of their own country, became inoperative. The gross absurdity of this strikes me as bearing directly upon the argument, and as greater than that of any consequences which I remember to have seen deduced from almost any disputed position. It may further be remarked that this argument applies equally to the case, if we admit that the Scotch divorce is invalid out of Scotland, and consequently that it stands well with even the principles of Lolley's case.

In order to dispose of the present question, it is not at all necessary on the one side, to support, or on the other to impeach, the authority of Lolley's case, or of any other which may have been determined in England upon that authority. This ought to be steadily borne in mind. The resolution in Lolley's case was, that an English marriage could not be dissolved by any proceeding in the Courts of any other country, for English purposes; in other words, that the Courts of this country will not recognize the validity of a Scotch divorce, but will hold the divorced wife dowable of an English estate, the divorced husband tenant thereof by the curtesy, and either party guilty of felony by contracting a second marriage in England. Upon the force and effect of such divorce in Scotland, and for Scotch purposes, the Judges gave, and indeed could give, no opinion; and as there would be nothing legally impossible in a marriage being good in one [541] country which was prohibited by the law of another, so if the conflict of the Scotch and English law be complete and irreconcileable, there is nothing legally impossible in a divorce being valid in the one country which the Courts of the other may hold to be a nullity. Lolley's case, therefore, cannot be held to decide the present, perhaps not even to affect it in principle. In another point of view it is inapplicable; for, though the decision was not put upon any special circumstance, yet in fairly considering its application, we cannot lay out of view that the parties were not only married, but really domiciled in England, and had resorted to Scotland for the manifest purpose of obtaining a temporary and fictitious domicile there, in order to give the Scotch Courts jurisdiction over them, and enable them to dissolve their marriage; whereas here the domicile of the parties is Scotch, and the proceeding is *bona fide* taken by the husband in the Courts of his own country, to which he is amenable, and ought to have free access; and no fraud upon the law of any other country is practised by the suit. It must be added that, in Lolley's case, the English marriage had been contracted by English parties, without any view to the execution of the contract at any time in Scotland; whereas the marriage now in question was had by a Scotchman and a woman whom the contract made Scotch, and therefore may be held to have contemplated an execution and effects in Scotland.

But although, for these reasons, the support of my opinion does not require that I should dispute the law in Lolley's case, I should not be dealing fairly with this important question, if I were to avoid touching upon that subject; and as no decision of this House has ever adopted that rule, or assumed its [542] principle for sound, and acted upon it, I am entitled here to express the difficulty which I feel in acceding to that doctrine—a difficulty which much deliberation and frequent discussion with the greatest lawyers of the age, I might say both of this and of the last age—has not been able to remove from my mind.

If no decision had ever been pronounced in this country, recognizing the validity of Scotch marriages between English parties, going to Scotland with the purpose of escaping from the authority of the English law, I should have felt it much easier to acquiesce in the decision of which I am speaking: for then it might have been said, consistently enough, that whatever may be the Scotch marriage law among its own subjects, and for the government of Scotch questions, ours is in irreconcileable conflict with it, and we cannot permit the positive enactments of our statute-book,

and the principles of our common law, to be violated or eluded, by merely crossing a river, or an ideal boundary line. Nor could anything have been more obvious than the consistency of those, who, holding that no unmarried parties, incapable of marrying here, can, in fraud of our law, contract a valid marriage in Scotland, by going there for an hour, should also hold the cognate doctrine, that no married parties can dissolve an English marriage, indissoluble here, by repairing thither for six weeks. But upon this firm ground the decisions of all the English Courts have long since prevented us from taking our stand. They have held, both the Consistorial Judges in *Compton* v. *Bearcroft*, and those of the common law in *Ilderton* v. *Ilderton*, the doctrine uniformly recognized in all subsequent cases, and acted upon daily by the English people, that a Scotch marriage, contracted by English parties in the face and in fraud [543] of the English law, is valid to all intents and purposes, and carries all the real and all the personal rights of an English marriage, affecting, in its consequences, land, and honours, and duties, and privileges, precisely as does the most lawful and solemn matrimonial contract entered into among ourselves, in our own churches, according to our own ritual, and under our own statutes.

It is quite impossible, after this, to say that we can draw the line, and hold a foreign law, which we acknowledge all-powerful for making the binding contract, to be utterly impotent to dissolve it. Were a sentence of the Scotch Court in a declarator of marriage to be given in evidence here, it would be conclusive that the parties were man and wife; and no exception could be taken to the admissibility or the effect of the foreign evidence, upon the ground of the parties having been English, and repaired to Scotland for the purpose of escaping the provisions of the English law. A similar sentence of the same Court, declaring the marriage to be dissolved by the same law of Scotland, being now supposed to be given in evidence between parties who had married in England, can it, in any consistency of reason, be objected to the reception or to the force of this sentence, that the contract had been made, and the parties had resided here? In what other contract of a nature merely personal—in what other transaction between men—is such a rule ever applied—such an arbitrary and gratuitous distinction made—such an exception raised to the universal position, that things are to be dissolved by the same process whereby they are bound together: or rather, that the tie is to be loosened by reversing the operation which knit it, but reversing the operation according to the same rules? What gave [544] force to the ligament? If a contract for sale of a chattel is made, or an obligation of debt is incurred, or a chattel is pledged, in one country, the sale may be annulled, the debt released, and the pledge redeemed, by the law and by the forms of another country, in which the parties happen to reside, and in whose Courts their rights and obligations come in question; unless there was an express stipulation in the contract itself against such avoidance, release, or redemption. But at any rate this is certain, that if the laws of one country and its Courts recognise and give effect to those of another in respect of the constitution of any contract, they must give the like recognition and effect to those same foreign laws when they declare the same kind of contract dissolved. Suppose a party, forbidden to purchase from another by our equity as administered in the Courts of this country (and we have some restraints upon certain parties which come very near prohibition), and suppose a sale of chattels by one to another party standing in this relation towards each other, should be effected in Scotland, and that our Courts here should (whether right or wrong) recognise such a sale, because the Scotch law would affirm it—surely it would follow that our Courts must equally recognise a rescission of the contract of sale in Scotland by any act which the Scotch law regards as valid to rescind it, although our own law may not regard it as sufficient. Suppose a question to arise in the Courts of England respecting the execution of a contract thus made in this country, and that the objection of its invalidity were waived for some reason; if the party resisting its execution were to produce either a sentence of a Scotch Court declaring it rescinded by a Scotch matter done in *pais*, or were merely to pro-[545]-duce evidence of the thing so done, and proof of its amounting by the Scotch law to a rescission of the contract—I apprehend that the party relying on the contract could never be heard to say, "The contract is English, and the Scotch proceeding is impotent to dissolve it." The reply would be, "Our English Courts have (whether right or wrong) recognised the validity of a Scotch proceeding to complete the obligation, and can no longer deny the validity

of a similar but reverse proceeding to dissolve it—*unumquodque dissolvitur eodem modo quo ligatur.*"

Suppose, for another example, that the law of this country precluded an infant or a married woman from borrowing money in any way, or from binding themselves by deed (which is the fact), and that in another country those obligations could be validly incurred; it is probable that our law and our Courts would recognise the validity of such foreign obligations. But suppose a *feme covert* in a foreign country had executed a power, and conveyed an interest under it to another *feme covert* in England, could it be endured that where the donee of the power produced a release under seal from the *feme covert* in the same foreign country, a distinction should be taken, and the Court here should hold that party incapable of releasing the obligation? Would it not be said that our Courts, having decided the contract of a *feme covert* to be binding, when executed abroad, must, by parity of reason, hold the discharge or release of the *feme covert* to be valid, if it be valid in the same foreign country?

Nor can attempt succeed, in this argument, which rests upon distinctions taken between marriage and other contracts, on the ground that its effects govern the enjoyment of real rights in England, and **[546]** that the English law alone can regulate the rights of landed property. For, not to mention that a Scotch marriage between English parties gives English honours and estates to its issue, which would have been bastard had the parties so married, or pretended to marry, in England; all personal obligations may in their consequences affect real rights in England. Nor does a Scotch divorce, by depriving a widow of dower or arrears of pin-money charged on English property, more immediately affect real estate here, than a bond or a judgment relased in Scotland according to Scotch forms, discharges real estate of a *lien*, or than a bond executed, or indeed a simple contract debt incurred in Scotland, eventually and consequentially charges English real estate.

It appears to me quite certain that those who decided Lolley's case did not look sufficiently to the difficulty of following out the principle of the rule which they laid down. At first sight, on a cursory survey of the question, there seems no great impediment in the way of a Judge who would keep the English marriage contract indissoluble in Scotland, and yet allow a Scotch marriage to have validity in England; for it does not immediately appear how the dissolution and the constitution of the contract should come in conflict, though diametrically opposite principles are applied to each. But only mark how that conflict arises, and how, in fact and in practice, it must needs arise as long as the diversity of the rules applied is maintained. When English parties are divorced in Scotland, it seems easy to say, "We give no validity to this proceeding in England, leaving the Scotch law to deal with it in that country; and with its awards we do not in anywise interfere." But the time speedily arrives when we can no longer refuse **[547]** to interfere; and then see the inextricable confusion that instantly arises and involves the whole subject. The English parties are divorced—they return to England, and one of them marries again: that party is met by Lolley's case, and treated as a felon. So far all is smooth. But what if the second marriage is contracted in Scotland? and what if the issue of that marriage claims an English real estate by descent, or the widow demands her dower? Lolley's case will no longer serve the purpose of deciding the rights of the parties—for Lolley's case is confined to the effects of the Scotch divorce in England, and professes not to touch, as, indeed, they who decided it had no authority to touch, the validity of that divorce in Scotland. Then the marriage being Scotch, the *lex loci* must prevail by the cases of *Compton* v. *Bearcroft*, and *Ilderton* v. *Ilderton*. All its consequences to the wife and issue must be dealt with by the English Courts; and the same Judge, who, sitting under a commission of gaol delivery, has in the morning sent Mr. Lolley to the hulks for felony, because he re-married in England, and the divorce was insufficient, sitting at *nisi prius* in the afternoon, must give the issue of Mrs. Lolley's second marriage an estate in Yorkshire, because she re-married in Scotland, and must give it on the precise ground that the divorce was effectual. Thus the divorce is both valid and nugatory, not according to its own nature, or the law of any one State, but according to the accident whether a transaction which follows upon it, and does not necessarily occur at all, chanced to take place in one part of the Island or in the other; and yet the felony of the husband depended entirely

upon his not having been divorced validly in Scotland, and not at all upon his not being divorced validly in England; and the [548] title of the wife's issue to the succession, or of herself to dower, depends wholly upon the same husband having been validly divorced in that same country of Scotland.

Nor will it avail to contend that the parties marrying in Scotland after a Scotch divorce, is in fraud of the English rule as laid down in that celebrated case. It may be so; but it is not more *in fraudem legis Anglicanae*, than the marriage was in *Compton* v. *Bearcroft*, which yet has been held good in all our Courts. Neither will it avail to argue that the indissoluble nature of the English marriage prevents those parties from marrying again in Scotland as well as in England; for the rule in Lolley's case has no greater force in disqualifying parties from marrying in Scotland, where that is not the rule of law, than the English Marriage Act has in disqualifying infants from marrying without banns published; and yet these may, by the law of England, go and marry validly in Scotland. Indeed, if there be any purely personal disqualification or incapacity caused by the law, and which, more than any other, may be said to travel about with the party, it is that which the law raises upon a natural *status*, as that of infancy, and infixes on those who, by the order of nature itself, are in that condition, and unable to shake it off, or by an hour to accelerate its termination.

If, in a matter confessedly not clear, and very far from being unincumbered with doubt and difficulty, we find that manifest and serious inconvenience is sure to result from one view, and very little, in comparison, from adopting the opposite course, nothing can be a stronger reason for taking the latter. Now surely it strikes every one that the greatest hardships must occur to parties, the greatest embarrassment to [549] their rights, and the utmost inconvenience to the Courts of Justice in both countries, by the rule being maintained as laid down in Lolley's case:—The greatest hardship to parties; for what can be a greater grievance than that parties living *bona fide* in England, though temporarily, should either not be allowed to marry at all during their residence here, or if they do, and afterwards return to their own country, however great its distance, that they must be deprived of all remedy in case of misconduct, however aggravated, unless they undertake a voyage back to England, aye, and unless they can comply with the Parliamentry forms in serving notices:—The greatest embarrassment to their rights; for what can be more embarrassing than that a person's *status* should be involved in uncertainty, and should be subject to change its nature as he goes from place to place; that he should be married in one country, and single, if not a felon, in another; bastard here, and legitimate there? —The utmost inconvenience to the Courts; for what inconvenience can be greater than that they should have to regard a person as married for one purpose, and not for another—single and a felon if he marries a few yards to the southward; lawfully married if the ceremony be performed a few yards to the north—a bastard when he claims land; legitimate when he sues for personal succession—widow when she demands the chattels of her husband; his concubine when she counts as dowable of his land?

It is in vain to remind us of the opportunity which a strict adherence to the *lex loci*, with respect to dissolution of the contract, would give to violators of our English marriage law. This objection comes too late. Before the validity of Scotch marriages had been supported by decisions too numerous and too old for any [550] question, this argument *ab inconvenienti* might have been urged and set against those other reasons which I have adduced, drawn from the same consideration. But we have it now firmly established as the law of the land, and daily acted upon by persons of every condition, that, though the law of England incapacitates parties from contracting marriage here, they may go for a few minutes to the Scotch border, and be married as effectually as if they had no incapacity whatever in their own country, and then return, after eluding the law, to set its prohibitions at defiance without incurring any penalty, and to obtain its aid without any difficulty in securing the enjoyment of all the rights incident to the married state. Surely there is neither sense nor consistency in complaining of the risk, infraction or evasion arising to the English law from supporting Scotch *divorces*, after having thus given to the Scotch *marriages* the power of eluding, and breaking, and defying that law for so many years.

I have now been commenting upon Lolley's case on its own principle—that is, regarding it as merely laying down a rule for England, and prescribing how a Scotch divorce shall be considered in this country, and dealt with by its Courts. I have felt this the more necessary because I do not see, for the reasons which have occasionally been adverted to in treating the other argument, how, consistently with any principle, the Judges who decided the case could limit its application to England, and think that it did not decide also on the validity of the divorce in Scotland. They certainly could not hold the second English marriage invalid and felonious in England, without assuming that the Scotch divorce was void even in Scotland. In my view of the present question, there-[551]-fore, it was fit to show that the Scotch Courts have a good title to consider the principle of Lolley's case erroneous even as an English decision. This, it is true, their Lordships have not done; and the Judgment now under appeal is rested upon the ground of the Scotch divorce being sufficient to determine the marriage contract in Scotland only.

I must now observe, that supposing (as may fairly be concluded) Lolley's case to have decided that the divorce is void in Scotland, there can be no ground whatever for holding that it is binding upon the Scotch Courts on a question of Scotch law. If the cases and the authorities of that law are against it, the learned persons who administer the system of jurisprudence are not bound to regard—nay, they are not entitled to regard—an English decision, framed by English Judges upon an English case, and devoid of all authority beyond the Tweed.

Now, I have no doubt at all that the Scotch authorities are in favour of the jurisdiction, and support the decision under appeal; but I must premise that, unless it could be shown that they were the other way, my mind is made up with respect to the principle, and I should be for affirming on that ground of principle alone, if precedent or *dicta* did not displace the argument. The principle I hold so clear upon grounds of general law, that the proof is thrown, according to my view, upon those who would show the Scotch law to be the other way.

In approaching this branch of the question, it is most important to remark, that there may be a very small body of judicial authority upon a point of law very well established in any country; nay, that oftentimes the less doubtful the point is, the fewer cases will you find decided upon it. Thus no one denies [552] that the Scotch Consistorial Court had, ever since its establishment upon the Reformation, been in the practice of pronouncing sentences of divorce for adultery. The Catholic religion was abolished by the Parliament of Scotland in 1560; and three years after that important event, we find a statute made, the Act 1563, c. 74, in which, after a preamble expressing great and lively horror of the "abominable and filthie vice of adultery," (an opinion, perhaps, more sincere in the estates of Parliament than in the Queen,) it is declared to be a capital offence, if "notour" (notorious); and all other adultery is to continue punishable as before, but with an express saving of the right to "pursue for divorcement for the crime of adultery, conform to (according to) the law." For above two centuries the jurisdiction thus recognized by the statute had been exercised by the Consistorial Courts. Nor was any objection whatever made to the want of jurisdiction over parties, in respect of their domicile having been foreign or the marriage contracted abroad. In truth, the view which the law took of adultery as a crime punishable with even the severest of penalties, seems almost to preclude any such exception. If a person were indicted under the statute for notour adultery committed in Scotland, he clearly never could have defended himself by showing he had been married in England, and was only temporarily a resident in Scotland; so there seems never to have been any such distinction taken, in giving the injured party the civil remedy against the offender by dissolving the marriage. That Englishmen temporarily residing in Scotland have been in use to sue for divorces from marriages contracted in England, ever since the intercourse of the two countries became constant by the union first of the Crowns and then of the Kingdoms, [553] is a fact of much importance, and it is not disputed. The importance of it is this—that the Courts administering the law of divorce have, with a full knowledge that they were dissolving English marriages, never inquired further than was necessary for ascertaining that the Pursuers and Defenders had acquired a domicile in Scotland, and then exercised the jurisdiction without scruple, and without any hesitation. This is a clear proof that the law, the Scotch law, was always understood among its

practitioners, and by the Judges of the country, as the present decision supposes it to be; and such a long continued and unqualified practice is a fully better proof of what that law is, than even a few occasional decisions *in foro contentioso*. It would be a dangerous thing to admit that generally recognized and long continued practice should go for nothing, merely because, until a few years ago, no one had brought those principles and that practice in question, and because the judicial decisions in its favour were few in number, and of a recent date. There is every reason to believe that in this, as in most other particulars, the more ancient law of England was the same with that of our northern neighbours. Between the Reformation and the latter end of Queen Elizabeth's reign, it was held that the Consistorial jurisdiction extended to dissolve marriages *à vinculo* for adultery (2 Burn's Eccl. Law, 503).

It was, however, apparently not till 1789 that the question of jurisdiction was raised *in foro contensioso*, by the case of *Brunsdon* v. *Wallace*. But there a question was made upon the sufficiency of the *forum originis* to found a jurisdiction. The husband, before marriage, had left Scotland without any intention of **[554]** returning, and so had the wife. The Judges were much divided, and the judgment was given with an express reference to the circumstances of the case, of which the absence of the defender, the husband, from Scotland, when and long before the suit was commenced, must be regarded as one. Nevertheless, as the majority of the Court considered the *forum originis* of both parties sufficient to found the jurisdiction, I should have thought this a decision against the principles which I deem to be recognised by later cases, had it stood untouched by these.

Pirie v. *Lunan* is, I believe, the next case; but it was the case of a Scotch marriage between Scotch parties, and only raised the question of *forum;* for both were domiciled in England. The Court sustained the jurisdiction *ratione originis*. This decision clearly proves little or nothing anyway in the present question. And the same may be said of *Grant* v. *Pedie*. So *French* v. *Pilcher* turned on the wife, the defender being an Englishwoman and resident out of Scotland, and the adultery chiefly committed abroad; and, accordingly, it does not touch, and hardly even approaches, any of the points now in dispute.

In *Lindsay* v. *Tovey*, the Court of Session sustained the jurisdiction in all respects, though the parties had been living separate under a deed. It is true that your Lordships, on appeal, remitted the case; and that the death of one of the parties prevented any further proceedings. The ground of the remit was twofold: that the domicile of the husband appeared to your Lordships (acting under Lord Eldon's advice) to be in England; and that Lolley's case had not been considered by the Court below. Upon that case Lord Eldon pronounced no opinion, but he certainly intimated a doubt; and I can inform your Lordships **[555]** (having been counsel in the cause, and having, at the argument, given his Lordship a note of the judgment in Lolley's case) that he said, "It is a decision on which we probably shall hear a good deal more."

But since Lolley's case was decided, with the doctrine there laid down fully before them, and after maturely considering it, the Scotch Courts have repeatedly affirmed the jurisdiction in all its particulars. Those cases to which I particularly refer were decided in 1814, and the two or three following years. *Lovett* v. *Lovett*, and *Kibblethwaite* v. *Kibblethwaite*, both of the same date, 21st December 1816, are those to which I shall particularly advert. In both cases the marriage was had in England; in both, the parties were English by birth and by domicile; in both, the suit was brought by the wife for the husband's adultery; and the only domicile in Scotland being that required to give the Courts jursdiction, the Commissaries in both refused to divorce, on the ground, not of the indissolubility of the English marriage, but the insufficiency of the Scotch residence; in both, the Court of Session, after the fullest discussion, with one dissentient voice, and that turning upon the question of domicile, sustained the jurisdiction, and remitted to the Commissaries to proceed with the divorce.

Upon the other cases, of *Edmonstone* v. *Edmonstone*, and *Butler* v. *Forbes*, I need not dwell in detail. The state of the judicial authority on this question is fully given in the work of Mr. Ferguson, one of the most experienced of the Scotch Consistorial Judges. After referring to all the cases, the words of that learned person, though not to be cited as an authority, are well worthy of attention, as the testimony of a Judge

sitting for so many years in the Scotch Consistorial [556] Court, and speaking to its uniform and established practice, twenty years after Lolley's case had been determined here. Mr. Ferguson says, "According to these precedents, the municipal law of Scotland is also now applied by the Consistorial Judicature in all cases of divorce, without distinction, whether the parties are foreign or domiciled subjects and citizens of this kingdom; whether, when foreign, the law of their own country affords the same remedy or not, and whether they have contracted their marriage within this realm, or in any other; provided only that they have become properly amenable to the jurisdiction in this *forum*. None of these last-mentioned cases, nor indeed any other from Scotland, in which a question of international law could be raised for trial and judgment, having hitherto been appealed, the rule has for a period of more than ten years stood as fixed by them, and the subsequent practice has furnished additional instances of its application."

I think I need scarcely add, that this current of judicial authority, and still more the uniform practice of the Scotch Courts, unquestioned ever since the Reformation, establishes clearly the proposition in its largest sense, that the Scotch Courts have jurisdiction to divorce when a formal domicile has been acquired by a temporary residence, without regard to the native country of the parties, the place of their ordinary residence, or the country where the marriage may have been had.

But although it was necessary, to complete the view which I have taken of this important question, that I should advert to the cases which bear upon it in all its extent, there is no necessity whatever for our assenting to the proposition in its more general and [557] absolute form, for the purpose of the case now before us. That is the case of a marriage contracted in England, between a man, Scotch by domicile and birth, and a woman about to become Scotch by the execution of the contract. It is moreover the case of a suit instituted in the Scotch Courts, while the pursuer had his actual domicile in Scotland, and his wife had the same domicile by law. To term a marriage so contracted an English marriage, hardly appears to be correct. I am sure it is, if not wholly a Scotch contract, at the least, a contract partaking as much of the Scotch as of the English. This, in my judgment, frees the case from all doubt; but as I have also a strong opinion upon the more general question—an opinion not of yesterday, nor lightly taken up—I have deemed it fitting that I should not withhold it from your Lordships, and the parties, and the Court below, upon the present occasion.

Lord Lyndhurst:—My noble and learned friend has, in the judgment which he has just read, given your Lordships so full and clear a view of the state of the case, and of the law applicable to it, that it is not necessary for me to do more than communicate the result of my own opinions on the principal question submitted for your Lordships' decision. That question is one of great importance, not only to the parties immediately interested, but also to the public, on account of the principle which is involved in it. I have, on that account, from time to time during the argument, and since, given my best consideration to the subject, in the earnest desire to arrive at a just and satisfactory conclusion. I must, however, in the outset declare, that if I conceived that the judgment which your Lordships are now about to adopt, were [558] to be understood as affecting that delivered by the twelve Judges in Lolley's case, I should feel it my duty to object to so dangerous and precipitate a course—a course so likely to create inconvenience and embarrassment in its results—and should recommend to your Lordships, before you pronounced a final judgment, to review the principles of the law, and especially to request the assistance and opinions of the learned Judges of the Courts of Law on the whole case, or so far at least as your judgment might be in conflict with their unanimous decision in the case of Lolley. It may be in the recollection of some of your Lordships that Lolley had been married in England, had subsequently gone to Scotland, and there procured a divorce, and then returned to England, where he married a second time, and was, in consequence, tried for bigamy. His defence was, that he had been legally divorced in Scotland; but the twelve Judges declared that the sentence of divorce pronounced in Scotland, however effectual there, could not be permitted to enable a party, who had previously solemnized one marriage in England, to effect a second in it while his first wife was living. He was found guilty, and sentenced to transportation. That proceeding was not carried through lightly and unadvisedly; for it came before the assembled Judges of England,

in the course of objections raised in reference to Lolley's plea of impunity, founded on the fact of the Scottish divorce, and supported by advocates of the first ability; yet the sentence, overthrowing the force of the Scottish ceremonial of divorce, was confirmed by the unanimous approbation of the twelve eminent individuals in England best fitted, by talent, legal knowledge and great experience, to pronounce with the voice of undoubted authority on the [559] wisdom of that decision. If, therefore, your Lordships contemplate any interference with that sentence, so supported, it would only be just and wise to take care that such interference is warranted, and, as a consistent preliminary, to consult those twelve individuals, and obtain their assistance on this important point. It has been stated that Lord Eldon has entertained some doubts on the propriety of that decision; but my noble and learned friend is hardly warranted in drawing such a conclusion, or so interpreting what might have dropped from that learned Lord, who was then at the head of the law, and would certainly not have allowed Lolley to be punished, if he had not fully acquiesced in the principle involved in the sentence, and confirmed by the twelve Judges. But Lolley's case has received further confirmation; for my noble and learned friend, sitting in the Court of Chancery, deciding a case which came before him there in 1831, referred to this case of Lolley, and on the high authority of that case laid it down, in the most satisfactory manner, that an English marriage could not be dissolved or affected by a Danish or other foreign divorce.—[His Lordship read, from the printed case, the observations said to be made by Lord Brougham upon Lolley's case, when giving judgment in the case in Chancery (vide *M'Carthy* v. *De Caix*, infra, p. 568), and proceeded thus:]—If after this confirmation of Lolley's case by my noble and learned friend, and by Lord Eldon, as my noble and learned friend distinctly states in the judgment which I have read—if after all this your Lordships intend to pronounce this judgment as interfering with the principle established in Lolley's case, my opinion is, that we should have a new hearing before the twelve [560] Judges, that we may have the question settled advisedly once for all, and know henceforth with certainty what the law shall be in Great Britain.

It must be admitted that the legal principles and decisions of England and Scotland stand in strange and anomalous conflict on this important subject. As the laws of both now stand, it would appear that Sir George Warrender may have two wives; for, having been divorced in Scotland, he may marry again in that country: he may live with one wife in Scotland most lawfully, and with the other equally lawfully in England; but only bring him across the border, his English wife may proceed against him in the English Courts, either for restitution of conjugal rights, or for adultery committed against the duties and obligations of the marriage solemnized in England: again, send him to Scotland, and his Scottish wife may proceed, in the Courts in Scotland, for breach of the marriage contract entered into with her in that country. Other various and striking points of anomaly, alluded to by my noble and learned friend, are also obvious in the existing state of the laws of both countries; but however individually grievous they may be, or however apparently clashing in their principles, it is our duty, as a Court of Appeal, to decide each case that comes before us according to the law of the particular country whence it originated, and according to which it claims our consideration; leaving it to the wisdom of Parliament to adjust the anomaly, or get rid of the discrepancy, by improved legislation.

The real question now before us amounts to this: whether in the law of Scotland a divorce obtained in Scotland, as decided by the Scottish Judges, is supported and justified by the invariable course of the law of Scotland. We are now sitting as a Scottish [561] Court of Appeal, this case coming thence to us, and as such we must be guided by a reference to the principles of the law of that country. In English cases, on the contrary, we sit as an English Court of Appeal, and must equally be guided by the spirit of the laws prevailing here. As to the first question—the point of the domicile—it is fully established by all the papers produced in the case, and was without hesitation admitted by counsel on both sides, in the preliminary argument, that Sir George Warrender has been a domiciled resident in Scotland during the whole period, from his marriage up to the commencement of the suit and to the present time. This is the basis of the whole case, and it therefore clearly follows that Lady Warrender became, as his wife, similarly domiciled in Scotland; for the principle of the law of both countries equally recognises the domicile of the husband

as that of the wife. No point of law is more clearly established: that point being established, the subsequent deed of separation amounts to nothing more than a mere permission to one party to live separate from the other—not a binding obligation in the eye of the law—and there the matter rests. It confers no release of the marriage contract on either party, and neither can thereupon presume to violate it. The letter of Sir George Warrender cannot alter the principle of law. The strongest articles of separation may be drawn up and signed with full acquiescence of husband and wife, yet he may sue her and she may sue him notwithstanding. It is at the most a mere temporary arrangement, a permission to live elsewhere; but the legal domicile remains as it was. One may pledge himself not to claim or institute a suit for conjugal rights; but he cannot be bound by any such pledge, for it is against the inherent con-[562]-dition of the married state, as well as against public policy. It is said that Lord Eldon, in the case of *Tovey* v. *Lindsay*, in this House, threw some doubt on the principle, and seemed inclined to give effect to those deeds of separation; but I am of opinion, on the authority of cases deliberately decided by that noble Lord himself, that the deed of separation here cannot affect the domicile, or any other condition inherent in the relation of husband and wife, or be any bar to the husband's suit.

The next point in the case regards the *locus delicti*. The allegations in the summons are, that the adultery was committed in France, and other countries abroad. We must assume for the present that Lady Warrender is innocent of these charges; they are not to be taken as facts proved in the cause: she may, for anything that has yet appeared in this suit, be as pure and spotless as any woman in the country. But it is proper to remark, that it is no bar or objection to the suit, that the adultery was committed, not in this country, but in a foreign country: the law, either in this country or in Scotland, makes no distinction in respect of the place of the commission of the offence. An action for damages may be brought in this country for adultery committed abroad; that circumstance cannot have any effect even in the mitigation of damages. There is no validity in this objection of the place where the adultery is alleged to have been committed.

On the third plea depends the main question in the appeal; and it is, whether it is competent for the Scotch Courts, on proof or admission of adultery, to pronounce a decree of divorce in a marriage which was contracted and solemnized in England. I may observe here, that marriage is looked upon, in the international spirit of the laws of almost every country [563] in Europe, as a Christian contract, equally binding on the parties wheresoever they may be found; and in looking to the propriety of the law of divorce in Scotland, it must be treated as a question of remedy for a violation of nuptial rights—rights guaranteed by peculiar ceremonials in every country, and in enforcing respect to which each country has a right to provide what remedy it pleases. In ascertaining what the principle of that remedy may be in any country, the safest rule is to look to the decisions of the Courts of that country. In Scotland these are found, in perfect agreement with each other, extending in its records over the space of a century, and embodying a principle which, till the case of Lolley occurred in England, was never doubted or disputed. In *Gordon* v. *Englegraaff* (Fac. Coll. 9 June 1699; S. C. Ferg. Cons. App. 251), in the year 1699, the marriage was contracted in Holland, between a Scotchman and a native of Amsterdam. All that was in proof was the fact of adultery committed by her in Holland, and the Scotch Court pronounced a decree of divorce at the suit of the husband. In *Graham* v. *Wilkieson* (Fac. Coll. 16 December 1726; S. C. Ferg. Cons. App. 252), in 1726, the parties were married in Ireland; the husband a Scotchman, and the wife an Irishwoman. A suit for divorce, on the head of adultery, was instituted by the husband in Scotland, and a decree was pronounced. In 1731 happened the case of *Scot* v. *Boutcher* (Fac. Coll. 6 March 1731; S. C. Ferg. Cons. App. 252): the marriage was had in England with an Englishwoman, and the adultery was alleged to have been committed in England. The husband, a Scotchman, instituted a suit in the Consistorial Court of Edinburgh, and, on proof of her guilt, obtained in her absence a decree of divorce *à vinculo matrimonii*. [564] The case of *Urquhart* v. *Flucker* (Fac. Coll. 25 January 1787; S. C. Ferg. Cons. App. 259), in 1787, was still stronger in relation to the present case. There a Scotchman in the army married at Boston, in New England, a native of that place; they cohabited there, and afterwards at Halifax, and lastly in London. The husband, finding proofs of adultery committed

by the wife in all these places, brought his action for divorce in Scotland, and obtained a decree accordingly. In none of these cases was the objection made that the Court in Scotland had not jurisdiction, because the marriage was solemnized or the adultery committed abroad. No doubt was entertained of the jurisdiction, upon proof of the adultery, until the year 1789, when the case of *Brunsdon* v. *Wallace*, or *Dunlop* (Fac. Coll. 9 February 1789; S. C. Ferg. Cons. App. 259) occurred. The parties there were married in England; the question of domicile was the only point contested. The Consistorial Court proceeded to entertain the action, brought by the wife in absence of the husband, who was cited edictally; but on his appearance, and appeal to the Court of Session, the action was ordered to be dismissed, on the ground that the parties were not domiciled in Scotland. Up to that period the decisions in the Scotch Courts were uniform, and so they continued afterwards; as in the case of *The Duchess of Hamilton* v. *The Duke of Hamilton*, in 1794 (Fac. Coll. 7 February 1794; S. C. Ferg. Cons. App. 260). That was an English marriage, according to the English law and ritual; sentence of divorce *a vinculo* was nevertheless pronounced by the Scotch Courts, on proof of adultery. Next came the case of *Lindsay* v. *Tovey* (Fac. Coll. 27 January 1807; S. C. Ferg. Cons. App. 265), in Scotland, in 1807, which was brought by appeal to this House about the time that Lolley's [565] case was decided by the twelve Judges of England. In consequence of doubts entertained by Lords Eldon and Redesdale, and the great importance of the question then raised for the first time, as to the jurisdiction, the case of *Lindsay* v. *Tovey* (1 Dow, 117) was remitted for further consideration. The pursuer in that case unfortunately died, and no further proceedings were taken. The Courts in Scotland, however, continued to sustain and exercise the same jurisdiction; as appears by a series of cases, which are briefly stated in Ferguson's Consistorial Reports, and Appendix: as, *Utterton* v. *Tewsh; Rodgers* v. *Wyatt*, in 1811; *Hilary* v. *Hilary*, and *Sugden* v. *Lolley*, in 1812; *Pollock* v. *Russell Manners*, in 1813; *Homfray* v. *Newte*, and *St. Aubyn* v. *O'Brien*, in 1814. All these cases were uniformly decided according to the law and practice of Scotland. Then came the case of *Gordon* v. *Pye*, in 1815, which I mention for the purpose of showing a difference of opinion between the Judges of the Consistorial Court in Scotland, the majority of whom came to the conclusion, that in consequence of what was done by the Judges of England, in Lolley's case, the Courts of Scotland ought not to interfere with English marriages. But afterwards came the case of *Edmonstone* v. *Lockhart*, or *Edmonstone*, in 1816; in which the question was raised as to the validity of a defence to an action of divorce in Scotland, that the marriage took place in England. That case was brought before the fifteen Judges of the Courts of Scotland—the very thing which Lord Eldon desired, in remitting the case of *Lindsay* v. *Tovey*—and they were unanimously of opinion, that according to the law of Scotland, notwithstanding the marriage was [566] had in England, it was competent for the Courts of Scotland to pronounce sentence of divorce *à vinculo*. The arguments of Lord Robertson, one of the Judges of the second division of the Court of Session, delivered by him in support of his opinion, and printed in Mr. Ferguson's Appendix (p. 393) to his report of that and other cases, have satisfied my mind that it is the law of Scotland that the Courts there have, without reference to the country where the marriage was contracted, been used from a very remote period to pronounce sentence of divorce for adultery. The decisions of the Courts of a country are the best proofs of the law of that country, and they are our best guides. There was no doubt, or suggestion of a doubt, what the law of Scotland was on those questions, until Lolley's case brought it into question, and the doubts raised by that were removed very soon after by the fifteen Judges, in *Edmonstone* v. *Edmonstone*. Though only an English lawyer, and only picking up Scottish law during the three years that I had the honour of attending to cases that came before us, sitting here in a Court of Appeal, yet I am quite satisfied with the decision of the Scottish Judges in the present case, and I should act very inconsistently if I should advise your Lordships to reverse their judgment. I am clearly of opinion that the domicile is established: the husband's is clearly so, as admitted; the wife's follows the husband's. The deed of separation does not affect the rule of law. The objection as to citation has been virtually abandoned, and the law of Scotland gives the remedy of divorce without reference to the country in which the marriage was contracted or the adultery committed. If my noble and learned friend thinks that your Lord-[567]-ships' judg-

ment will affect the decision in Lolley's case, then, whatever inconvenience may be sustained, it would be advisable to call in the aid of the learned Judges; but my opinion is, that it does not break in on that case. As to a reconcilement of the conflict of the laws of the two countries, Parliament must effect that, for it alone is competent to interfere, as it has done from time to time, to remove other inconveniences. I shall, therefore, advise your Lordships to affirm the decision of the Court below.

Lord Brougham:—I think that this judgment does not break in on Lolley's case. This is a decision in reference to the law of Scotland; a judgment founded on which, we now, as a Court of Appeal, confirm. Lolley's case refers to the law of England. The note of what I said in Chancery, in *M'Carthy* v. *De Caix*, read from the printed case by my noble and learned friend, may or may not be correct: I did not correct this note, nor did I know of it until I saw it in these papers. Whatever opinion I may have entertained of Lolley's case in the Court of Chancery, or privately, cannot affect my judicial opinion in this House, sitting as a member of a Court of Appeal on a case from Scotland.

The interlocutor of the Court below was affirmed.

Lolley's case, and *M'Carthy* v. *De Caix*, having been so often referred to, the Reporters think it may be useful to add here a brief notice of the main facts of both.

ANN SUGDEN, otherwise LOLLEY *v.* WILLIAM MARTIN LOLLEY.

[1812. R. and Ry. 237. See note to *Warrender* v. *Warrender*, 2 Cl. and F. 488.]

Mrs. Lolley, whose maiden name was Sugden, raised an action of divorce against her husband in the Consistorial Court of Scotland. She stated in her summons, that in the [568] year 1800 she was married to the defender at Liverpool, where they afterwards cohabited for some time as man and wife. She afterwards accompanied him to Carlisle, and thence to Edinburgh, where he alleged that he had business. They lived together there in lodgings for some short time. She then charged the defender with having been guilty of adultery both in England and Scotland, and concluded for a divorce in the usual form. The defender appeared, and admitted the marriage and cohabitation in Liverpool, etc., but denied the adultery. The Commissaries, in respect that the parties appeared to be English, and the marriage an English contract, appointed the pursuer to state in a condescendence the grounds in law and fact on which the Court was competent to entertain the action. A condescendence and answers were accordingly given in, and various acts of adultery by the defender were proved. The Commissaries suspecting collusion, examined both parties judicially, but finding no proof thereof, decreed for a divorce.—(Extracted from Fac. Collection, 20th March 1812.)

Lolley was afterwards tried at the Lancashire summer assizes, 1812, for having married Ann Hunter at Liverpool, his former wife, Ann Sugden, being then living. The marriages, and the fact that Ann Sugden was alive a week before the assizes, were proved. The prisoner's defence was, that he had been divorced from Ann Sugden in Scotland, and that his present wife knew the fact. The decree of divorce was produced.

The prisoner was found guilty, but sentence was respited to the then next assizes. The case was afterwards argued before all the Judges, at Serjeants'-inn Hall, and the conviction was affirmed.—(See Russ. and Ryan's C. C. 237.)

M'CARTHY *v.* DE CAIX.

[1831. 2 Ru. and My. 614. See note to *Warrender* v. *Warrender*, 2 Cl. and F. 488.]

A person of the name of Tuite, a domiciled Dane, was married in England to an Englishwoman. They left England and went to Denmark, where they were subsequently divorced. The wife returned to her relations in this country and died, leaving Mr. Tuite her surviving, in Denmark. After his death a suit was instituted in England between his and her personal representatives, respecting some property the right to which accrued to her subsequently to the divorce.

[569] Lord Brougham, Chancellor, in giving his judgment on the points in issue, said:—A gentleman of the name of Tuite, contracted a marriage, which was legally solemnized in England. He was himself a Dane by birth and by domicile. He removed immediately the person whom he had made his wife, from this country—the

locus contractus, with which he appears to have had no further connexion than so far as he was married to an Englishwoman—to his own country, where his domicile continued, and in that country the marriage was dissolved by a valid Danish decree of divorce; dissolved as far as the Danish law could dissolve it, but which divorce could not, by the law of this land, as it is fully established by the solemn opinion of the twelve Judges, in a fully argued and most maturely considered case, operate to dissolve, or in any manner be made to affect here an English marriage. Lolley's case was the strongest that can possibly be imagined in favour of the doctrine laid down, as it was not a question of a civil right, but a conviction for felony in having contracted a second marriage during the existence of the first. Lolley—for whom I was counsel before the twelve Judges, Mr. Justice Littledale being on the other side—had, you may say, acted *bonâ fide*, but the statute of James I. does not make any difference whether a man acts with an innocent ignorance, or a guilty knowledge, and says, if A. B. shall marry C. D., when his former wife, E. F., is alive, he is guilty of felony; there being no exception but that of the proviso of being absent seven years abroad, which is one exception, and a divorce at Doctors' Commons, which is another. Lolley, in a perfect belief that a Scotch divorce—which all the Scotch lawyers told him, and which many of the Scotch lawyers still hold to be the law in Scotland, notwithstanding Lolley's case—had perfectly and validly dissolved the first marriage, intermarried in England with a second wife. He was tried at Lancaster, and was convicted, the point being saved for the opinion of the twelve Judges, and the point was argued before the twelve Judges, including some of the most learned Judges of our day, Lord Ellenborough, Lord Chief Justice Gibbs, Chief Baron Thomson, Mr. Justice Bayley, Mr. Baron Wood and Mr. Justice Le Blanc, some of the most eminent and able lawyers that I have ever known in Westminster Hall, who, after hearing [570] this case argued during term, and at Serjeants' Inn after term, gave a clear, decided and well-weighed opinion, all in one voice finding that no divorce, or proceeding in the nature of a divorce, or tending towards a divorce, obtained in any foreign country, Scotland included, could dissolve a *vinculo matrimonii*, a contract of marriage, in England; and they sentenced Lolley to seven years' transportation. He was sent to the hulks for one or two years; and after being at the hulks one or two years instead of going to Botany Bay, the residue of the sentence was in mercy remitted. I took the liberty of saying at that time, perhaps feeling the prejudice of a counsel in favour of his client, that he ought not to have gone to the hulks, because he acted *optima fide*, that he really believed what, to this day, many of the Scotch lawyers, and at that day all the Scotch lawyers said was the law in Scotland, that a Scotch divorce could dissolve an English marriage, and upon that he acted; and many other men of high rank in this country had acted in the same way, except that they had taken the precaution of contracting the second marriage in Scotland, but if they had come across the Tweed, and contracted a marriage in England, they would have been liable to the same penalty, because it would have been an English marriage which they had *in fraudem legis* contracted. Lolley was sent to the hulks to show the clear opinion of the Judges upon the law, and part of his sentence was remitted afterwards, only because it was thought, that under the particular circumstances of his case he had suffered enough. Now, therefore, Lolley's case lays down these two points, that no foreign proceeding in the nature of a divorce can affect an English marriage; and, secondly, that a Scotch divorce, in the Consistorial Court of that country, is not such a proceeding in an English Court as to bring the case within the provisos in the Polygamy Act, namely a sentence dissolving an English marriage, and nothing but a sentence of divorce in the English Court, *à mensa et thoro*, can bring the party within the exception, even as regards felony. [This case was stated at greater length in the Appellant's printed case, from which it was read by Lord Lyndhurst.—See *ante*, p. 559.]

[571] WRIT OF ERROR

FROM THE COURT OF KING'S BENCH.

DOE on the Demise of JOHN BIRTWHISTLE,—*Plaintiff in Error;*
AGNES VARDILL,—*Defendant in Error.*

[Mews' Dig. vii. 604, viii. 231, 259, 160. S.C. 9 Bli. N.S. 32; 7 Cl. and F. 895; West, 500; 4 Jur. 1076; *sub nom. Doe d. Birtwhistle* v. *Vardill;* 1 Scott N. R. 828; 6 Bing. N. C. 385; 5 B. and C. 438; 5 Rul. Cas. 748. Discussed in *Skottowe* v. *Young*, 1871; L. R. 11 Eq. 477: *In re Goodman's Trusts*, 1881, 17 Ch. D. 271. And see *In re Andros*, 1883, 24 C. D. 638; *Escallier* v. *Escallier*, 1885, 10 A. C. 317; *In re Grey's Trusts* (1892), 3 Ch. 88; Westlake, *Priv. Int. Law*, 3rd Ed. 199, 200; and Dicey, *Confl. of Laws*, 2nd Ed. 505-507.]

Qu. whether a child, born in Scotland, of parents domiciled there, who at the time of his birth were not married, but who afterwards intermarried in Scotland, (neither having in the meantime married any other person,) can take as heir lands of his father in England.

In Hilary term, 1825, the Plaintiff in error brought an action of trespass and ejectment against the Defendant in error, for one undivided third part of lands situate in several parishes in Yorkshire, and the same was tried at the Yorkshire spring assizes of that year, when the jury found a special verdict; which was in substance, that William Birtwhistle, being seised in his lifetime, in his demesne as of fee, of and in one undivided third part of and in the premises mentioned in the declaration, died so seised on the 12th of May 1819, without leaving any issue of his body; that all the brothers of the said William Birtwhistle had died, in his life-time, unmarried and without issue, except Alexander, who married and had issue in the manner hereinafter mentioned: That the said Alexander Birtwhistle went from England to Scotland in the year 1790, and became domiciled there, and dwelt there until the time of his death; that one Mary Purdie was also a person dwelling and domiciled in Scotland during the whole time that the said Alexander Birtwhistle was domiciled there, and the said Alexander Birtwhistle did there cohabit with the said Mary [572] Purdie, and did beget upon her the said John Birtwhistle (the Plaintiff in error), who was their only son, and was born in Scotland on the 15th of May 1799; that on the 6th of May 1805 the said Alexander Birtwhistle and Mary Purdie were married in Scotland, according to the laws of Scotland, and on the 5th of February 1810 the said Alexander Birtwhistle died in Scotland, seised to him and his heirs of divers lands and tenements there situate, leaving the said John Birtwhistle him surviving, who, after the death of his father, was duly, according to the law of Scotland, served heir to the said lands and tenements of the said Alexander Birtwhistle, and now holds and enjoys the same in his own right, having from the time of his birth hitherto remained in Scotland, and been domiciled there; that if a marriage of the mother of a child with the father of such child takes place in Scotland, such child, born in Scotland before the marriage, is equally legitimate by the law of Scotland with children born after the marriage, for the purpose of taking land, and every other purpose, etc.* The question was, whether he could, as heir of his father, take the lands in England The case was argued by Mr. (now Lord Chief Justice) Tindal, for the Plaintiff, and by Mr. Courtenay for the Defendant; and the Court, consisting of Lord Chief Justice Abbott (afterwards Lord Tenterden), and Justices Bayley, Holroyd and Littledale, gave judgment for the Defendant.

[573] The present writ of error was then brought, and the matter was argued in

* It was admitted on the argument in the Court below, that the Scotch law was not correctly stated in the case, but should have had subjoined to it this qualification: "if begotten and born while such father and mother respectively were unmarried, and if they respectively continued unmarried from the time when such child was begotten until their intermarriage." See 5 Barn. and Cress. 438 *et seq.*

1830 before the Judges, and a question was put to them, and they took time to consider it.

Lord Chief Baron Alexander subsequently delivered their opinion as follows:— My Lords, in this case the Judges have agreed upon the answer which is to be given to the question put to them by your Lordships. The question is: "A. went from England to Scotland, and resided and was domiciled there, and so continued for many years till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son, B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland according to the laws of that country. By the laws of Scotland, if the marriage of a mother of a child with the father of such child takes place in Scotland, such child, born in Scotland before the marriage, is equally legitimate with children born after the marriage, for the purpose of taking land and for every other purpose. A. died seised of real estate in England, and intestate. Is B. entitled to such property, as the heir of A.?" It appears to us, that whenever a question of the nature put to us by your Lordships arises in an English Court of Justice, there are two points to which the attention of the Judge must be directed, separately, and in succession to each other. The first in order regards the *status* or condition of the claimant; the second is, what rules of inheritance the law of the country where the property is situated and the tribunal sits, has impressed upon the land, the subject of the claim. As to the first of these questions, I believe I express the opinions of the Judges when I say, in the well-consi-**[574]**-dered language of Lord Stowell, in *Dalrymple* v. *Dalrymple*, that "The cause being entertained in an English Court, must be adjudicated according to the principles of English law applicable to such a case; but the only principle applicable to such a case by the law of England is, that the *status* or condition of the claimant must be tried by reference to the law of the country where the *status* originated: having furnished this principle, the law of England withdraws altogether, and leaves the question of *status* in the case put to the law of Scotland." Such is the sentiment of that great Judge, and such is his language, varied only so far as to apply to a question of legitimacy what was said of a question respecting the validity of a marriage. When the question of personal *status* has been settled upon these principles, when it has been ascertained what the claimant's character and situation are, it becomes then necessary to inquire what are the rules and maxims of inheritance which the law of that country where the inheritance is placed, and whose tribunals are to decide upon it, has stamped and impressed upon the land in debate.

In order the more distinctly to explain what is meant, I will suppose a case, in many circumstances resembling the present. In addition to the circumstances stated in the question, let it be further supposed that the father and mother of the claimant had, after their marriage, one or more sons born to them. Suppose then the present claim to be made. The first inquiry having been satisfied, and it being upon that inquiry perfectly ascertained that the claimant is the eldest legitimate son of his deceased parent, for the purpose of taking land, and for every other purpose, by the law of Scotland, it will next be necessary to inquire what are the rules and maxims of inheritance which the law of England has impressed upon **[575]** that land which is the subject of the claim. Let it further be supposed, that upon this inquiry it shall turn out that the land claimed is of that description which is called "Borough English." This being proved, we think it clear that the claimant's legitimacy by the law of Scotland, his right to inherit by that law, will give the claimant no right whatever to the land in England held in Borough English.

The comity between nations is conclusive to give to the claimant the character of the eldest legitimate son of his father, and to give him all the rights which are necessarily consequent upon that character; but what these rights are respecting English land must be left to the law of England, and the comity is totally ineffectual to alter, in the slightest degree, the rules of inheritance and descent which the law of England has attached to this English land. It would unquestionably descend upon the youngest son. I am anxious to mark clearly the distinction which I have pointed out, because it is upon that distinction that our opinion rests. I will therefore illustrate it by another example.

Take the case of *Ilderton* v. *Ilderton* (2 H. Black. 145): that is the case of a

claim to dower by a foreign widow: whether she is a widow or not, that is, whether she was the lawful wife of the man who was, during the coverture, seised of the land, is a question which the law of England permits, upon a claim to English land, to be determined by the foreign law, the law of the country where the contract of marriage was made: there the comity stops. When her character of widow shall have been fixed according to these foreign rules, the law of England comes into action, and proceeding inexorably by its own provisions and regulations, de-[576]-cides what are the interests in the English land which her character of widow has conferred upon her: it inquires what are the rules which attach upon the particular land in favour of a widow. If, upon that inquiry, it appears that the land is subject to the common law, it will give her a third; if it appear to be gavelkind, one half, while she remains *casta et sola;* if the land be customary land of any manor, the custom must be looked into, and she can have only what that custom may bestow, however strange and capricious that custom may be.

The distinction to which I am directing your Lordships' attention is very familiar to foreign jurists, and is noticed by them as the difference between real and personal *status:* the last being those which respect the person, and follow it everywhere; the first being those which are connected with the land, and adhere to it, and are as immoveable as the subject to which they are applied.

My Lords, it appears to us that the answer to the question which your Lordships have put must be founded upon this distinction: while we assume that B. is the eldest legitimate son of his father in England as well as in Scotland, we think that we have also to consider whether that *status*, that character, entitles him to the land in dispute as the heir of that father? and we think that this question, inasmuch as it regards real property situated in England, must be decided according to those rules which govern the descent of real property in that country, without the least regard to those rules which govern the descent of real property in Scotland. We have therefore considered whether, by the law of England, a man is the heir of English land, merely because he is the eldest legitimate son of his father. We are of opinion that [577] these circumstances are not sufficient of themselves, but that we must look further, and ascertain whether he was born within the state of lawful matrimony; because, by the law of England that circumstance is essential to heirship; and that this is a rule not of a personal nature, but of that class which, if I may use the expression, is sown in the land, springs out of it, and cannot, according to the law of England, be abrogated or destroyed by any foreign rule or law whatsoever. It is this circumstance which, in my opinion, dictates the answer which we must give to your Lordships' question; viz. that in selecting the heir for English inheritance, we must inquire only who is that heir by the local law. It has appeared to us, that the vice of the Appellant's argument consists in treating the question of who shall be the heir to English land, as a question of personal *status:* so it is, no doubt, up to a certain point; but beyond that point, it becomes a question to be decided entirely by the local rules relating to real property in the realm of England.

That the rule of English law is what I have represented, can hardly require proof. If the argument from the comity of nations be shaken off, no person will doubt that a person legitimated *par subsequens matrimonium* is not the heir of English land. What Lord Coke says, in 7 *b* of the 1st Inst., affords the rule: "Haeres, in the legal understanding of the common law, implieth that he is *ex justis nuptiis procreatus;* for *haeres legitimus est quem nuptiae demonstrant.*" Perhaps Lord Coke's expression would have been more precise and accurate, if instead of saying "*ex justis nuptiis procreatus,*" he had said, "*ex justis nuptiis natus.*" But this is what is meant, as all experience shows. It would be useless to follow [578] this further; but it will be material to recollect, that this maxim, which pervades all our books, and which is confirmed by all our practice, though it is, in form, a description of the person who shall be heir, is in substance, in our opinion, a maxim regarding the land, describes one of its most important qualities, traces out the course in which it shall descend, and is no more liable to be broken in upon by any foreign constitution than are the degree of interest which the heir shall take in the land, the conditions on which he shall hold it, the proportion which a woman shall obtain as a widow, or the limitations and conditions attached to her estate.

I have endeavoured to state the principles, and to show the course of reasoning, which has conducted my learned brothers and myself to the conclusion that B., the person designated by your Lordships, is not entitled to the property in question, as the heir of A.

Before I finish I will notice two arguments used on behalf of the Plaintiff in error, which merit particular attention. It is said for the Plaintiff in error, that, according to the rule we adopt, if he is born in lawful wedlock, he fulfils every condition required of him: now they say that he is born in lawful wedlock, because, by a presumption of the Scottish law—a presumption *juris et de jure*— there was a marriage anterior to his procreation. It is by force of this presumption that he is legitimate; by this fiction, he is born within the pale of lawful matrimony. We know that this fiction is, by many respectable writers on the Scottish law, represented as accompanying the legitimation *per subsequens matrimonium*. But we do not concede the consequence deduced from it as applicable to the present question. The question is what the law of England requires; and, as we are advised, the law of [579] England requires that the claimant should *actually* and *in fact* be born within the pale of lawful matrimony. We cannot agree that the presumption of a foreign jurisprudence, contrary to the acknowledged fact, should abrogate the law of England; and that by such a fiction, a principle should be introduced, which, upon a great and memorable occasion, the Legislature of this kingdom distinctly rejected: your Lordships will perceive that I allude to the Statute of Merton. It would seem strange to introduce, indirectly and from comity to a foreign nation, a rule of inheritance which may affect every honour, and all the real property of the realm: which rule, when proposed directly and positively to the Legislature, it directly and positively negatived and refused; a refusal that in England has obtained the approbation of every succeeding age. Again, my Lords, it is said that two cases have been decided in this House which are nearly in point, and prove that the claim of B. ought to be supported: these are, the cases of *Shedden* v. *Patrick*, and the *Strathmore Peerage* case. These two cases are alike in principle, and establish the same propositions: in the one case, the parents lived in a state of concubinage in America; and in the other, in England: in both, children were born to them. The parties afterwards married in their respective countries; and by force of their marriage the American issue claimed Scottish land, and the English issue claimed Scottish honours: in both, your Lordships decided against the claimants. Now it is said, that these authorities are exactly the converse of the present case; that they establish the principle, that the Courts of the country where the lands lie, in a question respecting the heirship to these lands or honours, inform themselves whether the claimant is [580] heir, not by the law of the country where the lands lie, but in the country of the domicile where the marriage of the parents was contracted; and if he is not heir by that foreign law, his claim is rejected: from which this consequence is said to be deducible, that if he is heir, his claim should be sustained.

The argument presents itself in a very plausible shape, and was pressed at the bar, as it seemed to me, with striking ingenuity and force. But if I have had the good fortune sufficiently to explain the principles which have conducted my learned brothers and myself to the opinion I have stated, you will soon perceive that these principles afford a conclusive answer to it. The first step to be taken in every case of this kind, as I have already explained, is to inquire into the *status* of the claimant. The *status*, it is argued, is to be determined by the law of the foreign country: with this the *lex rei sitae* does not intermeddle; and intermeddles no more when that foreign law establishes the claimant's bastardy, than when it proves his legitimacy. In both the cases the claimants were bastards: the laws of their own country, the laws of their domicile, the laws of the spot where the matrimonial contract was entered into, declared them to be illegitimate: the law which, by acknowledged principles, ascertained their personal *status*, fixed upon these persons a character of illegitimacy fatal to their claims; on the first step the ground sank under them, and it became impossible for them to advance.

It is obvious, that if in the cases to which I am now referring the claimants had been declared heirs by the Scottish law, the Scottish law admitting of no heirship without legitimacy, that law must have been called in aid to bestow upon them

that personal [581] character of legitimacy refused to them by their own law: in other words, a law foreign to their birth, to their domicile, and to the marriage of their parents, would have been held to bestow upon them their personal *status* and character—a decision certainly contrary to the acknowledged principles on this subject. The character of illegitimacy attached to the persons of the English and American claimants by their own law, accompanied them everywhere, and would prevent their being received as heirs everywhere within the limits of the Christian world. This view, in our judgment, renders these decisions entirely consistent with the principles I have unfolded, and prevents our considering them as objections to the opinion we entertain, that B. is not entitled to the property in question as the heir of A.

My Lords, it is matter of satisfaction to us to reflect that this rule, held by us to be the rule of English law, is more useful and convenient than the rule opposed to it by the Plaintiff in error. Convenience and utility, when they regard so important a subject as inheritance, appear to me of the highest consequence in the administration of justice. The rule I have stated, which limits the operation of the foreign law to fixing the personal *status*, and excludes it from any ulterior influence in regulating the succession to real property, has a manifest tendency to render the law of inheritance simple and uniform, by preserving it unaltered and unchanged; and by sending us to look for it among our own municipal institutions alone, and among the decisions of our predecessors applicable to such questions, it will exclude many difficult and intricate inquiries which might intrude themselves from foreign laws into this subject. Some of these were suggested at the bar in the argument [582] for the Defendant in error, and there would be many others whose details no human foresight can anticipate, although the various transactions of mankind, and the variety in the laws of foreign nations, would assuredly bring them upon us.

My Lords, I conclude that it is the humble opinion of all the Judges who have attended the argument of this case, that B., described in your Lordships' question, is *not* entitled to the property in England as the heir of A.

Lord Brougham:—My Lords, the extreme importance of the question raised by this special verdict in the Court below, and brought here by writ of error, has occasioned a more than ordinary delay in giving your judgment. It was argued in 1830; the learned Judges attended, and gave their opinion in favour of the principle upon which the judgment of the Court of King's Bench proceeded. I was counsel in the case, and I argued it in support of that judgment; and it now falls to my lot, in the discharge of my judicial duties in this House, to state my opinion to your Lordships; which I should not do had it been according to the argument which I maintained professionally at your bar; but it is on the opposite side: it goes to impeach the judgment pronounced below, and to advise a reversal. I feel much uneasiness in adding, that this opinion is also unchanged by the authority of the arguments of the learned Judges, who unanimously supported that judgment in their answers to the question put by your Lordships. Whatever your Lordships may do in disposing of the case, I feel I should not perform my duty, if I withheld my opinion in this stage of the proceeding.

The facts of the case, as they appear on the special [583] verdict, are these:—[His Lordship stated them.]—In 1810 the father died in Scotland, whence he never had removed, and John succeeded to his Scotch estates, being by the Scotch law legitimate, in consequence of the marriage of his parents subsequent to his birth, and without anything intervening between the birth of the child and the marriage of the parents which could have prevented them from contracting a marriage at any moment. The question is, whether or not he takes the English real estate as heir to his father deceased? In approaching this question, there are some things not disputed. It is admitted that the validity of a marriage must depend upon the law of a country where it is had, and that consequently the parents of this party were lawfully married. It seems also to be agreed that, generally speaking, legitimacy is a *status*, and must be determined by the law of the country to which the party belongs; but it is said by those who support this judgment, that whether the party here is legitimate or not is no question before us; the only question being, it is alleged, whether or not he is the heir to an English real estate. This distinction, I confess, appears to me founded on an indistinct view of the subject. It is true that the question here arises upon the claim of an heir as such, and that therefore the only question may be said

to be, whether he is heir or not? But it is also very possible that this question may turn wholly upon another, namely, whether or not the claimant is eldest legitimate son of his father, the person last seised? Nor do I well see how legitimacy can ever come in question in any other way than as connected with the claim to succession, either real or personal, either in England or in Scotland, unless in the single case of a declarator of bastardy [584] or of legitimacy; a proceeding unknown in the English law. It is, therefore, by no means sufficient for deciding this case to say, that the question touches not legitimacy, but inheritance; not the personal *status* of the party, but his right to real property. It may touch both these matters, and the latter may wholly depend upon the former.

In truth, "legitimate son" means lawful son, and the rule of inheritance is, that the eldest lawful son shall succeed to the father; but "lawful or not" depends upon the law which is to govern, and no other definition can be given of what is lawful, unless that he is lawful son whom the law declares to be such. What law? There are two, it is said, in this case—the law of the birth-place of the party and of his parents' marriage, and the law of the place where the land lies—then which of these two laws shall prevail? The whole inclination of every man's mind must be towards that law which prevails where each man is born, and where his parents were married, supposing the countries to be one and the same; and if they differ, I should then say certainly the law of the birth-place. Nor can anything be more inconsistent with principle, than the inevitable consequence of taking the *lex loci rei sitae* for the rule; because this makes a man legitimate or illegitimate, according to the place where his property lies, or rights come in question—legitimate when he sues for distribution of personal, a bastard when he sues for succession to real estate—nay, legitimate in one country, where a part of his land may be, and a bastard in some other, where he has the residue.

So in like manner, all who claim through him must have their rights determined by the same vague and uncertain canon; a circumstance which I nowhere [585] find adverted to below. I may say I am perfectly certain that it was not adverted to below; I expected it to be, and was apprehensive of the force of it, being aware of the difficulty I should have in meeting it. The arguments on behalf of the Plaintiff in error were those which had been urged in the Court below, and we met them by the arguments we had urged in that Court. All the learned Judges proceed upon the case being one of an inheritance claimed by the party himself; but what if he were dead years ago, and another claimed an estate in England to which he (the alleged bastard) never had been, and never could have been entitled; an estate, for example, descending from a collateral, who took it by purchase after the death of the alleged bastard? Then the pedigree of the claimant must be made out through legitimate persons, and the question of legitimacy is raised as to one who is not himself claiming any land—who never did or could claim any land—and it is not raised in respect of any right in him to inherit, any right to be called the heir to any land. I apprehend this shows strongly the necessity of taking a somewhat more enlarged view than the learned Judges seem to have deemed sufficient for getting them over the difficulty of the case, and of admitting that there is a *status* of legitimacy which is personal, and travelling about with the individual, must be determined by the law of the country of his birth.

Another view, which strikes me immediately as having been admitted below, is very important, and shows, like the last, how much less easy this question is to dispose of than the learned Judges have imagined. It is thought enough to say, the heir is he who is born in lawful wedlock, *ex justis nuptiis*. Then what is lawful wedlock? Is there any greater reason for being bound by the law of the country [586] where a marriage contract was made, in deciding whether or not the wedlock was lawful, than there is for being governed, in ascertaining the legitimacy of the issue of the marriage, by the law of the country where that issue was born, more especially when it was also the country where the marriage was had? But can the Court stop short, according to its own principle, at the mere fact of the marriage being according to the *lex loci contractus?* Do not the principles on which their decision proceeds demand this further inquiry—were the parties able to marry by the law of the *lex loci rei sitae?* And thus a door is opened to the further examination of how far a preceding divorce of one of the parties was sufficient to dissolve a previous English marriage. All such difficulties are got rid of by holding the *lex loci contractus et nativitatis* as

governing the validity of the contract and legitimacy of the issue; but they are not to be got over in this way by any argument which does not with equal force apply to holding the legitimacy of the issue a question equally to be governed by the *lex loci contractus*, and the law of the birth-place. Nor is it correct to say, as the Judges below assumed, that the *lex loci* only influences the validity of the contract, and extends not to its effects: the highest authorities have held expressly the reverse. Huber, in the treatise "De conflictu Legum," which forms part of his larger work, and is constantly cited as the greatest authority on this question, says, "Non solum ipsi contractus ipsaeque nuptiae certis locis rite celebratae ubique pro justis et validis habentur, sed etiam jura et effectus contractuum nuptiarumque in iis locis recepti ubique vim suam obtinebunt."—Book I. title 3. sect. 9. It would be difficult to state anything more clearly and properly as to the effect of the ma [587]-trimonial contract than the legitimacy of the issue; it is, in fact, the main object, and therefore the principal effect of the contract. But to remove all doubt on this subject, and to extend the same rule also to the *lex loci nativitatis*, he adds, "qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure quo tales personae alibi gaudent vel subjectae sunt fruantur et subjiciantur."

This principle was adopted and acted upon in several remarkable cases by your Lordships, then proceeding under the advice of Lord Eldon; I mean, *Shedden* v. *Patrick*, and *Strathmore* v. *Bowes*. In the former, a child having been born before marriage in America, where the English law prevails, claimed a Scotch estate, in respect of the subsequent marriage of his parents there, of whom the father was Scotch. He contended, that the question having arisen upon a real estate in Scotland, the Court of Session was bound to administer the *lex loci rei sitae*, and that that law declared him legitimate. I argued the case on this precise ground, which was that adopted by the Court below, that there was no such thing as legitimacy in the abstract; that *ex vi termini legitimus* means he who is, under a certain law, entitled to certain rights; that a man might be legitimate in one country and illegitimate in another, legitimate for one purpose and bastard for another; that it was *secundum quid*, and not absolute; and a denial of the question of *status* was the very ground on which we maintained the argument of the then appellant. But the Court below in the present case, and your Lordships, held that legitimacy is a *status* to be determined by the law of the party's birth-place, or at any rate by that of the country where the marriage of his parents was had as well as himself born; and [588] they held him bastard in Scotland, where the land lay, because he was bastard in America, where his birth and his parents' marriage took place.

In *Strathmore* v. *Bowes*, a marriage had in London after the birth of the child, was held not to legitimate the issue, either as to Scotch honours or estates, on the same grounds; and in both these cases, one of the points made for the judgment was, the absurdity of holding the same person to be bastard in one country and legitimate in another. It is plain that legitimacy has but one meaning, namely, born in lawful wedlock. Now in Scotland, the child born before the marriage ceremony is performed is legitimate, not because of a subsequent act of his parents, but because he is considered as born in lawful wedlock. The marriage is held to have preceded his birth; and according to the doctrine and language of the Civil Law, from which Scotland and many other countries borrowed this principle, he is considered as *non legitimatus sed legitimus ab initio*. Nor is this a mere fiction of law, or a technical refinement; marriage in Scotland is a consensual contract, and effected by consent alone. But this may be given and the contract made in two ways; either *per verba de presenti*, or by a promise *subsequente copula*. Now in the latter case the *copula* makes the previous promise a consent; it turns the promise touching the future into a present consent; a child then, born in the interval between the promise and the *copula*, would be legitimate clearly; for the *copula* would show that consent, and therefore a marriage, had preceded his birth. But so does a marriage after the birth; for that raises a legal presumption that there was a consent before the birth, and at the cohabitation. The cohabitation is held to have been a consent and a marriage; the ceremony is only held [589] as evidence of that previous consent and contract. So much is this the case, that if either party was married to another at the time of the child's birth, or during the interval between that birth and

the ceremony, no legitimation takes place, because no room exists for the presumption of law that the consent or marriage took place before the birth. All this is certain and clear, and yet the learned Judges appear not to have taken it into their consideration in the judgment they pronounced.

The judgment is rested entirely upon the Statute of Merton; and it is contended, that by that famous Act he is declared a bastard who is born before the marriage of his parents. No doubt so he is in England; and no doubt bastardy—the *status* of bastardy—is what the English law is there dealing with. But is this authority for saying, that he only shall inherit English lands whom that statute declares legitimate?

It is said that the *lex loci rei sitae* must govern the succession to real estate. Undoubtedly it must; and if that law gives it in Kent to all the sons, and in Brentford to the youngest, and elsewhere to the eldest, these several sons are the heirs in those several places. But when it is said that the lawful issue shall take, I agree; I too say, the legitimate son or sons shall inherit: but to find who are the legitimate sons I must ask the law of the birth-place which fixes the *status* of legitimacy, of that personal quality which, according to Huber, travels round everywhere with the party. But the argument assumes a narrower and apparently a closer form still; for it is said that the statute declares those only inheritable who are born in marriage, and that Lord Coke accordingly defines "heir," he who is *ex justis nuptiis procreatus*. There is in this, however, a great fallacy: "born in [590] marriage," or not, "*ex justis nuptiis procreatus*" or not, is to be determined by some law or other. It is not a question that answers itself, and in one way only. Then what law shall determine? Certainly, either the law of the country where the party was born, or where the marriage was had; the law either of the country where the *nuptiae* were had, or where the *procreatio* took place. A question might arise where the events happened in different countries: it might thus be doubted which law should govern; which law should be resorted to for an answer to the question: but where both events happened in the same country, as here, there seems no doubt at all in the matter. Now the law of the country where both the marriage and the birth took place declares that the party was born in lawful wedlock, that he was *ex justis nuptiis procreatus*, and wholly denies that he was born before marriage, or out of wedlock.

But it is said that this is a fiction, and that our law cannot import the fictions of a foreign system, though its principles we are allowed to import. This distinction I do not profess to comprehend. What is a fiction but a principle? It is only one particular view which the law takes, and one doctrine which it lays down. Suppose a Scotch Court were to deny the legitimacy of a child who was born the day after his parents were married in England; should we not say that a gross absurdity was committed? Should we not say that the child was born in lawful wedlock, and hold the doctrine absurd which should question his being lawfully begotten? Nay, suppose a gift, in the usual terms, to the heirs of the body lawfully begotten, we should let the child born the day after the marriage take under such a gift, although it was clearly not lawfully begotten in point of fact. This is a fiction [591] exactly analogous to the Scotch fiction. The Scotch law presumes, against the fact, the marriage to have been had before the birth of the child; our law presumes, against the fact, the marriage to have been had before the cohabitation of the parents. The fiction, or rather the presumption, is parcel of the legal principle in both; and there can be no reason for importing the residue of the doctrine, and rejecting the presumption; there can be no reason for importing the English law presumption into Scotland, which does not justify and require us to import the Scotch law presumption into England. It must be recollected too, that the special verdict finds, as a fact, the legitimacy of the party, and not his legitimation; it finds as a fact that he is legitimate, that is, lawfully born. Now we know this to mean, by the Scotch law, born in lawful wedlock; but the finding in the verdict is sufficient; for legitimate, as contradistinguished from legitimated, means born in lawful wedlock, and means nothing else. So in the civil law, whence this doctrine is wholly taken both in Scotland and Holland, and also in other countries, the child is *legitimus*, not *legitimatus*; as, in the same system of jurisprudence, *liber* and *libertus* both import a free man: *liber* is a free man; *libertinus* one freed: *ingenuus* one freeborn. If any person were found to be *ingenuus* by an inquisition, we should contend that he never had been a slave, though a finding of *liber* might leave it equivocal. In like manner, and by parity of

reason, a person being found legitimate, excludes the supposition of his ever having been a bastard, and shows him to be lawfully born and begotten. Suppose a Scotch estate devolves to one born before marriage, as it might, by devise to the first son of A., I apprehend that A., marrying the mother the day after the devisor's death, the estate would be vested in the son, because he would become legitimate, though born [592] before the testator's death; but it is unnecessary to argue this, though it illustrates the principle, the fact found being, that the lessor of the plaintiff was born in Scotland legitimate, or in lawful wedlock.* Again, if it be said that the special verdict not only finds the party to be *legitimus*, but states how, namely, by the marriage of his parents after his birth; then, I say, this reason given alters not the ultimate finding of legitimacy, that being the fact found. Suppose a verdict found the claimant of an estate to be born in lawful wedlock, adding how the wedlock was lawful, namely, the father having married under age, without consent of parents and without the publication of banns, could we on this ground deny the finding of lawful wedlock? Could we say that a marriage, which our law declares void and unlawful, had thus been found in the face of the verdict? Surely the Marriage Act is as strong to declare what makes *justae nuptiae*, as the 20th Henry III. to declare what makes a man heir to lands; nay, the very latter statute itself and Lord Coke's authority requiring *justae nuptiae*, a lawful marriage, it may just as well be argued that the verdict does not estop us to say the facts found by it amount not to such marriage, as to contend that the finding of legitimacy does not estop us in the case at bar.

The cases of *Shedden* v. *Patrick* or *Crawford*, and *Strathmore* v. *Bowes*, have been already referred to; but they require another remark; they were decided in this House by appeal, it is true, from Scotland, and respecting Scotch real estate; but still by this House, and upon general principles of law. Those cases were the precise converse of this: they decided the bastardy of parties, and on the distinct ground that, as Lord Redesdale said, "they were bastard by the law [593] of their birth-place, and therefore bastard in Scotland, where the rights claimed respected real estate." It is not more the rule of English law, that children born out of wedlock shall not inherit though their parents intermarry, than it is the rule of the Scotch law that such children shall inherit if their parents do intermarry. It is not more alien to the English law to adopt the fiction that such children are born in wedlock, than it is alien to the Scotch law to exclude this principle. The English rule being statutory can make no difference. A fixed and known principle of common law has exactly the same force as a statutory provision. How then can the opposite principle be adopted in two cases identically the same? The Court below says, that the English law gives not an estate to the bastard *eigne*, and that it treats him as bastard although by the law of his birth-place he was legitimate: the Scotch law gives the estate to the bastard *eigne*, regarding him as legitimate; and this House adjudged that he should not take that estate, only because he was illegitimate by the law of his birth-place. Your Lordships decided that the *lex loci rei sitae* should not be regarded when it differed from the *lex loci contractûs et nativitatis;* you decided that when the former law declared for legitimacy it should yield to the latter, which declared for bastardy. How can you be called upon here to decide that the *lex loci rei sitae* shall not overrule the other law, and that again in favour of bastardy? I profess my inability to understand how these two decisions of the same question can in any way stand together, nor can I perceive that the least attention was paid in the Court below to those decisions of your Lordships.

I perceive that the whole argument in that Court turned upon a question not in dispute here, and which [594] nothing but a very indistinct view of the case can raise as connected with it. The learned Judges suppose that they decide the question when they prove that the English law is to govern the case, because the question relates to real property situate in England. Now undeniably the English law is to govern the case in one sense; the eldest lawful son is to succeed, but who that son is must be determined by the law of his birth-place, and by the fact found, that under that law the lessor of the plaintiff was eldest lawful son: nay, even if we take the

[* The Reporters add an *Erratum*, with reference to this paragraph, as follows: "Page 592, from 4th line from the top, *omit the rest of that paragraph.*"]

English law to be, that the lawful son or heir is he who is born in wedlock, then we have here the fact found, and found as a fact, that in the country where he was born the party was born in wedlock. No one, it must be always borne in mind, pretends to say that the English law can in anyway dispose of the whole question, admitting that the rule cited from Lord Coke, in reference to the Statute of Merton, is to govern, namely, *haeres est qui ex justis nuptiis procreatus est*, no one contends that the question, what are *justae nuptiae*, can be determined otherwise than by a reference to the *lex loci contractûs*, or it may be, *loci nativitatis*. To that foreign law, then, we must resort; and the only question is, at what period of our inquiry this recourse shall be had? No more need be said to show how very far from decisive of the present question that position is which alone is argued or defended by the learned Judges, namely, that the law of England must govern. It does govern, but with the aid and through the ministry of the foreign law. The reference made to the *dictum* of the Master of the Rolls, in *Brodie* v. *Baney* (2 Ves. and B. 129), does not touch the case: all that his Honor there said was, that questions on real rights must fol-[595]-low the law of the country where the land lies. This is not denied; nor was it denied by this House, when it refused to consider Mr. Shedden or Mr. Bowes as legitimate in respect to Scotch estates, although the law of Scotland, where these estates lay, held them both to be so, or rather would so have held had they been born in Scotland. But while this House and the Court of Session admitted that the Scotch law must decide, they also held that the Scotch law refused estates to bastards, and that it awarded one to be a bastard who was so by the law of his birth-place. That was the very same case as this, in every material respect.

It is not easy in such a question—a question raised on the *conflictus legum*—to omit all consideration of convenience, inasmuch as it is principally on views of convenience that the whole doctrine of what is called *comitas* turns. One should say that nothing can be more pregnant with inconvenience; nay, that nothing can lead to consequences more strange in statements, than a doctrine which sets out with assuming legitimacy to be not a personal *status*, but a relation to several countries in which rights are claimed, and indeed to the nature of different rights. That a man may be bastard in one country and legitimate in another, seems of itself a strong position to affirm; but more staggering is it when it is followed up by this other, that in one and the same country he is to be regarded as bastard when he comes into one Court to claim an estate in land, and legitimate when he resorts to another to obtain personal succession; nay, that the same Court of Equity, when the real estate happens to be impressed with a trust, must view him as both bastard and legitimate in respect of a succession to the same intestate. Further still, should he [596] happen to be next of kin to his uncle, who had a mortgage upon the estate, he must be denied his succession to the land of the mortgagor in his quality of bastard, and be allowed to come in as an incumbrancer upon the self-same estate in his capacity of legitimate son to the same mortgagor. All this is assumed to be the law by the learned Judges who have decided below and advised your Lordships here. They have not assumed, however, what they cannot deny, that it is another consequence of their doctrine, to enable a descendant of this same bastard to claim through him as if he were legitimate, while the alleged force of the Statute of Merton, and of Lord Coke's commentary thereupon, excludes him from taking it himself. In the same country, in the same Courts, in respect of the same land, he is both bastard and legitimate; bastard for the purpose of his own succession, legitimate when the succession of others is concerned.

May I be permitted most respectfully to express a doubt, whether or not this question has received all due consideration at the hands of those learned Judges, and whether they have not dealt with it a little too easily; made somewhat too light of it. I know not that it carries the argument much further, but there is a proceeding well known to your Lordships, sitting here as a Court of general jurisdiction over the whole United Kingdom though unknown to the learned Judges of England—the process of declarator. Suppose a process of declarator of legitimacy had been brought in the Scotch Courts by the lessor of this plaintiff, the judgment would have been, and quite as a matter of course, that he was the lawful son of Alexander Birtwhistle; and to this suit the present Defendant being made a party, the judgment could be given in evidence before the Court where the eject-[597]-ment was brought. I agree that such a judgment does not conclusively

bind, yet it would place the conflict of the two laws in a somewhat strong light to observe that, with this judgment before them of a competent Scotch Court,—the Court of the country, the English Court, should pronounce him bastard, when the Scotch Court had pronounced him lawful son; but if both judgments were brought here by appeal and writ of error, as might easily happen, your Lordships would be compelled to affirm the sentence of the Scotch Court, and yet you are now asked to affirm the opposite judgment of the Court of King's Bench. Let it be observed, too, that all this anomaly is in England; it begins and ends here; for the Scotch Courts have decided in such cases with perfect consistency, as well as entire uniformity. Those very learned persons, whose familiarity with legal principle, in its enlarged sense, is derived from a deep study of the feudal and of the civil law, as well as of the modern jurisprudence of Scotland, have been guided in all their determinations of such questions by simple, rational and intelligible principles. If a declarator of legitimacy were brought before them by one born in England before marriage, and whose parents afterwards intermarried, their sentence would be that he was illegitimate; and even were he to claim a Scotch estate, the law would be the same. This has been ruled in Scotland, in the cases more than once referred to, and affirmed upon appeal here. But your Lordships are now advised to take a different course, when the same question arises in another part of the kingdom. It may be observed, that in referring to those Scotch cases the learned Chief Justice says, without discussing them, that it is satisfactory to him that the form of the proceeding (a special verdict) was [598] such as to carry the question before the same tribunal which pronounced the decisions in *Shedden* v. *Patrick* and *Strathmore* v. *Bowes*. In the advice, however, which has been given to this tribunal by the same learned Judges, I do not find that those decisions have been much, if at all considered.

Entertaining a very strong opinion that this case was wrongly decided in the Court below, and upon imperfect views of the question—views which, losing sight of the real point, and proceeding on one very easy and quite undisputed, left the real question undetermined,—with the greatest respect for the learned Judges, who gave the same opinion to your Lordships which had been given in the Court below, and proceeding on the same grounds, I am bound to give my own opinion, although it differs so widely from theirs. I think, with a view to the uniformity of your Lordships' decisions, particularly with reference to the cases to which I have adverted, it is desirable that this case should undergo a further consideration before it is finally decided; and I humbly submit these observations to the consideration of your Lordships, and more particularly of my noble and learned friend who held the Great Seal at the time, and heard the cause argued.

Lord Lyndhurst:—My Lords, this was a case which arose on the Northern Circuit. For the purpose of raising the question of law for the opinion of the Court of King's Bench, the parties agreed on a special verdict. The question was argued originally at great length, and with great learning, by the present Lord Chief Justice of the Common Pleas, on the one side, and by counsel of great eminence on the other, and the Judges of the Court of King's Bench were unanimous in their [599] opinion upon the case; however, in consequence of the importance of the question, at the suggestion of the Lord Chief Justice at the time, it was thought right to bring the question to your Lordships' House. It was again argued, with great learning, at your Lordships' bar, by my noble and learned friend on the one side, and, I think, Dr. Lushington on the other. It was very elaborately argued, and the learned Judges unanimously concurred in the decision of the Court of King's Bench. However, my noble and learned friend has stated a doubt with respect to the case: he is of opinion that all the necessary views of the subject were not taken in the argument, and that they were not sufficiently considered by the learned Judges at the time of giving their evidence to your Lordships. Under these circumstances I agree with my noble and learned friend, that with a view to settling the law upon this subject, and with reference also to the importance of the question, it might be desirable that the case should again be argued by counsel at the bar, in such a way as your Lordships shall direct, in the presence of the learned Judges: that, of course, must be in the next session, as it will be impossible to call them together this session. I must say that some of the views put by my noble and learned friend are very striking: I have adverted to them myself, over and over again, in considering the case;

they require very full and patient consideration, and no pains should be spared to arrive at the proper result: therefore I should suggest the course which I believe my noble and learned friend approves, that your Lordships should request the learned Judges to attend here to hear the case re-argued.

Lord Brougham:—My Lords, I am much better pleased that my noble and learned friend should put [600] it as he has done, on his having considered those points as worth consideration, than that it should proceed on any doubts being entertained by me. I should not think it right that I, who was not judicially here when it was heard, should advise your Lordships.

Lord Denman:—My Lords, I too think the importance of the case is such, and the doubts which exist are so considerable, that they ought to be further investigated before the case is determined by your Lordships.

Ordered to be further argued before the Judges next session.

Some doubt being entertained whether the parties may think fit again to bring this case under consideration, and some delay being at all events necessary before a final decision can be given, it has been judged advisable to print these observations of the noble and learned Lords, on the opinion delivered by the Lord Chief Baron, on behalf of the Judges, in 1830.

[The alterations noted at p. 600 of 2 Cl. and F. as requiring to be made in the above report of Lord Brougham's opinion, have been duly given effect to.]

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[601]

APPEAL

From the Court of Chancery.

CHARLES NEWDIGATE NEWDIGATE, CHARLES NEWDIGATE, an Infant, by the said CHARLES NEWDIGATE NEWDIGATE, his Father and next Friend, and EDWARD MILLER MUNDY,—*Appellants;* FRANCIS NEWDIGATE,—*Respondent.*

[Mews' Dig. xiv. 1853, 1872. S.C. 8 Bli. N.S. 734; and, in Ch., 1 Sim. 131; 5 L.J. (O.S.) Ch. 52; 1 Jur. 636. See *Micklethwait* v. *Micklethwait*, 1857, 1 De. G. and J. 504; and Bewes on *Waste*, 157, 171, 184.]

Where A. was tenant for life without impeachment of waste, except as to "the timber growing in the park, avenues, demesne lands and woods adjoining to the capital messuage," and cut timber in woods not precisely answering that description, but which were an ornament or shelter to the messuage: Held that he was guilty of equitable waste, and an account was directed, and an injunction granted.

If there be an accidental omission of form in the drawing up of a decree in the Vice-Chancellor's Court, and that decree be appealed against, the Lord Chancellor may supply the omission.

Sir Roger Newdigate, late of Arbury, in the county of Warwick, being seised of, or otherwise entitled in fee simple or in demesne as of fee to large real estates in the said county, made his will on the 30th of October 1800, duly attested for passing freehold estates, and thereby gave to the Respondent all his books, pictures, etc. as heir-looms, etc., and also "all and singular his real estates, manors, freehold lands and freehold estates in the said county [602] of Warwick and elsewhere (except as therein excepted), for his life, without impeachment of waste, except the timber growing in the park, avenues, demesne lands and woods adjoining to the said capital messuage." And after the death of the Respondent, to the Appellant, Charles Newdigate Newdigate, for life, without impeachment of waste, and then to his sons, in tail male; with power to a tenant for life in possession, to settle a limited estate by way of jointure, and to let leases for 21 years.

The testator died on the 6th day of November 1806.

The Respondent then entered into the possession of the estates devised: and on the 26th day of June 1824, the Appellants, claiming to be entitled to the inheritance

of the estates, filed their bill in Chancery against the Respondent; and after setting forth amongst other things the will of Sir Roger Newdigate, and his death, and the interest of the Appellants, stated, that the estates in the county of Warwick devised by Sir Roger Newdigate, consisted of a mansion-house called Arbury, and a mansion-house called Astley Castle, and about 5650 acres of land thereto adjoining, and that the park belonging to the mansion-house called Arbury contained 300 acres; and that the lands held in hand, together with the park and woods in hand, consisted of 800 acres, and were part of the demesne lands; that there were several woods which lay intermixed with and were part of the demesne lands, two of which were called Spring Kidden Wood and Seaswood; that in Spring Kidden Wood there was an avenue, forming the only communication from the mansion-house of Arbury, to the North Lodge, which opened on the high road; that there was another wood, [603] called Hawkeswood, and a small wood adjoining; that there was an avenue leading through the two last-mentioned woods, communicating on one side with the road leading to Arbury, and on the other with Astley Castle; that there were also certain farms, part of the demesne lands, called Dencher's or Horner's Farm, and Temple House Farm; that the Respondent had felled timber in the park, etc. adjoining Arbury mansion-house, and in particular in the wood called Seaswood, and in the wood called Spring Kidden Wood, and the private towing-path adjoining; that he had felled all the timber in Hawkeswood, and in the small wood adjoining, to the value of £2000; that he had felled timber in the south avenue of the park, and on the farm called Dencher's Farm; that he had cut trees on Temple House Farm; that he had cut down timber and other trees upon every part of the estate, many of which were or were intended to be ornamental, or afforded shelter to the mansion-house of Arbury, and also many intended to be ornamental, or to afford shelter to the mansion-house called Astley Castle.

The Appellants insisted, that the Respondent ought to account for the timber and produce thereof, and charged that the parts of the devised estates in the bill mentioned to be excepted, were by the said testator's will expressly excepted from being cut by the Respondent during his life, and that the timber which the Respondent cut or caused to be cut down from such parts was timber growing in the park, avenues, demesne lands and woods adjoining the capital mansion-house called Arbury; and the bill prayed for an account, and for an injunction to restrain the Respondent from further cutting down [604] the timber on the estate. The Appellants obtained an injunction to the effect prayed by the Bill.

The Respondent, in December 1824, put in his answer, stating, that the estates consisted of a mansion-house called Arbury, and 5368 acres of land, the whole whereof, except about 245 acres, lay together, but that the house called Astley Castle never was considered to be a mansion-house, it having been for many years a ruinous and uninhabitable building, until Sir Roger Newdigate repaired a small part thereof, and that it was at the time of his death let together with the garden to a tenant, for £10 per annum, which rent being considered the fair value thereof, the Respondent continued to receive until the year 1808, when the Respondent in a great measure rebuilt the same, at an expense of £4000 and upwards, as a residence for Colonel Francis Newdigate, his son; that the park contained 296 acres, the whole whereof, except 25 acres, were demesne lands; that this park was divided from the mansion-house called Arbury, by pools of water and pleasure grounds; that the demesne lands contained above 900 acres, and were described in an ancient map, indorsed in the hand-writing of Sir Roger Newdigate, "Arbury Demesne Park and Manor and Griffe." The answer set out the description of this park at full length, and then alleged, that a part of Scug Grove was the only wood that lay intermixed with the demesne lands; that the only woods adjoining the demesne lands were the Alders, Coventry Wood, Fir Grove, and the Ash Plantation, which last was cut periodically as underwood; that the lands held in hand by Sir Roger Newdigate consisted of 794 acres, and all the woods except Seaswood, which was at that time let to a tenant; that Seaswood did not form any [605] part of demesne lands, and that no woods save Spring Kidden Wood, Park Wood, and part of Scug Grove, were demesne woods; he admitted that there was an avenue as described in the will, in Spring Kidden Wood, but denied that there was one in Hawkeswood.

In a first schedule, the Respondent set forth an account of all timber felled in the

park, avenues, demesne lands and woods adjoining the capital mansion called Arbury, and for which he submitted to account as the Court should direct; stating however that the trees were cut for repairs, or because they were past their maturity, or were detrimental to the tenants occupying the land, and in forgetfulness of the restrictions as to cutting timber on the demesne lands. In two other schedules, he gave an account of all timber felled, and to which he claimed to be entitled, and he denied generally having committed waste.

The Appellants filed a replication. Witnesses were examined and cross-examined on the part of the Appellant, and on the part of the Respondent. The cause was heard on the 25th November 1826, before Sir John Leach, then Vice-Chancellor, when his Honor expressed his opinion, that Seaswood was not within the exception in the will, and that there was no evidence that equitable waste had been committed therein (see the report of the case, 1 Sim. 131). The decree made by his Honor, after delivering his judgment on the case, bore date on the same day, and it was thereby declared, that "except the timber growing in the park, avenues, demesne lands and woods adjoining to the capital messuage called Arbury, in the said county of Warwick," the words "demesne lands" denoted the lands comprised in a map exhibited in the cause; and the [606] words "woods adjoining to the capital messuage called Arbury," with the word "avenues," included the woods after mentioned, viz. Birch Wood, Alders Wood, Coventry Wood, the Ash Plantation, Great Hawkeswood and Little Hawkeswood, and all other woods or timber trees through or by which the road and avenues leading from the North Lodge towards the capital messuage called Arbury, or the roads or avenues leading from Astley Lodge, or Griffe Lodge, to the said capital messuage, respectively passed at the time of the death of the said testator: And it was ordered, "that the injunction granted in the cause to restrain the Respondent from cutting down or felling the timber on the said estates should be continued as to the timber growing in the park, avenues, demesne lands and woods adjoining to the said capital messuage called Arbury, and including therein the woods already mentioned, and all other woods and timber trees through or by which the road and avenues leading from the North Lodge towards the capital messuage called Arbury, or the roads or avenues leading from Astley Lodge or Griffe Lodge towards the said capital messuage, respectively passed at the time of the death of the said testator." The Master was directed to take an account of all timber felled by Respondent thereon, and to make a separate report as to costs.

The Bill was not in form dismissed, so far as it sought to charge the Respondent on account of the trees cut down in other parts, besides those declared by the decree to be within the exception in the will.

On 3d July 1827, the Appellants filed another Bill against Respondent, for an account of the timber felled by Respondent in Seaswood and on Temple House Farm, as having been planted and left standing [607] for ornament and shelter to the mansion-house of Arbury.

The Respondent appeared to the bill, and put in a plea of a former suit depending for the same matter; and on the 18th November 1829, the plea was over-ruled by the present Vice-Chancellor.

On the 14th January 1830, the Respondent presented his petition to the Lord Chancellor to rehear the cause, and to supply the omission in the decree of the Vice-Chancellor, by dismissing the bill of the Appellants, so far as the same sought for an account other than the account directed by the said decree.

On the 25th January 1831, the petition was heard before Lord Brougham, then Lord Chancellor; and on 31st January 1832, an order was made that the decree of the 25th November 1826 should be varied, that the original Bill, therein omitted to be dismissed, should be dismissed, and that the accounts should only be taken as therein directed.

The Appellants appealed against the decree of 25th November 1826, and the decree of 31st January 1832, so far as it had corrected and confirmed the former: the grounds of appeal being, that the Appellants were entitled to the full extent of the relief sought by their bill, which ought not to have been dismissed as to any part, and that a wrong construction had been put upon the words of the will.

The Solicitor-general (Sir C. C. Pepys), and Mr. Jemmett, for the Appellants:—
No part of this Bill ought to have been dismissed. In an anonymous case (3 Atk.

215), the Court restrained a tenant for life without impeachment of waste, from cutting down trees in lines or avenues or ridings in a park: that case laid down the general rule on which this bill was filed. In [608] *Jesus College* v. *Bloome* (3 Atk. 262), the Bill was dismissed because it was only for an account of the value of the trees which had been cut down; but it was said that if the bill had also been for an injunction, it would have been good. It is so here. The cutting down of the timber in Seaswood is equitable waste, for that is ornamental timber. If that is so, the Appellants are entitled to what they require. In *Pulteney* v. *Warren* (6 Ves. 89), it was in effect declared, that where there was waste in respect of one tree, the party might have an account and an injunction. There is nothing to prevent the Plaintiffs from maintaining the present bill. The dismissal of a bill in equity is not so unfavourable to a plaintiff as a nonsuit at law, and where a man has been nonsuited he may bring a fresh action: so also, unless the dismissal of the bill is accompanied with a special restriction, the plaintiff can at once file another bill. The decree of the Vice-Chancellor ought not to have been altered by the Lord Chancellor; the omission referred to was not a mere matter of form, to be supplied as of course. The facts of the case here have not been fully tried, nor the judgment of the Court exercised upon them: the question here is, what the testator intended by the form of exception? He meant to convey to the inheritance the timber in the woods, and that which contributed to the ornament of the property. The right of the first tenant for life to cut timber on the estate was therefore limited to certain parts of it; the limit thus assigned him the tenant for life has exceeded, and he must therefore be considered to have been guilty of committing equitable waste. There is no wish to press on the Respondent; the costs may come out of the fund.

[609] Sir E. Sugden and Mr. Bridger, for the Respondent:—The claim of equitable waste cannot be made out here, for the Vice-Chancellor did not declare that Astley Castle was a mansion-house; the woods adjoining Astley Castle were therefore not within the exception; that is the main point of the case; Seaswood is not within the description, and there was in fact no waste committed there. The proposition that the costs should come from the fund, shows that the decision of the present Master of the Rolls on this point was considered conclusive. The refusal to grant the relief to the extent prayed in the bill, was in fact a dismissal of the bill, and the omission of the formal dismissal in the decree was a mere accident, of which the Appellants cannot now take advantage; it was rightly supplied by the Lord Chancellor. By the practice of the Court, the dismissal of one bill is a bar to another founded on the same complaint, unless the Court makes the decree without prejudice. It was not so made here. This appeal ought to be dismissed with costs; for the Respondent is brought here, not on a point of substance but of mere form.

The Lord Chancellor:—I should wish to communicate with the Master of the Rolls (Sir J. Leach) on this subject; and also to consider whether on the evidence I am satisfied as to that part of the decision which relates to Astley Castle, and whether I can properly supply the omission in the Vice-Chancellor's decree, which would have directed a formal dismissal of the bill, if his Honor had been asked for it.

The Lord Chancellor:—This case stood over for the consideration of one point, namely, as to supplying the omission in the Vice-Chancellor's decree. [610] On that point I am now satisfied. I also remain of the opinion expressed in the Court below, and of which the present Master of the Rolls, then Vice-Chancellor, was as to the other points, and I think that his decision ought to be affirmed. Thinking at first that there was some part of the case on which I might feel a doubt, I communicated with the Master of the Rolls; I showed him the notes of the argument, and submitted them to him, with my observations upon them. I received in writing from him, so far as his recollection went, a statement of his reasons, assisted as his recollection had been by the note I had furnished to him. Upon the result of the best consideration I have been able to give the case, thus assisted, I am of opinion that the judgment of the Court below ought to be affirmed, and I shall move that it be affirmed with costs not exceeding £100.

Judgment affirmed accordingly.

[611]

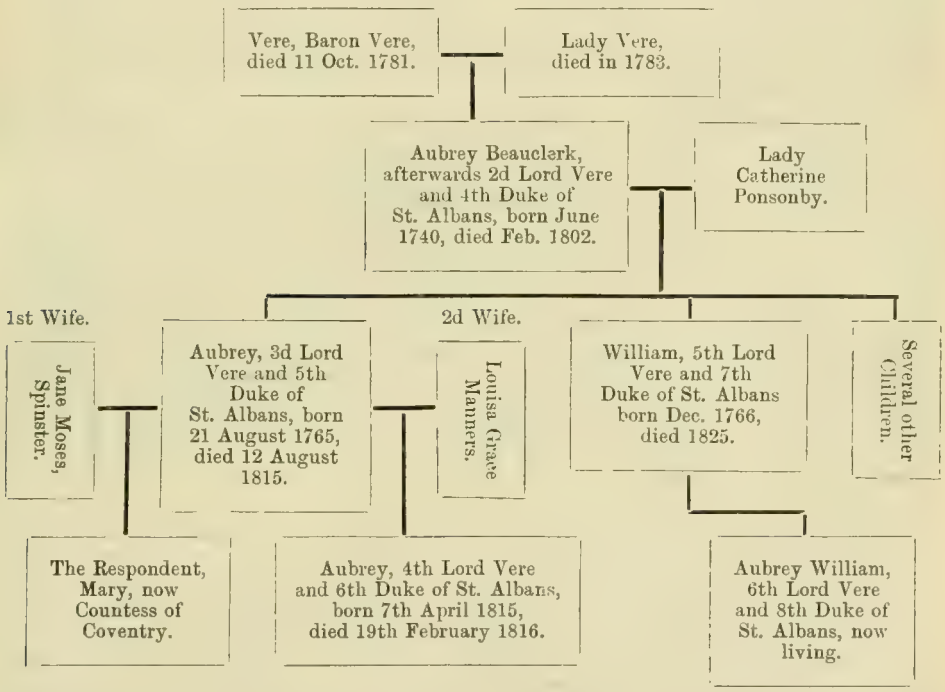
APPEAL

FROM THE COURT OF CHANCERY.

LADY LAURA TOLLEMACHE,—*Appellant*; The EARL and COUNTESS of COVENTRY,—*Respondents*.

[Mews' Dig. x. 1004; xii. 925; S.C. 8 Bli. N.S. 547; and, in Ch., *sub nom. Deerhurst* v. *St Albans* (*Duke of*), 5 Madd. 232. Discussed in numerous cases, most of which are referred to in *In re Johnston*, 1884, 26 Ch. D. 538.]

Vere, Lord Vere, bequeathed certain chattels to trustees, in trust for his wife for life, and after her decease for his son for life, and after the decease of the survivor of them, in trust for such person as should from time to time be Lord Vere; it being his will and intention that the same should, after the decease of his wife, go and be held with the title of the family, as far as the rules of law and equity would permit. The testator left his wife and son surviving him, and also two sons of his son. After the death of the wife and son, the eldest grandson succeeded to the title and to the enjoyment of the chattels, and died, leaving an only son, who then succeeded to the title, and died an infant and unmarried, leaving the second grandson of the testator surviving him. HELD by the Lords, reversing a decree of the Court below, that the chattels vested absolutely in the eldest grandson, on succeeding to the title.



[612] Vere, Lord Vere, by his will, bearing date the 15th of March 1781 (among other things), gave and bequeathed as follows: "I give and bequeath unto James, Earl of Abercorn, Robert Drummond, and Thomas Walley Partington all the household goods, furniture, pictures, books, linen, china, and glass which shall at the time of my decease be at my mansion-house of Hanworth, in the county of Middlesex, or in any of the offices belonging to the same; and also all such silver and gilt plate as I shall be possessed of at the time of my decease, whether the same shall be at Hanworth or in London, and in both places respectively; upon this special trust and confidence nevertheless, that they the said James Earl of Abercorn, Robert Drummond, and Thomas Walley Partington, and the survivors and survivor of them, and the executors

and administrators of such survivor, do and shall permit and suffer my wife, Mary, Lady Vere, to have the use and enjoyment of the same goods, furniture, pictures, books, linen, china, glass and plate, for and during the term of her natural life; and from and immediately after her decease, upon trust to permit and suffer my son Aubrey Beauclerk to have the use and enjoyment of the same goods, furniture, pictures, books, linen, china, glass and plate, for and during the term of his natural life; and from and immediately after the decease of the survivor of my said wife and son, it is my will, and I do hereby direct that they my said trustees, and the survivors and survivor of them, and the executors and administrators of such survivor, do and shall be possessed of the same goods, furniture, pictures, books, linen, china, glass and plate, in trust for such person as shall from time to time be Lord Vere; it being my will and intention, and my sole motive for making this disposition, that the same goods, furniture, pictures, books, linen, china, glass and **[613]** plate, shall after the decease of my said wife, from time to time go and be held and enjoyed with the title of the family, as far as the rules of law and equity will permit." And he appointed his said wife, Mary, Lady Vere, and Lord Charles Spencer, his executors, and died in October 1781, leaving Lady Vere his widow, and his son Aubrey Beauclerk, and his two grandsons, Aubrey and William, sons of the said Aubrey Beauclerk, and all of them in his will named, him surviving.

The executors proved the will, and they afterwards assigned to the said James Earl of Abercorn, R. Drummond, and T. W. Partington, the household goods, furniture, pictures, plate, linen, china, glass and other things so bequeathed to them in trust as aforesaid. Robert Drummond having survived his co-trustees, died in or about the year 1806, having by his will appointed his sons Andrew Berkeley Drummond, John Drummond, and Charles Drummond, executors, who duly proved the same, and became his personal representatives, and trustees of the said furniture, pictures, books, plate, etc.

Upon the death of Vere, Lord Vere, the title of Lord Vere descended upon his son Aubrey Beauclerk, who was second Lord Vere, and afterwards became fourth Duke of Saint Albans. He survived the Lady Vere his mother, and died in February 1802, leaving Aubrey his eldest son,—who thereupon became third Lord Vere and fifth Duke of Saint Albans, — William his second son, and other children. Aubrey third Lord Vere and fifth Duke of Saint Albans, intermarried first with Jane Moses, spinster, by whom he had issue the Respondent, Mary, Countess of Coventry; and secondly, with Louisa Grace Manners, spinster, by whom he had issue Aubrey, who upon his father's death in 1815, became fourth Lord Vere and sixth **[614]** Duke of Saint Albans, and died an infant, in February 1816. Upon the death of the infant, William his uncle became fifth Lord Vere and seventh Duke of Saint Albans; and upon his death in 1825, Aubrey William, now Duke of Saint Albans, succeeded to both his titles. Aubrey the second Lord, and Aubrey the third Lord Vere, were both living at the death of Vere, Lord Vere, the testator. Aubrey the fourth and infant Lord and Duke, was born long after the testator's death.

Mary, Lady Vere, died in the year 1783. The chattels bequeathed by Lord Vere's will were enjoyed by her during her life; and after her death, by Aubrey the son and Aubrey the grandson, in succession, during their lives. This last Aubrey, third Lord Vere and fifth Duke of St. Albans, by his will, dated the 18th July 1814, gave the residue of his personal estate to his wife, Louisa Grace, Duchess of Saint Albans, and appointed her sole executrix; and died in August 1815, leaving the Duchess and his two children (viz.) Lady Coventry, his only child by his first wife, and Aubrey the fourth and infant Lord and Duke, his only child by his second wife, surviving him.

After the death of Aubrey, the third Lord and fifth Duke, a bill was filed in Chancery, by Aubrey his infant son, then fourth Lord Vere and sixth Duke of Saint Albans (by his next friend), against Louisa Grace the Duchess, his mother, the said Andrew Berkeley Drummond, and others, by which the infant Lord and Duke claimed to be absolutely entitled to the furniture, pictures, etc. bequeathed by the will of Vere Lord Vere as aforesaid, and prayed that an account thereof might be taken under the decree and direction of the Court; but before the Defendants had put in their answers, the plaintiff died an infant, aged ten months and a few days.

[615] Louisa Grace, Duchess of Saint Albans, survived the said infant plaintiff,

and died, having by her will, dated the 28th of November 1815, bequeathed the residue of her personal estate to her sister Lady Laura Tollemache, the Appellant, and appointed her sole executrix. This will Lady Laura proved in the Prerogative Court of Canterbury, and also took out letters of administration to Aubrey the third Lord and fifth Duke, with his will annexed, and became his sole legal personal representative.

In Trinity term, 1818, the Respondents, George William Coventry, then commonly called Viscount Deerhurst, now Earl of Coventry, and the said Mary, now Countess of Coventry, then called Lady Mary Deerhurst, his wife, (who had taken out letters of administration of the goods and chattels of the said infant Duke, her half brother,) filed their bill of revivor and supplement against the said Andrew Berkeley Drummond, John Drummond and Charles Drummond, the Appellant, Lady Laura Tollemache, William then Duke of Saint Albans, and others (whose names were afterwards struck out by amendment), claiming to be absolutely entitled in right of the Countess (as representative of the said infant Duke), to the furniture, plate, pictures, etc. mentioned in Vere Lord Vere's will.

William, fifth Lord Vere and seventh Duke of Saint Albans, by his answer claimed, as tenant in tail in possession of the barony of Vere, to be entitled under and by virtue of the said will to the said goods, furniture, pictures, etc.

Lady Laura Tollemache, by her answer, stated, that in the year 1795, the household furniture, linen, china and glass, and some of the pictures bequeathed by the will of Vere Lord Vere, had been sold, and the proceeds thereof invested in securities bearing inte-**[616]**-rest, and which then amounted to £928 6s. 5d. four per cent. annuities: and that some of the said pictures had been destroyed by a fire which happened at Hanworth House, the residence of Aubrey, the second Lord Vere, and afterwards Duke of Saint Albans: and submitted that the late infant plaintiff, Aubrey the fourth Lord Vere and sixth Duke of Saint Albans, did not, upon his father's death, become absolutely entitled to the said chattels, but that the same had vested in his father, the preceding Duke (being the third Lord), as his absolute property, and then belonged to Lady Laura, as his personal representative.

The cause came on to be heard before the Vice-Chancellor, in 1820, when his Honor declared and decreed, amongst other things, that Lady Mary Deerhurst, now Countess of Coventry, (as administratrix of the late infant Lord and Duke), was absolutely entitled to the said goods, furniture, pictures, etc., and decreed accounts to be taken of the same, etc. (see a full report of the case, under the title of *Lord Deerhurst and others* v. *Duke of St. Albans and others*, 5 Madd. 232).

William, the then Duke of Saint Albans, and Lady Laura Tollemache, severally appealed to the Lord Chancellor. Before the appeals were heard the late Duke William died, whereupon the title of Lord Vere descended upon the present Duke, and he and the executors of his father were made parties to the suit, by bill of revivor. The appeals were heard before Lord Eldon, and subsequently before Lord Lyndhurst, who in November 1830 gave his judgment, and ordered the said decree to be affirmed.

Lady Laura Tollemache now appealed to the House of Lords against so much of the decree as declared Lady Coventry to be absolutely entitled to the chattels in question.

[617] The Solicitor-general (Sir C. C. Pepys), and Mr. Preston, for the Appellant: —The gift was to a class of persons in succession, viz. Lords Vere, and not to individuals. The executory bequest of the chattels to the person who should be first taker of the title of Lord Vere, after the death of the survivor of the testator's widow and son, was a bequest which must of necessity vest, if it ever vested, in some person who either was in existence at the time of the testator's death, or would come into existence within the compass of a life in being at that time, or within a few months after the dropping of such life; and was therefore good in law. But the executory bequest over to the person who would be Lord Vere next in succession after such first taker of the title, was not a bequest which must of necessity vest in any person who would be in existence at the testator's death, or within any life then in being, or twenty-one years after the dropping of any such life; and therefore was not valid. The executory bequest to the person who should be first taker of the title of Lord Vere at the time of the death of the survivor of the testator's widow and son, not being

a bequest which must of necessity vest in a person living at the testator's death, no gift over upon the death of that person could, by the rules of law, be good and valid, unless expressly made in favour of some person who must of necessity be in existence, either at the testator's death, or within the compass of some specified life then in being, or twenty-one years after the dropping of such life. The testator might have taken the lives of one or more person or persons in existence at his death, and twenty-one years after the dropping of the last of such lives, to form a period within which an executory bequest of the chattels might have vested; yet, as he omitted to do so, it was not in the power of the Court to supply **[618]** that omission; one reason for which is, that, as the testator would have had all the world to choose his lives out of, it is impossible to say what lives he would have taken; and another reason is, that executory devise, being an infringement on the rules of the common law, has only been allowed on condition of its not exceeding certain limits; *Robinson* v. *Leake* (2 Meriv. 390); namely, on condition that it be so framed as that it must vest, if at all, within a certain period; but if that period is not expressly defined in the will, this condition is not performed. The trust not being executory, nor connected with any devise or settlement of real estates, by way of strict settlement, the words "as far as the rules of law and equity will permit" cannot operate to make the bequests valid to a greater extent than they would be without those words, or allow of the addition of any modification of ownership not expressed in the gift.

Mr. Tinney and Mr. Romilly, for the Respondents:—There were three several claimants to these chattels in the Courts below: first, the Appellant, as the personal representative of Aubrey, the third Lord Vere; secondly, the personal representatives of the infant Lord Vere and Duke of Saint Albans, who are the Respondents in this appeal; and third, the late Lord Vere, William Duke of Saint Albans, on whose death, his representatives, together with the present Duke, were made parties to the suit, but they have not joined in the appeal. The question, therefore, is now between the Appellant and Respondents. The will directed the chattels to go with the title, as far as the rules of law and equity would permit. Aubrey, the third Lord Vere and first grandson of the testator, being in *esse* **[619]** at the date of the will and death of the testator, must be considered as tenant for life only; and his son, the great-grandson of the testator, was the first tenant in tail of the dignity, and in him therefore these chattels vested absolutely. To construe the will differently, and hold them to vest in the grandson, the third Lord, would be tantamount to the striking out of the words "in trust for such person, etc. as far as the rules of law, etc. would permit." There was no ground in this case for supposing that the period of the suspension of the absolute vesting would exceed the time allowed by the rules of law, if that period were extended to the great-grandson not born at the date of the will, as there never could be any interval in the succession of Lords Vere.

The above is a mere outline of the arguments. They are so fully reported, on the hearing before the Vice-Chancellor, in 5th Maddock 232, where the case also is stated more at large, and on other points which were not now in dispute, that the Reporters did not think themselves justified in repeating them. Among the cases cited, besides those mentioned in the judgment, were, *Gower* v. *Grosvenor* (Barnard. 54; S.C. 5 Madd. 337); *Trafford* v. *Trafford* (3 Atk. 347); *Foley* v. *Burrell* (1 Bro. C.C. 247, and 4 Bro. P. C. 319); *Bridgewater* v. *Egerton* (1 Bro. C.C. 280; S.C. 1 Ves. sen. 122); *Vaughan* v. *Burslem* (3 Bro. C.C. 101); *Carr* v. *Lord Errol* (14 Ves. 478); *Gee* v. *Lord Audley* (1 Cox, 324); *Humberstone* v. *Humberstone* (1 P. Wms. 332); *Chapman* v. *Browne* (3 Burr. 1626); *Beard* v. *Westcott* (5 Taunt. 392); *Blackburn* v. *Stables* (2 Ves. and B. 367).

The Lord Chancellor observed, that the case was **[620]** one of considerable difficulty, not so much from any doubt about the principles of the law which were brought into discussion, for they were settled and clear enough, but the difficulty he felt was in the application of them to the very peculiar circumstances of this devise. It was to be regretted that no reasons were given for the decision to which the Court below had come. He advised their Lordships to postpone the consideration of the case.

The Lord Chancellor:—My Lords, this was an appeal from a decree of the present Master of the Rolls, when he was Vice-Chancellor; for it was decided originally as far back as the year 1820. It turns on a question of great difficulty, and of great

novelty, in the construction of a will. The will is that of the first Lord Vere, created Baron Vere, and who died in October 1781. By that part of his will on which the question arises, he gave and bequeathed to trustees all his household goods, furniture, pictures, books and so on, and all his plate, being in his mansion-house at Hanworth, upon trust for his wife, during her life; and after her death, to his son Aubrey Beauclerk, during his life; and after the death of the survivor of those two, who were both named, instead of giving it to any one individual by name, or to any number of individuals by name, and to their first and other sons,—which would have carried estates for life first to the persons named, and afterwards an absolute interest, being personalty, to the unborn issue of the taker of the last life estate—instead of doing that, he, for the purpose of going as near as the law would permit him to create a perpetuity, adopted a course which has given rise to all this difficulty: **[621]** he has given this part of his personal property in trust for such persons as should from time to time be Lord Vere; it being his will and intention and sole motive for making this disposition, that the same goods, furniture, pictures and so forth, after the decease of his wife and son, should from time to time go and "be held and enjoyed with the title of the family, as far as the rules of law and equity will permit." He left his said son, and also his widow, Lady Vere, surviving him: Lady Vere took this personalty by force of the first limitation; and the son surviving her, took after her by force of the second limitation; and then the lordship of Vere went to his son Aubrey, the third Lord Vere, fifth Duke of St. Albans, who died in 1815, having married, for his first wife, Jane Moses, and for his second wife, Louisa Grace Manners. By the first marriage he had issue the Respondent, Mary, Countess of Coventry; by his second he had issue Aubrey, the fourth Lord Vere and sixth Duke of St. Albans, who was born in 1815, and died in February 1816, a few months old, leaving as representing him by administration, Lady Coventry, his sister of the half-blood.—She and Lord Coventry, in her right, are the Respondents who have obtained the decision of the Court below. Louisa Grace Manners, the then Duchess of St. Albans, was made executrix of the will of her husband, the third Lord Vere; and Lady Laura Tollemache, as her executrix and personal representative, is the Appellant, and claims under Aubrey, the third Lord Vere, of whom also she is personal representative.

It is manifest that Lady Laura Tollemache must prevail, if Aubrey, third Lord Vere, took, under **[622]** the limitation of the will, an absolute interest in this personalty: she represents his executrix, being the executrix of that executrix. It is equally clear that if Aubrey, the fourth Lord Vere, took an absolute estate, then Lady Coventry, as representing him, takes an absolute interest in this personalty. It is also clear that Aubrey, the fourth Lord Vere, took that absolute interest, if the gift was by limitation over to "Lord Vere" such as to carry an estate for life only to Aubrey, the third Lord Vere, he being in *esse* at the date of the will and at the death of the testator: and consequently his first unborn son would take an absolute interest. The question, therefore, resolves itself into this, whether or not the testator has done that which the rules of law permit, when he made a limitation,—not to a series of persons in *esse*, and to the survivor of them, and to the first and other sons of that survivor,—but a limitation to one person in *esse* by name as purchaser, with remainder to all persons who "from time to time should successively become Lord Vere, as far as the rules of law and equity would permit;" from which last limitation this implication is sought to be raised, that the first unborn issue of the last person answering the description of Lord Vere, and in *esse* at the time of the will and the death of the testator, should, according to the analogy of the rules of law, take an absolute interest, the prior taker only taking an estate for life.

My Lords, that is a question of difficulty, and undoubtedly without precedent; for the three cases which have been referred to, when examined, throw upon it but a faint glimmering of light, if indeed they throw any light at all on it: and I am bound to say, **[623]** with respect to the case of *The Duke of Newcastle* v. *The Countess of Lincoln* (3 Ves. jun. 387, and 12 Ves. 218), that although there may be somewhat of a principle there laid down which has a remote bearing upon this question, yet it carries you hardly a step on the way in deciding the present case. With regard to the case of *Robinson* v. *Leake* (2 Meriv. 363), much relied on by the Appellant's counsel, there is doctrine there laid down which no man can dissent from, and which

is indeed equally admitted by the Respondents; I mean what Sir William Grant says in the passage cited for the Appellant and relied on in the argument. As to the case of *Proctor* v. *The Bishop of Bath and Wells* (2 H. Black. 358), I am not prepared to deny that there may be in that case some bearing, or rather I should say, some analogy between the principle which governed the decision in that case, and the principle which must govern the present. But the case itself was wholly different: for it was a limitation to A for life, and remainder to such son of B, if any, as should be educated for the church and enter into holy orders; the question arising on an advowson limited in the settlement. Now it is perfectly clear, that by law you cannot limit to any person any interest of any kind, which should go nearer to a perpetuity than the life or lives in *esse* and twenty-one years, and the period of gestation, which is a few months; and although the late decision in the case of *Cadell* v. *Palmer* (1 Clark and F. 372), in which your Lordships were assisted by the Judges, carries the principle to the full length,—a principle undoubtedly repugnant to the original grounds of the rule, but adopted in conformity with decisions of an old date, and with the general understanding and practice **[624]** of the profession;—yet in laying down that principle, when your Lordships held that a man may add the term of twenty-one years, as it were in gross, to the life or lives, and the survivor of the lives, in being, without any regard to infancy, or any other circumstance, you at the same time held that he cannot add any number of months to that term in gross—thus excluding the time added for gestation, unless the fact exists, and in so far recurring to the original grounds of the rule. It has been said that *Cadell* v. *Palmer* went further than the former cases; it went in my opinion no further than at least one case of great authority, and decided in this House, though it may have gone further than the original reason of the rule authorized; it laid down this for law, and no more, that you may add to a life or lives in being the period of twenty-one years in gross; but on this point your Lordships said, after consulting the Judges, that you may not add any period for gestation, except where gestation actually happens.

That case is totally different in principle, and does not meet this case, and does not carry us one step further in the argument than the case of *Proctor* v. *The Bishop of Bath and Wells*. No man could have made a limitation to the unborn children of B, first giving the estate to A, and limiting it to the unborn issue of B, when he should be educated for the church and enter into holy orders: first, because it is too remote a contingency, (that perhaps applies to this case upon principle); but secondly, which is decisive, because before the age of twenty-three he cannot be in deacon's orders, and before twenty-four he cannot be in full priest's orders. Therefore there are at least two or three years beyond what the law allows, even according to the established rule, as expounded in *Cadell* v. *Palmer*, of this term of twenty-one years in gross **[625]** being added to the life or lives in being. I do not then think that the case of *Proctor* v. *The Bishop of Bath and Wells* is applicable to the present case; certainly it cannot be said to rule it; almost as certainly it affords but little assistance in deciding it: and what little assistance it does give us, is in favour of the Appellant, rather than of the Respondents. We are, therefore, compelled to have recourse to principle; and so regarding the question, first of all, we may admit that the testator might have done successfully what he has attempted to do, if he had been minded to take another course; he might have so contrived as that every one person who successively became Lord Vere, should take a life interest, and that thus the unborn issue of the last taker should have the fee simple, by giving him what would be an estate tail in realty, and consequently an absolute interest in personalty. All this may be admitted: he might have annexed the chattel interest to land entailed to a certain succession of heirs, in such a manner as to carry the chattels to certain of the uses of that settlement, and so to accomplish his object. We need not dispute that.

But now let us pause for one moment, and consider how difficult it is to annex chattels personal to a title, whether the title is a series of estates for life, or a series of estates of inheritance, either in fee simple or fee tail; a fee simple after the manner of a Scotch entail, which amounts to fee upon fee indefinitely, only prescribing certain rules of enjoyment, certain conditions annexed, and giving a certain course of succession; a fee tail, such as we know in England. If it is a series of estates

for life, how can any one, without an Act of Parliament, annex the enjoyment of personalty to a succession of life [626] estates in a dignity? If on the other hand it is an estate in fee tail, then from the course of the reasoning to which I have referred, annexing an estate in chattels to an estate in fee tail, should seem to give a fee simple to the first taker in those chattels. But here is a totally new invention, and a kind of limitation not known to the law, treating Lord Vere as if he were a corporation with perpetual succession,—treating "Lord Vere" as if he were something known to the law, and different from a person, but were a succession of persons; and though true it is that the third Lord Vere was alive at the time of the will, and you only give to the fourth Lord Vere, his unborn issue, that which the rules of law would enable you to give if the event had happened, it does not follow because you are wise after the event, that therefore you are to put a construction on the instrument which you have no right to do, to meet that which has accidentally happened after the date of the instrument. In the next place he gives a life estate to certain persons; he gives to Lord Vere, whoever he may be, however short he may live, or however long he may live, new estates and new successions to be enjoyed at the caprice of individuals, and to shift from one to another, following no rule or analogy, and in many respects—as I shall presently show—resting on totally different grounds from those of landed succession. The law knows what you mean, when you say a person coming in *esse*, a person continuing in *esse*, and a person ceasing to exist; a person comes in *esse* in one way alone, by being born into the world; continues in *esse* by living; ceases to exist by death; all those things are known in law, and guiding yourself by this, which is fixed [627] and known, and referring to those familiar events, you may leave your personal chattels and real estate, by the rule of law; but a Peer does not come into existence in the same way; a Peer neither comes in *esse*, or continues in *esse*, or ceases to be, by any such rules, in any such way.

That, my Lords, leads me to a most material consideration in this case, as it leads me to refer to the very able argument of the learned Counsel for the Respondents, which impeded me for a long time in the conclusion to which I saw I must ultimately come. He said that, after all, the rule was not violated in any way, as the lordship of Vere was to go to the heirs male of the body of the first patentee, one after another, and of course there never could be any interval; that one must succeed the other, and there never could be any overstepping of the boundary of the twenty-one years. I do not think, strictly speaking, that that is so, even independent of the consideration I am about to urge. We are now speaking of honours; the same rule must be applied to the lordship of Vere, which is limited in tail to the heirs male of the body, as would be applied to honours taken in other ways by different limitations; and, conversely, the rule applied to this dignity, would be applicable to those others. Suppose this to be a barony in fee, in the ancient way of creating such barony, by calling up the first Lord Vere by a writ of summons, and by his sitting in Parliament, which would give a barony in fee tail; and that there was afterwards an abeyance of the barony; observe what the consequences would have been. The first taker takes, and there is a son and no more; that son, who would take after the parent, has two daughters [628] and dies. Who is to be Lord Vere? The dignity is in abeyance; what becomes of the annexed chattel interest during the period of the abeyance? Till the Crown is pleased by selection to determine that abeyance, there is no Lord Vere to take; but there is no forfeiture of the chattel interest given, because there may be a Lord Vere whenever the Crown chooses to exercise its selection between the two daughters. Therefore during the life of those two daughters of the son, which son I am supposing to be dead, the state of things never can be altered by the birth of another son: and therefore if the son predeceases his father, that father would have an estate to which I know nothing like in the law. The title is in abeyance till a most uncertain event, which never can be calculated on, and which is much more remote and less to be counted on in law than the contingency of taking orders in the case of *Proctor* v. *The Bishop of Bath and Wells*. Till that event and during all the intermediate time the estate is in a sort of abeyance, because the Crown may not select till the efflux of time has prevented the necessity of selection, by one of those daughters having her issue extinct, and then a Lord Vere may come into existence, possibly, 150 years afterwards. But here you will say the chattels are to go with the title as far as the rules of law will permit and no

farther. Then the rule of law will not permit that; for the rule is, that if there be any possibility of the period of vesting absolutely exceeding the twenty-one years—if it is not absolutely certain that it never can exceed twenty-one years—the limitation is void: and according to all the cases, it is void not in the excess only, but void absolutely in the whole.

[629] Now it may be said, that this is putting a case which is not the present peerage. No more is it, but the same rule will apply to the one and to the other. I have hitherto supposed this to be a barony in fee, and that Lord Vere's eldest son dies leaving his father and two daughters him surviving. I will now put the case of a limitation of the barony, by patent, to Vere or Aubrey, the first Lord Vere, and the eldest son and the heirs male of his body lawfully begotten, and with remainder to the heirs male of the patentee's body. I will put the case of his having an eldest son, and of that eldest son having a brother who would succeed, failing the eldest son and heirs male of his body, under the limitation, and I add to the case the supposition that the eldest son has a son; suppose the eldest son commits high treason, and there is an attainder and corruption of blood worked, observe the state in which the title is: As long as there is any issue in existence, any issue in tail of that eldest son so attainted, the title is not extinct but no one has it. If that issue fail altogether, then the title goes to the second son of the patentee, and then there comes a Lord Vere into existence fifty or sixty years hence; the title continues as long as the issue of the eldest son continue, through which eldest son's attainder the corruption of blood and forfeiture of the title *pro tempore* was wrought; during all that time there was no Lord Vere, but still the title was not gone. Then that is a case which never could happen in the annexing of land with the lives in being, and giving it to them and their survivor for life, and limiting only an estate in remainder in tail to the first and other sons of either of them, or the survivor of them. But **[630]** here arises the possibility of abeyance from this novelty in conveyancing, invented by the testator; and which of itself appears to me to furnish one among other answers to the doctrine contended for by the Respondent's counsel. I need only on this matter refer to Walsingham's case (Plowd. 557), where it is said, "if a man at this day make a gift in tail, and the donee is attainted of treason, the Queen and her heirs shall have the land as long as there are any heirs of the body of the donee:" and to the cases of Percy, Earl of Northumberland (7 Rep. 34 a.), and Henry St. John, Lord Bolingbroke (3 Cru. Dig. 180. Vol. 28, Jour. 204), in which the same course of succession to peerage and honours was taken to which I have now alluded.

My Lords, I hold it to be a mere fallacy to say that the Lords Vere were all in *esse*, and that at the death of the testator, or rather the date of the will, that Lord Vere was in *esse*, on the failure of whose life estate the fourth Lord Vere, the first unborn issue, took. The man was in *esse*, but we are not to speak of the man here, because I have taken the distinction in the former part of my argument, for another purpose, between a limitation such as the law knows, depending upon events known to the law, and usually dealt with by the law, namely, of coming in *esse* by birth, continuing in *esse* by living, and ceasing to exist by death; but that is not what Vere, Lord Vere, the maker of the will, has contemplated; he looks at it in another way; neither looking at lives nor duration of lives, he goes by peerage and not by birth; he goes by at-**[631]**-tainder and not by death; he goes by the selection of the Crown, and not by the hand of nature. It is a fallacy, as it appears to me—it is a play upon words, to say that Lord Vere was in *esse*, because the individual Beauclerk, who afterwards happened to become Lord Vere, was in *esse* at the time. There was not a Lord Vere in *esse*, nor *ex vi termini* could there be said to be a Lord Vere in *esse* till that individual, whom, *quasi* individual, we admit to have been in *esse*, came to be Lord Vere. You must look at it either in one way or another; you must either take it as an artificial or as a natural existence, either a man or a peer; you cannot take it both ways; you cannot, for one purpose and in order to escape the rule for restraining perpetuities, of executory devise take him to be the natural man, and for another purpose bring in a fourth Lord Vere to defeat the estate in fee simple, the estate of the third Lord Vere; you cannot turn round to say Lord Vere was in *esse*, because he existed who happened to be Lord Vere, when the event occurred. The testator must abide by one of two things, by the natural capacity or the politic capacity: he has elected, and the case can only succeed for the Respondents upon the ground that we are

to take the politic capacity, and this excludes the application to the natural capacity. According to the politic capacity, I deny that Lord Vere was in existence; he had not come in *esse*, he was not in *esse*, according to that capacity.

My Lords, these are the principal grounds on which I found it impossible to agree with his Honor the Master of the Rolls in the judgment he has pronounced. It is a question of great difficulty; it is a case to which I have given much consideration, otherwise I should have taken an earlier oppor-[632]-tunity for delivering my opinion (it was the day of the prorogation of Parliament). I could not, however, delay this longer, because there are circumstances in the family which may require a revivor of the suit. I understand that since the argument, Lady Laura Tollemache, one of the parties, has departed this life; the consequence of which is that there must be a revivor. There will be no difficulty in this respect, as the same thing has occurred in former cases.

It is high time that there should be an end put to this litigation. The case was decided in 1820; it was afterwards brought before Lord Eldon, when he was Chancellor, but he expressed no opinion, nor even intimated any inclination of opinion; he was pressed, as I happen to know, with the difficulty, the nicety of the case, and he found very little light in the authorities to guide his path. It was then argued before my noble and learned friend who immediately preceded me, Lord Lyndhurst, and he gave judgment in affirmance of the decree below, but he gave it the day of his quitting the Great Seal; and as it was handed to the Registrar without reasons, of course, in these circumstances his Lordship was very properly slow to reverse his Honor's judgment. I should probably have done the same thing, if I had felt any grave doubt on the matter. To say that I move your Lordships to reverse this judgment, with perfect confidence, and with no doubt, would be taking a liberty with the facts of the case, which its acknowledged difficulty makes me feel little disposed to do. But I am sure that I am pursuing the safest course in abiding by established rules of law, and in showing a marked [633] disinclination to minister to such fanciful designs; to aid the inventors of capricious limitations of new estates, of estates shifting and springing according to rules which are wholly unknown in the ordinary course of practice and decision, and unauthorised by any precedent. I do freely acknowledge that some of the arguments I have used, I mean particularly respecting the attainder and abeyance, would apply, not merely to the case of Aubrey the fourth Lord Vere, but in some degree to Aubrey the third Lord Vere: I felt all along the possibility of such application; but beside its much more pointed application to the case at bar, I am bound by decision and authority in the one case; I must run in the face of authority if I denied the third Lord Vere's right; but I have no decision nor any authority supporting the other.

These are the reasons which have influenced me in the conclusion to which I have come; I have the satisfaction of thinking that, after an able and learned argument at the bar, I have come to a conclusion which it did not appear possible to avoid without introducing new law; and therefore I move your Lordships that the decree of the Court below be reversed, but without costs. The decree was accordingly reversed

[634]

APPEAL

FROM THE COURT OF CHANCERY.

HENRY HOWARD, Esq.,—*Appellant;* The Right Honourable EARL DIGBY, —*Respondent.*

[Mews' Dig. vii. 1260; ix. 657; S.C. 8 Bli. N.S. 224; 5 Sim. 330; and, in Ch., 4 Sim. 588, 1 L.J. Ch. 3. As to pin-money, followed in *Dixon* v. *Dixon*, 1878, 9 Ch.D. 589; and see *Edwards* v. *Cheyne* (2) 1888, 13 A.C. 398, and Married Women's Property Acts 1882 (ss. 1, 5) and 1893 (s. 1). As to maintenance of lunatics, see *In re Rhodes*, 1890, 44 Ch. D. 97.]

The Duchess of Norfolk was entitled, under the trusts of the settlement made in contemplation of her marriage with the Duke in 1771, to two annuities of £700 and £300, charged by way of pin-money, upon estates to which the Duke

was entitled for his life. The Duke received all the rents and profits of the estates, and maintained the Duchess according to her rank, up to the time of his death in 1815. In 1816 the Duchess was found to have been a lunatic, without lucid intervals, from 1782, and she continued so until 1820, when she died intestate. Her personal representative claimed from the personal representative of the Duke, arrears of the pin-money from 1782 to 1815. HELD by the Lords, reversing the decree of the Court below, that the personal representative of the Duke was entitled to set off any payments made by the Duke in respect of the pin-money, against a claim for the arrears by the Duchess during her lifetime, and that the personal representative of the Duchess was not entitled to *any* arrears of her pin-money.

This was an appeal from a decision of the Vice-Chancellor. The Appellant was the executor of Charles late Duke of Norfolk, the Respondent was the personal representative of the late Dowager Duchess of Norfolk, and the suit was instituted for the purpose of recovering alleged arrears of annuities, in the nature of pin-money, secured to the Duchess, by indentures of lease, release and settlement, bearing date March 1771, being the settlement made previously to and in contemplation of the marriage of the Duchess, then Miss Frances Fitzroy Scudamore, **[635]** with the Duke of Norfolk, then the Honourable Charles Howard. Under and by virtue of that settlement, and in the events which happened, the Duchess became entitled in 1777, to receive during the joint lives of herself, and of the Duke her husband, one annuity or clear yearly rent-charge of £300 out of estates of the Duke, in augmentation of the pin-money secured to her out of estates of which she herself had been seised in fee-tail before her marriage; and in 1782 she became entitled to receive in like manner out of these last-mentioned estates, another yearly rent-charge of £700 for her separate use for pin-money, in lieu of the yearly sum of £500 theretofore payable for such pin-money, and in addition to the said yearly rent-charge of £300.—(The settlement is stated more at large by Mr. Simons, in his report of the case in the court below, vol. 4, p. 588.)

Charles, Duke of Norfolk, died in December 1815, having by his will appointed the Appellant his executor, who duly proved the same, and thereby became the Duke's legal personal reperesentaive. Under a commission of lunacy issued against the Duchess in April 1816, she was found to have been a lunatic, without lucid intervals, from December 1782. By an order of the Lord Chancellor, made in August 1817, the custody of her person and estate was granted to the Respondent and two other gentlemen; and they, by another order of the Lord Chancellor, made in August 1819, were at liberty to institute a suit for the recovery of the arrears of the said yearly rent-charges of £700 and £300, from 1782, the time from which the Duchess was found to have been a lunatic, to the time of the Duke's death. A bill was accordingly filed **[636]** by the committee of the Duchess against the Appellant as the Duke's executor, and others, but before any further proceedings were had, the Duchess died intestate, in October 1820, and letters of administration of her personal estate were granted to the Respondent, who thereby became her legal personal representative, and as such he filed the present bill.—(The interest of the committees of the Duchess having been determined by her death, their bill was dismissed.)

The cause came on to be heard before the Vice-Chancellor, and his Honour, by his decree dated November 1831, declared that all the arrears claimed (£1000 a year from 1782 to 1815) were due to the estate of the late Duchess, and directed the Appellant, admitting assets of the Duke's estate, to pay the same to the Respondent, with costs (see his Honor's judgment, 4 Sim. 601).

That decree was the subject of this appeal.

Sir Charles Wetherell and Sir Wm. Horne, for the Appellant:—Our first proposition is, that a claim for arrears of pin-money has in no case been allowed to be carried farther back than a year, or at most, a year and a fraction. In one case only was the fraction added to the year, *Countess of Warwick* v. *Edwards* (1 Eq. Cas. Abr. 140, c. 7); and that was by reason of the peculiarity of the circumstances, and because, as it was there said, "it made little difference." In all other cases of pin-money the account for arrears was limited to a year, and that limitation is now the rule of the Court of Chancery: *Thomas* v. *Bennett* (2 P. Wms. 341), *Fowler* v. *Fowler*

(3 P. Wms. 353), *Lord Townshend* v. *Windham* (2 Ves. sen. 7). But it is [637] alleged that the circumstances of the present case constitute an exception to the rule, inasmuch as the Duchess of Norfolk having been a lunatic from the year 1782, was incapable of giving a receipt for her pin-money, or of consenting that her husband might receive it for his own use, or of entering into any legal contract respecting it. Could that unfortunate circumstance, even if it were proved that the disability continued uninterrupted by lucid intervals, keep alive this claim for thirty-three years, when it is admitted that the Duke maintained, during all that time, an establishment for this distinguished lady suitable to her rank, expending a sum far exceeding the annuities, in providing for her clothes, jewels, and all such other ornaments and articles of comfort or necessity as are the objects contemplated by the provision of pin-money?

The second proposition which we undertake to support is, that at all events there should be a reference to the Master to take an account, and the Appellant ought to be at liberty to set-off against this claim, the sums expended by his testator for the Duchess, in supplying her with those things to which pin-money is usually applied. The decree appealed from, instead of directing such reference, ordered the payment of the accumulations of the annuities for thirty-three years, without deduction.

The Vice-Chancellor seemed by his judgment to have viewed the provision for pin-money in the marriage settlement, as if it were separate estate to the use of the wife in the ordinary sense; and his Honor further seemed to make a distinction in respect that the annuity of £700 was to issue out of the lady's own property. Both these views were erroneous; It could not make any difference in the nature of [638] the annuity, whether it was to issue out of what was originally the husband's estate, or out of what, before the marriage, was the wife's own estate. Pin-money should not be confounded with the wife's separate estate generally. The Vice-Chancellor was drawn into the error of confounding these different provisions by that part of the settlement, by which "it was declared and agreed that the same annuities were so limited to them (the trustees) upon trust that they should from time to time pay, apply and dispose of the said several annuities of £500 and £700, or such of them as should become due and payable by quarterly payments, under which the said trustees should become entitled to receive the same, unto such person or persons only, and for such intents and purposes only, as the said Frances Fitzroy Scudamore should by any writing or writings to be signed with her hand, from time to time, notwithstanding her coverture, direct or appoint; and in default of such direction or appointment, and in the mean time until the said Frances Fitzroy Scudamore should make any such direction or appointment, should pay the said several annuities of £500 and £700, as the same should be severally had and received, or so much thereof whereof she should make no such direction or appointment, into the proper hands of the said Frances Fitzroy Scudamore, for the sole and separate use and benefit of her the said Frances Fitzroy Scudamore, exclusive of the said Charles Howard, who was not to intermeddle therewith, nor was the same to be subject to his debts or engagements; and the receipts and discharges of the said Frances Fitzroy Scudamore, and of such persons as she should from time to time direct or appoint to receive all or part of [639] the said annuities or yearly rents of £500 and £700, as the same should become due and payable, should be good and effectual releases and discharges." The term "pin-money" was not used in that part of the settlement, but in other parts of it the annuities were expressly named as "pin-money," and the Appellant was thereby relieved from all difficulty as to the intention of the parties and the destination of the provision. It was material on that part of the case to observe, that the Duke had settled on the Duchess by way of jointure, £2000 a year out of the Norfolk estates, and that on his death without issue, she again became entitled in possession to the rents and profits of her own estates, which were of very considerable amount. The accumulations of the excess of this large income, beyond the expenditure of the Duchess, for several years before her death, fell into her personal estate for the benefit of her next of kin. These considerations would have been ingredients in the cause, if the Court below had directed a reference to the Master.

The trustees of this pin-money made no demand for arrears on the Duke during his life; they well knew that the Duke had expended a far larger sum on the objects of pin-money. But supposing they had filed a bill in Chancery for such alleged

arrears, would not that Court have answered, "*quamdiu* the lady is supplied by her husband with all that her situation requires, and she is unable to spend any more, these annuities, if raised, must be for the benefit, not of the lady, but of some unborn relative, some future next of kin: therefore you shall not be allowed to raise an accumulating fund out of the husband's property, for the purchase [640] of ornaments with which the lady is sufficiently supplied by the husband." Had the trustees made such a demand, the Duke would have been forced, in his own defence, to take out a commission of lunacy against the Duchess, and the Lord Chancellor, sitting in the matter of the lunacy, would have ordered an account to be taken by the Master of what was expended by the Duke, the establishment kept for the Duchess at Holmlacy, and on such objects as are contemplated by the provision of pin-money. Was there any just reason for refusing a like account to the Duke's executor, against this claim by the representative of the Duchess? Had the Duke of Norfolk survived the Duchess, these arrears would all belong to him; the absence of all provision in the settlement for the contingency of the lady's becoming a lunatic, most clearly shows that the parties to it never contemplated the accumulating of this fund.

That which is in this settlement called pin-money, is what the law considers the wife's actual expenditure during coverture. The only peculiarity in the provision is, that it is secured to the wife by means of trustees. If the wife be unable to spend it, on what grounds are the arrears demanded, or for what purposes is the fund to be applied, the coverture being at an end, and the wife being dead? Even during the coverture this demand could not be sustained at law, if it were there, as it is here, admitted that the husband maintained the wife in a way suitable to her rank. It is probable that the Duke would not have kept up the establishment at Holmlacy were it not for the unfortunate situation of the Duchess; it is certain that he in no way limited her expences.—[The Lord Chancellor: If a [641] tradesman furnishes the wife with apparel suitable to her station, and not being paid by her, brings an action against the husband, would it be an answer to the action that the husband allowed *pin-money?* Could he retain the pin-money to protect himself against the action? There are cases at common law which protect the husband if he had paid the wife's allowance, but they are cases of separate maintenance during separation; *Marshall* v. *Rutter* (8 Ter. Rep. 546).]—There is no doubt on that point; separate allowance is by contract, and so is pin-money; and if the sums agreed upon for either provision be applied by the husband to the objects contemplated by the agreement, he cannot be obliged to pay it again.

The decree of the Court below was against the current of authorities; and it was a strong proof that the Vice-Chancellor had only a confused notion of this case, when he applied in favour of the Respondent those decisions which clearly supported the argument for the Appellant. In *Powell* v. *Hankey* (2 P. Wms. 82), which was a case of property settled to the separate use of the wife, Lord Macclesfield said, "as to the case of separate maintenance, the Court took notice that the husband's maintaining the wife barred the wife's claim in respect thereof: so if there should be a provision for the wife's separate use for clothes, if the husband finds those clothes, the wife's claim will be thereby barred." If that be incontrovertible doctrine in respect to a wife of sound mind, would it not be much stronger in favour of a husband who supplied a wife of unsound mind with all that her unfortunate situation required? In another part of his judgment in that case, Lord Macclesfield laid it down that it "was [642] not material whether the allowance or maintenance money was provided out of that estate which was originally the husband's, or out of what was the wife's own estate," an observation which was directly opposed to the distinction attempted to be made in behalf of the Respondent in this case. The case of *Fowler* v. *Fowler* (3 P. Wms. 353) was still more applicable, because that was a case of pin-money. Lord Talbot there said, "when pin-money is secured to the wife, and the husband finds her in clothes and necessaries, that is a bar to *any* arrears of pin-money incurred during such time." The other cases cited and much relied upon for the Respondent in the argument before the Court below, were *The Attorney-general* v. *Parnther* (3 Bro. C. C. 441, and 4 Bro. C. C. 409), and *Brodie* v. *Barry* (2 Ves. and B. 36). Both these were cases of separate estate to the use of the wife, who was of unsound mind; and Lord Chancellor Thurlow, making an order in the former, on the executors of the husband to account for the dividends of the wife's estate, directed consideration to

be had of the extraordinary expense of her maintenance by reason of her insanity. That case therefore could not be an authority for the Vice-Chancellor's decree in this case, in which his Honor refused to give any such direction.

The Lord Chancellor:—I take it to be admitted that the demand here is for arrears of *pin-money*. It is not denied in the argument for the Appellant, that where the wife has a *separate estate*, and it is retained by the husband, the wife's executors are entitled to the arrears. I have taken a full note of the argument; I will communicate it to Lord Eldon, and request him to look into the case.

[643] The Solicitor-general (Sir C. C. Pepys), and Mr. Stuart, for the Respondent:—We admit that this is a case of pin-money, but there is no material distinction between pin-money and other separate estate of the wife.—[The Lord Chancellor: The decisions and practice of the Court take this distinction: they allow a claim of arrears of pin-money for a year, or a year and a fraction, but set no such limit to a claim of arrears of separate estate.]—That is a fanciful distinction: no such distinction was taken in the case of *Brodie* v. *Barry* (2 V. and B. 36), by Sir Samuel Romilly, who, as counsel in support of the husband's petition for the application of part of the insane wife's separate income to her maintenance, said, "where a woman entitled to *pin-money, or any other separate income*, which has been received by the husband, has been maintained by him, the Court will not after her death compel him to account, but will *presume an agreement between them*, that maintaining her, he shall retain that income." In *Ridout* v. *Lewis* (1 Atk. 269), where the question was, whether the wife should have the arrears of her pin-money out of her deceased husband's assets, Lord Hardwicke declared her entitled to have the arrears for several years raised by the trustees out of the estate which was by settlement charged with it: and there was no distinction taken between pin-money and other separate estate of the wife. No such distinction was taken in the cases of *Aston* v. *Aston* (1 Ves. sen. 264), *Townshend* v. *Windham* (2 Ves. sen. 7), and *Peacock* v. *Monk* (2 Ves. sen. 190), which were cases of pin-money. In the case of the *Countess of Warwick* v. *Edwards* (1 Equ. Cas. Abr. 140), another case of pin-**[644]**-money, the Court directed an account of the arrears to be carried back to the period at which there was evidence of the lady's consent to her husband's receiving the pin-money for her, and that was a year and three quarters of a year. These cases, and all the cases on the subject of pin-money or other separate estate (for no distinction was made between them), being decided on the ground of consent or no consent on the part of the wife, must be considered as overruled if the House should reverse the Vice-Chancellor's decision in this case, in which it is impossible from the situation of the Duchess to presume her consent. The law permitting a married woman to have the enjoyment of property settled to her use, as if she were a *feme sole*, will not allow her to be deprived of it, unless she precludes herself from all claim to it by some act of her own, either of contract or consent, or acquiescence which implies consent, and where there is evidence to deny the wife's acquiescence in the acts of the husband, her title to the property remains: *Parker* v. *Brooke* (9 Ves. 583). There could not be a more conclusive authority against the Appellant than the case of *The Attorney-general* v. *Parnther* (3 Bro. C.C. 441; and 4 Bro. C.C. 409), on which his counsel placed so much reliance. There the Court held the very reverse of the doctrine asserted on behalf of this Appellant, but directed regard to be had, in taking the account against the husband, of the extraordinary expense to which he was put by reason of the unsoundness of mind. But could it be alleged that the Duke of Norfolk incurred greater expense in maintaining the Duchess, than if she had lived with him in the full possession of **[645]** her faculties, and in the magnificence of the expenditure suitable to her rank?

It being admitted that the Duchess was incapable from the year 1782, of consenting to the Duke's retaining this separate income, if the arrears be due at all, upon what principle is the account for them sought to be restricted to one year?—[Sir Charles Wetherell: We do not admit that the Respondent is entitled to have the account for even one year; there is no case in which the account for the year's arrears was allowed, except where the wife herself, and not her personal representative, sued for them.]—The bill which commenced this suit was filed in the lifetime of the Duchess: if she was entitled to arrears for a year, her personal representative must be entitled to the same. It is for the Appellant to show, that although the Duchess was entitled to one year's arrears, she was not entitled to all the arrears from 1782

to the Duke's death. Lord Eldon, in *Brodie* v. *Barry* [2 V. and B. 36], said, "it is true, that if the husband receives from the trustees her separate maintenance, the Court will not charge him (the husband) with more than one year's income; but *that is upon the notion of her consent* to make it a common fund for the expense of the family; and this is the case of a person incapable of consenting, and therefore not within the rule which guides the Court in those instances." To the authority of Lord Eldon in that case, the Respondent might add that of Lord Thurlow, in *Attorney-general* v. *Parnther*, both these eminent Judges respectively using words so accurately descriptive of this case. Whether this provision for the Duchess be called pin-money or separate estate, her right to it under the instrument of release and settlement was un-[646]-questionably established, and that right could not be extinguished or barred except by her consent. That doctrine was to be collected from all the cases without exception.

The Appellant finding the weight of authority against him, claims to be allowed to make a cross demand and set-off, in respect of the Duke's expenditure in the maintenance of the Duchess. Though one would not expect so extravagant a proposition, yet against that also the Respondent was able to oppose the authority of Lord Eldon in *Ball* v. *Coutts* (1 Ves. and B. 305), where he said that "the alimony of the wife (separated *a mensa et thoro*) should not be deducted from her pin-money, because if she lived with the husband, she would be entitled to maintenance beyond the pin-money." The wife's separate estate was not a substitute for anything which the husband was by law bound to supply; it was neither for clothes, nor board wages, nor support; the wife had a right to do what she pleased with it, as if she were sole, without being accountable to any one. In the late case of *Murray* v. *Barlee* (3 Myl. and K. 209), in Chancery, it was distinctly laid down that the wife's separate estate was subject to her sole control, exempt from all other interference or authority. If a set-off were admissible against the arrears of this annuity, upon what principle was it admissible against the claim of the arrears of former years, and not admissible against the arrears of the last year? In no case was there any deduction from the last year's amount of arrears. But it was argued on behalf of the Appellant, that, had a commission been issued against the Duchess, and she [647] been found a lunatic in the Duke's lifetime, the Lord Chancellor, sitting in the matter of the lunacy, would upon petition direct this fund to be applied towards the maintenance of the lunatic. That was an assumption without authority: the Lord Chancellor would make no such order, without first considering what would be best for the interest of the lunatic, and without seeing whether her husband was of sufficient ability to maintain her. That was the doctrine laid down by Lord Eldon in *Brodie* v. *Barry* (2 Ves. and B. 39). Even in the case of an infant for whose maintenance two different funds were given, the interest of the infant was the rule to determine which was to be applied; *Foljambe* v. *Willoughby* (1 Sim. and Stu. 169).

The Lord Chancellor:—Admitting that the distinction between pin-money and separate estate of the wife is very obscure, little being found in the books upon it, and no definition being given, passing also over the argument as to what would be done had a commission been sued out, let us suppose the provision for pin-money to be £200 a year, and that the husband with his own hands pays for the wife's jewellery, millinery and ornaments, what difference can it make whether he pays it into her own hands, or gives it to her trades-people? If he pays all, for the purposes to which the wife herself would apply it, should not he be allowed credit for what he so paid? If the Duke of Norfolk, instead of paying this annuity to the Duchess,—supposing her to be of sound mind,—had paid all her tradesmen's bills with it, would it not be hard, that because she did not consent to his acts, he should pay the whole over again? It seems [648] to me impossible that the decree of the Vice-Chancellor, refusing all account of what the Duke expended in this way, can stand as it is now. His Honor calculated the demand against the Appellant, by multiplying the annuities of £1000 by the number of thirty-three years, and directed payment of the gross aggregate sum. The Duchess being incapable of giving consent, satisfaction, it is true, cannot be presumed against the claim, but proof of payments actually made might be permitted as a set-off against the demand, in the case of a lunatic, as in the case of a person of sound mind.

Counsel for the Respondent: Payments were not put in issue on the pleadings.

Supposing that the Duke made some payments which the Duchess would have made out of her separate estate, if she had been of sound mind, could he under the circumstances maintain a suit for recovering money so paid for articles suitable to his wife's rank and condition? If he could not, can he or his executor be allowed to set-off such payments in a suit against him? The Duke's representative cannot be in a better condition than the Duke was to resist this demand. All the cases, on the authority of which the demand for arrears was held to be barred, proceeded on the doctrine of contract or consent, which could not have place in this case. Incapacity to enjoy the fund could not deprive the Duchess of her right to it, or confer it on any other. The Duke was as much a stranger as any other person in respect of this estate, and the settlement expressly provided that he should not intermeddle with it. The trusts of the settlement were valid and subsisting during the lives of the Duke and Duchess; it is therefore **[649]** impossible to hold that this provision made for her expenditure on fanciful and luxurious articles, was extinguished by her lunacy: it was not an allowance from the Duke, but an inconsiderable part of the Duchess' property reserved to her use, while the Duke was, under the same settlement, in effect to receive during their joint lives the surplus rents and profits of her vast estates. It was not denied that he received all the rents, or that he retained this separate estate of the Duchess up to the time of his death, and died possessed of it. Until the numerous decisions of Lords Macclesfield, Thurlow, Rosslyn and Eldon, were set aside, it was impossible to deny the right of the Duchess, or of her representative, to recover the whole of these arrears without deduction or set-off of any advances made by the Duke for her maintenance.

Sir Charles Wetherell was going to reply—

The Lord Chancellor:—Upon one part of this case I entertain so clear an opinion differing from that of the Vice-Chancellor, that I shall advise your Lordships to dispense with a reply upon such part of the argument for the Respondent as touches it, reserving to the learned counsel for the Appellant, if they shall be so advised, their right to reply to the rest of the case. I regard this question as one of considerable importance, of some interest from the peculiarity of the facts, and of novelty in respect of judicial decision. It is a case of first impression; for there is no decision, there are no *dicta* even in any other case, nor is there any authority of any text writer which can be cited, either applicable to it or at all bearing **[650]** upon it, so as to throw any light upon the question. The main facts of the case were these:—In the year 1771, Charles Duke of Norfolk, then Mr. Howard, heir apparent to Mr. Howard, of Greystoke, in Cumberland, who was heir presumptive of Edward then Duke of Norfolk, intermarried with Miss Frances Fitzroy Scudamore, a lady of large fortune; her property in land at that time consisting of from £4000 to £5000 a year, in Herefordshire and other counties; her property in money amounting to £26,482. The whole of that money, with the exception of such part as was necessary for her *paraphernalia* at the marriage, passed to the husband under the settlement made previous to the marriage. The rents and profits of the estates became his, by operation of law, during the coverture; but by the marriage settlement, there was a provision made for the separate use of the wife, to this effect; that in respect of pin-money, the recital states that it had been agreed to provide £500 a year, to be afterwards increased to £700. The operating part of the instrument, dropping the name of "pin-money," settled in trustees for her life (in the events there mentioned and which happened) £700 a year, reserved out of the rents and profits of her estates; but as those rents and profits became the husband's, this £700 was as much given by him as if it had been given out of the reversion of the Greystoke estates, in the possession of his father, which would come, and which eventually did come to him upon his father's death, and they were put in settlement and conveyed to that amount; or as if it had been given out of any of the Norfolk estates, when they should be vested in him in possession. That this yearly sum came out of her own property **[651]** made no difference whatever, in the legal effect and substance of the provision: because whether he gave it out of his own estates, or reserved it out of her estates, he equally infringed upon his own right. The *jus mariti* would have vested the whole rents and profits of her estates, just as much as of his own estates, in himself during the coverture.

There is a reference in the latter part of the deed of settlement to the same sum

of £700 a year, as follows: That when he should succeed to the estates in which he was severally heir apparent and heir presumptive, namely, the Greystoke estates as heir apparent, and the Norfolk estates as heir presumptive,—that £300 a year should be added to the £700 a year already set apart for the wife in respect of pin-money, in augmentation of the pin-money thereinbefore set apart and provided for her. There is then another provision made contingent on the succession devolving upon him of these magnificent estates; £2000 a year was to be added to her then jointure: the consequence of all which was that, on surviving her husband, she was to enjoy the whole rents and profits of her own estates, supposing there was no issue of the marriage, and £2000 a year besides if he succeeded to his expected property.

Such was the state of matters when the marriage was solemnized: from a very early period, unhappily, the mind of the Duchess proved to be unsound, though no commission of lunacy was then taken out against her; she remained cohabiting with her husband, that is, living in the same house and even occupying the same chamber with him till the year 1809. For the next six years of the Duke's life there was more of separation: but this [652] is, at any rate, certain, that during the period from December 1782 to December 1815, when his Grace died, by the inquisition under the commission of lunacy sued out after the Duke's death, she was found to have been of unsound mind, without a lucid interval. She survived her husband five years. In 1820 a bill was filed upon the suggestion of Lord Eldon, then sitting in matters of lunacy: that bill was dismissed on her death: this bill, filed after her death, led to the decree which is now brought under the review of your Lordships by the present appeal.

The Duchess (an important fact which is not denied) continued to enjoy good bodily health; she lived not much in society, but was not confined; she went about visiting, and was visited to a certain extent, and the Duke, it is not denied (but if so, that will be the subject of inquiry), paid for her maintenance; and when living separate for several years as she did, and having a separate establishment, he paid her milliner's bills, carriages, and, in fact, all those personal expenses with which, more or less, pin-money has connection. The committee having done nothing in this matter during her Grace's life, on her death her personal representative preferred a claim against the personal representative of the Duke, to this effect: The Duchess had a right to so much a year for pin-money; if she had been a person of sound mind the demand could not have gone back beyond a year, because beyond a year, or a year and a fraction, the Court never has allowed a claim for pin-money to go back. But this is said to be upon the presumption, that the wife by acquiescence releases the claim; and as that presumption can have no place in the case of a lunatic, the Court, [653] it is contended, is not confined to the year, or the year and a fraction, in this case as it would be in any other, but must go back the whole time; and accordingly £33,000, or thereabouts, is the sum which is substantially awarded by this decree, to be paid by the personal representative of the Duke, to the personal representative of the Duchess, in respect of an unsatisfied and unreleased claim of pin-money.

First, I must observe, that there is no case in which it has ever been held, as far as I know, that the personal representatives of the wife can go back for a year, or even any part of a year, for the arrears of pin-money. That the wife herself can go back is admitted; but then they say, on the part of the Respondent, if the wife can go back for a year, it follows as a matter of course that her representative can go back; because how can one have a claim which does not survive to the representative? I see a very material difference between the wife herself and her personal representative, in respect to pin-money. There may be no difference in the case of an ordinary debt, where there is no peculiar relation between the debtor and the creditor, which peculiar relation it is that distinguishes pin-money from all other cases. What signifies it to the debtor whether he pays the creditor himself, or his personal representative? What signifies it to me, if I owe £1000 of annuity to A. B., whether I pay it to A. B. himself, or, if A. B. dies, I pay it to C. his representative? I am bound to pay him, and his executors, administrators and assigns; and though at law my debt is not assignable, yet in equity it is assignable, and I am bound to pay the representative just as much as I was bound to [654] pay the original creditor. But is that the same entirely and in all respects with pin-money? Very much the reverse.

This leads me to consider what pin-money is: for what purpose and with what

view it is set apart and provided. In what right the wife enjoys it, and by what obligation the husband pays it. It is not an ordinary debt; it is not a gift from the husband to the wife, out and out; it is not to be considered like money set apart for the sole and separate use of the wife, during the coverture, excluding the *jus mariti;* but it is a sum set apart for a specific purpose, due to the wife in virtue of a particular arrangement, payable by the husband by force of that arrangement and for that specific purpose. I am subject to be corrected upon this as upon all other subjects, and to be better informed, but I have not in this case received any such correction. I have not had the benefit of any light better than I possess myself; I have heard nothing whatever to shake my opinion that pin-money is, with respect to the personal expense of the wife, for the dress and the pocket-money of the wife; its very name implies a connection with the person; it means that which goes to deck the person of the wife, and as I should say, upon a somewhat larger construction, to pay her ordinary expenses. A person in a humble station of life, pays his wife's bills as he pays his own; a person in a station a little higher, is accustomed to make, for common convenience, an allowance to his wife of so much for house keeping expenses, and so much over for her own dress and the dress of her children; a person in a higher station still, makes a general arrangement, which probably extends over years, if not over the whole [655] coverture; and a person in a higher station,—in the highest —makes the arrangement of pin-money by the marriage settlement; which is as much as to say, "you, the wife, shall not be reduced to the somewhat humiliating necessity of disclosing to me every want of a pound to keep in your pocket; or of taking my pleasure and obtaining my consent every time you want to go to the milliner's shop to order your dress; but you shall have so much, consistent with my estate and my income, which you shall retain apart from me and exempt from my control." It is a refinement which the law has introduced, peculiar to the bargain or arrangement previous to and upon the marriage. The husband exempting it from his control, may be supposed to say, "there shall be your dress-money, your pocket-money, your fund for separate personal expenses set apart for you during the coverture."

That I take to be clearly the nature of pin-money; and if it be so, it is equally clear that no nobleman or person of however high and honourable degree, being in ever so wealthy circumstances, would ever dream of making an allowance to his wife for pin-money, if he were at the same time to be paying all her bills year after year, her milliner's bills and others, over and above her pin-money. If it is the right construction of law upon pin-money, that the husband is to pay the bills, although he has provided the other fund, the sooner it is known to all persons about to enter the state of matrimony the better. But that being clearly, according to my view of the case, not the intendment of the law upon the subject, and pin-money being such as I have described it, I take this to follow: that there is a difference between this provision and a debt to [656] strangers; a difference arising from a separate fund being set apart as pin-money, and from the mode in which it is to be expended, the kind of expense which it is intended to defray; an expenditure in which the husband as well as the wife may be said to have an interest, for the wife is to dress according to his rank, not her own. Here the lady became the wife of Mr. Howard of Greystoke immediately, but she became in expectancy a Duchess; because her husband, as it was known at that time, stood in the line of succession and made provision for the event of his succession to Edward then Duke of Norfolk. He was to pay to his wife, as Duchess, so much more jointure, and so much more pin-money. On Duke Edward's decease she was to become the very first lady in the land, as a subject; next to the Royal family; she was to be provided for according to the magnificence of that high station of Premier Duchess of England, occupying the highest station which any female subject of the King, out of his own Royal Family, could possess; she was to be adorned according to her degree, not as Miss Frances Fitzroy Scudamore, or Mrs. Howard, but as the wife of Charles Duke of Norfolk, and hereditary Earl Marshal of England. She was to maintain that station which she derived from being his consort; a station next to Royalty in the society of this country. It was, therefore, the Duke's interest that this money should be retained for supporting his wife's rank, and this ample provision was made plainly with a view to supporting the station of his wife; the Duke her husband had the fund in a certain degree in his own power, and it is in contemplation of that power that the law says "you shall not go back beyond

a year." If his wife [657] chose to dress herself like a mechanic's housewife, or a farmer's dame, or as a mere servant, instead of the first Duchess of the land, and to pay £25 of her £1000 a year for dress, instead of appearing in the attire becoming her condition; if instead of paying for dress, of which the Duke of Norfolk would have no reason to be ashamed when he took her to court, she dressed like a tradesman's wife, and filed a bill in Chancery for the savings of the annuities, the Court of Chancery would not have given her an account of the fund.

It is an error to suppose that the ground on which that Court would refuse to go back a year, is only because of the supposed satisfaction by acquiescence; that is not the sole reason. The Court refuses to go back for this obvious reason; that the money is meant to dress the wife so as to keep up the dignity of the husband, not for the mere accumulation of the fund; and as it is meant that the money should be expended for the husband's honour, to support his and her rank in society, if the *femme* did not choose to pay away the money to the *baron's* honour, she would in vain come to the Court of Chancery and pray, "order payment of £9000 into my banker's, for 10 years; for I only spent £1000, when it was meant that I should spend £10,000." The Court of Chancery would say, "your Grace comes here in vain; you might have asked it year by year, and we, if you had asked it, should have given it to you." Now that is good practice, it is sound reason and plain common sense; it provides a check and control to the husband, it secures the appropriation of the money to its natural and original purpose; and it is for that view, quite as much as on account of the presumed satisfaction by acquiescence, that the [658] Court of Chancery on principle, and by a settled rule on the subject, will not allow a wife to claim pin-money beyond a year. This illustrates the reason urged by the Appellant's counsel, and the distinction they justly took in the course of this argument, between the representative taking the money, and the wife herself taking it. It is one thing to say, that during the wife's life-time, a year's arrear shall go to the wife; and a totally different thing to say, that the Duke of Norfolk shall pay the wife's personal representative £1000. The Court of Chancery sees that the Duke of Norfolk may have some interest and advantage in having paid the wife £1000 of arrear, because it pays the milliner's bills, which, but for that, he is liable to pay; if she has run up £1000 of debt with her milliner for dress, or with her jeweller for the wear and tear of jewellery and other ornaments; if she has incurred a bill which is consistent with the degree and station of the Duke, he might be compelled by an action at law to pay it; but if the pin-money is paid to the representative of the wife, the Duke is still liable to the action, and that forms a most material distinction between this and the case of a common debt. If I have a debt against the Duke of Norfolk, it is quite immaterial to him whether he pays it to me, or to my representatives after my death; because if he pays it to my representatives, he is not liable to pay it over again; but very different is this debt of pin-money; for if he pays it to his Duchess's representative the year after her death, he is liable to pay the Duchess's milliners, if they bring an action against him for her dress, even after he has paid it to the Duchess's personal representative. This is a convincing proof of the total difference between the two [659] cases: it illustrates strongly that which is the foundation of my opinion, the difference between pin-money and other claims; but it also answers, and I think irresistibly answers, the argument urged with some plausibility for the Respondents, that if the money due to the Duchess were a year's arrear, or a year and a fraction of a year's arrear, as one of the cases gives it, therefore the same must be equally due to the Duchess's representatives. No case can be produced which shows that a single farthing has been given by the Court of Chancery, even for a month's arrear of pin-money, to the wife's representatives: to the wife herself it has been given, but never to her representatives.

I have dwelt so long upon this part of the case, not merely to illustrate the distinction I take between pin-money and other separate estate of the wife, but for another reason also, because it carries your Lordships a good way in the argument upon that part of the case which I am now about to dispose of, and materially aids the Appellant's argument, where he denies altogether his liability even for one year's arrear of this pin-money; denies that the personal representative of the Duchess has a right to claim any arrears.

I proceed now, my Lords, to apply the argument to the first part of the case, with

which alone I am now dealing. It is surely a very imperfect view which is taken of the foundation of the cases in Chancery, allowing a year's arrear to be claimed by the wife during her life, to say that this is owing to a presumption of satisfaction of the income of former years; I think that that is not the only foundation; I have suggested another from the nature of pin-money; but I will state to your Lordships a ground **[660]** which seems in the present case decisive against the judgment of his Honor; there is a presumption of actual satisfaction of the party's demand in this way: The wife having the pin-money allowed her for the purpose of her apparel and pocket-money, the Court says, "we will not suppose you to be above a year without the means of dressing yourself according to your rank, or paying your tradesmen's bills; but we will suppose that the year before, and in all preceding years, they were paid by the husband: and we know that if he has not paid them, he is liable to pay them, being for necessaries according to his state and degree." Can any person who considers the subject, doubt that precisely the same presumption is applicable to the case of this noble lady, as to the case of any wife who might have been of sane mind all her life? It is true the Duchess was of non-sane mind and memory; it is true that the inquisition declares this affliction to have begun in 1782. But is a lunatic incapable of receiving the benefits of the expenditure of money? May not money be expended for her? Might not the Duke pay her milliner's bills? Might not he pay for the ornaments of the person decked in them, to his credit and her own? Might not all this happen year after year, just as much if she were lunatic as if she were of sound mind? The argument for the Respondent is this: you cannot presume satisfaction, because she cannot release a debt, being a lunatic; you cannot presume silence to be acquiescence, or an abandonment or waiver of her claim; because silence in a lunatic would not make that claim amount absolutely to anything. I agree that generally speaking it does not; but there is another principle, there is another presumption to be taken into the account, **[661]** which is applicable to the case, and that is the ground upon which the Court acts in giving nothing beyond the year, or at most the year and fraction; the presumption is this, that the money has been paid, if not directly to the wife in money, yet received to her use in bills paid by the husband, in discharge of debts incurred for necessaries, or ornaments for the use of the wife's person. Will any man contend that such a principle of decision does not apply to the case of a lunatic? Can it be doubted that a lunatic may receive payment by the discharge of her milliner's bills, and that thereby her demand for pin-money may be satisfied?

Pin-money is, in its nature, for the use and purpose of paying these bills; the only difference is, that the Duke of Norfolk, instead of paying over to his Duchess money wherewith she might pay her milliner, paid her milliner, and saved her the trouble of transmitting the sum. The law on this point, at least, is as clear, both in equity and in lunacy and at common law, as that a man's eldest legitimate son is his heir to freehold land. A lunatic cannot bind himself by bond or by bill; a lunatic cannot release a debt by specialty; cannot be a cognizor in a statute merchant, staple, a judgment, warrant of attorney, or any other security, I admit; but that a lunatic cannot receive payment of a debt, cannot receive money's worth, and thereby make himself, his executors and administrators, that is, his assets, liable in discharge for what he has received, I hear to-day for the first time. I do not say that I hear it broadly stated, because the learned counsel are too good lawyers to state such a proposition directly; but I hear it assumed; I hear arguments built on the assumption, arguments which but for that assump-**[662]**-tion crumble into pieces the moment you touch them. It is the foundation of the whole of those arguments. I constantly pressed the learned counsel to say what possibility there was of distinguishing the case of the Duchess being a lunatic, from that of any other wife not being a lunatic, in respect of the presumption of payment of milliner's bills, and upon the position that the Duke, her husband, was not bound to pay twice over the money provided for the payment of these bills; and I think I received not only no satisfactory answer, but no answer at all; I generally received an argument upon another part of the case, in answer to those inquiries.

In the case of the Earl of Portsmouth (*Baxter* v. *Earl of Portsmouth*, 5 Barn. and Cress. 170), a heavy bill was made the subject of an action, by a coachmaker, against his committee, for whom I was of counsel. The Earl was an undoubted lunatic,

found so on inquisition after much litigation: the jury had carried back their finding beyond the period of the coachmaker's bill; consequently the production of that inquisition was *primâ facie* evidence of the lunacy. The jury, on the trial of the action, found for the plaintiff, under the direction of the Lord Chief Justice; and the Court afterwards refused to disturb the verdict, holding that the committee were bound to pay, notwithstanding the finding upon the inquisition. A case occurred a year after at York, to the same effect: there we set up a defence of lunacy, and Mr. Justice Bayley would hardly allow the objection to be raised. He said, "you cannot stultify yourselves in this way. Is a man of doubtful sanity to go about dealing with honest tradesmen, and to say afterwards that he will set up his lunacy to [663] avoid paying the bills? There is nothing extravagant in this bill; there was nothing to give the party notice that he was dealing with a madman: he got the goods delivered to him." A verdict was recovered, and the defendants never sought to set it aside. The practice is the same in Chancery on matters of lunacy. Nothing is more common than for the Chancellor to confirm a Master's report, making allowances to A. B. for monies paid for the use of the lunatic,—to C. D. for having maintained the lunatic: to E. F. for having clothed the lunatic. Upon what ground are all these allowances made? Not from kindness, not from charity, not for the convenience of the parties; but because they are debts; because in the eye of that Court, be it a Court of Law, or a Court of Equity, or the Chancellor sitting in lunacy, they are valid debts incurred by the insane person, and are discharged by the justice of the Court. It is certainly done not for the interest of the lunatic, because that would be better consulted by rejecting the claim, and by saying, "Why did you throw away your money or your care on an insane person, who had not the power of paying you, or binding himself to pay you, and who could give no acknowledgment for it?"

Now these cases can, upon no conceivable principle, be distinguished from the one I am now considering; for they all show that a lunatic,—whose silence would be no consent, whose acquiescence would not be a waiver, whose obligation by a bond would not bind him, whose conusance of a judgment would not bind him to the conusee, may nevertheless, by receiving the property of another, and using it for his own benefit, or, as in this case, by receiving clothes, or the value in payment for [664] millinery or repairs of articles of dress, so far bind himself to the person who pays for the goods, as to enable the latter to set off the money so paid for the lunatic, against a claim in our Courts in *pari materia;* that is, against the claim of money which was provided as the alternative of his not paying for the goods. The Duke pays for the dress, instead of paying the £1000 a year: and the party's being a lunatic is no more a reason for refusing him the power to set off money so paid to the milliners, than if she were a person of sound mind, where, *ex concessis*, it is quite clear it would be set off. I feel no doubt whatever upon this point, and have no hesitation in pronouncing my opinion, that as regards the judgment of the Vice-Chancellor, it cannot stand; that the case must at all events be referred to the Master, with power to the personal representative of his Grace the late Duke of Norfolk, to set off whatever may be proved to have been properly paid by him in respect of the lunatic's dress, etc.

Upon the other question, whether any claim at all by the representative is to be allowed, I profess to have an inclination of opinion favourable to the Appellant. I have stated generally the grounds upon which I distinguish pin-money from all other debts; upon these grounds, as at present advised, I incline to reject altogether this claim of pin-money by the personal representative of the Duchess, against the Duke's representative, as inconsistent with the nature of the thing. But this part of the case is of the first impression. I have heard the arguments urged for the Respondent with very great ability by both his learned counsel, who have done all possible justice to their client; and I wish to be assisted on this part of the case, by the reply of the learned counsel for the Appellant.

[665] Before concluding these observations, and closing them with the proposition which I am about to throw out to the parties, I shall add another observation, which may, as it strikes me, further illustrate the distinction between pin-money and other property of the wife. I have shown the distinction between a claim of pin-money, and debts claimed by a stranger creditor against a stranger debtor. But observe also the material difference between this case of pin-money, in all its incidents, as well as

in its nature; observe the different way in which the Court deals with it, and with money settled to the separate use of the wife. I was surprised to hear it said that these cases of separate estate are subject to the same rule as if they were pin-money, and that the claim of the wife in them also is confined to a year. Can anybody seriously maintain that, as a proposition of law? Suppose I settle upon a wife, with no reference to pin-money, £1000 a year to her sole and separate use, her receipts only to be a discharge and not mine, under her power alone to be recoverable, and exempted entirely from my control; and suppose that I vest a fund in trustees for that purpose: can any one doubt that the wife, who had not received that annuity for six years, would have a right to recover that arrear? Can it be contended that the wife's claim would be confined to a single year? Clearly, the trustees would be bound to see that the whole amount was paid her. That is the difference between the provision of separate estate, and pin-money, which is confined to a year or a year and a fraction.

I have spoken with distrust of my opinion upon one part of the case, and stated it as only the leaning of my opinion. But I expect to have more [666] light furnished by the argument in reply. If I eventually entertain any doubt, I shall consult the noble and learned Lord who presided so long in the Court of Chancery. I have taken a full note of the arguments, and of the cases which have been cited, and I shall be able to refer him to the particulars. I close these observations with a suggestion to the learned counsel for the Appellant, to consider whether they will be satisfied to take an immediate reversal, with a remit to the Court below, to send the case to the Master, with instructions to take an account of the payments made by the Duke, and to set them off against the claim; or whether they will argue the case on the larger footing, which I have before stated. If they are satisfied with the first proposition, there will be an end of the discussion.

Sir Charles Wetherell: I opened a case of total discharge, and I shall contend for that.

The Lord Chancellor: I am not surprised that you do; we shall hear your reply on a future day.

Sir Charles Wetherell replied: The exact and lucid statement of the facts of this case, and of the law as applicable to them, by one of their Lordships on a former day, relieved him from the necessity of any further argument on one part of the case; for no one could after that statement, if he could before, doubt that this decree was erroneous in not directing a reference to the Master to take an account of the Duke's payments in respect of the Duchess' dress and ornaments, and to make such inquiries as might enable the Duke's representative to establish more completely the grounds on which he resisted the claim to arrears. He would still insist, [667] even with more confidence than in his opening address to their Lordships, upon the other parts of the Appellant's defence to the claim of the Respondent; first, that the claim for arrears of pin-money was never carried by a Court of Equity further back than one year, or a year and a fraction, and that the claim so restricted was subject to a set-off and deduction of such sums as might be found, on an account taken, to have been paid by the husband in respect of the provision of pin-money. He cited in support of that proposition, the cases before referred to, and *Parkes* v. *White* (11 Ves. 209), and said that any exception from the general rule established by these cases was founded on special circumstances. But in no case did it appear, that after the wife's death, her personal representative or next of kin brought such a claim as this against the husband or his representative. With all the industry exerted on behalf of the Respondent, no such case could be produced; law and reason and common sense were opposed to such claim.—[The learned counsel repeated and adopted the Lord Chancellor's arguments and conclusion on that point.]

The second and the only remaining question for consideration was, whether the special circumstances of the case did not afford peculiar grounds for maintaining that any claim to arrears must be considered as extinguished? These circumstances, instead of affording an exception to the rule of limitation to a year, should, on the contrary, be held to extinguish the claim altogether. The arguments for the Respondent went to this extent, that the Duke having expended a sum equal to, or even exceeding the pin-money, in providing the Duchess with clothes, etc., [668] was still liable to pay every penny of the fund provided for that purpose. Would not that be paying the same thing twice; first paying for the articles supplied, and after they

were supplied and paid for, then paying over the fund out of which they were provided? Was that consistent with equity or justice? Was it meant to be argued that the Duchess was entitled to the dress and *paraphernalia*, *ultra* the pin-money? The answer of the Respondent to these monstrous propositions was, this—the incapacity of the Duchess, by reason of her lunacy, to assent to the due application of the fund; and therefore her next of kin were to have the benefit, and from her unhappy situation to derive title to the accumulations of the fund. Was it intended to be maintained in argument, that a principle was to be applied respecting a demand in which a *feme covert* of unsound mind was concerned, different from that which was applied to a *feme covert* sane? The consequence of establishing such a distinction would be, that a husband of an insane woman, who could not give a receipt or release, could never during the coverture, if the insanity of the wife lasted so long, get himself discharged from the arrears of pin-money, although he scrupulously applied the whole of it to the purposes for which it was intended by the settlement; which would be a preposterous and mischievous rule.—[The Lord Chancellor: The decree of the Vice-Chancellor went on the assumption that not one farthing of the pin-money had been paid; and that the Master, under the order directing him to compute the arrears, had nothing to do but to multiply £1000 by thirty-three years, the product of which process the Appellant was to pay].—Had the Duke survived the Duchess, the whole of the arrears, if **[669]** any could be, would have come to him: so that, according to the argument for the Respondent, the wife's pin-money might, without the application of a farthing of it for her use, be thus made an accumulating fund for the husband; than which no proposition could be more absurd. He cited on this part of the case, Justice Dormer's case (2 P. Wms. 265), *Thomas* v. *Bennett* (2 P. Wms. 341), *Fowler* v. *Fowler* (3 P. Wms. 353). The Appellant was not bound by the finding on the inquisition of lunacy. There was no admission in the pleadings that the Duchess was without lucid intervals. If there had been one hour of lucid interval in the mind of the Duchess, if in any five minutes of a lucid interval during the thirty-three years, the Duchess were proved to have said or written to the Duke, "What are all these directions about pin-money for? I am grateful for your payments and kind treatment of me; for having been established in my splendid mansion by you, and kept in all the comfort and magnificence to which I am entitled:" if a letter containing such sentiments were produced, the whole argument for thirty-three years' arrears would have crumbled to atoms.

The Lord Chancellor: This is a case of great importance, and consequently it was my duty to see that it should receive the most ample discussion; more especially as I felt that it was quite impossible for me, upon the best consideration I could give the case, to arrive at the same conclusion in all respects as that to which the Court below had come, and inasmuch also as this is a case in many respects novel, there being little of authority upon it in the books. It is wonderful indeed how little there is to be **[670]** found upon the subject of pin-money, notwithstanding its occurring almost every time that a marriage takes place among persons of large fortune. You cannot get from the books even a definition upon which you can rely; you cannot trace the line which divides it from the separate property of the wife, with any distinctness: and as to authority, either of decisions or *dicta* of text writers, or of Judges, there is nothing that furnishes a clear and steady light on the subject: the cases running from pin-money into separate estate, and from separate estate into pin-money, in such a way, that where a text writer quotes a case, *Brodie* v. *Barry* (2 Ves. and B. 36; and 2 Roper, Law of Husband and Wife, 133), for instance, in support of a doctrine touching pin-money, you look at the book and find it has nothing to do with pin-money, and does not support the proposition for which it is cited.

I remain of opinion that this decree cannot stand. The Duchess of Norfolk having been thirty-three years insane, and the Duke having for the whole of that long period of time, not only paid the expenses of her establishment with a munificence and liberality adequate to her station, but having also, beyond a doubt, paid all the personal expenses of her Grace, for pocket-money, for trinkets, for millinery, in short for everything on account of which pin-money is generally supposed to be provided—her executors after her death claim £33,000 as arrears of pin-money, she having survived the Duke five years, during which she had the ample jointure of £2000 a year out of the Duke's estate, besides her own private fortune of £11,000

or £12,000 a year; all, in consequence of the lunacy, accumulating. Her representatives proceeded in the exercise of a duty [671] which they could not perhaps avoid, as it was considered a question fit to be raised, by Lord Eldon, who suggested that the opinion of the Court should be taken upon it. To this demand the executors of the Duke answer, "You cannot both have the pin-money, and also the payments made by the Duke out of his own pocket, for the very things to provide which pin-money was given." I also take leave to add, that this distinction on the subject of pin-money must be taken: There is no case in the books in which pin-money has been given, not even for one year, in any case to the representatives of the wife, for this obvious reason, arising from the nature of pin-money, because it was meant not for the sustentation of the wife, but for her dress and ornament in a station suitable to the degree of her husband; so that the Court gives the arrear to the wife, of a year, or a year and a fraction, because if it be not given to the wife, the husband is liable to pay her debt for necessaries according to her degree, and he advances the money to her in order that he may exonerate himself from payment for those necessaries. But if the wife dies, and her personal representatives make the claim, (and this does not appear to have been considered in the Court below), the fact of the husband or his representative paying the arrear to the wife's personal representatives, does not in the least exonerate the husband or his estate, because he or his representative is just as liable to pay the undischarged debt for necessaries according to the husband's rank, as if he had not paid the amount to the personal representatives of the wife. I have, therefore, no doubt whatever, that you cannot allow the £33,000 without an account. The decree below says they are to have the whole £33,000 without any account; so that even if the [672] Duke had paid £2000 a year for expenditure of the wife in the nature of pin-money expenses, not one farthing of that can be deducted. At all events, therefore, there must be an account in the Master's office, and credit allowed for pin-money expenses, in so far as the Duke's representatives shall be able to prove to the satisfaction of the Master that he had paid those pin-money expenses.

There remain two other questions which I must crave time to consider further, because on those two my opinion is not so clear, especially on the third; whether there can be in this case, any claim at all for pin-money? Whether there should be allowed a year, or a year and a fraction to the executors, in respect to which year, or year and a fraction, the cases have allowed it to the wife herself? That is a point which, as there is no case or other authority either way, I wish to have time for considering. With this view I shall move your Lordships that the further consideration of the case be postponed, wishing only to state here again, that if the decision of the Court below be allowed to stand, and the doctrine be recognized that the wife may accumulate her pin-money while the husband pays her bills, and may then leave the accumulation to others, the sooner that doctrine is known the better; for I am quite sure that, instead of £1200 or £1500 a year, or £1000 a year, which last was the allowance in this great family settlement, a much smaller and a conditional allowance only will in most instances be made for the future.

The Lord Chancellor, in moving final judgment, briefly recapitulated the facts which led to the suit, and the proceedings in it up to the decree of the Vice-Chancellor. His Lordship then proceeded:—"His [673] Honor's decision was, that an account should be taken by the Master in the cause, of the arrears due for pin-money, from the year 1782 till the time of the death of his Grace (December 1815); and no further direction was given of any other account to be taken, or any credit to be given to the Duke's estate for any monies that might have been paid in respect of those expenses, to provide for which the pin-money was settled. Very early in the argument of this case, I entertained an opinion that this decree could not stand; and that it was clearly erroneous to hold, that whatever had been paid by the Duke was immaterial; that no payment by him was to be carried to the account; that if the very money itself had been received by her Grace during that time, it should not be taken into the account: To hold that no account should be taken of the pin-money expenses defrayed by the Duke during those thirty-three years, appeared manifestly erroneous: for the decree was merely a reference to the Master to multiply £1000 by 33, and to give the whole to the Duchess's representatives.

This opinion was confirmed in the course of the arguments, which left me with

a very decided impression, which I stated for the convenience of the parties, in the hearing of the counsel on both sides; and I then made a proposition to the learned counsel for the Appellant, that if they would be satisfied with a declaration, and with remitting the cause to the Court below with that declaration, so as to take an account in the Master's office of the payments made for pin-money expenses, then, without calling on them to reply to the elaborate and ingenious arguments on the other side, I should have no hesitation in moving your Lordships to make such an order. As, however, I had plainly indicated the leaning of my opinion [674] upon the rest of the case also, I was not surprised at the learned counsel preferring the other alternative, and going on with the reply. I then again went into the subject and I was glad to have an opportunity of doing it in the presence of an unusually great number of your Lordships, greater than I almost ever saw at any judicial proceeding, from the accident of the case having been protracted to the hour of the day at which your Lordships usually sit for the ordinary business of the House. I have since held communication with a number of those noble persons, whose opinions are entitled to great weight, and I find that my impression respecting the nature of pin-money is by no means confined to myself; that the view I had formed of it is the universally prevalent view among all who have considered the matter.

Upon a subject of this sort, where authority is so scanty, that you hardly can find any *dictum* in the books as to the purposes to which pin-money is devoted, I am far from thinking little of the general sense of your Lordships, who are the persons of all others most conversant with the nature and object of pin-money, and whose settlements are made with reference, in some degree at least, to its amount. It is a very material fact, in a case where authority is so little to be had, that the general opinion of all those who give pin-money, either to their own wives or to the wives of their sons upon marriage, should be entirely coincident with the view to which the argument led, namely that it is a sum allowed to save the trouble of a constant recurrence by the wife to the husband upon every occasion of a milliner's bill, upon every occasion of a jeweller's account coming in.—I mean not the jeweller's account for the jewels, because that is a very different question; but I mean for the [675] repair, and the wear and tear of trinkets, and for pocket-money, and things of that sort. I do not, of course, mean the carriage, and the house and the gardens, but the ordinary personal expenses. It is in order to avoid the necessity of a perpetual recurrence by the wife to the husband, that a sum of money is settled at the marriage, which is to be set apart to the use of the wife, for the purpose of bearing those personal expenses. I stated the consequences of this doctrine, and that they appeared to exclude the claim, and left little or no doubt upon the question, save upon one part of it; and that is, how far personal representatives were entitled to go back a year, or a year and a fraction. I stated the reasons why I considered, in the first place, that the nature of pin-money excluded the claim, by whomsoever made, for the by-gone thirty-three years; and that in the next place, the nature of pin-money seemed also to exclude a claim by personal representatives, even for the smallest portion of the period. I stated the reason why the proposition of exclusion, both as to the large and as to the lesser extent, seemed to follow from the nature of pin-money. I took further time to consider this part of the case, and the result has been to confirm my opinion upon both the points, and I will now shortly state the grounds: First, with respect to the whole period; shall it be said that the money allotted to the wife, is so allotted to her that she may consider it as a sum given every year, to do with it as she pleases? That her Grace of Norfolk, the first lady in England after the blood Royal—who takes precedence of all the King's female subjects while her husband is preceded by several from official rank,—shall it be said that this lady may dress herself like a peasant's wife; may lay out £10 by the year upon [676] her own personal expenses; may give no monies either in charities to the poor, or in *largesse* to her servants, her attendants, or her maidens! In former times, when pin-money was first introduced, the Duchess of Norfolk had ladies in waiting, esquires' wives and barons' daughters, just as the Queen of England has at this day. The less aristocratic habits of modern times have altered that, but pin-money was invented in the days when the Duchess of Norfolk was more like a princess than a subject; shall it be said then that this distinguished lady is to give no *largesse* to any of her attendants or servants; that she may dress herself either so that she shall not be admitted at Court, or so that she

shall never appear at a county meeting, or an assize ball, or upon any of those occasions where the nobility of the country show themselves among their fellow subjects: that she may dress herself in such a manner that she shall not be able to show her face at those places of resort, or so that if she appears, her noble consort shall be ashamed of seeing her there, and of owning his connexion with her; that she may in every respect spare every expense upon her person, and hoard her pin-money; that she has a right to do so in neglect of the rank, and in spite of the authority of her husband: and when her husband dies that she may claim, or when she dies that her representatives may claim, the whole arrears of this pin-money, as if it had been set apart as an annuity of which she had a right to the sole and separate use, and to the arrears of which she had just as good a right as her husband had to the residue of the estate upon which that annuity stands charged? Is that a tenable proposition? The principle of this decree cannot stop short of that proposition; they who maintain it, must either maintain that proposition, [677] or they are out of court and can maintain nothing. I deny that such is the nature of this provision: it is meant for the wife's expenditure on her person, it is to meet her personal expenses, and to deck her person suitably to her husband's dignity, that is, suitably to the rank and station of his wife. It is a fund which she may be made to spend during the coverture, by the intercession and advice, and at the instance of her husband. I will not go so far as to say, because it is not necessary for the purpose of this argument, that he might hold back her pin-money if she did not attire herself in a becoming way. I should not be afraid, however, of stretching the proposition to that extent, but I am not bound here to do so, because if during her coverture a claim was made by her, (and this is one distinction between the claim of the wife, and the claim of her personal representatives after her death), the absurd and incredible state of things that I have put as the consequence, the case of her attiring herself in an unbecoming manner, never could happen if the pin-money is only to be claimed by herself; for in that case the Duke would of course say, "If you do not dress as you ought to do, what occasion have you for pin-money!" He need not refuse, but he remonstrates; he uses that influence which the law supposes him legitimately to have over his wife, and sees that the fund is duly expended for its proper purposes. The purpose is not the purpose of the wife alone; it is for the establishment, it is for the joint concern, it is for the maintenance of the common dignity; it is for the support of that family whose brightest ornament very probably is the wife; whose support and strength is the husband, but whose ornament is the wife. It is to support the dignity and splendour of the joint establishment consisting of hus-[678]-band and wife, that part of the whole expenditure is for the support of the wife herself. Then does it not follow from thence that the husband has a direct interest in the expenditure of the pin-money! He has a right to have the pleasure of it, to have the credit of it, to be spared the eyesore of a wife appearing as misbecomes her station: that is the distinction and the object of pin-money.

Having stated the principle, I have now to show its application to the two branches of this case; the one relating to the thirty-three years, and the other to the year, or the year and a fraction. I say it follows from the principle, as to the first branch, that if during the longer period the expenses of her person, and the demands upon her pocket for those things to which pin-money is applicable, have been defrayed by her husband; if he has not only kept, during her unfortunate illness, a separate establishment for her, providing for those expenses for her, from which pin-money stands apart, (as house and garden, servants, carriage and horses), but has also during all that time paid all the milliners' bills, all the wear and tear of trinkets, all the little expenses of pocket-money; then I say, that even if she were alive and came for an account, she could not have it both in the one way and in the other; she could not have it both in kind and in money; she could not have the bills paid for her, and the money paid to her which was originally settled upon her for the sole purpose of paying those bills. That I hold to be a perfectly clear proposition; yet no account whatever has been directed on that principle, in the decree referring it to the Master to take an account; and it is not denied that those expenses were paid by the Duke during the coverture. In the next place, there is this ma-[679]-terial observation, which applies to both branches of the case, and in my view disposes of the whole. If she comes forward and makes the claim during coverture, of course the husband takes

care that the bills are paid, and he has an opportunity of controlling her, so that she shall not go and game, for example, with her pin-money, and leave him to pay her milliners' bills. But if the same claim, whether it be for thirty-three years or for twelve months, may be made by her personal representatives after her death, either upon the husband if he is living, or upon his representatives if he has predeceased her, then what follows? he is bound to pay the pin-money, and he is liable to the bills too; because the husband is liable to pay the bills of dressmakers and other such persons, provided the articles furnished are of a kind suited to his and his wife's station in life. That is the meaning which the law affixes to the term necessaries; and nothing will relieve him from the claim of necessaries except a proof (and that only when the husband is living apart from the wife) that they are separated, that he has made an allowance adequate to her support, and, as the late cases in the Court of King's Bench have determined, that he has actually paid the sum allowed for her separate maintenance. Nothing short of this defeats the claim for necessary expenses. Therefore the Duke's representatives would be liable to pay the bills for which that pin-money was allotted. Can it be contended that such is the law, that such is consistent with the nature of this provision? It might as well be said, that pin-money means an annuity set apart, a separate sum set apart for the wife during the coverture, which she may use as she pleases, and come upon her husband for her personal expenses besides: such a proposition cannot be maintained in any con-[680]-sistency with principle, or deduced from any authority that can be referred to on the subject.

Upon these grounds, I have no doubt that the judgment appealed from is wrong; I have stated several others upon former occasions; and, upon both those propositions, everything which I before said has appeared to me, upon further consideration, to be well founded. I have no hesitation, therefore, in recommending to your Lordships to reverse the decree of the Court below, after making one further observation: it is this,—that there is not only no one instance shown, but nothing like an instance, of pin-money having been allowed except to the wife. It is one thing to allow it to the wife, it is another thing to allow it to the wife's representatives; and should we affirm this decree, we should not only go the length of laying it down that pin-money is an unconditional provision, and that all that the husband may have paid for the wife cannot be set-off against the claim, whether the claim be made during the wife's lifetime, or after her decease by her representatives; but we should be affirming another proposition, for the first time: we should be making a precedent, the first that can be shown to exist, of a claim of pin-money to any extent whatever allowed to the wife's personal representatives after the wife's death; and I am not prepared to advise your Lordships to make any such precedent: it would be going further than any case has yet gone; it would be contrary to every principle of the law generally, and to the whole spirit of the law upon this subject.

The question was then put, and the decree was reversed.

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[681]

APPEAL

From the Court of Exchequer Chamber.

MARGARET TOULMIN, THOMAS BUTTERFIELD SIMPSON, and BRYAN HOLME,—*Appellants:* JOHN COPLAND,—*Respondent.*

[Mews' Dig. x. 904, 912. S.C. 8 Bli. N.S. 918; and for later stages in the same proceedings see 3 Y. and C. Ex. 382, 625; and, in H.L. 7 Cl. and F. 350; West, 164.]

R. T. and A. T. having carried on business in partnership in equal moieties, the former retired, leaving large sums due to the partnership from its customers, and some debts also owing from the partnership. A. T. entered immediately into partnership in the same business with C., and it was agreed between them, but not in writing, that upon A. T.'s bringing into the new partnership £40,000 of good debts owing from customers of the then late partnership, for

the purpose of meeting claims of debts from that partnership, transferred to the accounts of the new partnership, A. T. should be entitled to two-thirds of the new partnership, and C. to one-third. This partnership business was carried on for 14 years without any settlement of accounts, or any entry in the books declaring the terms of the partnership. It appeared that within the first five or six years, £40,000 were received from the debtors of the former partnership, but not so much, if the advances to them by the new firm were deducted from their payments. Held that £40,000 of good debts were brought in according to the intent and spirit of the agreement.

Monies paid by debtors, without specifically appropriating them, are to be applied in discharge of their oldest debts.

For several years previous to the year 1806, Richard Toulmin and Abraham Toulmin, both since deceased, carried on the business of navy agents, in [682] partnership together, in equal shares. That partnership was dissolved on the 31st of August 1806, in consequence of the lunacy of Richard Toulmin. Abraham Toulmin having then become entitled to carry on the business on his own account, formed a partnership with the Respondent; and they carried on the business of navy agents in partnership, under the style and firm of *Toulmin and Copland*, from the 1st of September 1806 to the 4th of January 1819, when Abraham Toulmin died, having by his will bequeathed all his estate and effects to the Appellant Margaret Toulmin, his widow, and appointed her and the other Appellants executrix and executors thereof, who duly proved the same, and thereby became his legal personal representatives.

There being no deed or written memorandum of the terms of the partnership between Toulmin and Copland, a dispute arose between the Appellants and Respondent, respecting each partner's share in the capital and profits of the business; and on the 16th of January 1819, the Appellants filed their bill in the Court of Exchequer against the Respondent, making also the Governor and Company of the Bank of England, in whose books a sum of £16,000 in stock was then standing in the name of and as belonging to the partnership of Toulmin and Copland, Defendants thereto. The bill stated (amongst other things) that on or about the 1st of September 1806, it was agreed by and between A. Toulmin and the Respondent, that the Respondent should become a copartner with the said A. Toulmin, in carrying on the said business of navy agents, and should bring into the business £8000. That A. Toulmin should be entitled to two-third shares of the profits, and the Respondent to the remaining one-third share. That the business had been carried [683] on upon these terms, up to the time of the death of A. Toulmin, (except that the Respondent did not bring into the concern more than £4000), and that the said business was very profitable. The bill prayed for the usual accounts of the partnership dealings, and for a receiver of the outstanding debts; and also that the Respondent be restrained by injunction from collecting the same, and from transferring the stock standing in the name of the firm in the Bank books, and that the Governor and Company of the Bank be restrained by the like injunction from permitting such transfer.

The Respondent by his answer stated, that the copartnership was to be carried on upon the terms, that A. Toulmin should bring into the concern good outstanding debts due to the partnership of R. and A. Toulmin, to the amount of £40,000 at least, in order to set them against debts to that amount due from that concern, and by that means to preserve the connexions of the old firm to the new firm, without subjecting the latter to liability for the debts of the former. That the Respondent should bring into the partnership £4000 in cash. That upon these conditions being fulfilled on both sides, A. Toulmin should be entitled to two-thirds of the profits, and subject to the like proportion of any losses that might be sustained, and that the Respondent should be entitled to the remaining one-third of the profits, and subject to one-third of any losses of the partnership; but that at the expiration of five years from the time of such agreement, they, A. Toulmin and the Respondent, were to be interested as partners in equal shares; and in case A. Toulmin should fail to bring in good and available debts to the amount of £40,000 from the old partnership, to answer the purposes before men-[684]-tioned, the partnership should in that case be carried on upon equal terms, both being entitled to equal moieties of profits, and

liable to the losses in like moieties. The Respondent in his said answer, insisted that A. Toulmin failed to bring in the said sum of £40,000 of good debts of the former copartnership, and that the latter alternative of the agreement was adopted and acted upon by him and A. Toulmin, and that they became interested in the partnership in equal shares from the 1st September 1806 to January 1819; and he submitted that he was entitled to half of the profits of the partnership concern.

The Respondent on the 29th of January 1819, and before putting in his said answer, made an affidavit in support of a motion in the cause. That affidavit, as far as it is material to be here stated, was to this effect: "That he (the Respondent) and A. Toulmin, the testator named in the pleadings, became concerned together as copartners in the business of navy agents in 1806, and continued so concerned together until the death of the said A. Toulmin on the 4th of January 1819; and that it was on the formation of such copartnership, in the first instance, agreed between this deponent and the said A. Toulmin, that upon A. Toulmin's bringing into the copartnership between him and deponent £40,000 of good debts, which were owing to the late concern carried on in partnership between the said A. Toulmin and Richard Toulmin, for the purpose of meeting the claims by debts transferred from the said firm, and upon deponent's bringing £4000 into the said partnership concern between him and the said A. Toulmin; A. Toulmin should be entitled to two-thirds of that concern, and deponent to the other third; but the said A. Toulmin not being able to [685] bring £40,000 of good debts into the partnership, it was afterwards agreed between deponent and the said A. Toulmin, that they should carry on their said partnership business upon equal terms as to profit and loss, and they did accordingly so carry on such trade or business; and the said A. Toulmin and deponent never came to any settlement of accounts together touching the said partnership concern, but all accounts from the commencement of such partnership were, at the time of the death of the said A. Toulmin, open and unsettled.

The Governor and Company of the Bank of England duly put in their answer to the Bill, and the same was ordered to be dismissed as against them, in February 1827.

The cause being at issue between the Appellants and Respondent, several witnesses were examined, and a great deal of documentary evidence also was adduced on both sides. The substance of the evidence is hereinafter stated.

The Lord Chief Baron, on the hearing of the cause in June 1828, ordered it to be referred to the Master to inquire whether the said A. Toulmin brought into the partnership of Toulmin and Copland £40,000 of good debts due to the partnership concern of R. and A. Toulmin, according to the true intent and meaning of the agreement stated in the Respondent's affidavit, upon the footing of which the late partnership commenced, and to inquire whether the said agreement was at any time after the commencement of such partnership varied or altered; and if on making those inquiries, it should be found that A. Toulmin brought in the £40,000 of good debts as aforesaid according to the said agreement, and that the agreement was not afterwards varied, then the said late partnership [686] was to be considered as in thirds, the Respondent taking one-third only, and the accounts should be taken on that footing; and in that event the Master was directed to take an account of what, if anything, was due to the Appellants as the legal personal representatives of A. Toulmin for two-third shares of the profits of the partnership, and to take an account of what was due to the Respondent for one-third. And if it should be found that A. Toulmin brought into the said partnership the said £40,000, according to the true intent and meaning of the said agreement, and that the agreement was afterwards varied or altered, then the Master was to take the accounts of the partnership profits on the footing of such altered agreement. But if the Master should find that A. Toulmin did not bring into the partnership of Toulmin and Copland the said £40,000 of good debts of the old firm, then he was to take the accounts of the partnership between A. Toulmin and the Respondent on the footing of a partnership in equal shares. And the Master was at liberty to make a separate report on any of the matters so referred to him.

The material parts of the evidence read on behalf of the Appellants on the hearing, previous to this order of reference, consisted (besides the Respondent's affidavit before stated) of the depositions of Mr. S. S. Toulmin, solicitor for the Appellants,

and of Mr. R. Reynolds, a customer of the firm of Toulmin and Copland, in answer to interrogatories. The former deposed in substance, that in the summer of 1827, he examined the books of account of the firm of R. and A. Toulmin, from February 1796 to the 31st of August 1806, for the purpose of ascertaining what profits or losses had been made or sustained by that firm; and he found clear profits during that period amounting to [687] £27,974, averaging yearly about £2650. He at the same time examined the books of account of the late firm of Toulmin and Copland, for the purpose of ascertaining the amount of Copland's capital therein: he found that these accounts were generally balanced on the 31st of August in each year, and that the largest amount of Copland's capital at any period was £4880. He further examined those books for the purpose of ascertaining whether the late firm paid or received any monies on the account of the firm of R. and A. Toulmin; and he found that Toulmin and Copland received the sum of £56,037 on account of debts to R. and A. Toulmin, and paid £38,624 on account of debts due from R. and A. Toulmin; that £31,796 of the said £56,037 had been received by the 1st of September 1807, and a further sum of £8575, other part of the said £56,037, had been received by the 1st of September 1808.—Mr. Reynolds deposed to a conversation which he had with the Respondent in April 1819, on the subject of the disputes between the latter and the Appellants, and in which the Respondent said that he had only brought £4000 into the concern; that one Roper also brought in £4000, and that Respondent was to receive one-third part of the profits; that on deponent's observing that he understood Respondent claimed half. Respondent replied that the executors (meaning the Appellants) offered to allow him four-ninths, and deponent might tell Mrs. Toulmin (the Appellant) that that proportion of the profits would satisfy the Respondent, and would settle everything in dispute between them.

The additional evidence for the Appellants produced before the Master, for his inquiries under the said order of reference, consisted of extracts from the books [688] of account of the partnership of Toulmin and Copland; of affidavits of the said S. S. Toulmin, and of a record of a judgment hereinafter mentioned. The accounts in effect showed that the partners were in the habit of drawing money from the partnership funds for their private purposes, and that where they were separately indebted to the same individual on their private respective accounts, such several debts were sometimes paid by a partnership cheque on the partnership bankers, and the amount so paid for either partner was debited to his private account. The books of account further showed the mode of transferring the debts due to and from the firm of R. and A. Toulmin, and of keeping and balancing the accounts.

The affidavits of S. S. Toulmin, sworn the 6th and 22d of July 1829, and the 15th February 1830, stated that the deponent carefully examined the books of account of the firm of Toulmin and Copland, for the purpose of ascertaining whether that firm ever received, on account of such of the customers of the firm of R. and A. Toulmin as were debtors to such last-mentioned firm, any surplus monies, after deducting the advances made to such customers by the firm of Toulmin and Copland; and if so, what was the amount of the surplus monies so received during the first six years of the partnership of Toulmin and Copland, which, if Toulmin and Copland were entitled to deduct such advances, would have been applicable in discharge of the debts due from such customers to the firm of R. and A. Toulmin. And deponent further said, the schedule marked E, produced and shown to deponent, contained, to the best of his knowledge and belief, a full, true and particular account of such surplus monies, together with the times when [689] and the persons from whom or on whose account they were respectively received.

The schedule referred to was intitled "Schedule containing an account of the surplus monies received by Toulmin and Copland from the customers of R. and A. Toulmin, after deducting the advances made to such customers; from the 31st of August 1806 to the 1st of September 1812," and was added up on the 31st of August in every year, and the amount carried over to the next year; and by such schedule it appeared that the amount of sums received, from the commencement of the partnership of Toulmin and Copland, to the end of each of the following years, was,—

31st August 1807	£23,652	1	4
31st August 1808	29,897	8	1
31st August 1809	34,170	16	4

31st August 1810	£37,294	5	1
31st August 1811	40,070	4	5
31st August 1812	42,171	19	6

And deponent said, this schedule was made out by striking a balance, or taking issue, upon every distinct item of receipt and payment, on account of the debtors of the firm of R. and A. Toulmin; and that after the 31st of August 1812, and before the termination of the partnership of Toulmin and Copland, further monies, to the amount of £11,481 19s. 1d. or thereabouts, were, upon the principle adopted by deponent in making out the said schedule (*in case such principle was in fact applicable*), received by the partnership of Toulmin and Copland, on account of the debts which would upon such principle have been due to the firm of R. and A. Toulmin. And deponent said that he had particularly examined the accounts of Captain Douglas and Mrs. Woodmeston, in the [690] account books of Toulmin and Copland, and it there appeared that on the 1st of September 1806, Captain Douglas was indebted to the firm of R. and A. Toulmin in the sum of £66, and that Mrs. Woodmeston was indebted to the same firm in the sum of £54. That deponent examined the account of Captain Douglas, for the purpose of ascertaining what was the balance due from him on the 4th of May 1809, and whether on that day the firm of Toulmin and Copland had received on his account monies sufficient to discharge the debt so due from him to R. and A. Toulmin, and also whether on that day Toulmin and Copland had received on his account, sufficient monies to discharge the debt so due from him to R. and A. Toulmin, after deducting the advances made to him by the firm of Toulmin and Copland. And it appeared by the said books, that if the account of Captain Douglas had been balanced on the said 4th of May 1809, the balance due from him on that day would have been £469 14s., exclusive of interest from the 1st of September then last; and it also appeared that on the said 4th of May, Toulmin and Copland had received, on account of Captain Douglas, monies sufficient to discharge the debt due from him to R. and A. Toulmin, but had not received on his account monies sufficient to discharge the debt due from him to R. and A. Toulmin, after deducting the advances made to him by Toulmin and Copland. And deponent examined the account of Mrs. Woodmeston, for the purpose of ascertaining whether on the 12th of February 1817, the firm of Toulmin and Copland had received on her account, monies sufficient to discharge the debt due from her to the firm of R. and A. Toulmin, and also whether on that day Toulmin and Copland had received on her account monies sufficient to discharge the debt [691] due from her to R. and A. Toulmin, after deducting the advances made to her by Toulmin and Copland. And it appeared by the said books, that on the said 12th of February 1817, Toulmin and Copland had received, on account of Mrs. Woodmeston, monies sufficient to discharge the debt due from her to R. and A. Toulmin, but had not received on her account monies sufficient to discharge the debt due from her to R. and A. Toulmin, after deducting the advances made to her by Toulmin and Copland.

The affidavits further stated, that Captain Douglas and Mrs. Woodmeston being so indebted to the firm of R. and A. Toulmin, on the 1st of September 1806, the former in the said sum of £66, the latter in the said sum of £54; these debts were afterwards transferred, and the accounts carried on by the firm of Toulmin and Copland, in like manner as the other debts due to the firm of R. and A. Toulmin; and that it also appeared by such books, that on the 30th of October 1806, the firm of Toulmin and Copland had paid or advanced on the account of the said Captain Douglas several sums of money, amounting in the whole to the sum of £62, and making, together with the said sum of £66, the sum of £128; and that on the same 30th of October, the firm of Toulmin and Copland received on account of the said Captain Douglas the sum of £100, leaving the sum of £28, with interest, remaining due from him; that on the 1st of November following, the firm of Toulmin and Copland paid to Captain Douglas the further sum of £452, thereby increasing the balance due from him to the sum of £480, which balance was never paid off, though an action was, as deponent believed, brought for it by Toulmin and Copland, as their own property.

The attorney of Toulmin and Copland in that action against Captain Douglas, deposed, in a joint affidavit [692] with the said S. S. Toulmin, that the said action was settled by Toulmin and Copland accepting a warrant of attorney of the said

Captain Douglas, with a memorandum indorsed thereon, that it was given for securing the payment to Toulmin and Copland of the sum of £502, being the balance of accounts due from Captain Douglas to them, together with interest, in manner therein mentioned; and also a memorandum of agreement made between Captain Douglas and Toulmin and Copland, whereby, after reciting (amongst other things) that the said Captain Douglas was indebted to Toulmin and Copland in the sum of £502, he agreed with them that he, Captain Douglas, should forthwith convey and assign to them, Toulmin and Copland, their heirs, executors, etc., all his estate and interest in premises therein particularly described, as a collateral security for the payment of the said sum of £502. And deponent, S. S. Toulmin, for himself said, that it appeared by the books of account of the firm of Toulmin and Copland, that if the account of Captain Douglas therein contained had been balanced on the 26th of May 1809, the balance due from him would have been £469 14s., exclusive of interest from the 1st of September then last past; and that it appeared by the said account of Captain Douglas, that on the 26th and 30th of May 1809 respectively, the firm of Toulmin and Copland had received, on account of Captain Douglas, monies sufficient to discharge the debt due from him to the firm of R. and A. Toulmin, and had not, on either of the said two last-mentioned days, received on his account monies sufficient to discharge the debt due from him to the firm of R. and A. Toulmin, after deducting the advances made to him by the firm of Toulmin and Copland.

The warrant of attorney and agreement referred to [693] in the affidavits were produced and verified before the Master, as was also an affidavit of the Respondent, who therein swore, in order to hold Captain Douglas to bail in the said action, that he, Captain Douglas, was indebted to him and A. Toulmin his partner, for work and labour performed by them as navy agents, at his request, and for money lent, commission, interest, etc. The record of the judgment produced before the Master was of an action in the Court of Exchequer, in which Toulmin and Copland recovered against Mrs. Woodmeston the before-mentioned debt of £32 due from her.—(These documents were put in evidence for the purpose of showing that Toulmin and Copland dealt with the debts due from debtors of the old firm, as if they had become debts due to themselves.)

The evidence for the Respondent consisted of depositions of witnesses, in answer to interrogatories, with exhibits of accounts, of office copies of proceedings in the Court of Chancery in the matter of lunacy of R. Toulmin, the former partner of A. Toulmin; and of affidavits. The depositions of the witnesses, as far as it is material to state them, were as follows:—John Edmonds said, he went into the employment of Toulmin and Copland in 1812, as clerk, and continued in it to the death of A. Toulmin in 1819; that during the whole period of his employment he had the care of the partnership books, under the superintendence of the principals: that A. Toulmin, who more particularly attended to the books, told deponent in 1813 that the debts due to the firm of R. and A. Toulmin had been by him transferred to the books of Toulmin and Copland, but that Copland was not to be responsible for such debts so transferred, as he, A. Toulmin, caused them to be placed in such books. [694] in order to facilitate the recovery of them; and that all advances made by Toulmin and Copland, to customers of the old firm of R. and A. Toulmin, were to be deducted from the first remittances or receipts on account of such customers of the old firm respectively. That he always considered and believed A. Toulmin and Respondent to be joint and equal partners, and in no case, to deponent's knowledge, did it appear from the partnership books to the contrary; but that, in all cases where any division had taken place as to the partnership dealings, such division was in equal moieties. That in December 1814, Respondent directed deponent, in the presence and hearing of A. Toulmin, to balance the partnership books, and carry over half of the profits to A. Toulmin's account, and the other half to Respondent's account; and A. Toulmin did not express any dissent or disapprobation of such directions, which the pressure of business alone prevented deponent from carrying into effect, and the said accounts remained unbalanced as to profits and loss down to A. Toulmin's death. The deponent verified several entries, in his own handwriting, in the partnership books, relating to losses in several stock transactions, sustained by the partnership in 1814 and 1815, showing that one moiety of each of

such losses (viz., £184, £521, £206, and £318, in 1814; and £81, £171, £162, and £78, in 1815,) was, by direction of A. Toulmin, debited to his account, and the other moiety was debited to the account of the Respondent. Deponent also referred to three several entries under the head, "House Expenses," in the partnership books, relating to purchases of wine, from 1812 to 1816, and showing that the payments were made out of the partnership funds; and deponent heard and believed that these wines were sent in [695] equal moieties to the separate private residences of the partners. Deponent verified an account in his own hand-writing commenced in 1812, under the direction of A. Toulmin, and continued in 1813, and said the same was made out for the purpose of showing the actual receipt of money by Toulmin and Copland on account of the debts due to the old firm of R. and A. Toulmin; and it appeared from it that all advances of money by Toulmin and Copland to persons who were indebted to the old firm, were deducted from the first receipts from such persons; and in all cases where the receipts exceeded such advances, the excess alone was carried to the credit of the firm of R. and A. Toulmin.

John Harrison, an accountant, deposed that he had been employed by the Respondent to examine the partnership books. He investigated the accounts contained in them; and it did not appear from any of them that the profits of the partnership business were ever ascertained and carried into the account of the partnership to the credit of the partners, at any period during the continuation of the partnership; although it appeared that the monies drawn out by the partners respectively were regularly carried to their separate accounts. This witness confirmed the depositions of Edmonds, as to the equal division of the losses on the stock transactions of the partnership, and as to the equal division of the wines; and he deposed, that from his careful examination of the accounts, his opinion was that Toulmin and Copland were partners in equal shares; and that it was impossible for any person conversant with accounts to arrive at any other conclusion, from the evidence afforded by the partnership books. Five other witnesses, examined on interrogatories, supported the depositions of the first [696] witness, particularly as to the equal division of the wines.

The documentary evidence consisted of proceedings in the Court of Chancery on a bill filed by R. Toulmin, the lunatic, by his committee, against A. Toulmin. That bill prayed an account of the partnership dealings of R. and A. Toulmin, and of the profits thereof since R. Toulmin became a lunatic. The answer of A. Toulmin contained passages to this effect:—That he was unable to meet with a proper person, able to advance a sufficient sum of money for carrying on the concern until July 1806, when he met with Copland, who agreed to become a partner in the said business of a navy agent, from the 1st of September following, and to bring in a sufficient sum of money for the purposes of carrying on the same. That he, A. Toulmin, thereupon sent circular letters to the customers of the late partnership, to inform them of R. Toulmin having agreed to withdraw from the copartnership, and soliciting a continuance of their agency concerns with the new partnership of Toulmin and Copland. That in compliance with such circular letters, he, A. Toulmin, and said Copland were appointed by most of the connexions of the late partnership, to act as agents for them; and he and Copland accordingly commenced their said partnership business, from the 1st of September 1806, and ever since carried on the same; and Copland had at different times advanced monies for the purpose of carrying on the said copartnership, to the amount of £7000 and upwards; whereby, and by his, A. Toulmin's own private monies, he had been enabled to carry on the said business, and to discharge the greater part of the debts outstanding and due from the said late partnership at the time of the termination [697] thereof. That the accounts of the said late partnership were all balanced up to the 31st August 1806, when all the said late partnership concerns ceased and terminated. That since the said 31st of August he had paid considerably more than he had received on account of the said late partnership; and that no part of the property or monies of the said R. Toulmin had been employed in the carrying on of the said business, which had been so carried on by him, A. Toulmin, and Copland, since the said 31st of August, 1806.

By different schedules annexed to his answer, A. Toulmin stated, that he had received, since the 31st of August 1806, and up to the 31st of August 1807, on account of the outstanding debts due to the firm of R. and A. Toulmin, the sum of £15,217 4s.;

and that he had paid, since the 31st of August 1806, and up to the 31st of August 1807, on account of debts owing by the said firm of R. and A. Toulmin, the sum of £22,410 18s. 6d.

The further documentary evidence produced on behalf of the Respondent was a report of Master Alexander, dated December 1814, and made in pursuance of an order of the Lord Chancellor, on a petition in the lunacy, to take an account of the partnership dealings of R. and A. Toulmin. The Master certified (among other things) that the new partnership of Toulmin and Copland opened a new set of books from the 1st of September 1806, in which they stated the debts due from several persons therein mentioned as debts due to the partnership of R. and A. Toulmin; and that when money was received on account of any of such debtors, a balance was struck in the said books at the time of making up the yearly accounts, and the sums remaining due carried on as debts due to the [698] new partnership of Toulmin and Copland, and afterwards the account was carried on in the usual way by receipts and payments as between the several persons and the new firm. And the Master was of opinion, that whatever sums had been actually received under the circumstances, should be carried to the account of the debts due to the old firm, without giving the new firm credit for their new advances to the several debtors, until the old debts should be satisfied; and that A. Toulmin should be charged with such receipts as between him and R. Toulmin. He further certified, that he had taken the accounts on that principle; and he found that the debts due to the firm of R. and A. Toulmin on the 31st of August 1806, together with interest thereon, at that time amounted to £66,096. That the several sums received since that time by Toulmin and Copland, on account of such debts, amounted to £54,641, with a moiety of which, viz. £27,320 10s., he charged A. Toulmin, for R. Toulmin's share of the said debts; and that of the said sum of £66,096, debts due to the old firm, £11,455 were then (June 1814) still outstanding one moiety whereof, when received, would belong to R. Toulmin. The Master also certified, that the debts due by the old firm at its dissolution on the 31st of August 1806, amounted to £37,056, all of which were since paid by the new firm. Giving A. Toulmin credit for half that sum, (viz. for £18,528), and adding to it one half of sundry advances made by A. Toulmin on behalf of the lunatic, and deducting the aggregate amount from the said sum of £27,320 10s. charged against A. Toulmin, the Master found that the sum of £4732 was then (June 1814) due from A. Toulmin to R. Toulmin, upon the balance of the accounts of their partnership dealings.

[699] Objections taken by A. Toulmin to the Master's report, and several affidavits made by him in support of the objections, were also put in evidence for the Appellants. The objections were to the principle on which the Master took the accounts; and it was insisted that, instead of carrying the sums received by Toulmin and Copland from the debtors of the old and new firms, to the account of the debts due to the old firm only, without giving Toulmin and Copland credit for their advances until the old debts should be satisfied, the Master should have certified that the sums received from such debtors should be carried to the account of the debts due to the old firm, after giving credit in the first place to Toulmin and Copland for their advances. The affidavits set forth that it was the invariable custom of navy agents to advance money to their customers, for the purpose of securing their agency, and thereby enabling the agents to repay themselves the monies due from such customers: That in several interviews which deponent had with the committee and solicitor of the lunatic in 1806 and 1807, they approved of deponent's making advances to the customers indebted to the old firm, for the purpose of ultimately obtaining payment of the old debts; and that it was under that impression, and on the express condition of being allowed to reimburse himself out of the first monies received by him and his partner on account of such customers, that deponent and his partner were induced to make advances to them: his sole view being to retain their agencies, in order that he might be able to discharge, out of the monies coming to them from time to time, the debts due by them to the old firm: That in many instances in which deponent and his present partner had received monies on account of officers for whom they [700] were agents, it had been upon a previous and express understanding that deponent and his said partner were to make advances throughout on account of such officers respectively, and not apply such receipts to

the discharge of the balances respectively, owing from them to the late partnership of R. and A. Toulmin; and in many instances deponent and his present partner had been called upon to accept bills by way of anticipation of the monies so to be received: in which cases, if deponent and his said partner had refused to accept such bills, they would have been prevented by such officers from receiving the monies so coming to them. And deponent and his said partner, on their accepting the said bills, had been directed by the said officers specifically to appropriate the said monies to be received by them to the payment of such their acceptances; and in various other instances deponent and his said partner had been under the necessity of making payments, in order to the receiving the pay due to the officers; such as the expenses of letters of administration and the like.

(This summary of the evidence produced before the Master and the Court below is extracted from the appendixes to the printed cases of the parties to this appeal.)

The Master to whom this cause was referred, by his separate report, bearing date 26th May 1830, and made in pursuance of the said order (*vide* p. 685 *supra*) of June 1828, after stating the evidence produced before him by the Appellants and Respondent, found that the said A. Toulmin and the Respondent became concerned together in 1806, as copartners in the business of navy agents; and that they continued to be concerned together as such co-partners, until the time of the death of the said A. Toulmin, which happened on **[701]** the 4th of January 1819. And he found that it was on the formation of such co-partnership, in the first instance, agreed between the Respondent and A. Toulmin, that upon the said A. Toulmin bringing into the co-partnership between him and the Respondent £40,000 of good debts, which were owing to the late concern carried on in partnership between the said A. Toulmin and R. Toulmin,—and which was for the purpose of meeting the claims by debts transferred from the said firm—and upon the Respondent bringing £4000 into the said co-partnership concern between him and the said A. Toulmin; the said A. Toulmin should be entitled to two-thirds of that concern, and the Respondent to the other one-third. And he found that the said A. Toulmin *did not bring* into the said partnership of Toulmin and Copland the said £40,000 of good debts, according to the true intent and meaning of the said agreement, as stated in the said affidavit of the Respondent, sworn in this cause on the 29th of January 1819. And he certified that he had directed the accounts to be taken on the principle contended for on the part of the Respondent, viz. in equal moieties; and he further certified that his finding that the said £40,000 of such good debts as aforesaid was not brought into the said partnership of Toulmin and Copland, according to the true intent and meaning of the said agreement, having been the subject of objection by the Appellants, and having been requested by them to make a separate report of such finding, in order that the opinion of the Court might be taken touching the same, he had thought fit to make that his separate report accordingly; and that he had forborne to take the account directed by the said decree, on the footing of the said A. Toulmin and the Respondent having been partners in equal **[702]** shares, until the Court should have decided upon the said objections to his said finding; inasmuch as in the event of such finding being overruled by the Court, the so taking such account would have occasioned a very great and unnecessary expense to all parties.

The Appellants took two exceptions to that report: first, that the Master ought, instead of the above finding, to have found that A. Toulmin *did bring* into the partnership of Toulmin and Copland the said sum of £40,000 of good debts, according to the true intent and meaning of the said agreement as stated in the Respondent's said affidavit: secondly, that the Master ought not to have directed the accounts to be taken on the principle of equal moieties, but on the footing that A. Toulmin was entitled to two-third parts or shares thereof, and the Respondent to the remaining one-third.

The first of these exceptions came on to be heard before the Lord Chief Baron, who by an order bearing date 21st December 1830, overruled the same and confirmed the report.*

* The following is a note of the judgment:

Sir William Alexander, L.C.B.—The question in this case is, as I understand it,

The Appeal was against that order.

[703] The Solicitor-general (Sir C. C. Pepys), and Mr. Simpkinson, for the Appellants:—The exceptions to the Master's report were supported by the evidence laid before him, and he ought to have found in the affirmative; that is, that the £40,000 of good debts had been brought into the new firm, from the debts due to the firm of R. and A. Toulmin. The Lord Chief Baron had, as appeared from his judgment, by mistake, considered the question on the exceptions to be, as to the proportions of the business and profits to which the partners were entitled. The Appellants were bound to take both exceptions, the second as necessarily flowing from the first; the chief question arose on the first exception, but it was evident that the Master and the Lord Chief Baron drew a wrong conclusion from the premises before them. The Lord Chief Baron held that persons entering into partnership, without any agreement as to their respective **[704]** shares, would be equally entitled. That position is not controverted by the Appellants. Here, however, **[705]** there was an express agreement, as appeared from the Respondent's affidavit; by that agreement one part-**[706]**-ner was to bring £40,000 of good debts of the former firm; good debts exceeding

whether Mr. Copland is, upon the evidence before the Court, to be held entitled to one-half or one-third of the profits made during the continuance of this partnership between him and his late partner Abraham Toulmin. Upon reference to the Master respecting the facts, he was of opinion that Mr. Copland was entitled to half the profits; and it is to that opinion that the exception which has now been argued was taken. I do not well know the form of the exception, whether it was to the allowance of one half the profits, or to the bringing in of the £40,000 according to the meaning of the agreement.

It appears that Mr. Toulmin and Mr. Copland carried on their partnership under circumstances so loosely expressed, that if it had not been for some collateral evidence entered into in the cause, we should have been left with general presumptions only to deal with, which general presumptions would unquestionably have given to Mr. Copland a moiety of those profits; for I take it, that when two persons agree, without any articles and without any apparent stipulation, to carry on a business or trade together, it is presumed they are interested in equal moieties, until that presumption is displaced by actual evidence of the fact: such I take to be the rule. Now with that advantage in Mr. Copland's favour, nothing appeared originally against that hypothesis but the evidence derived from his own affidavit, and that is expressed in these words: "It was on the formation of such co-partnership, in the first instance agreed," etc. [His Lordship read that part of the affidavit, as above p. 684:]—Now that is the passage, aided by certain collateral testimony, upon which the whole case turns. There are stated, in fact, two agreements, or that which amounts to two agreements; a second agreement, which was the continuation of the first.

I conceive that upon the terms of the original agreement, the position taken on the part of those who sustain this report, could never have been maintained without a great deal of satisfactory evidence; because, when a partner is admitted into an old concern, and stipulates that a certain sum, not of money, but of debts, shall be brought into that partnership,—which debts, from the nature of them could not be realized immediately, which could be realized only by application, by a great deal of management, and by making fresh advances,—it is impossible to conceive that parties could mean the sum of money to have been immediately brought in, or that there should be a sum of money speedily realized from those debts, contrary to the nature of the transactions. I am persuaded, that if such a stipulation were comprized in a written instrument or in a letter, it would be a perfectly sufficient compliance to bring into the partnership a certain sum of debts apparently good; and would be better, if it appeared in after times, and no very near time, that that sum had been actually realized. That depends both upon the construction which the agreement would receive and the facts which followed; and it appears to me, that if it stood only upon that contract, and upon the facts which now appear, I should have been obliged to overturn the report; but I am not about to do so, for the reasons I will now state. It appears to me in justice, when I have nothing to displace the common presumption with respect to the rights of these parties, but the language of one of the parties himself, that in using the whole of that language, I am bound in justice to give it its full

that amount were brought in within a reasonable time. These were good debts, and were so treated by the firm of Toulmin and Copland; and in one way, the true way, of taking the accounts, they were to be deemed to have been brought in within a reasonable time.

By the agreement contained in the Respondent's affidavit, A. Toulmin was not bound to bring into the concern any capital of his own. But the evidence in the cause showed that he did bring in a very considerable capital, which consisted of a moiety of the monies received by Toulmin and Copland on account of the debts due to R. and A. Toulmin. That moiety, after deducting from the whole sum brought in the monies paid for debts due from R. and A. Toulmin, amounted to several thousand pounds. It appeared that on the 1st of September 1806, Toulmin and Copland opened for themselves a new set of books, into which they transferred debts due to R. and A. Toulmin to the amount of £60,000, or thereabouts, and which debts when transferred were therein stated to be due to R. and A. Toulmin, and the accounts so transferred

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effect; and if so, then I find Mr. Copland immediately afterwards in this transaction swearing positively that Mr. A. Toulmin had not, according to the express terms of this agreement, brought in the £40,000, and that he did by a fresh agreement consent to give Mr. Copland a moiety of this concern, and that he should have a moiety of the profits. When I have nothing upon this transaction but the evidence of Mr. Copland, I am bound to give weight to the whole of that evidence: in the same affidavit in which Mr. Copland admits that which would turn him out of court in one event, when he adds to it a new contract, by which under the circumstances he was entitled to one-half, I think it due to justice to give all weight to his words, without regarding the interest which he has in the question; as this is used as evidence against him, it is but justice it should be used as evidence for him. Now the question is, how far the assertion is supported by the collateral testimony? and really one cannot help expressing surprize that one does not find in the books of account more distinct traces of what the interests and understanding of the parties were; it is truly marvellous that for so many years the business should be carried on, and yet nothing but an obscure trace upon the subject can be derived from these books. I think, however, that there is some collateral testimony. In the first place, two gentlemen have been examined, Mr. Edmonds and Mr. Reynolds, who, I think, give different accounts of this transaction. Mr. Edmonds says he was desired by Mr. Copland, in Mr. A. Toulmin's hearing, to make out a statement of the concern, allowing to Mr. Copland a moiety of the profits. That to be sure was at a late period, but at a period before the present question arose, and affords very strong evidence in favour of that proposition. On the other hand, the other witness says Mr. Copland told him that he was entitled only to one-third, that he was offered four ninths, and would be satisfied with that share. That conversation strikes my mind as of much less importance than the other. I do not know what was passing upon that occasion, or whether Mr. Copland might not be saying "I once had a third;" it is very loose; but the other is of a more distinct and connected character; it was a positive direction to do the most important act upon this subject, and affords direct evidence upon it. I do not place great weight upon a circumstance like this loose conversation with Reynolds, the whole particulars of which we may not have before us. There is much greater weight to be given to that other conversation upon which I am now relying; but I confess I am at all times more disposed to rely upon any evidence which appears by writing, and from which I think a safer inference can be drawn. With respect to that particular transaction of Mr. Morgan's loan (relating to the losses in the stock transactions) I was not able to follow the plaintiff's counsel in his observations, which were meant to have the effect of setting at nought any inference to be drawn from that transaction. I think it does show that the expense of borrowing a large sum of money which was actually owing to this partnership, was carried equally to the separate account of these two partners; and I cannot account for that expense being so carried in moieties, except upon the hypothesis that at that time they were concerned in equal proportions; I cannot understand it in any other way. I apply this as a collateral fact, tending to confirm and support the weightier evidence in the case. It appears to me, therefore, that the opinion which the Master has formed is the accurate one, and that this exception must be overruled.

were always afterwards carried on in the books of Toulmin and Copland, as the accounts of Toulmin and Copland alone, though they included the balances belonging to the firm of R. and A. Toulmin. The firm of Toulmin and Copland from time to time received and paid monies on such different accounts, and struck balances thereon, and the sums remaining due at the time of such balances being struck, were carried on as debts due to Toulmin and Copland; and afterwards the accounts were carried on by receipts and payments in the usual way, as between the said debtors and the firm of Toulmin and Copland. [707] Toulmin and Copland not only treated such accounts as their own, but also brought actions in their own names against several of such debtors, for the whole balances due from them at the respective times when such actions were brought; instances of which are given in the evidence. The evidence showed, that if the advances made by Toulmin and Copland, to the debtors of R. and A. Toulmin, were not to be paid out of the monies received from such debtors till the debts due to R. and A. Toulmin, from such debtors, had been discharged, then good debts to the amount of £56,037, owing to the firm of R. and A. Toulmin, had been brought into the firm of Toulmin and Copland; and £40,000 and upwards of such debts were brought by A. Toulmin into the firm of Toulmin and Copland, before the 1st of September 1808. If the advances made by Toulmin and Copland, to the debtors of the firm of R. and A. Toulmin, were to be paid out of the monies received from such debtors, in the first place and before the debts due to R. and A. Toulmin were discharged, then good debts to the amount of £53,653, owing to R. and A. Toulmin, had been brought into the firm of Toulmin and Copland, and £40,000 and upwards of such good debts were, on the last-mentioned supposition, brought by A. Toulmin into the firm of Toulmin and Copland, before the 1st of September 1811. The evidence also showed that the firm of Toulmin and Copland had paid debts owing from the concern of R. and A. Toulmin, to the amount only of £38,624.

By the mode of taking the accounts contended for by the Respondent, £40,000 of the old debts were not brought in at all; at least he insisted that they were not brought in within six years. In taking accounts of debts and payments, the oldest debts should be [708] considered as first discharged: that was the practice, and it was supported by the authority of cases.

The Lord Chancellor:—The established rule is, that where there is no special contract or direction to appropriate payments made, the first debts are held to be first paid. That is also the reasonable practice, for otherwise they might be barred by the statute of Limitations. There is a decision to that effect; *Clayton's case*, *Devaynes* v. *Noble;* where another decision to the same effect, *ex-parte Toulmin*, is stated in a note (5 Madd. 600).

Mr. Knight and Mr. G. Richards, for the Respondent:—The Chief Baron could not have fallen into the mistake imputed to him; he had a particular experience in this case, for he was the Master to whom all the inquiries in the suit and lunacy of R. Toulmin were referred, and part of whose report on these inquiries were evidence in this case. Could any person doubt that, if it were not for the Respondent's affidavit, this partnership should be considered in equal moieties? The most curious part of the case was, that the Lord Chief Baron did not notice that part of the affidavit which supported the Respondent's case; "But A. Toulmin not being able to bring in the £40,000 of good debts, it was afterwards agreed between them that they should carry on the partnership business on equal terms," etc. It was, however, clear from the other evidence in the cause, that the partnership was in equal shares.—[The Lord Chancellor: There appears to be a discrepancy between the Respondent's answer and affidavit; in one he states the agreement to be in the alternative, but at one and the same time; whereas in the other he puts two dis-[709]-tinct agreements.]—The affidavit is not a narrative of a written agreement, but a recapitulation of a subsequent agreement.

The Respondent was willing to confine himself to the agreement to bring in the £40,000 good debts. It was manifest from the Appellant's statement, and from the conduct of the parties in the manner of bringing in these debts, that they had no definite meaning as to that part of the agreement. The former partnership of R. and A. Toulmin was in equal shares; the new partnership was intended to be on the same footing, nothing being understood of unequal shares, except in the case of

the £40,000 being brought in, and that within a reasonable time.—[Lord Wynford. Suppose these debts of £40,000 were brought into the new concern in sufficient time to meet the debts owing from the old firm, would not that fulfil the intent of the agreement?]—The testimony of the witnesses and the documentary evidence produced by the Respondent before the Master, and acted upon by the Master, showed that the debts of the old partnership of R. and A. Toulmin, were only transferred into the books of the partnership of Toulmin and Copland nominally, and for the purpose of facilitating their recovery, and that they never were assumed by that firm; and, in fact, it was never even in the contemplation of A. Toulmin or of the Respondent to assume them; the evidence also showed, that the understanding and agreement of A. Toulmin and the Respondent, in regard to the appropriation of the monies, subsequently to the formation of the partnership of Toulmin and Copland, received or to be received from customers whose debts were transferred, was, that the new partnership of Toulmin and Copland was to reimburse itself the advances made by it to customers, out of the [710] first monies received from such customers, and that the surplus, if any then remaining, was to be applied in the liquidation of the old debts of such customers. The evidence likewise showed that £40,000 of good debts had not been brought into the partnership of Toulmin and Copland, according to the true intent and meaning of the agreement stated in the affidavit of the Respondent, nor within six years next after the 1st of September 1806, which was not a reasonable time, nor such a period as the purposes and objects of the agreement required. The Respondent contends that it must be held to have been agreed, that the £40,000 was to be brought in within a reasonable time, due regard being had to the purposes and objects for which the same was required.

It also appeared from the payments which were made by the firm of Toulmin and Copland in various ways, that they conceived themselves to be partners in equal shares. The wine, for instance, which may be considered substituted for profits was equally divided, not on one or two occasions, but several times, and in large quantities. That point ought to have some weight as showing how all the profits were to be divided. But not only the profits, but the losses also, were carried to the account of each partner in equal shares. That was proved by the several exhibits in the Court of Exchequer, especially by the exhibits of the accounts with Messrs. Morgan, the brokers of the firm of Toulmin and Copland, from which it appeared that the several losses and expenses attending the stock transactions of the firm were divided equally, one-half being carried to the separate account of each partner. This equal division of the losses of the firm showed that it was Mr. Toulmin's understanding of the partnership terms, that the profits also should [711] be equally divided; for there could be no greater injustice than to charge Copland with half the losses, and give him only one-third of the profits. From the evidence in the cause, it was impossible to hold that £40,000 of the old debts were brought into the firm, so as to be available according to the true intent and meaning of the partnership agreement. That was a question of fact, referred to the Master to ascertain, and he found in favour of the Respondent. The case was very carefully considered by the Chief Baron, and he confirmed the Master's report.

The Solicitor-general, in reply, said, the only question disputed before the Master was whether the £40,000 had been brought in within a reasonable time. On that point the Appellants were entitled, upon the clearest evidence, to the judgment of the House, against the finding of the Master, whose report was opposed to the facts as proved.

Lord Wynford:—My Lords, in this case the chief point that is raised for our consideration, is whether the £40,000 had been brought into the new firm according to the tenor of the agreement. The Master has reported,—and the late Lord Chief Baron has confirmed that report,—that the £40,000 had not been brought in. I cannot help thinking, upon the evidence, that it had been brought in. There is no period stipulated within which that sum of debts was to be brought in; and the meaning of bringing the £40,000,—which I take from the learned counsel who have argued this case on the part of the Respondents,—the meaning of bringing it in was the assigning of £40,000, the amount of debts which at the time of the assignment were good. An assignment of debts is not an assignment of the money, but an assignment of that which [712] is a good claim to money, to come in at some time or other. As I understand the case, the whole of the £40,000 was paid in within five

years. The debts were good or they would never have been paid; they existed at the time of the original agreement. But I cannot help thinking also that the £40,000 may be considered to have been realized differently; for there had been advances, and it is not clear that the £40,000 had not been realized at a very early period. It was certainly equally to the advantage of Mr. Copland that this money should be applied to the demands of the new customers, as that it should have been applied for the purpose of paying off the old debts; or perhaps more so, for the house could not have gone on unless the customers had been accommodated in some manner; it could not have gone on but for the realization of this fund.

I was for some time puzzled by a very ingenious argument addressed to your Lordships, that the £40,000 was paid in, not on account of the old debts, but of the pay of officers and of other monies due to the house of Toulmin and Copland; but that is not so, because looking at the evidence in the affidavit of S. S. Toulmin (see pp. 688 and 689, *supra*), and the schedule which is annexed to that affidavit, it appears that those were not payments made on account of the customers from time to time, but payments made to satisfy debts existing, due from the customers to the house at the time of the dissolution of the partnership of Toulmin and his brother. It appears by that schedule, that certainly within five years, at all events, the whole £40,000 was realized. If the other mode of considering the case was the true one, the whole sum was realized at a much earlier period. But it appears to me that the period of realization is not the question, but whether there were **[713]** £40,000 of good debts assignable at the time that the partnership took place; and that there were is perfectly clear, or the money that was realized afterwards would never have been realized. With the greatest respect therefore for the judgment of the late Lord Chief Baron, I think that an erroneous view was taken by him of this case; and therefore I shall move your Lordships, that this judgment be reversed, or rather the appeal allowed.

The Lord Chancellor: My Lords, I take the same view of this case with my noble and learned friend. Your Lordships may have perceived from some observations on interlocutory matters which I suggested, that that has been the view of the case which I have entertained throughout. It was necessary, however, to hear the learned counsel for the Respondent, because they might have shaken the opinion I had formed upon the subject; but that opinion has been confirmed by that which I thought it my duty to do, subsequently to the hearing of the first counsel for the Respondent, who led, and was heard the other day finishing his address to your Lordships; namely, by reading carefully the printed cases and evidence on both sides. I took the opportunity that evening, when the argument was fresh in my recollection, of going through the whole of these papers; and the result of the whole—considering that argument of the Respondent's counsel, and reading the voluminous evidence upon the subject—is, that I have no doubt whatever that the Master came to an unsound conclusion, when he found that the £40,000 were not brought in, in the way in which it was required by the intent and meaning of the agreement.

My Lords, I could have wished that the parties had **[714]** agreed to the proposal which was made *—and which I think was perfectly fair to both parties, and very much for their interests, and which also might have relieved your Lordships as well as the Court below from much very useless, very tedious, unprofitable, and in all probability expensive litigation—not merely to have referred that which now must go back to the Master, whether we will or not, but also that which has been already, I think, adjudicated upon by the Master erroneously, touching the answer to the question put to him in the first inquiry, whether the £40,000 was brought in or not, and which might have been left most safely by the Appellants to another mode of adjudication, enlightened, as it probably would be, by the intimation of opinion which those of your Lordships who had attended this case had pretty plainly given. My noble and learned friend having stated that he considered the opinion of the Master to be erroneous, I think it would have been expedient that the whole should have gone together, and not merely this part in which I think there has been a miscarriage in the Court below. The consequence of that proposition not being accepted

* During the argument their Lordships recommended an arbitration, which was declined.

by the parties, is that it must go back with a direction, that the Court below shall in the first place allow the exception to the report: that will adjudicate upon the matter of the £40,000 being brought in. In putting the question therefore to your Lordships on my noble and learned friend's motion, in which I entirely concur, I shall propose that your Lordships shall adjudge that the decree shall be reversed, and that the cause be remitted, with a direction to allow the exception to the [715] Master's report; and then that it shall be referred back to the Master to proceed upon the foot of the former decree. We have no other way of doing it, and it is a painful thing to be obliged to do this, which must lead to further expense. This House has given greater facilities for the expeditious, economical and easy disposing of the case, in a manner peculiarly adapted to such a case, than I ever saw before; I regret for the sake of the parties the failure of the attempt, but I trust the failure will not prevent your Lordships from repeating the same attempt to other parties, should a case of a similar description arise.—His Lordship then put the question viz. whether it was their Lordships' pleasure that the order of the Court of Exchequer be reversed, and that the cause be remitted to the Court below, with instructions to allow the exception to the Master's report, and so refer it back to the Master, allowing that exception, to proceed upon the footing of the former decree? And it was ordered accordingly in the affirmative.

By an order of the Court of Exchequer, dated 3 July 1834, this order of the House of Lords was made an order of that Court, and the Appellants' said exceptions to the Master's separate report of May 1830 were thereby allowed, and it was referred back to him to revise his report.

The Master, in pursuance of that order, certified by his report dated 2d July 1835, that he found that the said A. Toulmin did bring into the partnership of Toulmin and Copland, the said £40,000 of good debts owing to the former partnership between A. Toulmin and R. Toulmin, according to the true intent and meaning of the agreement in the decree mentioned. And he further certified, that he found by the evidence before him, that the said agreement was varied and altered after the commencement of the partnership between A. Toulmin and J. Copland; and that it was agreed between them that they should be inter-[716]-ested in equal shares, and should receive and pay the profits and loss in equal moieties.

The Appellants took exceptions to the latter finding, insisting that, instead thereof, the Master ought to have found by his report, that the said agreement was not afterwards varied or altered; and that he had not found under what circumstances and in what respects the agreement was varied or altered, which he ought to have done.

These exceptions came on to be argued before the Lord Chief Baron; and his Lordship, by an order dated the 27th of February 1836, allowed the same, and it was thereby ordered that it be referred back to the Master to review his said last report, and to vary and amend the same accordingly.

The Lord Chief Baron, in making that order, said, the House of Lords having decided that the £40,000 were brought into the firm in pursuance of the agreement, the question to be ascertained was, whether there was any alteration of that agreement, the reason given by Mr. Copland for that having failed. If the evidence before Lord Chief Baron Alexander had been sufficient to show that there was a new agreement, he would have so declared without a reference of that question; the evidence being too doubtful on that point, that learned Judge referred the matter, in order to enable Mr. Copland to produce further evidence: no further better evidence has been produced. If there was any variation of the agreement, it became important to Mr. Copland to establish that by some entries in the partnership books, or by making up the accounts to that effect. If there was any alteration of the agreement, what was the consideration for it? There being no evidence of a new agreement, nor consideration for it, no jury would infer a new agreement from the recollection of the witness Edmonds that fourteen years ago he was directed by Mr. Copland, in the presence of Mr. Toulmin, to make up the books on the footing of an equal partnership. The chief evidence from the accounts, in support of an inference of a new agreement, was the loss on the stock transactions, which were by Toulmin's directions charged to the partners in equal portions. But these gambling speculations were not in the nature of partnership transactions, and

they furnished no evidence of the proportion of interest in the partnership concern. The same observation applied to the division of the wine.

(The suit is still going on.)

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[717] APPEAL

FROM THE COURT OF CHANCERY.

ISAAC ROBINSON, Surviving Administrator of GEORGE ROBINSON,—*Appellant;* DANIEL ALEXANDER,—*Respondent.*

[Mews' Dig. ix. 47; xiii. 47; S.C. 8 Bli. N.S. 352. Commented on in *Knox* v. *Gye* (1872), L.R. 5 H.L. 656; and see *Friend* v. *Young* (1897), 2 Ch. 421, p. 427; and Mercantile Law Amendment Act 1856, s. 9, which abolished exception in Statute of Limitations in favour of merchants' accounts.]

In 1799, D. A. purchased shares in a ship of G. R., who retained other shares in the same, and was entrusted by D. A. and the other owners with the whole management of the ship, and with the keeping of the accounts. The ship was sold by G. R. in 1805, with the consent of the owners, and he received the proceeds of the sale, and settled accounts with W. one of the owners, to whose credit a balance appeared to be placed, in respect of the earnings of the ship and the proceeds of the sale. In 1826 D. A. filed a bill against the administrators of G. R., who died in 1824, for an account of D. A.'s share of the earnings and proceeds of the sale of the ship. In G. R.'s account books, which appeared not to have been referred to for several years, were two accounts with D. A., one relating to the ship in the way of debit and credit from 1799 to 1805; the other containing two items only, in 1811 and 1812, on the debit side, not appearing to relate to the ship. D. A. was absent from England from 1820, after which time E., his brother-in-law, a witness in the cause, "called frequently on G. R. with messages from D. A., and asked him to come to a settlement of accounts with D. A. in respect to the ship; G.R. evaded the subject, but never stated or intimated that he was not indebted to D. A." Held by the Lords, affirming a decree of the Court below, that D. A. was entitled to an account of the dealings between him and G. R. relating to the ship.

In March 1826, the Respondent filed his bill in Chancery on behalf of himself and others, creditors of George Robinson, deceased, against the Appellant and [718] John Robinson, since deceased, as administrators of the said Geo. Robinson. The bill stated, among other things, that in the month of October 1799, the Respondent purchased of the said George Robinson six sixteenth shares of a ship called *The Volunteer*, for the sum of £1687 10s.; and other two sixteenth shares of the same ship, for the sum of £562 10s., in November of the same year; That Respondent paid the full amount of the purchase money for these shares; bills of sale were duly executed to him, and all the regulations of the Ship Registry Acts complied with, so that the Respondent was legally invested with the ownership of these eight sixteenth shares in the said ship; That the said Geo. Robinson carried on business in Tower-street, London, as an insurance broker at the time of the said purchase; and he having also certain shares in the same ship, was entrusted by the Respondent and the other part-owners with the whole management of the ship and the accounts relating thereto; and he undertook and continued to act as managing owner, and kept all the accounts relating to the ship, from the time when he and the Respondent so became joint owners, up to the time when both of them sold their shares in her; and during the period of their joint ownership the ship made considerable earnings, and Geo. Robinson received all the proceeds, but never accounted to the Respondent for his share of them; That in January 1805, Geo. Robinson, with the consent of the

Respondent and the other part-owners, sold the ship and received on account of the Respondent his share of the money produced by that sale, but died before he had accounted with the Respondent for the money received by him in respect of the sale and earnings of the ship. That Respondent was lately informed, that on the occasion of the sale, Geo. [719] Robinson settled the accounts between himself and Mr. Charles Wheeler, who was owner of one sixteenth share in the same ship during the period that the Respondent was owner of the eight sixteenth shares; and that on that settlement of accounts it appeared that there was due to Wheeler, in respect of the earnings of the ship and proceeds of the sale, the sum of £141 17s. 4d. on account of his one sixteenth share, and that balance was accordingly paid to Wheeler by the said Geo. Robinson, soon after the said sale, without Respondent's knowledge of the same: That from the time of that sale Respondent had frequently applied to the said Geo. Robinson for an account of the earnings and proceeds of sale of the said ship, but could never obtain it, though it was repeatedly promised to him by the said Geo. Robinson; That in November 1824, Geo. Robinson died intestate; and in December of that year letters of administration of his estate and effects were granted to his brothers, the Appellant and John Robinson, who possessed themselves of the personal estate and effects of the intestate to a large amount, and more than sufficient to pay his debts.

The bill prayed that an account might be taken of what was due to the Respondent in respect of the matters aforesaid, and that the Respondent might be paid what should be found due on settling that account; and that, in case the Appellant and the said John Robinson should not admit assets of the intestate sufficient to pay his debts, including what should be found due to the Respondent in respect of the matters aforesaid, then that the usual accounts might be taken of the personal estate and effects of the said intestate, received by the Appellant and the said John Robinson respectively, or either of them.

[720] The Appellant and the said John Robinson, by their answer to the bill, stated in substance, amongst other things, that shortly after the intestate's death they possessed themselves of certain books of accounts, policies of insurance, vouchers, documents, letters and papers of the intestate; and that amongst them were two letters bearing date respectively 10th of June 1799, and 27th of August in the same year, and written by the Respondent to the intestate, which contained general proposals on the part of the Respondent to become concerned with the intestate in some speculation relating to shipping; That amongst other accounts contained in one of the said books of account, was an account headed, "*Dr. Daniel Alexander, Lawrence Pountney-lane.—Contra, Cr.:*" and which appeared to be a general account between the Respondent and the intestate; and that on the debit side thereof were various items, one of them relating to bills of sale, and others of them relating in express terms to a ship called *The Volunteer;* and that on the credit side of the account were certain items, some of which related in express terms to the said ship, and others, as the Appellant and the said John Robinson believed, related also to the same ship; That by the said books of account it appeared that the Respondent and the intestate were respectively interested in the ship *Volunteer* from September 1799 to October 1804; that the Respondent held eight sixteenth shares, and the intestate held four sixteenth shares, and was the managing owner: that the said ship made certain freight, and the same was received by the intestate, but that he paid the outfit and expenses of the ship, and also the costs of certain investments or adventures in goods shipped on board of her on account of the owners; and that upon two [721] occasions, viz. after the said ship's first and second voyages respectively, dividends were made and credited by the intestate to the owners of the said ship, in respect of her supposed earnings.

The Appellant and the said John Robinson, by their said answer, also insisted that from the state of the accounts of the ship's last three voyages, (which they believed to be losing transactions,) and of the Respondent's first-mentioned account, and particularly as no charge was made to the debit of the Respondent in that account, for his share of the losses, outgoings, and expenses appearing by the accounts to have been sustained and expended, the true state of account between the Respondent and intestate, upon the close of the speculation relating to the ship, could not possibly be ascertained by reference to the accounts before mentioned; but that if the same could

be ascertained by reference to such accounts, they believed that it would either appear that the said account had been long since finally balanced and the balance paid, or that such balance was against the Respondent, and in favour of the intestate. And they further said, that from the time when the Respondent became interested in the ship, down to the time of the intestate's death, the Respondent and the intestate continued to be upon the most intimate terms of friendship, and for more than twenty years of that interval were in constant personal or written communication with each other on their private concerns, in the most confidential manner; and they submitted that all accounts between the intestate and Respondent ought, under the circumstances aforesaid, to be considered as closed and satisfied long since.

The Appellant and the said John Robinson, by their answer, admitted assets of the intestate sufficient [722] to answer what was claimed to be due to the Respondent; but insisted that if the Respondent ever had cause of action or suit against the intestate, concerning the matters in the bill mentioned (which they in no sort admitted), such cause of action or suit did accrue above six years before suing out process against them to appear and answer the bill; and that the Respondent had not, since such cause of action or suit (if any) arose, been under any disability to commence or prosecute the same.

The cause being at issue, witnesses were examined on both sides; the following is the substance of their testimony.—Mr. John Teesdale, the Appellant's solicitor, examined to interrogatories on behalf of the Respondent, and cross-examined by the Appellant and the said John Robinson, proved seventeen different books as exhibits, marked respectively with the first seventeen letters of the alphabet. The first three of them, marked with the letters A, B, C, were stated by the witness to appear to be ledgers; a fourth marked with the letter D, a journal: and all the other books were cash-books, bankers' pass-books, a bill-book, a letter-book, and policy-book. This witness further deposed, that the several produced books had been for a considerable time past in his possession, as the solicitor of the Appellant and the said John Robinson; and that, except as to the pass-books, he believed they were kept by the intestate himself, the entries therein chiefly appearing to have been made by him; and that the intestate kept the whole of the produced books in his own custody, at the London Dock-house, in New Bank-buildings. Witness further said, that he had looked upon the folio 34 of the book marked A, and upon folio 42 of the book marked B, and also upon folios 27, 66, 107 and 124 of the book marked A, and that the accounts written on those folios re-[723]-spectively were written by the intestate, as witness believed, he, the witness, having seen the intestate write many times, and being well acquainted with his hand-writing; and further, that the several accounts on the said folios 34 of book A, and 42 of book B, were accounts between the Respondent and the intestate,* and that the several accounts on the said [724] folios 27, 66, 107 and 124, of book A, were accounts between Charles Wheeler and the intestate.

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* The following is the account in the produced ledgers, marked A, folio 34, and B, folio 42.

ACCOUNT IN LEDGER A, FOLIO 344.

Dr. *DANIEL ALEXANDER, Lawrence Pountney Lane.* *Contra, Cr.*

			£.	s.	d.				£.	s.	d.
1799						1799					
Nov. 28	48	To Expenses for Bills of Sale	3	3	0	Sept. 14	37	By Lees & Co. Recd. of him,	1,500	0	0
,,	49	To Ship Volunteer for 8-16ths	2,250	0	0	Oct. 19	41	By ditto ditto	187	10	0
		2,253*l.* 3*s.*				Nov. 1	43	By ditto ditto	112	10	0
			2,253	3	0	Nov. 11	41	By ditto ditto	600	0	0
1800								2,400*l.*			
Mar. 24	66	To 2,400*l.* per Volunteer	381	0	0	1800					
July 11	74	To Lees, paid C. Wheeler, half Pipe Port Wine	39	11	9	July 11	74	By received of him for half Pipe Port Wine	39	11	9
Dec. 31	102	To Wine Account	6	19	3	Nov. 18	87	By ditto	500	0	0
			2,680	14	0	Dec. 31	100	By return Prem. 2,400*l.* a' 11*l.* 3*s.* 4*d.* per Cent.	255	10	0
Dec. 31	99	To 2,500*l.* per Volunteer, Wake, 2,893*l.* 16*s.* 6*d.*	213	2	6			3,195*l.* 1*s.* 9*d.*	3,195	1	9
			2,893	16	6	1801					
1801	114	To Lees & Co. paid T. Wake	37	17	3	Mar. 2	123	By dividend 8-16ths Volunteer	185	1	5
Feb. 4	117	To ,, ,, him	500	0	0	May 5	130	By Lees & Co. received Duties on Stone	11	2	2
Apr. 28	129	To ,,	124	19	4	May 15	132	By return Prem. 2,500*l.* a' 3*l.* per Cent.	75	0	0
		381*l.* £.255 10						£.381			
		To ,, Duties on Stone	11	2	2	June 24	136	By Lees & Co. received of him	500	0	0
		250 0						£.255. 10*s.*			
		£.505 10				Dec. 31	153	By Interest	12	10	0
May 15	133	To 2,400*l.* insured on Volunteer	380	8	0			£.125			
		124*l.*					155	By return Prem. 2,400*l.*	96	0	0
			3,876	3	3				4,074	15	4

Mr. Thomas England, another witness examined on behalf of the Respondent, proved that the said produced books belonged to the intestate, George Robinson, and that the accounts referred to were in his hand-writing; and that witness had inspected the two books A and B, also the produced books marked respectively E, F, G, H and I, the last-mentioned five books being the intestate's banking books; and that he so inspected the said books A and B, for the purpose of ascertaining what balance was due from the intestate to the Respondent; and finding that there appeared to be a balance of £950 4s. due to the Respondent from the intestate, by the accounts contained on folio 34 of the book marked A, witness examined the books marked respectively E, F, G, H and I, for the purpose of ascertaining whether or no the intestate had made any other payments than what appeared on the said folio 34 to the Respondent, and no such payments could there be found to have been made; and witness did not discover that the said balance of £950 4s. had been paid or satisfied. And witness had looked upon the folios 27, 66, 107 and 124 of the book marked A; and on said folio 27 there were entries of charges for insurance on the ship *Volunteer*, and of the cost of one sixteenth share of that ship; and on said folio 66 there were entries of sums charged for insurance, and of a credit for a dividend on the said ship; and on folio 107 there was an entry of a credit for another dividend on such ship; and on folio 124 there was an entry of credit for sale of the same ship; and it appeared by the said entries, that a sum of money was due to Charles Wheeler in **[725]** respect of the said ship, but not how much was so due; and that the accounts in the said folios related to a great number of other adventures and mercantile transactions besides that of the said ship *Volunteer*. The same witness stated that the intestate was engaged in the business of a merchant, shipowner and insurance broker, and was at the time of his death, and had been from the first establishment of the London Dock Company, secretary to that company; That he was for many years prior, and down to the time of his death, upon terms of intimate acquaintance and friendship with the Respondent; and that it appeared by the produced books, marked respectively A and B, that they had dealings and accounts relating to the ship *Volunteer*, and cash matters, from the year 1799 to the year 1812; That the respondent was by profession an architect; that in the year 1820 he was, from ill-health, obliged to leave this country, and in consequence witness, as his brother-in-law, did undertake to arrange all his affairs; That some short time after the Respondent so left this country, witness called several times upon the intestate with messages from the Respondent, and took the opportunity of asking the intestate to come to a settlement with the Respondent respecting the ship *Volunteer;* and that the last time when witness saw the intestate respecting the account between him and the Respondent relating to the said ship, was a few months before the death of the intestate; and witness did generally, on the said occasions, ask the intestate respecting a settlement of the said account, and the intestate generally evaded the subject, but never did state

Dr. *Contra, Cr.*

1802					1802				
Jan. 18	161	To Lees & Co., paid him	450	0 0	May 1	195	By Ship Volunteer for dividend 8-16ths	692	0 8
			4,326	3 3					
Nov. 4	187	To ,, Thompson, qr. Pipe Port	24	18 10			212*l.* 8*s.*	4,766	16 2
Dec. 27	191	To ,, Hullah, ,, Madeira	28	14 1			650*l.*	4,379	16 2
			4,379	16 2					
1804									
Mar. 8	242	To ,, paid Mr. Robarts	500	0 0	1805		2 5*l.*	387	0 0
1805					Jan. 29	262	By Sale Account of Ship Volunteer	1,306	7 0
Mar. 14	258	To ,, paid Acts, &c.	2	2 0					
		To ,, ,, Lewis	41	1 0					
Apr. 27	261	To ,, ,, him	200	0 0			£.5,122 19*s.* 2*d.*	£. 6,073	3 2
			£.5,122	19 2			£.4,766		
							£.356		

ACCOUNT IN LEDGER B, FOLIO 42.

Dr. *DANIEL ALEXANDER.* *Contra, Cr.*

			£.	*s.*	*d.*
1811					
June 26	322	To Lees and Co. paid Stone for Lord Romney	28	5	0
1812					
May,	338	To Account of Expenses for Arrowsmith's Map	5	5	0

or intimate to witness, or in his presence, or to his knowledge, that he, the intestate, was not indebted to the Respondent.

[726] Mr. Charles Wheeler, the third witness examined on behalf of the Respondent, verified the account in the produced book marked A, between himself and the intestate, relative to the ship *Volunteer;* and he stated that the intestate was an insurance broker and underwriter, and from March 1803 to March 1804 was engaged, with witness and another, in the trade of coal-merchants; and he believed that he was, from October 1805 to January 1806, engaged with Jervase Jackson of London, in the business of policy brokers; and that the Respondent had dealings and accounts with the intestate relating to the ship *Volunteer*, from the year 1799 down to the time of the sale of the said ship, in January 1805, and also respecting the building of the London Dock, and the warehouses belonging to the same, from the year 1795 down to the time of the death of the intestate.

Two witnesses were examined for the Appellant (one a clerk, the other a porter, in the service of the East India Company). The substance of their depositions was this:—When the intestate first went to the London Dock-house, a back room on the ground floor was fitted up as an office for him, as secretary to the Company, but he transacted business in that room four or five times only at the commencement of his residence in the house, after which, finding the room inconvenient, he discontinued the use of it; and from that time to the year 1814 that room was used only as a lumber room for depositing boxes and papers, and from 1814 it continued to be used as a lumber room, and also as a porter's or messenger's room for the servants of the Company; and the intestate never entered it for at least eight or nine years before his death. On the day of his death, the Appellant and [727] the said John Robinson, and their solicitor Mr. Teesdale, met at the London Dock-house for the purpose of searching amongst the intestate's papers, to ascertain whether he had made a will. In the course of their search books and papers relating to his affairs, and which referred to matters of modern date, were found in those parts of the house which he inhabited. Their attention being directed to a wardrobe in the said back room, they forced open the upper part thereof, and there found all the books and papers proved in this cause, covered with so much dust as to make it certain that none of them had been referred to or touched for many years.

The cause came on to be heard before the Vice-Chancellor on the 21st of July 1830, when his Honor ordered and decreed that it be referred to the Master to take an account of all dealings and transactions between the Respondent and the said intestate relating to the matters in the Bill mentioned, etc.

The appeal was against that decree. (John Robinson died during the proceedings.)

Sir William Horne and Mr. Wigram, for the Appellant:—There is no evidence that the Respondent has any demand on the assets of the intestate. By the books of account, which came to the hands of the Appellant in the manner stated by the witnesses, it appears that the Respondent and intestate were jointly interested in the ship from September 1799 to 1805, the Respondent holding eight sixteenth shares and the intestate four sixteenths, and being also managing owner of the ship. It also appears, from the same books, that the ship made some freight, which was received by the intestate, and that he paid for her outfit and expenses, also for investments in goods [728] shipped on board of her on account of the owners; and that dividends were made on two occasions, in respect of the ship's earnings on her first and second voyages. Of these dividends two sums of £185 1s. 5d. and £692 0s. 8d. were entered to the credit of the Respondent in the account with him in ledger A, under the respective dates of 2d March 1801, and 1st May 1802 (*vide* the accounts, p. 723 *supra*). In the same account various sums were entered to the debit of the Respondent, as having been paid on his account by the intestate. The last items in it are:—"1805, January 29. By sale account of ship *Volunteer*, £1306 7s." on the credit side: "1805, April 27, £200" on the debit side. There is no later entry found in that or in any other book or paper belonging to the intestate, of any dealing or transaction between him and the Respondent, except, indeed, that in another book of account, marked B. there are two entries, one of £28 5s. in June 1811, the other of £5 5s. in May 1812 (*vide* the accounts, p. 723 *supra*); both on the debit side of an account with the Respondent, and not relating in any manner to the ship *Volunteer*,

nor to any matter in question in the cause. It is material to attend to the evidence of the state in which those books of account were found by the Appellant, as from that it appears beyond a doubt that none of them could have been referred to or seen by the intestate for at least eight or nine years before his death.

The amount claimed by the Respondent in respect of his share of the earnings and produce of the sale of the ship is £1134 18s. 8d., which was calculated in this way:—The bill alleged that, on the sale of the ship, the intestate paid £141 17s. 4d. in respect of her earnings and the produce of the sale, to Mr. Wheeler, who was owner of only one sixteenth share; from which the Respondent concluded that he, who [729] had eight sixteenths, should have eight times that sum. There is no evidence, in the account books or otherwise, of payment to Mr. Wheeler, for any such sum, nor of any final settlement of accounts between him and the intestate. There is no evidence of acknowledgment by the intestate, or by the Appellant or his late co-administrator, of any sum being due to the Respondent in respect to the alleged dealings. On the contrary, the silence of the Respondent for twenty years and more, in respect to the present demand, is equivalent to positive evidence against its validity. It is in evidence that during the whole of that time the Respondent and intestate were in constant communication in the most confidential manner, on their respective private concerns, and yet no mention was ever made by them of this alleged debt.

But supposing, in the absence of all proof, that the Respondent's claim was originally well founded, still under the circumstances, and considering the lapse of time, as well as the uninterrupted intercourse between the Respondent and intestate down to the time of his death, their Lordships were bound to presume payment or other satisfaction, and to hold the account as stated and closed many years ago. The account sought for by the Respondent's bill was not a general account, but was confined to the ship's earnings and proceeds of sale,—to transactions which took place above twenty-one years before the bill was filed. The second account, that in ledger B, dated in 1811 and 1812, having no relation to the dealings in the ship, should not be considered a continuation of the ship's account, which ended in 1805. At all events, inasmuch as there was no item in any of the accounts within six years of the institution of the suit, and as the Respondent was not under any disability to sue, the rule in equity, founded [730] on analogy with the statute of Limitations (21 Jac. 1st. c. 16) in courts of law, barred this suit. The account here sought was not within the exception in the third section of the statute; it was not a mutual account, nor was it "between merchant and merchant," (the words of the exception), but an account by one partner against another, and the last item in it being long anterior to six years before suit, the whole was barred. So little of the character of trade and merchandize had these dealings, that, until the 6 Geo. 4, cap. 16, the parties could not be made bankrupts.

On the two points, the lapse of time and the application of the exception in the statute, the following cases were cited:—*Sherman* v. *Sherman* (2 Vern. 276), in which it was stated to have been held, that if dealings between merchants had ceased for several years, and one of them died, and the surviving merchant brought his bill for an account, the Court would not decree an account, but would leave the plaintiff to his remedy at law; *Bridges* v. *Mitchell* (Gilb. Eq. Rep. 224; S.C. Bunb. 217), where acquiescence for twenty years was held a bar to a suit for an account between merchants; *Barber* v. *Barber* (18 Ves. 286), where the bill was said, as in the present case, to be against the representative of a deceased partner, Sir William Grant held that the statute of Limitations was a bar, all accounts having ceased above six years; *Cattling* v. *Skoulding* (6 T. Rep. 189), *Martin* v. *Heathcote* (2 Eden, 169), *Webber* v. *Tivill* (2 Saund. 126, n. 6 and 7), *Walford* v. *Liddel* (2 Ves. sen. 400), *Crawford* v. *Liddell*, cited in *Jones* v. *Pengree* (6 Ves. 580-2), and *Foster* v. *Hodgson* (19 Ves. 180).

[731] Mr. Knight and Mr. Stuart, for the Respondent:—It was established by the evidence that, at the time of the intestate's death, there was an open and unsettled account between him and the Respondent in respect of their joint dealings in the ship, and that the intestate had never settled with the Respondent the account which, in the confidential situation he held, of managing owner of the ship, he was bound to do. The depositions of Mr. England were quite conclusive, not only that there was an unsettled account and a large balance due to the Respondent, but

also that the intestate, up to the time of his death, acknowledged the account to be unsettled. That witness deposed, that "some time after the Respondent left this country (having gone abroad for the benefit of his health) he (the witness) often called on the intestate with messages from the Respondent, and took an opportunity of asking him to come to a settlement with the Respondent respecting the ship *Volunteer;* and the last time when witness saw the intestate respecting that account, was a few months before his death, and the witness generally, on those occasions, asked him respecting the settlement of the said account, and the intestate generally evaded the subject, but never stated or intimated to witness that he was not indebted to the Respondent." That deposition was sufficient to sustain the Vice-Chancellor's decree for taking the account. Upon the account in ledger A, the balance in favour of the Respondent is £950 4s. If the Appellant is to have credit for those sums, entered in that account as paid by the intestate, why is he not to be debited with the items entered on the other side? It is in evidence that the accounts are in the intestate's handwriting.

It has been argued on behalf of the Appellant, that **[732]** as there is no entry in the account within six years before the commencement of the suit, the Respondent's claim must be held as barred by the statute of Limitations, or by a presumption of payment from the lapse of time and acquiescence of the Respondent, and cases have been cited to support those positions; but the attempted defence on the statute is not only inapplicable to these transactions, but is also inconsistent with the admissions of the Appellant and with the evidence. The cases cited do not apply to this account, which was, in point of law, an account between merchant and merchant, and strictly within the exception of the third section in the statute of Limitations, the words of which are, "all actions of account and upon the case, *other than such accounts as concern the trade of merchandize between merchant and merchant, their factors and servants.*" If the Respondent had abandoned the account in 1805, and had acquiesced for twenty years, then indeed a presumption of satisfaction would arise, and no suit for his claim, at law or in equity, could be maintained. Presumption of satisfaction, however, might be rebutted by proof of part payment, or other transactions. The account here was an open and unsettled account in 1805, and there were subsequent transactions between the parties, of which the account in ledger B was evidence, making these accounts one running account. The case of *Barber* v. *Barber* (18 Ves. 286), cited for the Appellant, was not authority; it was reported *ex relatione*, and the reporter did not give the name of the person on whose relation he had it; the statement of the case was very meagre; it was stated that they were partnership accounts, but it could not be collected whether the accounts were between merchants respecting mercantile transactions, although the counsel there argued **[733]** them as mercantile transactions, and the Master of the Rolls (Sir William Grant) held the claim to be excluded by the statute. That report is discredited on other grounds: in *Foster* v. *Hodgson* (19 Ves. 180), which came before Lord Eldon about a year afterwards, and was argued by Sir Samuel Romilly, who was counsel in *Barber* v. *Barber*, no reference was made to the latter. The law, as deduced from all the cases of authority, is, that where an account, even between merchants, has been stated and settled, and six years have elapsed without a new entry, that is conclusive, all claim is barred by the statute, and the courts of equity, on the ground of acquiescence and satisfaction, adopt a rule analogous with the limitation of the statute; but there is no bar where the account, though adjusted once, has been opened by subsequent entries, and made a running account. *Sandys* v. *Bladwell* (Sir Wm. Jones, 401), *Holscorn* v. *Rivers* (1 Cas. in Chancery, 127), *Farrington* v. *Lee* (2 Mod. 312), *Webber* v. *Tivill* (Saund. 126), and the cases referred to in the notes to the report of the last case.

Sir William Horne replied:—The Respondent produced no evidence to support his claim: the accounts are taken from the intestate's books, and an attempt has been made to confound two accounts, which are quite distinct, for the purpose of exempting this case from the operation of the statute. It was no impeachment of *Barber* v. *Barber* that it was not cited in *Foster* v. *Hodgson;* it may not have been there reported, and it is not to be expected that the counsel who argues a case will remember it, and cite it a year after in arguing another case.

[734] The Lord Chancellor:—My Lords, the course which I shall propose to

your Lordships to adopt in order to form your decision in this case, is naturally suggested to me by the line of argument, and by the importance of the points which have been taken at the bar. On one of those points, namely, how far the circumstances of this case justified the Court below in presuming satisfaction or payment from lapse of time, I see no reason to entertain much doubt, or to form any opinion different from that to which the Vice-Chancellor came upon that part of the case. But as to the other point, which is the principal one raised, namely, the application of the statute of Limitation, or rather the exception of merchants' accounts in the enacting or operative part of the third section of that statute, which has been elaborately argued at your Lordships' bar, I should wish to have further time for consideration. It is a matter which has been made so little the subject of solemn decision, and on which so many opposite *dicta* are found in the books, that, as at present advised, I should wish to have an opportunity of conferring with some of the learned Judges of the common law courts, before I finally make up my mind to advise your Lordships to affirm his Honor's decree. With that view I should propose to your Lordships to postpone the consideration of this case for a few days. Another reason for suggesting that course to your Lordships is, that I may take an opportunity of inquiring whether there has been any recent decision since I left the other side of Westminster Hall, affixing another and a more definite meaning to that clause of the statute than it has hitherto had. If my present degree of doubt should continue on further consideration, I should then be disposed to advise your Lordships to hear the case **[735]** re-argued before the learned Judges, by one counsel on each side, before finally deciding the case;—not at present saying that that will be the conclusion to which I shall come, but throwing it out merely for consideration.

Considerable doubts hang over the decision of the case of *Barber* v. *Barber* (18 Ves. 286); not over the authority of the learned Judge by whom it is represented to have been pronounced, but over the report itself; inasmuch as, in the first place, it is *ex relatione*, and secondly, there is but a very scanty account of the circumstances as well as of the argument; the point being made in the last paragraph of the report, as to the exception of the statute applying to merchants' accounts: and then, as it appears in the report that his Honor Sir Wm. Grant disposed of it in very summary and somewhat general terms, I should wish to examine that case further. At present, therefore, holding that that case is not of the highest authority, and feeling great doubt of the accuracy of the report, especially when we find that in the subsequent case of *Foster* v. *Hodgson* (19 Ves. 180), neither Lord Eldon in his judgment, nor the counsel on either side in their arguments, press that authority, although in all probability it was published; and at all events, Sir Samuel Romilly, who argued the case of *Foster* v. *Hodgson* before the Lord Chancellor, is stated in the report to have been in the case at the Rolls, and he must have been aware of it: for these reasons and with these views, I shall beg your Lordships to postpone the further consideration of this case.

[736] The Lord Chancellor, after stating shortly the main facts of the case, said, the question in it was a question of accounts involving two points: one, whether the lapse of time and other circumstances entitled the House to presume payment? The other was, whether the statute of Limitations, which was set up as a defence, operated in the same direction, and (the Respondent being within the exception in that statute) barred the suit?—I stated at the close of the argument, that on the first of these points I had no doubt; I considered that under the circumstances of this case, the lapse of time (and so thought the Court below) did not entitle the House to presume satisfaction or payment.

The second point was the one upon which, in regard to its importance, some difference of opinion had existed, particularly as to the reported decision in the case of *Barber* v. *Barber* (18 Ves. 286); a decision that has been a good deal questioned and commented on here, if not elsewhere. I considered that it was fit to allow this case to stand over for further consideration; and I mentioned, that should I continue to entertain a doubt on that point, the importance of the question, and the frequency of its recurrence in courts of law, more than in equity, would incline me to obtain the opinion of the Judges, and to have the case re-argued before them for that purpose. I have since had conversation with some of those learned persons; I have reconsidered the case, and the result is that the inclination of my opinion, as it was at the time of the argument, has been confirmed. I therefore advise your

Lordships now to affirm the judgment of the Court below, without costs. It was a matter very fit for [737] consideration. The conflicting arguments are fully stated, and the doctrine deduced from them is laid down with great distinctness by Mr. Serjeant Williams, in one or more notes to the case of *Webber* v. *Tivil* (2 Saund. 127, n. 6 and 7). Both these notes give a very distinct statement of the cases on the subject; and regard being had to those cases, and to the opinion of Lord Kenyon, which is distinctly given in one of them, I am of opinion that his Honor the Vice-Chancellor came to a sound conclusion on the second, as he had done upon the first point raised in the case; and that the suit being within the exception of the statute, it is not barred by the statute of Limitations. I am confident that if an action at law had been directed to be tried, and sent to a court of law on this point, there would have been, under the circumstances, no doubt of a verdict and judgment for the plaintiff. I therefore recommend your Lordships to affirm this judgment, but without costs.

Judgment affirmed without costs.

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[738]

APPEAL

FROM THE COURT OF CHANCERY.

THOMAS LEWIS, Esq., and ROBERT ANDREW STEVENS,—*Appellants;* WILLIAM BRIDGMAN, the Younger, and JOHN LEWIS MALLET, Executors of Sir Samuel Young, Bart.—*Respondents.*

[S.C. 8 Bli. N.S. 907.]

A portioner entitled to tithe of hay, is not necessarily entitled to tithe of clover, tares, vetches, and grass, cut and carried away green.

In June 1824, the Appellants filed their bill in Chancery against Sir Samuel Young, bart., since deceased, and thereby stated that the Appellant T. Lewis was in May 1815, and ever since continued to be, seised of the tithes of corn, grain, hay and grass yearly arising within a certain district or portion of land within the parish of Cookham, (Berks,) called the lower division of the parish of Cookham, and bounded as therein particularly mentioned; That by an indenture, dated 3d of May 1815, he demised unto the Appellant Stevens all the aforesaid tithes to which he (Lewis) was so entitled as aforesaid, with others, by the description of all that parcel of tithes of corn, grain, hay and other tithes whatsoever, appertaining or in anywise belonging to the parsonage of Cannon, in Cookham, (Berks,) coming, increasing, renewing or growing upon all the lands, arable, meadow, and pasture ground whatsoever, lying [739] within the parish of Cookham, and within the limits, precincts and boundaries therein mentioned; To hold the same and certain other hereditaments thereby demised, for the term and at the rent therein mentioned: And that by virtue of the said indenture, the Appellant Stevens became entitled to the tithes of corn and grain, hay and grass, yearly arising, etc. on all the land situate within that part of the said parish of Cookham; That the said Sir S. Young had, in the years 1820, 1821, 1822, 1823 and 1824, occupied and then continued to occupy a certain farm (containing 168 acres) situate within the said parish of Cookham, great part whereof (viz. 134 acres) was comprised within the precincts and bounds in the said indenture mentioned; and had in each of the said years cut and carried away from his farm, situate within the boundaries aforesaid, large quantities of clover, tares or vetches, meadow and rye grass, and other grasses, without making the same into hay; and that he had carried off part thereof whilst in the swathe, and other part whilst in heaps without setting out the tithe thereof to the Appellant Stevens or making to him compensation for the same; and the Appellants submitted that the tithe of all such clover, tares or vetches and grasses, so cut and taken away, ought to have been set out to the Appellant Stevens, as such lessee as aforesaid, or that a full compensation for the same ought to have been paid to him. And they, the Ap-

pellants, frequently requested Sir S. Young to account for the value of the several titheable matters and things so subtracted by him; but he refused to comply with such requests, alleging that the Appellant T. Lewis was at the time of making the said indenture of demise only entitled to the tithe [740] of hay within the said district, and that in his title deeds tithe of grass was not conveyed to him by name, whereas the Appellants charged that by law the person who was entitled to the tithe of hay, was entitled to the tithe of all clover, tares or vetches, and grasses of every description, severed from the ground by the hand of man, from the moment the same was so severed; and they prayed that the said Sir S. Young might be compelled to come to a fair and just account with the Appellant Stevens, for the single value of the tithes of all the clover, vetches or tares and grasses, which he in manner aforesaid, in the years aforesaid, had taken from off his said farm, and be decreed to pay what should appear due on such account.

Sir Samuel Young put in a plea in bar to the bill, and to the relief and discovery thereby sought, to this effect:—That the Appellants were not, nor was either of them, seised or possessed of or entitled to any tithes whatsoever, within the parish of Cookham, or the titheable places thereof, except only such tithes as appertained or belonged to the parsonage of Cannon, in the said bill mentioned; and that the parsonage of Cannon was an impropriate rectory, to which the tithes of clover, tares, vetches, meadow and rye grass; and other grasses, cut and taken and carried away without being made into hay, did not, nor did any of such tithes, appertain or belong; and therefore that the Appellants were not, nor was either of them, entitled to any such account or payment as by their bill was prayed, or to any discovery or relief in respect of the tithes of such clover, tares, vetches and grasses, or any of them.

Issue was taken upon this plea, and witnesses were [741] examined on both sides.* Before the matter was heard Sir S. Young died, and the suit abated. It was revived in 1828 against the Respondents, who were his executors; and the cause having come on to be heard before the Vice-Chancellor in January 1830, the bill was ordered to be dismissed with costs. (See the report of the case, 3 Sim. 316.)

The appeal was from that order.

Mr. Knight and Mr. Spence, for the Appellants:—By the effect of the plea of Sir S. Young, it was admitted that the Appellant Lewis was entitled to the parsonage of Cannon, and that the parsonage of Cannon was an impropriate rectory; the *primâ facie* title of the Appellant Stevens, the lessee of Lewis, to the tithes demanded by the bill, was therefore admitted, and it was incumbent on Sir S. Young to have proved by evidence that these tithes did not belong to the impropriator, that being the issue of fact tendered by the plea. The question came to this, whether the tithes here demanded were great tithes belonging to the rector, or small tithes belonging to the vicar.

Sir S. Young entered into evidence with a view to prove that the vicar was entitled to the tithes in question, but the evidence not only failed to establish that fact, but served to prove the perception of these very tithes by the Appellants. The only witnesses examined to the point were, the vicar of the parish, (who was materially interested in the event of the suit,) and Mr. Allnutt, who had occupied a farm within the parsonage of Cannon. The vicar did not state a single instance of the tithes in question having been set out [742] in kind, or of any payment having been made to him in respect of them, but merely stated that he had received a composition for all the small tithes; but from a letter admitted to have been written by him in 1822, it was evident that such composition did not include any tithes of the nature demanded by the Appellants, and that the vicar did not at that time consider himself entitled to such tithes.—Mr. Allnutt proved that in the only instances in which the tithes in question had been rendered in kind, they had been collected by the Appellant Stevens, as lessee of the Appellant Lewis, as impropriator of the parsonage of Cannon, and that he had never set out the tithes in question, or paid any composition in lieu thereof to the vicar; and it appeared, on his cross-examination, that in 1822 he had

* The material parts of their evidence were read by the counsel, and may be seen in the subjoined notes of their arguments.

himself voluntarily set out the tithes in question on his own farm, in kind, to the Appellant Stevens, and had admitted the Appellants' right to such tithes in 1824.

The documentary evidence proved by Sir S. Young, consisted of a certified copy of a document from the registry of the Bishop of Salisbury. The Appellants procured an inspection of the copy of that document, and they also caused the original to be inspected; and it appeared from the inspections that this document was not signed by any person; and although it was represented at the hearing, and was considered by the Vice-Chancellor, in giving judgment, to be a terrier, dated in 1715, and signed by the then churchwardens, it was not in fact so dated or signed, nor did it bear any date or signature, nor was it in any manner authenticated as a terrier. This document ought not to have been received in evidence. There was at least sufficient doubt on the evidence to entitle the [743] Appellants to an issue, which the Vice-Chancellor refused to grant.*

But even if the Respondents had made out that the vicar was entitled to all the small tithes, still the Appellants would in law have been entitled to a decree for an account of the tithes demanded by their bill, particularly of the tithes of tares or vetches; for they are great tithes, and belong of right, not to the vicar, but to the impropriator, and it made no difference whether they were dried or taken away when green; *Hodgson* v. *Smith* (Bunb. 279; S. C. 2 Gwill. 743), *Steers* v. *Brazier* (2 Gwill. 742; S. C. 2 Eag. and You. 61), *Lagden* v. *Flack* (2 Hagg. Consist. 303), *Knight* v. *Halsey* (4 Gwill. 1554), *Sims* v. *Bennett* (1 Eden, 382), *Lewis* v. *Allnutt* (2 Bli. N. S. 83). This last case was a suit by these Appellants against the witness Allnutt, for tithes of the same nature with those demanded in the present suit, and under precisely the same circumstances. The Appellants obtained a decree in the Exchequer Chamber, and that decree was affirmed on appeal to this House.

Sir Edward Sugden and Mr. Kindersley, for the Respondents:—The question in this case was disposed of in *Lewis* v. *Young* (13 Price, 394; S. C. 1 M'Cle. 113), a suit instituted in the Court of Exchequer by these Appellants against Sir Samuel Young for these same tithes. The decree being adverse to them, they appealed to this House, but never brought that appeal to a hearing. The object of the present [744] suit, instituted in the Court of Chancery, was to try to get a different decision from another Judge. The argument for the Appellants assumes that the plea admitted their title to the tithes demanded by them, because it admitted their title "to the tithes belonging to the parsonage of Cannon, and that that parsonage was an impropriate rectory." The admission is not in the sense in which the Appellants took it to be. Their bill alleged title to certain tithes within the lower division of the parish of Cookham. The plea denied their title to any tithes within the parish of Cookham, except such as appertained to the parsonage of Cannon; and the Respondents insist that the tithes claimed never appertained to that parsonage or rectory, and so put in issue the title alleged in the bill.

Whether the vicar of Cookham is or is not the owner of these tithes, is not the question in the cause; the Respondents are not bound to show who is the owner, but the Appellants are bound to prove their title, for it is distinctly questioned. In the case of *Norbury* v. *Meade* (3 Bli. 211), Lord Eldon held that a plaintiff in equity must state his title in his bill, and if not admitted he must prove it. "A lay impropriator," said his Lordship, "must claim under his deeds; or if he shows uniform exclusive possession, that may raise a presumption, in the absence of deeds" (Id. 225). The Appellants ought to have stated and given evidence of the foundation of their title, or of the perception of tithes of tares, grass, etc. cut green. The evidence shows that the vicar is entitled to these tithes, and that they are small tithes has been often decided in law.

The issue tendered by the plea, independently of the question of general title, though apparently an [745] issue of fact, is in effect an issue at law, (viz.) whether the right to the tithe of hay, carries with it the right to the tithe of clover, tares, vetches and grasses, cut and carried without being made into hay? And it has been decided, that by law, the right to the former does not carry with it the right to the latter. The Appellant is wrong in point of law, and does not even attempt to prove the fact

* The import of the document referred to, and the substance of the depositions of the vicar and of Mr. Allnutt, are set forth in 3 Sim. 319-321.

upon which the point of law arises. The Respondents, on the contrary, prove, by the depositions of the vicar, "that the parsonage of Cannon formed only a part of the parish of Cookham; that, to the best of his knowledge, all the great tithes arising within that district belonged to the parsonage of Cannon, but no species of small tithe belonged thereto; that the parish of Cookham was a vicarage without any endowment, and that the vicar was entitled to all the small tithes arising within the whole parish, and from the lands comprised in the district called the parsonage of Cannon, as forming part of the parish of Cookham; that during the whole of his (the vicar's) incumbency, he received a money payment as a composition in satisfaction of all the small tithes arising from all the lands in the parish, including the district called the parsonage of Cannon; that the Appellant (Lewis) was entitled to the great tithes within the parsonage of Cannon, and the vicar to all the small tithes within the whole parish of Cookham, including the said parsonage, and, among other species of small tithes, to the tithe of grass, tares, etc. cut and carried away green; and he never knew a claim made for these as being a species of great tithe, until such claim was made by the Appellants." The Appellants, therefore, have failed not only in proving their title, but also on the question of fact of perception of the tithes.

With respect to the question of law, whether the **[746]** tithes claimed were great or small tithes, it will be sufficient to refer to the elaborate judgment of Lord Chief Baron Alexander, in *Lewis* v. *Young* (13 Price, 394), in which he reviewed and distinguished all the cases on that subject. That case, and the case of *Dorman* v. *Sears* (6 Price, 338), which was to the same effect, are not to be overruled by *Lagden* v. *Flack* (2 Hagg. Consist. 303), which is a case of no authority. On the two grounds, first, that the Appellants have not made out their title, and secondly, that the tithes claimed by them are small tithes, it is submitted that the appeal should be dismissed with costs.

Mr. Knight, in reply:—The case of *Lewis* v. *Young* was appealed from, but the appeal was not prosecuted in consequence of the death of Sir S. Young. Sir Wm. Scott, in deciding the case of *Lagden* v. *Flack*, had all the cases cited to him, and he held that the tithes of tares and clover, cut with an instrument and carried away green, were great tithes; and the same was held in the Court of Exchequer, and in this House, in *Lewis* v. *Allnutt*.—[Sir Edward Sugden: That was upon Allnutt's admissions.]—Grass cut and carried away green, and grass dried and harvested, are the same; *Sims* v. *Bennett* (1 Eden, 382; S. C. 2 Gwill. 874). Lord Northington in the last case said that the mode of harvesting made no difference in the quality of the tithe; if great tithe when dried, it was great tithe when green. The only question which raised any difficulty against the Appellants was the proof of title, and that was partly admitted by the plea. There is also evidence of the perception of these tithes by the Appellants; for **[747]** the witness Allnutt admitted that himself and some of the occupiers of land in the district, had set out these tithes or paid a composition for them to the Appellants between 1815 and 1822, when the adverse decision was made in *Lewis* v. *Young*. It is to be hoped that this House will not adopt the principle of that decision.

The Lord Chancellor:—I shall ask your Lordships' permission to allow this case to stand over, until I shall have looked into the cases that were cited at the bar. Although the appeal to this House in *Lewis* v. *Young*, was not prosecuted, yet it might be; it is as easy and as usual to revive an appeal here after abatement, as a suit in the Court of Chancery. The principle of that case, however, is now appealed from in this case: you may on the same grounds go back for eight or ten years, and appeal from all the doctrines established by the Courts during that time. Are your Lordships prepared to do that, and bring under your consideration all the tithe cases decided in the Court of Exchequer? The law is made up of decided cases. With respect to the case of *Lagden* v. *Flack*, no man can feel greater veneration than I do for the learned Judge, Lord Stowell, who decided that case. It may however be observed, that if there was any branch of jurisdiction in which one might have less respect for his authority than in another, it was the adjudication of tithe cases, in which that learned Judge had less experience, less *solertia*, in consequence of the infrequency of such cases in the Ecclesiastical Courts. It accounts for his want of knowledge on the subject, his consciousness of his want of knowledge, that he did

not give his judgment in that case without consulting another Judge (Chief Baron Richards), from [748] whom he said he learned that very nice distinction, that grass severed with an instrument is great, but by the mouth of an animal is small tithe (2 Hagg. Consist. 309). If it had been a case of salvage or of prize, he would not have had so much diffidence in himself as to consult another; and we are not bound *in consulto* to give the same weight to his decision on a question of tithes, as we should be if it were one on which that very learned Judge brought the powers of his own well-stored mind to bear.

Without professing to entertain any great doubt on the present case, I should recommend to your Lordships to postpone the consideration of it for a few days, until I refer to the cases.

Moved and postponed accordingly.

The Lord Chancellor mentioned the case this day (July 9); and, after referring shortly to the facts and question in dispute, recommended to their Lordships to affirm the decree of the Court below.

Affirmed accordingly, with £198 costs.

REPORTS OF CASES heard in the House of Lords, on Appeals and Writs of Error, and decided during the Sessions 1834-36. By C. CLARK and W. FINNELLY, Barristers-at-Law. Vol. III.

APPEAL

FROM THE EXCHEQUER IN EQUITY

Lord GRAVES *v.* FISHER, Clerk.

[Mews' Dig. vi. 618; S.C. 8 Bli. N.S. 937.]

Evidence of a payment in lieu of tithes was given, extending as far back as the reign of Charles I. Still more ancient documents relating to the same parish, and among them the Ecclesiastical Survey of Henry 8, made no mention of such payment. Held, that under these circumstances, an allegation that such payment existed before the time of legal memory, was not supported.

The Respondent filed his bill in the year 1814, for an account and payment of tithes, upon lands occupied by the Appellant, within the Respondent's rectory of Farringdon, in the county of Devon. The Appellant in his answer admitted the legal title of the Respondent as rector, and his general right to all tithes arising within the rectory, but he alleged that the lands he occupied were demesne lands of the manor of Clist; that there had been, before the time of legal memory, an ancient customary payment of £2 6s. 8d., payable at Midsummer in each year, by the owners and occupiers of the said lands, to the rector of the said rectory for the time being, and accepted by him in lieu of all tithes arising upon the said lands; and for that reason neither the Appellant nor the former owners and occupiers of the said lands had ever set out the tithes, or paid any composition for the same. In order to support the alleged modus, [2] the Appellant produced a lease of the 16th October, in the eighth year of the reign of Charles 1st, reciting that there had been, and then was, a certain yearly sum or pension, yearly paid to the incumbent of the parish church for the time being, in lieu of all tithes of the lands therein described, including the lands occupied by the Appellant. He further proved by entries in the parochial and rector's books, by receipts, and by the testimony of witnesses, that a sum of £2 9s. 6d., had been for a great many years yearly paid to and accepted by the rector for the time being, in lieu of all tithes of these lands.

It was objected that the modus as alleged, varied from the modus as proved, but the difference between them was attempted to be explained by calling evidence to show that the 3s. additional had been specially paid for the repairs of the chancel. The evidence on this point was however quite inconclusive. The Respondent, with a view of showing that the payment set up by the Appellant could not have existed before the time of legal memory, produced, among other evidence in the cause, two instruments from the registry of the Bishop of Exeter, one entitled *Annexio Ecclesiarum de Clist Formison et de Farndon*, dated the 28th of September 1321, and purporting to be an ordinance of Walter Stapylton, then Bishop of Exeter; the other was an ordinance of John Grandison, also Bishop of Exeter, dated September 29th, 1366, and in these no money payment of the kind insisted on by the Appellant was

mentioned. The Respondent relied on these ordinances, and on the Ecclesiastical Survey of the 26th Henry 8th, for the purpose of showing that the alleged ancient customary payment was not recognised at the period of their respective dates.

Lord Chief Baron (Sir William Alexander), after hearing the case very elaborately argued (M'Clel. and Younge, 362) decreed [3] for an account of the tithes, observing that a careful examination of the evidence forced on his mind a conviction, that in the 13th and 14th centuries the modus alleged was not payable as of right, and that its origin must therefore have been subsequent to the time of legal memory; under the particular circumstances of the case, he directed the account to be confined to six years before the filing of the bill.

Mr. Bickersteth and Mr. Jacob for the Appellant:—A payment in money proved to have been so long in existence, must have had a legal origin. The mere omission of it from some ancient documents does not show that it was not then recognised. Those documents relate to the parish generally. The Appellant here only sets up his modus for those particular demesne lands, and the evidence he has produced amply supports the alleged payment.

Mr. Boteler and Mr. Beames for the Respondent:—The omission of this alleged money payment from the Survey and other documents clearly shows that it must have had an origin subsequent to the time of legal memory, for it is impossible to believe that so large a sum should have been left altogether without mention in them, had its existence been known and its legality recognised. The Appellant's case rests altogether on presumption, but the presumption of law is in favour of the full legal claim to tithes, and an exemption from such payment, or commutation for it, must be strictly proved. It is not proved here.

Lord Denman, recently appointed Deputy Speaker, presided at the hearing of the appeal; his Lordship, after taking time to consider the case, referred to and adopted the reasons stated by the Lord Chief Baron in the Court below, and therefore moved to affirm the decree.

The decree was accordingly affirmed.

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[4]

APPEAL

FROM THE COURT OF EXCHEQUER IN EQUITY.

ARTHUR CHAMPERNOWNE and Others,—*Appellants;* ELIJAH BROOKE and Others,—*Respondents.*

[Mews' Dig. xi. 618; S.C. 9 Bli. N.S. 199; 4 Cl. and F. 589. Cf. *Beavan* v *Mornington,* 8 H. L. C. 537.]

Where a decree has been made against a party upon hearing, and he omits to present a petition for rehearing within the limited time, if he afterwards presents a petition complaining of some omissions in the decree, an order made on such petition supplying the omissions is irregular. The proper course would be to file a bill of review.

Semble that the purchaser of an estate, the value of which is increased by the wearing of lives, may be called upon to pay interest on the purchase-money in respect of that increased value from the time when he becomes by law entitled to receive the rents and profits.

James Townsend, Elijah Brooke, Richard Smith and John Buller Pearse, were, in December 1810, seised in fee-simple, as tenants in common, of four equal parts of the borough, manor and lordship of Honiton, in Devon, with its royalties, etc., and all messuages therein; and being desirous of selling the same to pay a debt then due from Townsend, Brooke and Smith to Hammersley and Co., bankers, conveyed the estates on the 29th December 1810, to Richard Nowell in trust, for sale, and by another indenture of the same date made him trustee of the monies to arise from the sale. The estates were put up to sale, and bought in. One Charles Scott afterwards agreed to purchase them, but did not complete the purchase.

[5] By articles of agreement, dated 11th December 1812, between Charles Scott of the first part, Sir Christopher Hawkins of the second, James Townsend of the

third, Richard Smith, Elijah Brooke and James Townsend, therein described as bankers and copartners, of the fourth, John Buller Pearse of the fifth, Hugh Hammersley, Charles Greenwood, J. R. Drewe and Henry Brooksbank, of the sixth, Richard Nowell of the seventh, and Arthur Champernowne of the eighth part; after reciting the indentures dated on the 29th December 1810, and certain agreements dated the 27th May 1811, the 21st October 1811, and the 18th April 1812, and reciting that Champernowne had agreed to become the purchaser of the borough, etc., for £70,000, and further reciting that £10,000 had been paid on the 13th February 1812, by Scott for Champernowne; it was agreed by and between all and every the said parties thereto, that the said several therein recited agreements should be from thenceforth null and void. And it was witnessed, that in consideration of the sum of £60,000, thereafter agreed to be paid by Champernowne to Hammersley and Co., Nowell did for himself, his heirs, etc., by and with the consent and approbation of Smith, Brooke, Townsend and Pearse, and also of Hammersley and Co., testified as therein mentioned, promise and agree to and with Champernowne, his heirs and assigns, that Nowell, his heirs and assigns, should on or before the 1st day of May then next ensuing, at the proper costs and charges of Hammersley and Co., make out a good title unto, and at the charges and expenses of Champernowne, his heirs and assigns, by such conveyances, etc., as Champernowne, his heirs and assigns, or their counsel, should lawfully and reasonably advise or require, well and sufficiently convey and assure, by **[6]** proper parties, to the use of Champernowne, his heirs and assigns, etc., all the borough, lordship and manor of Honiton, in the county of Devon, with its rights, royalties, etc., and all the messuages, etc., to the said borough, lordship and manor belonging, as set forth and described in the particulars annexed to the said agreement of the 27th day of May 1811 therein recited, free from all incumbrances, save and except certain leases granted of part of the said premises for terms of years, and the lives of certain persons, as set forth in the said particulars, and which were then unexpired, and not determined; To hold the same unto Champernowne, his heirs and assigns, etc., freed and discharged from all incumbrances whatsoever, save and except the land-tax, and except the leases for years and lives chargeable upon and affecting the said borough, manor, hereditaments and premises. And Smith, Brooke, Townsend and Pearse did thereby for themselves, their heirs, appointees and assigns, promise and agree to and with Champernowne, his heirs and assigns, that he, Champernowne, his heirs and assigns, should be entitled to the rents and profits of all and singular the said borough, manor, messuages, hereditaments and premises, from the 1st day of May then next, or from such time as the said purchase should be completed. And it was thereby further witnessed, that for the considerations aforesaid, etc., he, Arthur Champernowne, did promise and agree to and with Nowell, and Hammersley and Co., that he, Champernowne, should and would, on or before the 1st of May then next, pay to Hammersley and Co. the sum of £60,000, remainder of the said sum of £70,000 as and for the absolute purchase of the said borough, etc. And Champernowne did thereby for himself, his heirs and assigns, further promise and **[7]** agree to and with Hammersley, Greenwood, Drewe and Brooksbank, their executors, etc., and also with Smith, Brooke, Townsend and Pearse, their heirs and assigns, that he, Champernowne, his heirs and assigns, should pay unto Hammersley, Greenwood, Drewe and Brooksbank, or to Nowell, upon the trusts reposed in him and them by the indenture of trust of the 9th day of December 1810, all and every such sum and sums of money for the increased value of the said borough, manor, messuages, hereditaments and premises, or any part thereof, by or in consequence of the death or deaths of any person or persons since the 29th day of September 1811, for whose life or lives any of the said messuages, lands, tenements and hereditaments were theretofore granted. And lastly, it was thereby agreed between Smith, Brooke, Townsend and Pearse, and Champernowne, that such increased value should be ascertained by one indifferent person, if they should agree in the nomination of such person; if not, by two indifferent persons, one to be chosen by the said Smith, Brooke, Townsend and Pearse, and the other by Champernowne; and in case such two persons should not agree in their valuations of such increased value, then they should name an umpire, and that the award or decision of the person or persons so to be chosen or nominated as aforesaid, should be conclusive. Provided always, and it was thereby agreed

between Smith, Brooke, Townsend, Pearse, Hammersley, Greenwood, Drewe and Brooksbank, and Champernowne, that Smith, Brooke, Townsend and Pearse should be allowed interest by the said Hammersley, Greenwood, Drewe and Brooksbank, upon the sum of £7000, part of the sum of £10,000, at the rate of £5 for £100 by the year, from the 13th February then last to the time of the completion of the said [8] purchase; and that Champernowne should in like manner receive from or be allowed interest by Hammersley, Greenwood, Drewe and Brooksbank, upon £3000 residue of the said sum of £10,000, at the same rate and for the same period; but in case a good title could not be made to the said borough, etc., then they, Hammersley, Greenwood, Drewe and Brooksbank, should and would pay, or cause to be paid unto the said Arthur Champernowne, his executors, administrators and assigns, the said sum of £10,000, with lawful interest for the same from the said 13th day of January then last, until it should be ascertained and settled that a good title could not be made out to the said borough, manor, lands and tenements.

On the 15th of March 1813, Champernowne paid into the banking-house of Messrs. Hammersleys the sum of £15,000, in further part payment of the purchase-money of the said borough, for which Messrs. Hammersleys agreed to allow interest at the rate of £5 per cent. upon the completion of the purchase. The said estates were subject to two mortgages: one for £11,000 to John Beague, Richard Bere and Henry Dunsford (executors of John Dickenson), and the other for £2000 to William Peard Tillard and Malachi Blake, for the term of one thousand years. On or about the 15th day of May 1816, the said Nowell received a draft conveyance of the estate from himself to or in trust for Champernowne, and prepared by Mr. Spedding, the solicitor to Champernowne, wherein it was recited (amongst other things) that the increased value arising from the deaths of lives had been fixed and ascertained at the sum of £1454 7s., and the decreased value, owing to the inaccurate statement of the ages in a particular of sale therein referred to, had been estimated at the sum of £961 8s. 11d., [9] leaving as an increased value upon the whole, the sum of £492 18s. 1d., and the said sum of £492 18s. 1d. made, together with and in addition to the said sums of £10,000 and £15,000 already paid, and the sum of £45,000 which remained to be paid, the full sum of £70,492 18s. 1d. And the draft conveyance also recited, that the mortgage sums of £11,000 and £2000 were to be retained by the said Arthur Champernowne out of that part of the said purchase-money which so remained to be paid as aforesaid; and that after such deductions, there remained to be paid by the said Arthur Champernowne, for the remainder of the said purchase-money of the said hereditaments, the sum of £32,492 18s. 1d.

Nowell returned the said draft conveyance to Spedding, approved of, on the 4th July 1816, but the same was never, in fact, executed by any of the proposed parties thereto.

In Michaelmas term 1817, Townsend, Brooke, Pearse, and Messrs. Hammersley, filed their bill in the Exchequer against Champernowne, stating the facts to the effect hereinbefore stated; and praying for specific performance, by Champernowne, of the agreement of the 11th December 1812.

Arthur Champernowne filed his answer on the 17th April 1818. Several of the parties died, and bills of revivor were filed against their representatives.

The cause came on to be heard in the Court of Exchequer on 24th February 1821, when the Court decreed that it should be referred to one of the Masters to inquire and report, whether the complainants in the said suit could make a good title to the estates and premises comprised in the said contract of the 11th of December 1812: and if the Master should find that the plaintiffs could make a good title, then he was [10] to inquire and state at what time they were able to make such title, and at what time they at first showed to Arthur Champernowne, deceased, or to his solicitor, that they were able to make such title; and whether the value of the said estate and premises had been diminished by any dilapidations which had taken place since the 11th day of December 1812, and to what amount, etc.; and that the Master should also inquire and report whether any arrangement binding upon the representatives of Arthur Champernowne, deceased, was come to in his lifetime, with respect to the deductions to be made from the purchase-money on account of the ages of some of the persons for whose lives part of the estates and premises comprised in the contract had been let, having been inaccurately represented; and if the Master should find that any such binding arrangement took place, then he was to state the par-

ticulars thereof; and if he should find that no such binding arrangement did take place, then that he should also inquire and state what deduction ought to be made from the purchase-money on account of such inaccuracy in the description of the ages of any of the persons for whose lives any part of such estate and premises was let; and that the Master should also inquire and report whether any of the persons for whose lives any part of the estates and premises comprised in the said contract was held on the 29th day of September 1811, had died since that time, and whether any arrangement binding upon the representatives of Arthur Champernowne, deceased, was come to in his lifetime, with respect to the payments to be made by Arthur Champernowne, deceased, on account of the lives which had so dropped, or any of them: And it was further ordered by the Court, that the said Master should also inquire and report how much the value of the said estate and **[11]** premises had been increased by the deaths of such persons, or of such of them as to which no such binding arrangement should be found to have been made; and the Master was thereby at liberty to make such separate report or reports to the said Court from time to time as he should see fit; and further directions were reserved.

The Master proceeded, in pursuance of the decree, to inquire into the title of the plaintiffs, and made a report on the 16th August 1824 against the title; exceptions were taken by the plaintiffs to such report, and were allowed, and the Master was directed to review his report generally touching the matters and things referred to him by the decree.

The Master, therefore, proceeded on the inquiry, and finally reported, on 29th March 1827, in favour of the title, with the exception of a very small portion of the estate and premises; and that the plaintiffs were first able to make the same on the 20th January 1825.

The defendants took exceptions to this report, but they were overruled.

The plaintiffs also excepted to the report, insisting that "The Master ought to have found that the plaintiffs were able to make such good title previously to the commencement of the suit." By an order dated 11th July 1827 this exception was allowed, but others taken at the same time were disallowed.

The Master then proceeded on the inquiry directed by the decree, as to the increased value of the estate by the deaths of lives; and by his report dated 7th April 1831, after stating the grounds on which his calculation had proceeded, he declared that he found the total increase of the value at that present time to amount to the sum of £2168 5s. 2d. And that as **[12]** each party had threatened exceptions to his report, on the ground of the basis on which the values were calculated, he had made a separate report as to certain premises therein named, and subjoined a statement of the mode of calculating the same; so that if the Court should think that he had proceeded on an erroneous basis, no unnecessary expense might be incurred.

Exceptions were taken by the defendants to this report on the 15th April 1831, and came on to be argued before Lord Lyndhurst (Chief Baron), on the 5th day of May 1831, when his Lordship expressed an opinion favourable to the report, but thought a difficulty arose in the way of granting the plaintiffs the relief thereby granted to them, from the wording of the decree of the 24th of February 1821, and ordered the exceptions to stand over, with liberty for the plaintiffs to present a petition for re-hearing, or such other petition as they might be advised.

The plaintiffs accordingly, in the early part of June 1831, presented a petition of re-hearing, which not having been, according to the forms of the Court, presented within six months after the decree had been pronounced, could not be granted.

The plaintiffs thereupon, on or about the 7th July 1831, presented a petition, complaining of certain omissions in the decree of the 24th February 1821, as to the manner in which the Master was to calculate the wearing and dropping of lives, and praying that the Court would be pleased to order, by way of supplement or addition to that decree, that the Master should be directed to inquire and report to the Court how much the value of the estate and premises had been increased by the wearing of the lives or increase of the ages of the persons for whose lives any part of **[13]** the said estate or premises were held on the 29th day of September 1811; and that the report of the Master might, as to the several values by the deaths of lives and by the wearing or increased ages of lives, be brought down to the date of the Master's report, so that the cause might, on the confirmation of such report, be in a state for a final decree and decision between the parties.

This petition came on for hearing on the 9th July 1831, when the Court ordered and decreed, That the Master to whom the cause stood referred, should, in addition to the several directions contained in the decree made on the hearing of the said cause, bearing date the 24th day of February 1821, inquire and report to the Court how much the value of the estate and premises in the pleadings of this cause mentioned had been increased by the wearing of the lives or increase of the ages of the persons for whose lives any part or parts of the said estate and premises was or were held on the 29th day of September 1811; and in making such inquiry the said Master was to make to all parties all just allowances, and all parties were to produce before and leave with him upon oath all deeds, books, papers and writings in their or either of their custody or power relating thereto, and were to be fully examined upon interrogatories touching the same, and otherwise touching this inquiry as the said Master should direct.

And that the said Master should proceed to make the inquiry he was directed to make by the said decree of the 24th of February 1821, as to how much the value of the said estate and premises had been increased by the deaths of any of the persons by whose lives any part or parts of the said estate and premises were held on the said 29th day of September 1811, **[14]** and bring down the same, as also the inquiry he was thereby directed to make as to how much the value of the said estate and premises had been increased by the wearing of the lives or increase of the ages of the persons for whose lives any part or parts thereof were held on the said 29th day of September 1811, to the date of his report to be made in pursuance of the said order. This was the order appealed against.

Sir W. Follett (Solicitor-general), for the Appellants: The first objection to this order is, that by the practice of the Court the order ought not to have been made. But assuming for the moment that that objection does not exist, then the decision below is wrong, according to all the rules of equity. As to the first objection, the parties here are out of time. In *Brackenbury* v. *Brackenbury* (2 Jac. and W. 391) it was distinctly held, that after a decree, the Court would not, on motion, make an order to vary that decree. The Lord Chancellor there said, "Where the decree has directed an ejectment, without restraining the party from setting up the outstanding term, that cannot be set right except by appeal or re-hearing. The only question is, whether the addition to the decree thus made upon motion, be regular or not?" His Lordship afterwards added: "If the defendant chooses to file a bill to put the term out of the way, the Court, if a proper case were made out, might be able to relieve him; but it cannot be done upon motion. I cannot, upon motion, do anything with the original decree; and the order which was made on the motion before the Vice-Chancellor must be discharged." The bill here prayed a certain relief, and a decree was **[15]** made upon hearing. This order directs a further and additional inquiry; one which had not been sought by the bill, nor directed by the decree. In *Creuze* v. *Lowth* (4 Bro. C.C. 316) application was made for an order for interest after a decree had been made. The Lords Commissioners had at first allowed the order on petition (Ib. 157); but when the case came before the Lord Chancellor Loughborough, he had it argued upon that point, and said, "No such order could be made on petition; for if interest was not given by the decree, or reserved, it was matter of re-hearing; and this, in strictness, is the rule: but if the point is made upon a hearing for further directions, I see no objection to its being then given, if the case will warrant it." The present is a petition to vary the original decree, and the plaintiffs cannot get such an order on petition; they must adopt another mode of proceeding. Then as to the second objection, the parties have no right to any advantage which they have not stipulated for; nor can the Court itself add to a contract a term which is not to be found in the contract itself.—[Lord Lyndhurst, C.: Suppose that there is a sale of a reversion of a term, with a nominal rent; that 19 years of the term have run out while one of the parties has refused to perform the contract, and at the end of that time the Court decrees specific performance of a contract made 19 years before, the party would have three or four times the value of his money, on account of his own litigation. Surely a decree for specific performance must be to perform the contract as he ought to have performed it years before.] —The distinction between the case supposed and the present case is, that here the parties against **[16]** whom the application in the petition is made, have always endeavoured to enforce the agreement. There is

no ground of complaint against them on the score of delay. In *Davy* v. *Barber* (2 Atkins, 489), and in *Blount* v. *Blount* (3 Atk. 636), a distinction between biddings in the Master's office and a private sale was referred to; but there has been no case distinctly deciding, that upon the ground of that distinction a purchaser shall or shall not pay interest. In the latter case the principle laid down was, that he shall not pay interest till he is let into possession. The order here proposes that the Master shall inquire into the difference of value of the property now and in September 1811, when the first statement was made that the title was completed: but it is clear that even in 1817, when the Respondents filed their bill, they were not in a situation to compel the defendants to accept the conveyance; for even at that time they were not able to make a good title to the premises. It is clear that they were not in a situation to make a good title till January 1825; so that if the Appellants are to pay interest, they cannot be called upon to pay earlier than that time, and in that respect the order upon the petition is defective in itself. The Appellants cannot be called on to pay interest where the other party was in fault.—[Lord Brougham: This is not a question as to the fault of either party. The thing contracted for has, in fact, increased in value; the purchaser will get an advantage by that increase, and ought to pay for it.] —[Lord Lyndhurst, C.: He will come into possession of a more valuable property.] The Court cannot make him pay an increased value for it, except the non-performance of **[17]** the contract has been his fault. [Lord Lyndhurst, C.: The argument for the Appellants loses sight of the fact, that they have had the purchase-money in their pockets all this time, and have been making interest of it.—Lord Brougham: The parties must be put in the same situation as at the time of making the contract, and the interest of the money retained in the pocket of one must be set against the profits derived from the estate in the meantime by the other. But here the case is still stronger: it is as if I put the rent, as I receive it, into a bag, and send it to the banker's, and at the end of some years you come and say, "Give me the estate, and the bag too, though I have been keeping the purchase-money of the estate in my possession all the time, and have been getting interest upon it."]—But here the Appellants do not now want the estate, whereas the other parties insist that they shall have it. The case of *Jones* v. *Mudd* (4 Russ. 118) limits the liability of the Appellants. In that case it was stated, that a purchaser who has not been in possession is bound to pay interest on the purchase-money only from the time when a good title was first shown, and not from the time fixed by the agreement for the completion of the purchase. That case must govern the present. The true doctrine of the Court on this subject has been laid down in the case of *Esdaile* v. *Stephenson* (1 Sim. and Stu. 122), where the Master of the Rolls said: "Where there is no stipulation as to interest, the general rule of this Court is that the purchaser, when he completes his contract, after the time mentioned in the particulars of the sale, shall be considered as in possession from that time, and shall from thence pay interest at £4 per cent.: taking the rents and profits. If, however, **[18]** such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor, then to give effect to the general rule would be to enable the vendor to profit by his own wrong, and the Court, therefore, gives the vendor no interest, but leaves him in possession of the interim rents." If that rule is applied to the present case, the order of the 9th July cannot be supported. —[Lord Brougham: In *Blount* v. *Blount* [3 Atk. 636] the Court considered the dropping in of lives, and said, that if that happened between the time of a person being reported the best bidder by the Master and his taking possession, it would order a compensation on that account, or direct that otherwise the parties should go again before the Master, and a new bidding take place.]—There the party was left to his option; not held bound to the contract, the nature of which had been changed by the lapse of time. The Appellants here would be glad in like manner to be left to their option.

Mr. Pemberton, for the Respondents:—It is a novel doctrine, that the Court will make a difference in its decision respecting a contract on account of the persons who seek to enforce it. It is perfectly obvious that what the Appellants insist on is, that the purchaser may take both the interest and the profits.—[Lord Lyndhurst, C.: The case of *Jones* v. *Mudd* [4 Russ. 118] proceeds on the principle of striking a balance.]—This is an ordinary case of sale and purchase: it will be impossible to

reverse this order, without making another of the same kind on further directions. It is supposed that the vendor has only a right to interest when the delay is attributable to the purchaser. What then is the consequence? There must be an [19] account of the rents and profits actually received. But suppose that the delay is attributable to the vendor; then it is said that the purchaser is not to pay interest till the purchase has been completed, and the purchaser put into possession; then the vendor ought to remain in possession of the rents and profits till the conveyance is made. The argument here puts the vendor in this situation, that he has not any advantage at all from the dropping of lives. No such rule can be found laid down in any of the cases. The year 1811 is objected to as a wrong time from which the calculation is to be made, as that was not the time when the purchase could be completed. But the purchaser was then to be considered in possession; he was in the receipt of the rents and profits, when by force of this contract he prevented us from following up the lives, and so receiving the fines. An inquiry of the kind directed by this order is absolutely necessary, as this is property partly in possession and partly in reversion. The original contract with Scott was entered into in the year 1811, and the Appellant took upon himself the same contract and the same obligations as Scott. The Court would have been working injustice in refusing this order. The Court has found, that from the 29th September 1811 the vendee was to be considered in possession of the property, and was consequently to be held entitled to the rights and subject to the liabilities of such a situation. But the case is still stronger against the purchaser: he cannot protect himself against the liabilities arising from his situation as purchaser by saying that he was not at once let into actual possession. The covenant says, that before the 6th day of May the sum of £70,000 shall be paid. The engagement to pay is positive and express: the provision [20] that the purchaser shall not be let into possession is not positive, it is qualified: that shows that the payment of interest on the purchase-money is not subject to the same uncertainty as the letting into possession. Either it must be said that the vendor remained in possession till the purchase was completed, and so had all the advantage of receiving the increasing rents, or that the purchase must be completed on a particular day, with all the consequences of a neglect in so doing. As to the objection to this order as matter of practice, it is admitted that it is a settled rule of Court not to vary a decree on motion: but this is a perfectly different case; for this was on petition, and in an order on petition the facts of the decree and of the previous proceedings are recited, and brought to the knowledge of the Court. A variation of a decree is not permitted on motion, unless all the parties are before the Court; but if they are all, as they were in this instance, before the Court, there is no objection to the order. There was an irregularity in the original decree; for it directed not only a reference as to the title, but certain inquiries, which depended on the materiality of the Master's report as to that title. In *Creuze* v. *Lowth* [4 Bro. C.C. 316] the application was unnecessary, and was therefore rejected. There a further account had been directed, and as the case would necessarily have to come again before the Court on further directions, the application was deemed unnecessary, and therefore irregular. The original decree here was to a certain extent premature. At all events that which has been done in this case was necessary to correct the original decree; and if not done on petition, can be done when the case comes on again on further directions. The House will not, for the sake of a mere empty form, reverse an order which has done [21] substantial justice between the parties. A bill was filed for an account; an account was directed to be taken before the Master, who reported that the rents and profits more than kept down the interest of a mortgage; and he reported other facts which might have been known when the decree was made. This order is for the Court to obtain information which it is absolutely necessary that it should possess, that it may do justice between the parties. All the cases concur in the view of the subject now taken, and none of them justify the assertion that the purchaser shall not pay interest and yet shall receive the increased value of the estate.—[Lord Brougham: *Blount* v. *Blount* [3 Atk. 636] says, that nothing shall be paid for the wearing of lives.] —But that was a case where there was no stipulation as to interest. Still if the purchaser gets an advantage he must pay for it; he will not pay more, but less than he gets. If it should appear that the amount of interest exceeded the increased value, he would only have to pay the balance, or so much as was equivalent

to the increased value.—[Lord Brougham: Do you not admit that this is an alteration of the decree? Exceptions were stated to the Court: you did not have them argued, but came to the Court and asked for an alteration in the directions given to the Master. You called on the Court to retrace its steps. It is a dangerous thing to open a door to alterations of decrees on motion or on petition, or even on further directions. This is almost the only ground of doubt we have. This is an addition to the decree, not a variation of it. The order supplies something that was omitted, but does not alter what already existed.—[Lord Lyndhurst, C.: My difficulty is, that this was not done on further directions, but on a special report of the Master. Was it absolutely **[22]** necessary that this should be done, when the Master had suggested that it would be convenient to take the opinion of the Court on a particular point, with a view to save expense?]—There is another view of the case, which removes the difficulty. Anything which has arisen since the date of the decree might properly be made, upon order, the subject of an additional inquiry. It is said that the Appellants were not in default till 1825; but it was admitted that they were so then, for it was conceded that the calculation of interest, if allowed at all, might commence from that period. Now, that point was raised after the date of the decereе, and the inquiry resulting from it, might be directed, on motion, as an addition to the decree.

Sir W. Follett, (Sol. Gen.), in reply: We are ready to abandon the contract, and give the Respondents the benefit of the increased value of the property. It is said, that upon further directions an order of this kind might be made. Assuming that, which implies that it could not be made otherwise than on further directions, then this order was wrong, for it was not made on further directions. This was not a special separate report of the Master, which might be made the subject of an order, after a decree had been passed; it was only an explanation of the mode he had adopted in calculating the value of the property, and was appended to the report solely with the view of saving further expense. There was no reason in this case for departing from the ordinary practice. There is no distinction between a petition and a motion with respect to the altering of a decree. The Court cannot alter a decree but on a re-hearing or a bill of review. The burden of showing that a Court of **[23]** Equity might make such an alteration lay on the other side, and no authority for it has been produced. As to the order itself there are two objections to it; first, that it ought not to allow the wearing of lives to be taken into consideration at all; and next, that if at all, it ought not to allow the wearing of the lives to be taken into consideration prior to January 1825, for till then it is not pretended that the Respondents were in a situation to make a title to the estate.

Lord Brougham:—My difficulty in this case has chiefly arisen from *Blount* v. *Blount* (3 Atk. 636), and if we take the judgment of Lord Hardwicke in that case liberally, then undoubtedly that case is an authority against the principle on which the present has proceeded, of allowing interest on the wearing of lives. Lord Hardwicke is there reported to have said, "as to what has been said of the advantage a purchaser receives from wearing out of lives, I never knew the Court take this into their consideration as a reason for a purchaser's paying interest." There is no distinction, as there supposed, at least so far as I am aware of, founded upon the circumstance of the bill being for specific performance of a private contract or for the specific performance of the conditions of open biddings at the Master's office. But I have another and a more general objection to the authority of *Blount* v. *Blount*; and I feel a strong inclination in favour of the decision of Lord Lyndhurst upon that point. We must consider the difference between the times of Lord Hardwicke and the present day. In Lord Hardwicke's days cases of this sort, **[24]** giving rise to questions of nicety and difficulty as to the calculation of the value of property at different periods, were of less frequent occurrence, and consequently were subjects of less familiar illustration, and were less understood than now, when the variations in the funds, the greater amount of pecuniary transactions, the extended commerce of the country, and the new and varied modes of investing capital, bring into daily calculation things of which the very wisest calculators then knew nothing. There is something so pressing and strong against the equity of the case in allowing a purchaser a profit on the purchase-money and the advantage of receiving the rent, both at the same time, (from whatever cause he may have been kept out of possession of the estate), and in refusing the person who sells the estate either interest on the

purchase-money or the profits of the land, (for if the purchaser in the end gets possession he will, in the contemplation of the law, have been in possession all the time, and will be entitled to the rents which have accumulated, so far as the disposal of those rents has not been covenanted for), that I confess I do entertain a strong feeling on the subject. I have, in fact, no doubt upon the merits of this case. At the same time I admit that the course adopted in this case lays down a dangerous precedent, for such, the attempt to get the Court to alter a decree without a bill of review, must be considered. I am, therefore, of opinion, and my noble and learned friend is of the same opinion, that it would be a dangerous thing to open a door to attempts of this sort, feeling convinced as we do, that matters would often be tried to be carried further than the precedents we should make would strictly justify. I have no doubt that the attention of the Court below, when the case was argued [25] there, was not called properly and effectively to this point. There was another and more important point, namely, the merits of the case, to which attention was there chiefly directed. I do not wish to be called upon to give any express or distinct opinion on this point. I have thrown out my view of the matter, and if that intimation of opinion is acted upon, it may save both parties a great deal of time and expense. On the other point, the point relating to the altering of the decree upon petition, I think that the order cannot stand. The order of the 9th of July must therefore be reversed. But I think that this case having been fully considered, the parties will see the propriety of settling the matter, with a view to what, after this intimation of opinion, will probably be the ultimate effect of our judgment.

Lord Lyndhurst, (Lord Chancellor):—I fully concur with the observations, as to the case itself, just made by my noble and learned friend. As to the point on which the decision of this House will proceed, I shall only say, that this was a new experiment to get a rehearing, the parties being out of time to get one in the ordinary way. I have no recollection of what passed, if anything did pass, as to the regularity of this mode of proceeding; probably the whole that was said upon it was an observation of one of the counsel suggesting that if the order was made on a petition of this sort it would be irregular: the point certainly was not argued.

Order of the 9th July 1831 Reversed.

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[26]

APPEAL

From the Court of Chancery in Ireland.

Sir JAMES CALEB ANDERSON, Baronet, PETER PURCELL and WILLIAM STOCKLEY, Esquires,—*Appellants;* WILLIAM WALLACE,—*Respondent.*

[Mews' Dig. i. 608, 619. As to calling in one party in absence of other, cited in *Haigh* v. *Haigh*, 1861, 3 De G. F. and J. 161. As to calling in valuer, see *Caledonian Ry. Co.* v. *Lockhart*, 1860, 3 Macq. 808.]

It is no objection to an award that the arbitrators have in the absence of one of the parties called in the other, and have asked him whether he admitted or disputed certain items in an account, and have merely taken his answer to that question.

Under an authority to arbitrators to call in a competent person to assist them in the valuation of the stock and property of a partnership, it is no objection to their award that they have availed themselves of the assistance of such person in deciding on the partnership accounts. The arbitrators by adopting in terms the opinions of such person, do not constitute him an umpire, but make his opinions their own, and their award cannot be impeached on that account.

In October 1820, John William Anderson, since deceased, the Appellants Peter Purcell and William Stockley, and Cromwell Wallace, then of the city of Dublin, esq.,

and since deceased, and the Respondent, engaged in a copartnership for the purpose of carrying on the business of a public coach company; and accordingly, by certain articles of agreement entered into, and bearing date on the 5th day of that month, between the said John William Anderson of the first part, the Appellants Peter Purcell and William Stockley of the second part, the said Cromwell Wallace of the third part, and the Respondent William Wallace of the fourth part, it was agreed between the said several parties that they should enter into a co-[27]-partnership, to be called the Southern Coach Company, to commence from that day, and to continue until the 5th day of February 1833, for the purpose of carrying on the business of a coach company, and of running mail-coaches and stage-coaches from the city of Dublin to the cities of Cork and Waterford, and to such other places as might be thereafter agreed upon for the conveyance of His Majesty's mails, and carrying passengers and luggage, as in said articles of copartnership was particularly set forth; and it was thereby agreed that the Appellants Purcell and Stockley should be entitled to one third part or share of the profits of the said concern, the said John William Anderson to one other third, the said Cromwell Wallace to one sixth, and the said Respondent William Wallace to the remaining sixth.

John William Anderson afterwards assigned his share therein to the Appellant Sir James Caleb Anderson, bart., who thenceforth became and acted as a copartner therein.

Disputes afterwards occurred among these parties, the Appellants, together with Cromwell Wallace, charged the Respondent with misconduct in his share of the concern; and in the month of February 1826 they filed their bill in the Court of Chancery in Ireland against him, and therein prayed that the said copartnership might be dissolved, and that an account might be taken of all the partnership dealings and transactions between the Plaintiffs and William Wallace in the said suit, which were open and depending between them; and that such sum as should appear to be due by the said William Wallace on account of the said dealings and transactions might be decreed to be paid by him; and that in the meantime he might be restrained by injunction from interfering in any part [28] of the management of the business of the concern, etc., and that a proper person should be appointed to carry on and manage the partnership business, and to receive all debts due to the partnership, and all the accruing profits thereof, and that five sixth parts of the monies arising, after payment of the necessary expenses and charges, should be paid to the Plaintiffs in the cause, in the proportion of their several shares in the partnership; and that the remaining sixth part should be paid into court, to the credit of the said cause, as a security for the sum which, upon the said account, should appear to be due to the said Plaintiffs in the said cause by the Respondent William Wallace.

An application was afterwards made, on motion, for an injunction to prevent the Respondent from interfering in the business.

The Respondent filed his answer on the 11th April 1826, denied all the allegations in the bill as to his supposed misconduct, and claimed a large sum of money as due to him from the firm.

On the 12th of May 1826 the Plaintiffs filed an amended bill in the said cause, to which the Respondent, on the 4th of November 1826, filed his answer; and issue having been afterwards joined, and witnesses examined on both sides, the cause came on to be heard before the then Lord Chancellor of Ireland, on Monday the 30th day of July 1827, when after some discussion had taken place it was agreed between the Petitioners and Respondent William Wallace to settle their differences by arbitration, upon certain terms then agreed upon, and accordingly a decree was made by the Court, whereby it was ordered, by consent of all parties, that the partnership between the Plaintiffs and the Respondent should be dissolved, as to the [29] share of the Respondent, upon the terms following, viz. the Plaintiffs undertaking to purchase all the Respondent's stock of horses, harness and forage, stables, office fixtures and stable articles or implements, and to pay the Respondent for the same within such time after the valuation thereof should take place, and without waiting for the final result of the reference, as the arbitrators thereinafter appointed should think fit; the Plaintiffs also undertaking to purchase the Respondent's share in the copartnership concern, and to pay to him, within such time as before mentioned, the value of the said share; the same to be estimated with due regard to the agreement on the

part of the Respondent not to run coaches upon certain roads, as thereinafter stated. Then followed mutual undertakings, rendered necessary by these arrangements. And it was further ordered, that it should be referred to the arbitration of William Dillon and Andrew Vance, with power to call in a third person in case of difference, to determine the value of the Respondent William Wallace's stock and property, as thereinbefore mentioned; and that the said arbitrators should be at liberty, if they should see fit, to have recourse to competent persons to assist them in the said valuation: and it was further ordered that the said valuation should take place within a month from the date of the said decree. And by the said decree all the partnership accounts, and all other matters in difference in the said cause between the parties Plaintiffs and the Respondent, including the claims of the Respondent relative to the expenses and losses sustained in consequence of the injunction theretofore issued against him, and also the claims of the Plaintiffs respecting any losses or expenses **[30]** sustained on their part in relation to the same matters, were referred to the said arbitrators: and it was further ordered that the said arbitrators should have power, from time to time as they should think fit and just, to make orders in the nature of interlocutory orders, respecting any of the matters so to them referred, without waiting for their final decision on the whole of the matters referred to them, and that such orders should be obeyed and have the same efficacy as if comprised or contained in a final or complete award: and it was further ordered, that in case the said William Dillon and Andrew Vance should not agree, they should be and were thereby empowered to call in a third person to determine between them, whose award or umpirage should be binding and conclusive on the parties Plaintiffs and the Respondent, and should be made the order, judgment or decree of His Majesty's High Court of Chancery in Ireland; and the better to enable the said arbitrators to proceed on the said accounts as to them referred, they were to be armed with a commission to examine all such witnesses as should be produced before them by the parties Plaintiffs or the Respondent, touching the matters of the said accounts: and it was further ordered, that all parties should be and they were thereby declared at liberty to examine each other on oath before the said arbitrators: and it was further ordered that all parties should produce, on oath, all deeds, papers, evidences and books of account in their hands, power or custody, relating to the said accounts, as the said arbitrators should think fit.

The valuation directed by the reference was completed on the 11th of August 1828, and on the 26th day of that month the arbitrators met, and by an inter-**[31]**-locutory order declared the particulars and amount of such their valuation, which was subsequently paid by the Plaintiffs to the Respondent.

In June 1830, Cromwell Wallace died; the Respondent (his brother) took out letters of administration to his estate and effects, and thereupon the bill was revived against the Respondent in his representative character.

No further meeting of the said arbitrators was held until 1832, and on the 3d of July in that year a meeting was held, and both parties attended with their counsel and solicitor, and one Samuel Parkinson, the book-keeper of the Appellants, and the several matters referred to the arbitrators were fully discussed, and the Appellants and the Respondent respectively closed the cases.

On the 4th of July both parties were apprized that the arbitrators did not require the further assistance of counsel or solicitors for either of them.

The arbitrators held some further meetings after the 3d of July, and before the date of their award, and made their award on the 21st of July 1832, whereby, after formally awarding payment of the money to the Respondent for his stock of horses, etc. (already awarded and paid under their interlocutory order of the 26th of August 1828), they further awarded that a sum of £5400 should be paid to the Respondent for his share in the Company, from the day when the stock was delivered up to the day of the expiration of the partnership, and a sum of £4643 15s. 2½d., as the balance of the accounts due to him; which two sums they ordered to be paid forthwith, and they directed the execution of certain bonds and releases, to secure the interests of all parties concerned.

The award was afterwards filed in the proper office, **[32]** and by an order made in the cause on the 6th of September 1832, it was ordered that it should stand confirmed, unless by the last day of the then next Michaelmas Term good cause should be

shown to the contrary. On the 26th November 1832 notice of motion to set it aside was given. Affidavits were filed on both sides.

The Appellants, in their affidavits, alleged that of the meetings which took place between the 3d of July, and the date of the award, neither they nor their solicitors had any notice; that the Respondent had notice of them, and attended at the same, and made statements thereat, which were received by the arbitrators, and materially influenced their judgments; and which statements the Appellants could and would have disproved, if the opportunity had been afforded them. On the other hand, the Respondent stated that at two only of these had he attended, and then at the desire of the arbitrators, and that their object in requiring his attendance was merely to know whether he admitted certain items in the Appellants' accounts, without requiring the same to be vouched or otherwise established; that he did admit these items, and that no further questions were asked of him. It was farther alleged by the Appellants in their affidavits, that the arbitrators had called in the assistance and acted upon the opinion of a Mr. James Hartley, who had, in fact, been thus made by the arbitrators an umpire between them. The Master of the Rolls gave liberty to the arbitrators to make an affidavit on the subject, and they accordingly, on the 19th of January 1833, filed an affidavit in relation to the said award. In that affidavit they alleged, amongst other things, that Samuel Parkinson, the book-keeper of Purcell and Stockley, attended at all the meetings subsequent to **[33]** the 3d of July 1832, either in the same room or in an adjoining room, with the books and accounts belonging to the Southern Coach Company; and that he so attended by the desire and direction of deponents, in order that they might from time to time refer to the books, and take extracts therefrom, and ask questions of him, Samuel Parkinson, respecting certain of the items charged in the said accounts; and say, that William Wallace, attended some, but not all, of said meetings, either in the same room or in an adjoining room, and that he so attended at the desire of these deponents; and that their object in having him in attendance during the time deponents were investigating the particulars of the accounts, was to ask him whether he would admit the several items charged in the accounts furnished on the part of Purcell and Stockley, or would insist on these deponents having the same regularly proved; and also on one other occasion deponents wished to know from him whether he would require an indemnity to be given to him mentioned in the said submission to arbitration; and on these occasions William Wallace was merely called into the room by deponents for the said purposes, and stated he would admit several of said items, and would not require any indemnity; and that said William Wallace did not upon any of those occasions make any other statement to the knowledge or belief of deponents, and they positively say that if he did, which deponents do not recollect, they were not influenced thereby, as deponents had then determined the principle on which the said accounts should be taken, and were employed solely in making out the details thereof. And that several of the items which William Wallace refused to admit, and especially several charges for fines and other expenses against him personally, and **[34]** amounting, as deponents now best recollect, to £560 or thereabouts, were allowed by these deponents against the said William Wallace.

The arbitrators further stated, with respect to a mileage allowance that was found fault with by the Appellants, that the "sum or allowance of 2s. 6d. per mile was, in the judgment and opinion of deponents, and in the opinion and judgment of James Hartley, whom these deponents consulted upon the occasion, as hereinafter mentioned, full compensation for the work so performed." They then went on to say, that after the 3d of July they held four other meetings; namely, on the 4th, 19th, 20th, and 21st of July aforesaid, and that at the meeting on the 4th of July, as deponents now best recollect and believe, they agreed to call upon Mr. James Hartley, who is extensively concerned in the management of public coaches, in order to have the benefit of his opinion and skill in making the necessary valuations, to enable deponents to settle and adjust the respective rights of the parties, and which these deponents considered themselves authorized in doing under the powers given to them by said order of submission; and they were induced to call in Mr. Hartley in consequence of one of them not being acquainted with the details of such matters, so as to enable him to form an accurate opinion with respect

to the value of or proper charges to be made for several of the matters so referred to deponents; but that they did not call Hartley in as umpire, nor did the said James Hartley act as umpire, nor take any part in the making of said award, which is the award of these deponents alone. And that the Defendant, William Wallace, did not to their knowledge, recollection, or belief, at any of the said meetings at which the said James Hartley attended, make any statement **[35]** or do any thing more than answer such questions as deponents found it necessary to put to him from time to time respecting the items in the said accounts as hereinbefore mentioned, and respecting the said indemnity; and they say, that said James Hartley was with deponents only at the last three meetings, namely, on the 19th, 20th, and 21st of July aforesaid; and that the amount of the allowance made to William Wallace in the accounts for the value of his share for the period of four and a half years therein mentioned was diminished by a sum of more than £1200, in consequence of the valuation so made by James Hartley.

The motion came on to be argued on the 29th of January 1833, when the Master of the Rolls ordered that the cause shown by the Appellants, Peter Purcell and William Stockley, against the said conditional order of the 6th of September 1832, be allowed, and that the parties respectively should abide their own costs. The Respondent appealed against this order to the Lord Chancellor of Ireland, and the Lord Chancellor was pleased to order that the said Rolls' order of the 29th day of January 1833 be set aside, and that the said award do stand confirmed.

By a further order, bearing date the 13th of June 1833, it was ordered that the cause should be set down in the Lord Chancellor's list of causes, to be heard upon said award during the then sittings, and it came on to be heard on the 25th of June 1833, when it was ordered and decreed by the Lord Chancellor that the Respondent, William Wallace, was entitled to the two several sums of £5400 and £4643 15s. 2½d. in the award mentioned, amounting in the whole to the sum of £10,043 15s. 2½d.; and it was further ordered that the Appellants should within one calendar **[36]** month pay to the Respondent the said sum so awarded as aforesaid.

The Appellants appealed against both these decrees of the Lord Chancellor; and in the mean time the sum in dispute was ordered to be paid into Court and invested in the name of the Accountant-General to the credit of the cause.

Mr. Knight and Mr. Kindersley for the Appellants:—One point of complaint against the award is, that after giving notice to the parties that further evidence would not be examined, the arbitrators held a meeting *ex parte;* that William Wallace attended that meeting and made statements to the arbitrators, and that no persons were summoned to attend them on the part of the Plaintiffs. This is clearly a ground for setting aside the award, and the Master of the Rolls was right in so considering it. Such a course of proceeding was, in *Walker* v. *Frobisher* (6 Ves. 70), held sufficient for that purpose. It is of no use for the arbitrators to say that the statements of William Wallace did not affect their judgments. The arbitrator in *Walker* v. *Frobisher* said the same thing; but the Lord Chancellor observed, that an arbitrator must not take upon himself to say whether evidence, improperly admitted, had or had not an effect upon his mind. The parties impeaching the award are not bound to show that what the arbitrators did was morally wrong, or that there was fraud in it; irregularity alone is sufficient to set aside the award as where the arbitrators proceed irregularly, in having a meeting and hearing evidence *ex parte*. The circumstances in *Walker* v. *Frobisher* were not so strong as they are in the present case; for here the party himself, and not merely a witness, was the person examined by the **[37]** arbitrators; yet there the award was set aside: and on a subsequent occasion Lord Eldon referred (*Fetherstone* v. *Cooper*, 9 Ves. 68) to what he had done in that case, as the proper course for a Judge to pursue. The arbitrators had no right to receive the evidence of William Wallace *ex parte;* they could only do so where, after full and fair notice to attend given to the other side, that notice had been disregarded. No such notice had been given here; on the contrary, the arbitrators had said that they would not receive more evidence. Then as to the accounts: they are improperly taken on the face of the award. Cromwell Wallace had been one of the Plaintiffs; he died; his brother William Wallace, the Defendant and Respondent, became his administrator, and yet the arbitrators have thought fit to award the payment of a sum of money by the plaintiffs in the suit, including of course Cromwell Wallace, to the Respondent; so that the Appellants are

not only deprived of the advantage of the joint liability of Cromwell Wallace, but they are called on to pay over to him, or rather to the Respondent who represents him, a sum of money, to the payment of which his estate ought to contribute.—[Lord Plunkett: As the bill was framed, it was impossible to take the accounts as between the surviving Plaintiffs and the representatives of the deceased Plaintiff.—Lord Brougham: If I have an account against four parties, and three of them pay me, they may recover contribution from the remaining one.]—The arbitrators exceeded their power in calling in the valuers, for they have not exercised their own judgment on the valuers' estimates, but have taken those estimates as decisive, though their authority only extended to the calling in of evidence in case of a difference of opinion between them as to **[38]** value. By the terms of the reference Hartley was not to be made an umpire. Again, though his opinion was to be asked as to the value of the stock, there was no authority to enable the arbitrators to take it upon the partnership accounts, the value of the shares of the concern, or the other matters in difference, or the question of the injury suffered by the Plaintiffs from the conduct of William Wallace.—[Lord Plunkett: This point was not made in the court below.—Lord Brougham: Can you show, as any part of the order of reference, where the power to call on the valuer is restricted to the taking the value of the stocks?]—The power to call him in was given only with reference to that subject and therefore was impliedly restricted to it.

Mr. Bickersteth and Mr. Lynch, for the Respondent:—The object of the bill was unfairly to get rid of William Wallace out of the partnership, and the object of taking the accounts at all was to ascertain the real value of the share of William Wallace. Explanatory affidavits respecting the award have been, by desire of the Master of the Rolls, laid before him, and he having had a full discussion of the case, was satisfied that there was nothing to impeach the conduct of the arbitrators, and he therefore gave them their costs of appearing; Hartley was rightly consulted as to all the matters in dispute.—[Lord Lyndhurst, C.: An arbitrator has, without any special provision, a power to call in a valuer; when a special provision is made, his power in that respect ceases to be a general power arising from the necessity of the case; must it not, then, be governed by the terms of that provision?]—That has been done here. The arbitrators have not in the least degree exceeded the powers **[39]** given them under the order of reference. The next point is, that the accounts as made out are not authorised by the decree. If they had been made out differently it would have been impossible to ascertain what was the value of William Wallace's share in the concern.—[Lord Lyndhurst, C.: The question before the arbitrators was, what was the value of the partnership property; that depended, of course, on the profits and expenses; the investigation was therefore necessary, for the purpose of ascertaining what the value of that property was, and that value could not be ascertained without a knowledge of the gains and the outgoings.]—The authorities to justify such an inquiry, under such circumstances, are numerous. There is no foundation for the objection to the calling in of Hartley on the general question of the profits and expenses. What then is the other objection in this case? It is said that the arbitrators held an *ex parte* meeting.—[Lord Lyndhurst, C.: We are all satisfied upon that point. There is nothing in that objection. An arbitrator has a right to call in one of the litigant parties, and say, do you admit or dispute any particular item? If the party admits it, there is no need of its being proved; if he disputes it, then it must be made the subject of examination and evidence.]—The only remaining objection is that which relates to the alleged adoption of the opinion of Hartley by the arbitrators. If that was true, it would not vitiate the award. In *Emery* v. *Wase* (5 Ves. 846), upon a similar question coming before Lord Alvanley, he said (Ib. 848), "One objection made is, that the arbitrator did not exercise his own judgment about the timber. That alone is not sufficient to prove the award bad; for a man may make use of the judg-**[40]**-ment of another upon whom he can depend, and the valuation of that person is his if he chooses to adopt it." But here the arbitrators formed their own opinion, and only stated that Mr. Hartley's concurred with theirs; a circumstance which was satisfactory to their minds, as he was a man of experience in the particular matters in which he had been consulted.

Mr. Kindersley, in reply:—The award is still open to objection, from the circumstance of the party himself having been examined at an *ex parte* meeting. An

erroneous impression seems to have been formed as to the nature of what William Wallace did say when thus examined; but at all events, his examination upon any point whatever in the absence of the other parties was a great irregularity, and is sufficient to vitiate the award. The arbitrators had no right to call in the assistance of Hartley for anything but the valuation of the property.—[Lord Lyndhurst, C.: The valuation of the property is a matter which depends on many others. He could not well value the property without going into the calculation of profits and expenses.]—As to the adoption of the opinion of Hartley by the arbitrators, the case of *Emery* v. *Wase* does not furnish an authority for what they have done. The remark quoted from that case was merely incidental, and the case itself was decided upon a totally different point.

Lord Lyndhurst, (C.):—In this case many objections have been made and disposed of as the argument has proceeded. One point remains on which your Lordships have taken time for consideration. That point is, whether the arbitrators have properly conducted themselves in the proceedings under this **[41]** reference. By the terms of the reference, they were employed to value the stock in trade of W. Wallace, who was one of the proprietors of this partnership concern; and they were also empowered to set a value on his share in the partnership, and on the expense of running the Waterford mail from a time mentioned in the submission. With respect to the two first points, they desired to call in the assistance of a valuer, but they were not, in terms, authorized to do so; with respect to the third, their object was stated, and they did call in a valuer. They declared, that the expense of running the Waterford mail was to be taken at 2s. 6d. the double mile, and that their estimate upon that point was founded upon the opinion of Mr. James Hartley. This declaration is stated as one of the grounds for setting aside the award. I do not think that on this ground alone there is any reason for setting aside the award: for they state their opinion on the question, and say, that in that opinion Mr. Hartley concurred. This case is not so strong as that which was before Lord Alvanley (*Emery* v. *Wase*, 5 Ves. 846), and there that learned Judge said, "One objection made is, that Bishton did not exercise his own judgment about the timber. That alone is not sufficient to prove the award bad; for a man may make use of the judgment of another upon whom he can depend, and the valuation of that person is his if he chooses to adopt it." But that is not all here, for these arbitrators had the authority expressly reserved to them to call in a valuer as to the shares of the partnership. Now, it was impossible to come to a conclusion upon that point without an estimate of the expenses of the concern, part of which was the running of the Waterford mail. The arbitrators must, therefore, have considered themselves **[42]** authorized to have assistance upon that point, for the purpose of inquiring into that expense. So that, on both these grounds, I am of opinion that there is no reason for setting aside the award. Then, another objection taken is upon the form in which the accounts have been made out by the arbitrators; but it seems to me that that mode of statement is perfectly correct. Both as to the principle which is to govern the calculation of the accounts, and the mode in which they are stated, I am of opinion that there is no ground for disturbing the award; and I therefore move that the judgment be affirmed.

Lord Brougham:—The first objection made to this award was, that evidence had been taken behind the backs of the parties; but the more that objection is examined, the less does it appear to me worthy of consideration. The Court below gave the arbitrators the costs of appearing, which it would not have done if it had considered that they had conducted themselves improperly. The Master of the Rolls did not mean to say that they had misconducted themselves. They called William Wallace before them, and asked him if he admitted certain items in the accounts. Such as he did admit, they put down as admitted; and it is not because he added any words upon other matters, words that they did not attend to, that their award is to be impeached. There is no objection taken to Mr. Hartley's assistance in examining the accounts. A professional arbitrator would have examined him as a witness, which would have been the more regular and advisable course. The case in the 8th Vesey goes further than the present, and fully supports the principle on which my opinion is founded. I have no manner of doubt that this decree should

[43] be affirmed. The Lord Chancellor has not moved for costs with the judgment, but I think that they ought to be given.

Lord Plunkett:—I may perhaps be permitted to state the grounds on which I set aside the judgment of the Master of the Rolls. I pronounced two orders, one setting aside an order of His Honor, which had itself set aside the award; and the other was on application for a decretal order to be pronounced by me for carrying this award into execution. I felt that if I could not have set aside the order of the Master of the Rolls, great injustice would have been done; and His Honor agreed with me on that point. I thought that the calling on Hartley for assistance was within the scope of the powers of the arbitrators, as they were to have assistance in settling the share of the partnership. I have traced the case in 8th Vesey, and I find that it first came before Lord Alvanley as Master of the Rolls, and his judgment was reported (5 Ves. 846). When it afterwards came on appeal before Lord Eldon, Sir Samuel Romilly, who argued against the award, admitted that an arbitrator might take the advice of another, but not delegate to that other his authority. The arbitrators have done no more here than it was there admitted that they might do. One other point has been started here which was not mentioned in the Court below, namely, the mode of the statement of the accounts. It seems to be supposed that a court of equity is strong enough to take property from a party, but not strong enough to restore it to him when it has been improperly taken: I think that that is a mistake. I concur with your Lordships in affirming the judgment, and I think that it should be affirmed with costs.

Affirmed with £100 Costs.

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[44] APPEAL

FROM THE COURT OF CHANCERY.

RICHARD WHITE, FRANCIS JENKS BURLTON, VINCENT WHEELER, and JAMES EYSAM GRAHAM,—*Appellants:* JOB WALKER BAUGH and THOMAS BEALE,—*Respondents.*

[Mews' Dig. xii. 84; xiv. 800; S.C. 9 Bli. N.S. 181; and, in Ch., *sub nom Salway* v. *Salway*, 2 Russ. and M. 215; 4 Russ. 60. See also Trustee Act, 1893, s. 17.]

A receiver cannot be permitted to enter into any agreement with his sureties by which he, in effect, indemnifies them against any loss that may accrue from his dealing with the receivership fund. The security for his good conduct must not be worked out of the estate itself.

Nor can he be permitted to put the fund entrusted to his care under their control or the control of any person appointed by them, but must retain the complete control over it in himself, so as to be able to act with promptitude on any emergency.

It makes no difference in such a case that the arrangement between the receiver and his sureties has not been the direct cause of a loss, nor that neither of them has obtained any personal advantage from it.

Where an order has been made in a cause directing a receiver to pay the fund to a particular person, and that person dies, the receiver is not bound in the first instance to take out a representation to the deceased, nor to apply to have the order revised; it is sufficient for him to keep the money in the custody in which it was originally placed, until the state of the proceedings in the Court enables him to pay it over.

In the month of August 1820, the Appellant, Richard White, was proposed, and was subsequently appointed to be receiver of the estates of John Salwey, esq., deceased, in a cause of *Salwey* v. *Salwey*, then depend-[45]ing in the Court of Chancery. Under the order by which he was appointed, he was directed to pay his balances from time to time into the Bank of England, in the name of the Accountant-General of the Court of Chancery, to the credit of the cause.

Upon White's appointment he was required to find two sureties, and the Appel-

lant, Francis Jenks Burlton and William Adams (since deceased), who is now represented by his executors, Wheeler and Graham, became such sureties, and entered into a recognizance, dated the 10th of November 1821, in the penal sum of £8000, and drawn in the usual form.

The sureties, with a view to their own security, stipulated with the receiver that the monies he should receive in his character of receiver should be lodged in some bank in the names of the sureties, and that all monies to be applied for the purposes of the receivership should be drawn for by cheques, to be signed by the receiver, Richard White, and to be expressed to be "On account of the trustees of the late John Salwey, esq.," and they further required that Mr. Anderson (who was a solicitor in partnership with Adams) should be at liberty to attend with the receiver on the rent days for the purpose of ascertaining the amount received, which amount should be afterwards paid into the account to be kept with the bankers. These stipulations were acceded to by the receiver, and an account was accordingly opened in the names of the sureties with the firm of Prodgers and Co. of Ludlow. There were some incumbrances affecting the testator's estates which bore interest, and the bankers had a general authority to pay such interest to the parties entitled to it without drafts being drawn for the same; but with that exception, the bankers had no authority to pay any money on account of the [46] receivership, except the same was drawn for by drafts signed and described in the manner above stated; and they never did pay except on drafts in that form. All monies received on account of the receivership were paid into the bank of Messrs. Prodgers until they became bankrupts, which happened in December 1824, at which time there was a balance of £1464 2s. 2d. in their hands on this account. Up to the time of their bankruptcy Messrs. Prodgers were in perfectly good credit and repute, and Mr. Richard Salwey, the person then entitled to the produce of the estates, himself kept a banking account with them. The sum of £1464 2s. 2d. was proved under their commission as a debt due to the receiver. Soon after the failure of Messrs. Prodgers an account was opened with Messrs. Coleman, Morris and Sons, of Leominster, in the names of the said sureties, and the same arrangements were made as before with respect to the payments of interest and of the drafts of the receiver.

An account was also opened by White with Coleman and Wellings of Ludlow, bankers, but this was not opened in the names of the sureties; it was headed "An account between the firm and the trustees of the late John Salwey, esq.," but no arrangement at all was made between the receiver and his sureties with respect to the monies placed in this bank as had been made with respect to the monies placed in the other two banks.

Both these banks were in good credit at the time the accounts were opened, and until the month of March 1826, when they both failed. The balance of receipts up to Midsummer 1824, in the bank of Coleman, Morris and Sons, at the time of their failure, was £1120 5s. 5½d., and that with Messrs. Coleman and Wellings was £259 2s. 8d.

[47] This sum of £1120 5s. 5½d. was proved under the commission against Coleman, Morris and Sons, in the name of Burlton, and the other sum of £259 2s. 8d. was proved under the commission against Coleman and Wellings by White.

The whole amount of balances of receipts to Midsummer 1824, in the hands of the three banking houses, was £2843 10s. 3½d.

On the 6th of August 1824, an order was pronounced on petition, whereby White was directed to pay to Richard Salwey, who was entitled to the rents and profits of the said estates for his life, the sum of £617 17s. 7d., being the balance reported due from him on the passing his accounts to Midsummer 1822, and whereby the receiver was also directed to pay the future balances upon his subsequent accounts up to Midsummer 1824, as the same should from time to time be reported due from him by the Master, as such receiver unto the said Richard Salwey.

On the 20th of July 1824, the sum of £617 17s. 7d., which was the actual balance reported due from the receiver to Midsummer 1822, together with £164 19s. due for costs, was by a draft transmitted to Mr. George Henry Dansey, the London agent of Adams and Anderson, with the following letter addressed to him:

"Dear Sir,

"*Re Trustees of John Salwey, Esq.*

"We send you enclosed a draft for £782 16s. 7d., being the balance of Mr. White's

account as receiver, up to Midsummer 1822; you will, as before, pay £617 17s. 7d., part thereof, into Court to the credit of the receiver, and £164 19s., residue, to Messrs. Still, Strong and Rackham. Be so good as to acknowledge the receipt, and send us the vouchers as soon as you have procured the same."

[48] Mr. Dansey, on the 22d of July following, paid the said sum of £164 19s. as directed by the letter, and at the same time requested Messrs. Still, Strong and Rackham, who were the solicitors for the trustees of the estates, to give him directions as to the paying into Court the sum of £617 17s. 7d.

Mr. Dansey was informed by them that the agents of Mr. Salwey had requested that the sum of £617 17s. 7d. should not be paid into Court, but should be paid to Mr. Salwey, and that a petition for that purpose was about to be presented, and they requested him to hold the money, as they had no directions for paying the same into Court.

This was communicated to Adams and Anderson, who repeated their directions to Mr. Dansey for payment into Court of the sum of £617 17s. 7d. Mr. Dansey again called on Messrs. Still, Strong and Rackham, when they informed him that an order had been pronounced for payment of the money to Mr. Richard Salwey, and that they would send the order to Mr. Dansey with a receipt from Mr. Salwey for the sum of £617 17s. 7d.

Neither this order nor the receipt was ever sent to Mr. Dansey, and in April 1825, he paid the sum of £617 17s. 7d. to the account of Adams and Burlton, with Messrs. Coleman, Morris and Sons, of Leominster.

Neither the receiver nor his sureties knew of this order until after the death of Mr. Richard Salwey, which happened on the 5th of February 1825, and it does not appear that the order was in fact drawn up in his lifetime; but the agent of the receiver having had notice of the order of the 6th of August 1824, was sufficient to prevent his paying his balance into Court.

Richard Salwey died in February 1825, but the [49] Respondents did not prove his will as executors till February 1827, and in the meantime no revised order was obtained, either by White or by any other person for payment of the monies directed by the order of the 6th August 1824, to be paid to Salwey.

On the 26th of July 1827 the Respondents, as the executors of Salwey, presented their petition to the Master of the Rolls, (Sir John Leach,) and thereby prayed "That it might be referred to the Master to compute interest on the sum of £2843 10s. 3½d. from the time when the same ought to have been paid by White, and that White and the executors of William Adams and Burlton, might be ordered within a month to pay the sum of £2843 10s. 3½d. and interest to the petitioners, and, if necessary, that the receiver's recognizance might be put in suit for the purpose of compelling these payments.

The Master of the Rolls, on the 29th of November 1827, dismissed the petition as against the Appellants Burlton, Wheeler and Graham, with costs, and referred it to the Master to take an account of the several dividends which had been received on the sums proved under the commissions of bankrupt against Prodgers, Coleman and Wellings, and Coleman and Wallis, and that White should, out of what the Master should find to have been paid to him on account of such dividends, pay and retain certain costs thereby awarded, and that White should pay the residue thereof, and all future dividends to be received on the several sums thereinbefore mentioned, as the same should from time to time be received by him, to the petitioners, and that he should assign all such future dividends to the petitioners, if required by them so to do, such assignment to be settled by the Master to whom the cause [50] stood referred in case the parties differed about the same.

From that decision the Respondents in the present appeal presented their petition of appeal and rehearing to the Lord Chancellor, before whom the same was heard on the 8th of February 1831, and on the following day the Lord Chancellor ordered that the order of the 29th November 1827 should be reversed, and that it should be referred to the Master to compute interest upon the sum of £2843 10s. 3½d., the balance due from White, the receiver, after the rate of four per cent. per annum, from the time the same ought to have been paid by White, and that the Appellants, Richard White, Wheeler, Graham, and Burlton, within a month from the date of the Master's report, to be made in pursuance of that order, should pay to the Respondents

the sum of £2843 10s. 3½d., and what the Master should certify to be due for interest thereon, and in default thereof the Respondents should be at liberty to put the recognizance of White and his sureties in suit.

This order was the subject of the appeal now before the House.

Mr. Knight, and Mr. Lowndes, for the Appellants:—The order here goes beyond the principle of any former decision. The principle on which Courts of Equity have always proceeded in cases of receivers is, that if such receivers have dealt honestly with the money entrusted to them as a prudent man would deal with his own, they shall not be charged with a loss. The Courts have always acted upon this principle, because they have always treated a receiver like any other trustee or agent. Suppose, then, that **[51]** this had been the case of a private receiver, he would not have been liable to make good the loss occasioned by the failure of these bankers. If he had been the agent of a landed proprietor to whom he had given sureties for the due payment of the rents received, and had paid these rents into the banker's, more especially if, as in this case, those bankers had been the bankers of his principal, nobody can pretend to say that he would have been liable when they failed. It can be no objection to him that he entered into a contract with his sureties, by which he was prevented from drawing cheques for any part of this receivership fund to answer his own private purposes.—[Lord Brougham: Would he not, even in the case you have put, be clearly liable, if he mixed the money with his own?]—Certainly he would; the cases all establish that proposition, because the rule is, that if he gains any advantage, direct or indirect, from it, he must be responsible for loss. But there, again, the same rule is applied to a receiver of the Court, and to a private agent or trustee.—[Lord Brougham: Then do you contend that there is no distinction whatever between these two classes of persons?]—There is no distinction between them: a receiver is merely the steward of the Court, and is to be dealt with like any other steward.—[Lord Lyndhurst, C.:* In the case of a private agent or trustee, does any mere irregularity of conduct make out a claim against him without proof of some actual damage arising therefrom? Does the same rule apply to a receiver?]—That may depend on the special circumstances of each particular case. In *Knight* v. *Lord* **[52]** *Plymouth* (3 Atkins, 480), a receiver was exonerated from liability though he had transmitted the money in an unusual manner, in consequence of which the loss occurred, it being proved before the Master that he had so transmitted it with a view to the benefit of the estate, and for no other reason.—[Lord Lyndhurst, C.: Lord Eldon expressed his dissatisfaction with that case in *Wren* v. *Kirton* (11 Ves. 377)].—There is no case in which the principle laid down in *Knight* v. *Lord Plymouth*, as reported in Dickens (1 Dick. 120) is expressly dissented from. On the contrary, it is distinctly recognized and acted upon in *Rowth* v. *Howell* (3 Ves. 565), and Lord Rosslyn there calls it (*ib.* 566) "a very strong case." If the receiver had mixed this money with his own it would be difficult to say that he was not liable; for there the rule as to his obtaining an advantage would apply; as he might thereby increase his own credit, and prevent the necessity of keeping in the hands of his bankers a large balance of his own money. In such a case the private agent or trustee would, if he made the trust money subservient to his own convenience, be liable in the same way that a receiver is to the Court. It is admitted that a private receiver would not be liable unless some mischief accrued directly in consequence of his irregularity. It is the same with a receiver of the Court, and the case of *Rowth* v. *Howell* fully supports that principle. It is not pretended that the loss accrued in consequence of what the Respondent White did in this case. It was necessary that the money should be deposited with bankers for safe custody, and neither White nor his sureties applied any part of the receipts to other than **[53]** the receivership purposes. The arrangements made with regard to the cheques did not give any advantage to the receiver or his sureties beyond that of enabling the sureties to prevent the receiver, if he were so inclined, from improperly dealing with the trust monies. Upon that arrangement they ought not, therefore, to be held liable; but at all events they cannot be liable upon the whole of the sum claimed, for the monies placed in the bank of Messrs. Coleman and Wellings were not affected by this arrangement, and those monies at

* This case was argued while Lord Lyndhurst was Lord High Chancellor, but the judgment in it was given after he had resigned the custody of the Great Seal.

least must be exempted from the operation of the Lord Chancellor's orders. There is no reason to complain of the conduct of the receiver in not paying these sums into Court; for by the order of the 6th August 1824, the receiver was prevented from paying his balances into Court, and by the death of Richard Salwey, and the fact that no administration was taken out for Richard Salwey's estate, he was prevented from paying them over to any person interested or authorized to receive them. Now *Adams* v. *Claxton* (6 Ves. 226) shows that a trustee is not to be charged with a loss occasioned by the failure of the banker of the agent in whose hands the money is deposited, pending a transaction for the change of trustee. The principle there laid down applies to the present case; and the receiver cannot be charged with a loss accruing while he was prevented by the order of the Court, or by the death of the party, from dealing with the money otherwise than he did. On no ground, therefore, can the order be supported as it now stands.

Mr. Wakefield for the Respondents:—The real objection to the agreement between the receiver and the **[54]** sureties is, that it deprives the receiver of the control which he ought to have over the fund entrusted to his care. In that respect, therefore, the receiver was not treating these trust monies as he would have treated his own. So that taking the argument of the other side to be well-founded, it is clear that the receiver is responsible for the loss; for no prudent man would leave his own monies so completely under the control of a third person, that, happen what might, he could not withdraw them from the bankers where they were placed, nor put them into safer custody, unless that third person chose to consent to his doing so. It is not necessary to prove here that the receiver or the sureties obtained any personal advantage from their manner of dealing with the trust fund; for it is quite clear that by keeping so large a balance at the banker's the estate was exposed to loss. If the receiver has acted irregularly he has become responsible to the Court. The principle stated in *Knight* v. *Lord Plymouth* (3 Atk. 480) has been in effect overruled by Lord Eldon in *Wren* v. *Kirton*, where his Lordship said (11 Ves. 380) "I should not much fear to contradict that case of *Knight* v. *Lord Plymouth*, upon what has been done by later authority, if it is as represented, for nothing is more dangerous." A receiver appointed by the Court does stand in a very different situation from a private trustee, and the same indulgence is not to be extended to the former as to the latter. This distinction has been taken in all the cases. The receiver here kept larger balances than he ought to have done in the hands of the bankers, and the failure of one taught him no caution with respect to the others. This alone is a ground for making him responsible. As to the argument raised upon the death of R. Salwey, and the **[55]** absence of any one who had taken upon himself administration of R. Salwey's estate, no excuse for the receiver can be founded on that circumstance; for the receiver might have applied to the Court for orders to enable him to pay the money into the bank, in trust in the cause. The money in the hands of Messrs. Morris and Coleman, as much as any other portion of the fund, has been lost by his neglect to do this, and in every respect, therefore, he is liable to make good to the estate the sum which has thus been lost by the bankruptcy of the bankers whom he imprudently trusted.

Mr. Knight, in reply:—The case of *Knight* v. *Lord Plymouth* [3 Atk. 480] was not overruled by Lord Eldon, who merely intimated a doubt whether he should have gone as far as Lord Hardwicke was represented to have gone in that case. It was recognized and acted upon by Lord Chancellor Rosslyn in *Routh* v. *Howell* [3 Ves. 565]; and in *Massey* v. *Banner* (4 Madd. 413) it was cited in argument before Sir John Leach, who expressed no dissent from its principle, but decided the case then before him on circumstances which rendered that principle inapplicable. If a different rule is now to prevail, there will be the greatest difficulty to obtain receivers; for no man will take upon himself an office in which he is to labour under a far greater responsibility in respect of the property of others than can be satisfied by his taking the same care of it as of his own.

Lord Brougham:—My Lords, In this case Richard White being appointed receiver of the rents of the estates of Salwey's executors, was required to find the usual sureties, and he proposed William Adams and **[56]** James Burlton, who were approved of, but it afterwards appeared that, in order to obtain the suretyship of these persons, and particularly of William Adams, he had come under an engagement that the rents and profits of the estate should be paid in to an account to be opened

in the names of the sureties, with Messrs. Prodgers, bankers in Ludlow, and that the money in this account should only be drawn out by cheques to be filled up in the hand-writing of George Anderson, William Adams's partner. George Anderson used generally to attend the audits and receive the rents, as White collected them, and used to pay them into the bank. Messrs. Prodgers were also the bankers of the sureties, who kept, accordingly, their private account with them, and the rents were carried to the account of Adams and Burlton, the sureties. The bank broke soon after the panic of 1825-26, and a loss of £1464 was incurred. The account was then transferred on the same terms and conditions to the bank of Coleman and Morris, and also, though not on the same conditions, to the bank of Coleman and Wellings, and both these broke, with a further loss in both of £1379; in all a loss of £2843 to the estate.

The question is, whether or not the receiver is answerable for this loss; and we may, in the first place, lay out of view the allegation that too great a balance was kept by the receiver in the bank, because an order had been made to pay the money to Mr. Salwey's account, and this on the death of Mr. Salwey could not be altered for want of a representative; the executors not having proved, there was no administrator. I lay this consideration out of the case only because there is no necessity for deciding upon it, and by no means because I would have it to be understood that a receiver is free from the duty of [57] bestirring himself in such circumstances, if he could obtain, through the Court and through the ecclesiastical authorities, the means of supplying the representation, so as to have the order altered, and the money paid into Court. It is unnecessary to decide one way or the other on this part of the case. The main question is, whether or not the arrangement as to the drawing and filling up the cheques made the receiver answerable, supposing he incurred no responsibility from the amount of the balance remaining in the bank, and supposing no other neglect or default to have been committed in guarding the fund.

Now, it is clearly the duty of the receiver, as an officer of the Court, to keep in his own hands the control over the fund. It is admitted that if he had parted altogether with that control he would have been answerable, whether the loss actually incurred could be traced to and connected with that severance and that want of power over the fund or not. Does it make any difference, that instead of entirely parting with the control he gave a *veto* on all his dealings with it to a mere stranger? The surety's partner, George Anderson, was wholly unknown to the Court, which reposed its confidence in its own officer, the receiver, and looked only to him. The acts of a stranger it had no power over, and could in no respect control or punish.

Consider the position of the fund. Had a sudden run come upon the bank, White, on hearing of it, would have been bound in discharge of his official duty, his duty to the Court, instantly to draw the whole balance out, and put it in a place of greater safety. But the arrangement which he had made prevented him from doing this without the concurrence of Adams's part-[58]-ner, Anderson, who lived at some distance, and who, even had he lived in the same town, might have been absent or unable from illness to act, and who, had he been both on the spot and able to write the cheques, might have been unwilling and might have refused. He might have been disposed to court the favour of his own bankers at the risk of this particular estate. He might have drawn out all his own money, and recompensed the bankers by leaving in that of the receivership. In order to prevent a run, which would endanger his own safety in the bank, he might have exposed the receivership fund to jeopardy, and all this he might have done without incurring the least risk himself; for he was not surety, nor in any way bound either to the Court or to the receiver. But without making any such supposition, and simply considering the provision made for the cheques being all drawn by Anderson, only let us ask ourselves how any individual would like, during a run upon his banker, to have his hand paralyzed by such a *veto* as was given to Anderson; what anxiety would he feel during the delay that must elapse in the interval between the run beginning and the messenger returning with the cheques filled up for his signature. Is a receiver entitled to place the custody or administration of the fund in a situation which in the case of any individual dealing with his own estate would be the source of such anxiety? Again, no person in his own case would make such an arrangement

without extreme necessity or ample equivalent. Has any receiver a right to treat the estate committed to his management, and for the management of which he is answerable to the Court, and is paid by the estate, in a situation in which neither he nor any one else would [59] voluntarily place his own property? Assuredly the least that can be required by the Court of its officers is that degree of diligence and care which any man would use in the conduct of his own affairs, and which, accordingly, the law expects and exacts from persons acting as agents for certain pay and reward in the affairs of others.

But we have been considering the case as it would have stood if the *veto* had been given to a stranger, and without any regard to the receiver's own interest, or without a view to any benefit accruing thereby to himself; this was not, however, the case here. The *veto* was given to the surety's partner, and the receiver was then enabled to obtain his suretyship. Now the Court has a right to a security quite independent of the receivership, and not a security which is to be as it were worked out of the estate itself. No one would find it a very hard matter to get a surety if he could give him a control over the funds. The receiver, who is paid his poundage, ought to be a person so honest and of such a character for honesty as to obtain security without any such contrivance; a knave might become a receiver, and obtain sureties on such terms; for he puts into his surety's hands the power of preventing the money going out of his own. Thus a knavish surety and a dishonest receiver might join in robbing the estate. But without putting such a case it is enough to say that the Court might, all the while, believe that one man had become bound for the good conduct of another when he had, in fact, given no such pledge, nor incurred any risk whatever. There is a deception thus practised on the Court, which is induced to believe that a receiver's honesty has been vouched for when it has not.

Again, an interest is given to the surety or his [60] partner to court the bankers, by keeping the balance of the estate large, and thereby obtaining accommodation on his own private account; surely no such risk should be run, and any benefit derived from the account should rather go to the estate than to a stranger. But if it be said that the surety can only put the receivership fund in jeopardy at his own risk, because the loss will certainly fall on the receiver and himself, if it can be traced to the balance being left too long in the bank or other place of deposit; then I answer that there are three considerations sufficient to destroy the whole force of this observation. First, in this case it was not the surety, but his partner, who had the *veto*. Secondly, neither the surety nor the receiver might have been made liable, although their *lâches*, in not removing the balance, might have caused the loss; for there might have been the greatest difficulty in tracing the connexion between the loss and the arrangement, or in proving the *lâches* of themselves to have caused the damage, or in proving their knowledge of the run on the bank; and Thirdly, and chiefly, supposing no such difficulty to exist, the Court and the estate have a right to be guarded against all risks which would call in the aid of the surety, or indeed of the receiver himself; for it is by no means right to say, "If the bank breaks, and the receiver and the surety have been negligent, we come upon them." They may be both insolvent as well as the bank; they may be broken by the very failure of the bank; and it is a far more safe thing for the fund that it should not be hazarded at all than that it should be hazarded, and the surety and his principal, the receiver, resorted to in case of a loss. Any man had much rather that his money was kept away from the fire than to be told that, in case of its being burned, he may resort to [61] the guarantie or the liability of the man who is sporting with it. His answer would be, "It is better not to risk it at all." Now, whatever arrangement risks the fund, makes it more likely that the Court shall have to come upon the receiver and his surety for a breach of duty, for which the receiver is answerable. Here there was no kind of necessity for the arrangement in question; but it was advantageous to the receiver in the same degree in which it was detrimental to the estate.

What has been said may seem to meet any argument raised upon the circumstance, that the *veto* and joint control are not proved to have occasioned the loss. It must be observed that we never can be quite sure of this; and if parties placed in the situation in which this arrangement put these gentlemen, are to be secure against

paying, unless they can be shown to have known of the run, or other dangers attending an investment, they will not be half so curious in their inquiries as they would be in their own case. But independently of any such consideration, it is to be remarked, that on all hands it is most explicitly admitted that the receiver, wholly parting with the control of the fund, would have made himself answerable, whether the loss had arisen from that cause or not. This rather differs, therefore, in degree than in kind from such a case. He relieves himself from the fetters imposed upon his own custody and management of the fund, by sharing that management with another, and giving that other as much power over it as himself; such power, indeed, that without filing a Bill in Equity and obtaining an order of the Court, he had no means of drawing out one shilling of the fund if the person entrusted with the *veto* refused to permit him to do so. Nay, he had deprived himself of the power of [62] obeying any order that the Court might make respecting the fund.

If it be said that the principle of this decree presses hard on receivers, and will discourage men from undertaking the office, I answer, first, that this is no matter for the Court's consideration, because the office is one of emolument, and therefore we are not to deal with it as with the office of a trustee; and, secondly, that nothing here decided can discourage from coming forward honest and solvent men who mean to perform their duty strictly, and to give the estate the security it has a right to, and to treat the Court with perfect fairness; and such are the persons whom it is best to have for receivers.

I am of opinion, therefore, on the fullest reconsideration of this case, that it was rightly decided, and I have only entered into the arguments upon it now, because the principle is important, and because my reasons, as given below, are not reported. The case was decided when, from the pressure of business, I had not been able to adopt the plan which, for the last three years of holding the great seal, I always pursued of writing my judgments at length.

I ought to mention that I have had an opportunity of consulting upon this case upon the point which alone raised any doubt in my mind, namely, the connexion between the loss and the arrangement made, the other heads of the Courts of Equity, and that I find that they entirely concur in the opinion I had formed. I shall therefore move your Lordships that the judgment of the Court below be affirmed. With respect to costs, however, it appears to me that this is not a fit case for costs, because it was a reversal of the decision of the Master of the Rolls. It is true that that is not always a sufficient reason, still, in addition [63] to that, there is no direct authority going the length of this case; and therefore though, on consideration, I see no reason for altering the opinion I before expressed, I think it is a very fair case to be subjected to the consideration of this House.

Lord Lyndhurst:—My Lords, I shall only say a few words on this case. I entirely agree with the opinion formed by the Noble and Learned Lord, that the judgment of the Court below ought to be affirmed. Here was a large sum of money received by the receiver; for that sum of money he was accountable to the Court and to the parties; he applied to be relieved from that liability, because he said the loss had been occasioned without any fault of his. The objections to that application were twofold; the first objection was, that he ought not to be relieved, because he improperly delayed in passing his accounts, and because he allowed a large sum of money to remain in his hands; and it was in consequence of such conduct that the loss was occasioned. The second is an objection which has been more insisted upon by the Noble and Learned Lord, namely, that he improperly dealt with the fund.

Now, with respect to these objections, it appears that in the year 1822 the account was made up to the summer of that year: when that account was passed a considerable balance, amounting to about £700, was found to be due; the receiver had that balance in his hands; he remitted that money to London, and his agent there offered that money to the party; the party desired that it might not be paid into Court, because he said "I am about to make an application to the Court to have the money paid over to Mr. Salwey, who is beneficially interested." Notwithstanding that, [64] he again applied to pay the money into Court, and he was told that an order had been actually obtained; but before that order was entered, and before all these proceedings had taken place, Mr. Salwey himself died, and in consequence of his

death there was a suspension of all the proceedings. It became necessary, then, that the order should be revived for the purpose of paying that money to the representatives; no other order, however, was ever obtained, in consequence of which the agent in London remitted the money back to the country, that it might be deposited with the bank from which it had been originally drawn. It appears to me that, under these circumstances, there is no fault whatever attributable to the receiver as to this part of the transaction; that he was not bound, in the first instance, to take out a representation to the deceased, and was not bound to apply to have the order revised; it was sufficient for him to keep the money in the custody in which it was originally placed, until the state of proceedings in the Court was such as to enable him to pay it over. It appears to me that if there was any neglect imputable to either party, it is to those parties who were to take out that representation, and who are now the parties to make complaint.

With respect, however, to the second point, it appears to me that he improperly dealt with the fund. My Noble and Learned Friend has stated the particulars. When he was appointed receiver he applied to those two individuals, Adams and Burlton, to become his sureties; they declined becoming his sureties upon the ordinary terms; they said, We will become your sureties only on this consideration, that the money shall be paid into our banker's in our joint names, and shall not be drawn out except by a cheque signed by **[65]** you, the receiver, but drawn in the handwriting of Mr. Anderson, the partner of one of us. That arrangement was obviously to give them control over the fund; I apprehend that that was entirely irregular; the receiver ought to have had the absolute control over the fund, for the purpose of applying it whenever it became necessary to the purposes of the trust. Such a condition leads to a great deal of abuse; in the first instance, to the abuse suggested by my Noble and Learned Friend. The sureties might have private accounts, as one of them had in this case at the bankers'; they might have been disposed to serve the bankers by having a large balance upon the trust fund for as long a period as possible in the hands of the bank. Again, the object of having sureties is, that the sureties may look to the conduct of the receiver, and compel him actively to perform his duties, and pass his accounts. But by the course of proceeding adopted in this case, it was a matter of indifference to them whether he did his duty or not. They did not say, as they would in an ordinary case, "Have you passed your accounts and paid in your balances?" because they wished that the balances might remain deposited in the hands of the banker. And last of all,—which has already been commented upon,—an emergency might arise, and it might be necessary to draw out the money on a sudden, and the party situated as the receiver was, could not do that; he must go and apply to the surety, and ask the latter to co-operate with him, and in consequence of that delay the fund might be absolutely lost. It appears to me that the manner of dealing with the fund was most irregular.

But then it was pressed in the argument, that the loss did not arise from that circumstance. That, however, appears to me a point altogether immaterial. **[66]** The party who is paid for the discharge of his duty comes to be relieved from his liability. The Court says "You cannot be relieved from your liability unless your conduct has been strictly regular, whether the loss has been occasioned by the irregularity of your conduct or not." Cases were cited at the bar, and it might be sufficient to refer to the ordinary case where a receiver mixes the trust-money with his own money at the banker's; the banker fails; the receiver is obliged to make good the loss. Why? Because he ought not to have mixed the trust-money with his own money, but to have placed it in a separate account (*Wren* v. *Kirton*, 11 Ves. 337). If it had been in a separate account this would not have taken place. In precisely the same way it is, because the party has conducted himself irregularly and improperly, that the Court will not relieve him here. The Court exercises the strictest vigilance over receivers; they are paid, be it remembered, for the performance of their duty; they are bound to perform that duty strictly, and when they come to the Court for a favour, the Court has a right to say, that they cannot have that favour unless their conduct has been strictly regular. In my opinion, the depositing the money in the banker's hands, subject to this control, which the

receiver had no right to give to other parties, was an irregular proceeding, and he is not entitled to the indulgence of the Court, and the sureties must make good the loss. On these grounds I am of opinion with my Noble and Learned Friend, that the judgment * in this case ought to be affirmed, but without costs.

Judgment affirmed.

[67]

WRIT OF ERROR

FROM THE COURT OF EXCHEQUER CHAMBER IN IRELAND.

CUTHBERT FETHERSTON'S Lessee, *Plaintiff in Error;* THEOBALD FETHERSTON, Esq.,—*Defendant in Error.*

[Mews' Dig. xii. 1114: xv. 1285; S.C. *sub nom. Jack* v. *Fetherston*, 9 Bli. N.S. 237. Discussed in *Cole* v. *Sewell*, 1842-43, 4 Dr. and War. 1; 2 H.L.C. 186; and see *In re Frost*, 1889, 43 Ch.D. 246; *Whitby* v. *Mitchell* 1890, 44 Ch.D. 91.]

Where by plain words, in themselves liable to no doubt, an estate tail is given in a will, it cannot be cut down to a life estate, unless there are other words which plainly show the testator to have used the former as words of purchase, contrary to their ordinary sense; or unless in the other provisions of the will there should be a clearly expressed intention inconsistent with the giving of an estate tail, and which intention can only be fulfilled by sacrificing the particular provision, and regarding the expressions as words of purchase. Held accordingly, that under a devise to "W. F. and his heirs male, according to their seniority and their respectively attaining 21, the elder son surviving of the said W. F. and the heirs male of his body to be preferred to the second or younger son, and in case of failure of issue male of W. F. surviving him, or dying without lawful issue male attaining 21, then over;" an estate tail was devised to W. F.

This was an action of ejectment, brought in the Court of King's Bench, in Ireland, upon a demise in the name of Cuthbert Fetherston, to recover possession of lands in the county of Westmeath, to which he claimed to be entitled as devisee under the will of John Fetherston.

The cause was tried at the Spring Assizes for the county of Westmeath, on the 5th of March 1830, before Lord Chief Justice Bushe, when it was agreed to turn the facts of the case into a special verdict.

The special verdict stated, that John Fetherston was, at the time of his death, seised in fee of certain lands, [68] mentioned in the declaration, and was also seised as of freehold, for the lives of three persons still in being, of certain other lands also therein mentioned, and being so seised, he on the 26th of April 1827, made his will, duly attested to pass real estate, and thereby after making other devises and bequests, he gave and devised the premises in the declaration mentioned, with the appurtenances, in the words following:—

"I give, devise and bequeath to my much respected kinsman, William Fetherston, and his heirs male according to their seniority in age, and their respectively attaining the age of 21 years, all my estates real and personal in lands, houses and tenements, not hereinbefore disposed of, the elder son surviving of the said William Fetherston and the heirs male of his body lawfully begotten, always to be preferred to the second or younger son, and in case of failure of issue male of the said William, surviving him, or their dying unmarried and without lawful issue male attaining the age of 21 years, then to Theobald Fetherston, brother of the said William, and his heirs male lawfully begotten, on attaining the age of 21 years, the elder to be preferred to the younger, and in case of the death or failure of issue male of the said Theobald, lawfully begotten, and their not attaining the age of 21 years, then to my right heirs for ever."

* See the case of *Salway* v. *Salway*, 4 Russ. 60. and 2 Russ. and Myl. 215. The latter was published after *White* v. *Baugh* had been sent to the printers.

William Fetherston died on the 3d of May 1829, leaving Cuthbert Fetherston his eldest son and heir at law.

On the 22d of June 1829, John Fetherston the testator died, leaving said Cuthbert Fetherston and Theobald Fetherston him surviving, and on the 1st of July 1829, the said Cuthbert Fetherston demised the land in question to a nominal Plaintiff.

The question raised upon the special verdict was, [69] whether upon the true construction of the testator's will the devise to William Fetherston was a devise to him of an estate tail, or a devise of an estate for life only to William Fetherston, with remainder in tail to his eldest son. If the Court should be of the former opinion, then by William Fetherston's death in the testator's lifetime the devise of the estate tail would lapse and the Plaintiff would take nothing; but if the devise was a devise to William Fetherston for life, with the remainder to his eldest son in tail, then the estate of William having lapsed, the remainder in tail to his eldest son would, upon the death of the Testator, vest in possession and entitle his eldest son (the now Plaintiff in error) to the possession of the estates in question by purchase. The Court of King's Bench thought that William Fetherston was entitled to an estate tail, and that Court therefore (on the 9th February 1831) gave judgment for the Defendant. That judgment was afterwards (13th June 1832) affirmed on error in the Court of Exchequer Chamber in Ireland. The Plaintiff then brought the present writ of error to this House.

Lord Chief Justice Tindal and others of the Judges attended the argument.

Sir John Campbell and Mr. Jemmett for the Plaintiff in error:—The true construction of this devise is, that William Fetherston took an estate for life, with remainder to his first and other sons successively in tail male. It is not denied that the very first words of the devise, "William Fetherston and his heirs male," appear to carry an estate tail, but they are so instantly followed by words which explain and qualify them, that no person can doubt that the devise to William Fetherston amounted to no more than a life estate. [70] It is clear that an estate tail, apparently given by some words in a will, may be cut down by others which show the testator to have had a different intention. Thus, "heirs male of the body" have been construed to be words of purchase, where it was clear that such was the intention of the testator; *Lisle* v. *Gray* (2 Lev. 223), *Lowe* v. *Davies* (2 Ld. Raym. 1561), *Bagshawe* v. *Spencer* (1 Ves. 142), *Goodtitle* d. *Sweet* v. *Herring* (1 East. 264). In the present instance the testator has sufficiently explained his meaning, for the whole of the latter part of the clause shows that by the use of the words "heirs male," in the devise in question, he merely meant to designate certain individuals. These were the sons of William Fetherston, to whom he has given the estate to take by purchase after the expiration of their father's life estate. The case between *Baldwin* and *Smith*, reported as Archer's case (1 Rep. 63 and 66), was a stronger case than the present, for there, though the testator devised to "Robert Archer, my first son," for life, yet he afterwards declared that the said "messuages and tenements shall wholly remain to the right and next heir of the same Robert Archer, and to the heirs of his body for ever." Yet in that case it was agreed that Robert had not an estate for life. The words in the present will, "according to their seniority in age, and their respectively attaining the age of 21 years," and "the elder son and the heirs male of his body always to be preferred to the second or younger sons," show that the preceding words "heirs male" must be read "sons," who are thus individually pointed out to take the estate, and who, therefore, take as purchasers and not by descent. The words of limitation applicable to an estate of inhe-[71]-ritance are only employed with respect to the devise to the sons. That shows that the intention of the testator is clear, and that intention may be easily effectuated. The difficulty as to sacrificing a particular intent in order to fulfil a general intent does not exist here. There is, in fact, no distinction between them in the present case. Both point alike to the devisee William Fetherston, as being the devisee of an estate for life. The words used by the testator with regard to the sons of William Fetherston leave no doubt as to his intention. In one single instance only does he use the expression "heirs," in all the rest he employs the words "son" and "sons;" and this fact proves, beyond a doubt, that he intended the estate of inheritance to begin with the vesting in possession of the sons. The word "sons," in one part of a devise has been held sufficient to cut down the effect of the word "heirs," or "issue," in

another part; *Long* v. *Laming* (2 Burr. 1100), *Blackburn* v. *Hewer Edgely* (1 P. Wms. 600), *Goodtitle* d. *Sweet* v. *Herring*, also proceeded expressly on this principle. The manifest intention of the testator, not the mere use of a particular technical word, must govern the construction of the instrument.

Sir W. Follett and Mr. Cruise for the Defendant in Error:—The devise to W. Fetherston was not a devise for life but in tail. The words "William Fetherston and his heirs male," at once passed an estate of inheritance. The law favours estates of inheritance (Burton on Real Prop., 3d edit. pl. 656); and, therefore, where an estate tail has been created by words proper for that purpose, the Court will not cut it down to an estate for life by any subsequent [72] expressions, unless those expressions are of a very decided character and clear meaning, and leave no doubt as to the intention of the testator. If the two sets of words are equally strong, and the context of the will does not distinctly require that the estate of inheritance should be cut down to a life estate, the Court will uphold the former (Fearne, Cont. Rem. 148); *Jesson* v. *Wright* (2 Bligh, 2), and *Jones* v. *Morgan* (1 Bro. Chan. Cas. 206). In the latter case the authority of *Bagshawe* v. *Spencer* [1 Ves. 142] was much questioned. There is nothing whatever in the present will showing the intention of the testator to have been to create merely an estate for life in William Fetherston. Every indication of his intention is the other way. It may be admitted, that in some cases, the Co rts have allowed the use of the words "son" and "sons" to explain away the legal meaning of the word "heirs," but all these have been cases where the intention of the testator would plainly have been defeated by any other construction. *Doe d. Long* v. *Laming* [2 Burr. 1100] was an instance of that sort. Here, on the contrary, his intention would have been defeated by such a construction; nor is there anything in the context of the will to warrant it. The latter parts of the devise are only intended to describe and identify the heirs of William Fetherston, not to make them take as purchasers an estate given to their father as an estate of inheritance. This case must be governed by the principle stated in the certificate sent by the Judges of the Court of Common Pleas in the case of *Poole* v. *Poole* (3 Bos. and Pul. 629), that where there is not a sufficient indication of the testator's intention to restrain the legal effect of the words "heirs male," and to con-[73]-vert them into words of purchase, they shall pass an estate tail. There is no such indication of intention here.

At the close of the argument Lord Brougham framed a question for the Judges who took time to consider it.

Lord Chief Justice Tindal on the following day delivered the opinion of the Judges: My Lords, the question proposed by your Lordships for the consideration of His Majesty's Judges, is this—"Whether, under the devise contained in the will set forth in the special verdict given in this case, the devisee, William Fetherston, took an estate in tail or an estate for life only?" And upon this question the Judges who have heard the argument at your Lordships' bar, are unanimously of opinion that William Fetherston took an estate in tail.

The first words of the devisor, namely, "I give to my kinsman William Fetherston and his heirs male, my real estate," are words which by a well-known rule of law do in a will give to the devisee a clear and unequivocal estate in tail. The only question, therefore, is whether the words which follow, do with so much clearness and certainty control those which have preceded them as to denote that it was the intention of the testator to cut down the estate tail in the first taker into an estate for life, and to make his first and other sons tenants in tail by purchase. Now we think the rule of construction laid down by Lord Alvanley in his judgment in the case of *Poole* v. *Poole* (3 Bos. and Pul. 627), being at once the result of the former cases, [74] and being consistent with the principles of legal construction and of good sense, is the safe and correct rule to be applied to cases of this description, namely, "That the first taker shall be held to take an estate tail where the devise to him is followed by a limitation to the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it." Applying that rule to the present case, we do by no means think the subsequent words of the devise shew a plain and unequivocal intention in the testator to reduce the estate tail in William Fetherston to an estate for life; on the contrary, we think them at least as compatible with an explanation of what the testator supposed to be the course of descent under an estate tail; for if William Fetherston takes in tail then "his heirs male" would take "ac-

cording to their seniority in age," as the devisee expresses it; and again, the eldest son if he survived, and "the heirs male of his body, lawfully begotten," would always be preferred to the second or younger son; and again, the clause which provides what shall happen if there shall be a general failure of issue of William, before the estate goes over to Theobald, is directly consistent with an estate tail in William.

The words in the devise, which appear to denote some intention in the testator that "the heirs male shall take on their attaining the age of 21 years," cannot be urged as an argument against the estate in William being held to be an estate tail, first, because those words would create the same difficulty against the holding the estate given to the sons of William to be an estate tail, which on all hands is allowed to be the case if William has not the estate tail in himself, and secondly, because if the devise in other [75] respects is a devise in tail, the testator cannot by interposing such a condition (if indeed it is to be held to be a condition in this will) create a new estate or a new course of descent not known to the law. Without professing to explain all that the testator may have intended by the words he has used, we hold that William Fetherston takes an estate tail under this will upon this broad ground, that an estate tail is given by the devise to him and his heirs male, and that such estate is not taken from him or reduced to an estate for life by any words that follow, denoting such intention of the testator with sufficient certainty and clearness.

Lord Brougham:—My Lords, agreeing entirely with the opinion of the learned judges in this case, it is perhaps hardly necessary for me to state the reasons upon which I have arrived with them at the conclusion that the words of this devise give an estate tail, and not an estate for life, to William Fetherston, the first taker. But as the practice here of late has been adopted of assigning the reasons of judgments pronounced in your Lordships' House upon questions touching materially the principles of law which are brought by appeal from the other parts of the United Kingdom, I conceive it advisable that I should not deviate from that practice in this instance, where the Writ of Error is brought from Ireland.

I take the principle of construction as consonant to reason, and established by authority, to be this, that where by plain words, in themselves liable to no doubt, an estate tail is given, you are not to allow such estate to be altered and cut down to a life estate unless there are other words which plainly show the testator to have used the former as words of purchase, [76] contrary to their natural and ordinary sense, or unless in the rest of the provisions there be some plain indication of a general intent inconsistent with an estate tail being given by the words in question, and which general intent can only be fulfilled by sacrificing the particular provisions, and regarding the expressions as words of purchase. Thus, if there is a gift first to A. and the heirs of his body, and then in continuation, the testator, referring to what he had said, plainly tells us that he used the words "heirs of the body" to denote A.'s first and other sons, then clearly the first taker would only take a life estate. It is needless to add, that there is a variety of ways in which such a reference and explanation may be given. A testator may, as in one case, after speaking of "heirs of the body" or "heirs male," which in a will are equivalent to the former expression, proceed referring to what he had before said, and speak of such first and other sons: or, as in another case, he may specify "my sons successively as aforesaid, or as abovementioned," or he may say, "from and after the death of those several sons who are to take one after another." So again, if a limitation is made afterwards, and is clearly the main object of the will,—which never can take effect unless an estate for life be given instead of an estate tail,—here again the first words become qualified, and bend to the general intent of the testator, and are no longer regarded as words of limitation, which, if standing by themselves, they would have been.

There have been at different times decisions on this point, some of which, as *Doe* v. *Goff* (11 East, 668) are now entirely displaced, and others, as *Doe* v. *Jesson* (5 M. and S. 95), are directly overruled by reversal in this House (2 Bligh 2). Even *Doe* v. *Laming* [2 Burr. 1100], where the circumstance relied on was the [77] impossibility of devisees taking gavelkind lands as tenants in common, has been considerably shaken by its remarkable inconsistency with the purport of some other cases; and as far as regards the peculiar circumstances adverted to by Lord Mansfield of the land being gavelkind, it has been expressly displaced by the late case of *Doe* d.

Bagnall v. *Harvey* (4 Barn. and Cress. 610, and Lord Tenterden's judgment, 620). All we need therefore say upon this second head of exception to the expressions being taken as words of limitation, is that it may be rendered necessary as well by the general frame of the will to consider those words as words of purchase, as by the explanation subsequently given by the testator that he used them in that sense. Such indeed is the force of those words—such their clear tendency to give an estate tail, that we may almost lay it down as a rule that no other provision of a will is sufficiently strong to overrule this tendency and make them words of purchase, which does not fall within the first head of exception, and show that the testator's meaning was other than what at first sight it appears to be.

We have now, therefore, to examine whether any explanation is, in the present case, given by the testator, which shows that he intended that Cuthbert Fetherston should only take as a purchaser.

It is, first of all, quite clear that a gift to William Fetherston and his heirs male is, in a will, an estate tail, and the addition of "according to their seniority in age," makes no kind of difference, for it is implied in "heirs male," and by no means converts that devise into a devise to sons. This was explicitly decided in *Jones* v. *Morgan* (1 Bro. C. C. 218), where the words were "severally, respectively, and in remainder, the one after [78] the other, as they and every of them shall be in seniority of age and priority of birth,"—words more expressive than any used in this case. The qualification of attaining 21 years of age, though it may give rise to some difficulties as to the administration of the estate, is not, in my opinion, of a nature to alter the preceding words or make them words of limitation. Indeed the difficulty which they interpose, appears to press nearly as much on the one construction as on the other. But then follow the words on which reliance is mainly placed by the Plaintiff in Error, "the elder son surviving of William Fetherston and the heirs male of his body always to be preferred to the second or younger sons," and it is contended that they, by explaining what "heirs male of William Fetherston" meant in the preceding part of the gift, converted those into words of purchase. I am very clearly of opinion that the clause has no such effect; and, after remarking that it is connected with the former part by not a single word of reference, I shall advert to the cases which are said to bear out the construction of the Plaintiff in Error.

Of *Archer's* case (1 Rep. 63 and 66) it is unnecessary to say much. There the gift was to A. for life, and to the next heir male of his body, and the heirs of the body of such next heir male, and was held to be purchase in the next heir male, both because if he were to take by limitation you must reject the limitation in tail upon that limitation, and also because you must reject "next," a very important word, preceding the words heir male, and one which shows a different intention in one part of the devise from that prevailing in the other. That case clearly does not bear upon the [79] present. Then *Lisle* v. *Gray* (2 Lev. 223) is relied upon. The devise there was to the first son of A. and the heirs male of his body, and for default of such issue to the second son, and then to the third and fourth sons, all by the name of sons, and the heirs male of their bodies; then come these words: "and so on to all and every other the heirs male of the body of A. respectively and successively, and the heirs male of their bodies." The ground of the decision in that case was, that the connecting words, "and so on," clearly showed the sense in which the words "heirs male," that followed, were used, the testator having thus connected those words with sons, repeated four times over, and having in the first instance given the estate to the sons by the description of sons. Surely that case cannot be likened to the present, where, without any word of reference, all we have is the expression, "the elder son surviving to take before the younger." It may, however, be added, that *Lisle* v. *Gray* never was finally decided, for the cause was dropped during the pendency of a Writ of Error, and the reporter expresses some doubt how it might have gone ultimately.

As for *Lowe* v. *Davies* (2 Lord Raym. 1561), it really proves less than nothing. There it was a devise to A. and his heirs, lawfully to be begotten, that is to say, his first, second, third and every other son and sons successively to be begotten of the body of A. and the heirs of the body of such first, second and third sons. Can we doubt that the word "heirs," first used, was explained by what followed, the explanatory words being "that is to say, first and other sons"? No words can be conceived more

plainly explanatory of the sense in [80] which "heirs of A." had been employed. A. there clearly took only an estate for life, notwithstanding the inaccurate use of the word heirs, an inaccuracy hardly used before it is corrected by the most technical expression of words of purchase. *Poole* v. *Poole* (3 Bos. and Pul. 620), is a case clearly with the Defendant in Error. The demise there was to A.'s first son for life, remainder to trustees to preserve contingent remainders, remainder to the heirs male of such first son, so as the elder of such sons, and the heirs male of his body, shall always be preferred, and take before the younger and his heirs male; remainder to the second, third and fourth sons; remainder to the several heirs male of their several and respective bodies, so as the elder shall always be preferred to take before the younger of such sons. The word "such" clearly shows sons to mean heirs male, and was held so to do, and not to show the converse, that heirs male meant sons; and Lord Alvanley, in addition to the words just cited by the learned Lord Chief Justice, said, in delivering the opinion of the Judges, that, in his judgment, "words are always to be taken in their ordinary sense, unless the testator has demonstrated an intention to put a different sense upon them." Lord Alvanley also added, "now the words employed in the first devise are clearly, in their ordinary sense, words of limitation," and all that follows is to the same purpose, and he concluded his elaborate and luminous judgment by saying, that "the Court would not be justified in suffering the rule of law to be broken in upon, where it could not see a plain intention to vary the construction which the law puts upon the words "heirs male of the body" (Ib. pp. 627-29). As to *Goodtitle* [81] v. *Herring* (1 East, 264), that was a case of distinct explanation and plain reference, for it was a devise to heirs male of the body of A. successively, the eldest of such sons and the heirs male of his body being always preferred to the younger son or sons. That case was exactly the same with *Lowe* v. *Davies* [2 Ld. Raym. 1561], on which I have already remarked.

It appears to me, my Lords, quite manifest that none of those cases gives any warrant for holding the words added in this case to the gift of an estate tail to be sufficient to cut down that estate to an estate for life, and I have no doubt at all that the earlier words of limitation are to be taken as such, and as standing unaffected by those which follow: I have no hesitation, therefore, in moving your Lordships that the judgment be affirmed with costs.

Judgment affirmed with costs.

[82]

APPEAL

From the Court of Chancery in Ireland.

HENRY SEYMOUR MOORE VANDELEUR, Esq., ANNE FRANCES VANDELEUR, Spinster, and ALICE STEWART, otherwise VANDELEUR, Widow, the younger children of the Right Hon. JOHN ORMSBY VANDELEUR, deceased, —*Appellants;* CROFTON MOORE VANDELEUR, Esq. the eldest son of said JOHN ORMSBY VANDELEUR, and the Right Hon. THOMAS BURTON VANDELEUR, one of the Judges of His Majesty's Court of King's Bench in Ireland, and CROFTON FITZ GERALD, Esq., Executors of the last will and testament of the said JOHN ORMSBY VANDELEUR,—*Respondents.*

[Mews' Dig. vi. 1473. S.C. 9 Bli. N.S. 157; and, in Court below, 1 Ll. and G. 241. Considered in *Jenkinson* v. *Harcourt*, 1854, Kay 695. And see also the Real Estates Charges Acts, 1854, 1867, 1877.]

A deed of settlement was made in contemplation of marriage, and contained a proviso by which the estates, etc. thereby granted, should in the first place be charged with certain portions therein mentioned, due to the brothers and sisters of the settlor, and with certain debts set forth in a schedule thereunto annexed. The covenant against incumbrances specially excepted a jointure

to the settlor's mother, and the before-mentioned portions and debts, and the covenant for further assurance contained an exception similar to the foregoing by an express reference to it. The settlor was possessed of other estates besides those settled. The settlor after his marriage paid off some of the portions and some of the debts, and, by his will, declared such payments to be in ease of his settled estate. Held, by the House of Lords, reversing a decree of the Court of Chancery in Ireland, that [83] all rights must be taken to be as they were established at the date of the conveyance, and therefore neither any directions in the will of the settlor, nor the state of his affairs at his decease, could alter its construction; and consequently that the debts, etc. continued to stand as a burthen on the real estates, and that the personal estates were exonerated in the hands of the executors.

In the year 1800, a marriage was intended to be solemnized between John Ormsby Vandeleur and Lady Frances Moore, the youngest daughter of the Marquis of Drogheda. The marriage portion of the lady was a sum of £6000. By an indenture of release, bearing date the 17th day of November 1800, and made between the said John Ormsby Vandeleur (since deceased) of the first part, the most Noble Charles Marquis of Drogheda, and the said Lady Frances Moore of the second part, Richard Earl of Shannon and the Honourable Francis Nathaniel Burton of the third part, and William Burton and Thomas Burton Vandeleur, Esqrs., of the fourth part, and which indenture was expressed to be made in consideration of the marriage and of the marriage portion, certain hereditaments in the counties of Limerick and Clare, of which the said John Ormsby Vandeleur was seised in fee, were conveyed and assured by him, from and after the marriage, to the use of himself for life, with remainder to trustees to preserve contingent remainders; and after his decease, to the use of the said William Burton and Thomas Burton Vandeleur for the term of 99 years, to secure a jointure for his said intended wife; and subject thereto to the use of the trustees for five hundred years for raising the sum of £10,000 as portions for the younger children of the marriage; and subject thereto to the use of the first and other sons severally and successively accord-[84]-ing to their respective priorities in tail male, and in default of such issue, to the use of the settlor in fee.

After the limitations before stated, and the declarations of the trusts of the two terms of 99 years and 500 years, and immediately following the proviso for cesser of the latter term, the settlement contained the following declaration:

"Provided always and it is hereby declared and agreed by and between the parties to these presents, that all and every of the said towns, lands, tenements, hereditaments, and premises hereby granted and conveyed, shall in the first place stand and be charged and chargeable, and the same are hereby declared to be charged with the several sums due for the portions of the brothers and sisters of the said John Ormsby Vandeleur, amounting to the sum of £15,900, and also with the judgments and bonds hereinafter mentioned, and which several sums are particularly set forth in a schedule hereunto annexed, and amount to the sum of £12,700."

Then followed a power for the settlor to jointure future wives; and the power of leasing: and then the covenants for title; and the covenant against incumbrances was expressed as follows: "And that free and clear, or freely and clearly acquitted, exonerated, and discharged or otherwise, by the said John Ormsby Vandeleur, his heirs, executors, and administrators, well and sufficiently saved, defended, kept harmless, and indemnified of from and against all and all manner of former and other gifts, grants, bargains, sales, mortgages, jointures, dowers, right and title of dower, portions, uses, trusts, wills, entails, statutes, recognizances, judgments, extents, executions, and of and from all and singular other estates, titles, troubles, charges, and incumbrances whatsoever had, made, [85] done, committed, or suffered by him the said John Ormsby Vandeleur, or by any of his ancestors, or by any person or persons claiming or to claim from by or under them, or any of them, or under their or any of their acts, means, assent, consent, or procurement other than and except the jointure of £700 yearly, provided for Alice Vandeleur, widow, mother of the said John Ormsby Vandeleur, during her life, and other than and except the several sums due by judgment or bonds to the different persons in the schedule hereunto annexed, amounting in the whole to the sum of £12,700, and also other than and except the sum of £15,900, the portions due to the brothers and sisters of the said John Ormsby

Vandeleur, with all and every of which said several sums the said lands and premises are hereby charged, and other than and except the quit rents issuing and payable out of the said lands and premises, and other than and except such leases of the said lands and premises as have been heretofore really and *bona fide* made to the tenants thereof." And the covenant for further assurance made a similar exception by this reference to the foregoing "except as before excepted."

Some of the debts enumerated in the schedule annexed to the said settlement, were debts previously contracted by the settlor, and to which he was personally liable. The rest were debts contracted by his father and predecessor in estate, Crofton Vandeleur. The £15,900 for portions had been charged on the estates by the marriage settlement and will of his father, Crofton Vandeleur.

The settlor being also seised in fee of the lands of Moyne and Ballymote (exclusively of the settled estates), and being also possessed of a large personal estate, made his will, dated 7th of August 1828, and [86] thereby, after sundry bequests to his wife and daughters, devised the lands of Moyne and Ballymote to T. B. Vandeleur and Crofton Fitz Gerald, their heirs, etc., in trust, to receive and take the rents and profits until his eldest son, Crofton Moore Vandeleur, should attain the age of 27 years, to be applied as thereinafter directed, and subject thereto to the use of his said son for life, with several remainders over; these rents to be invested from time to time in government funds, and the dividends payable thereon, to accumulate until his said son should attain the age of 27 years, or if he should die before attaining that age, until such time as he would have attained that age in case he had lived, and testator directed such rents and profits, and all accumulations thereof, to form part of his residuary estate, to be disposed of as thereinafter directed. And testator directed (among other things) that a certain judgment entered on one Andrew Browne's bond (one of the bond debts of the testator mentioned in the schedule) should be satisfied by his executors, the same having been paid. And as to all the rest of his property, of what nature or kind soever, (except his books, pictures, and plate,) he left same to T. B. Vandeleur and Crofton Fitz Gerald in trust for his younger child or children, his or their heirs, executors, and administrators, as to so much thereof as with the sum he, she, or they should be entitled to under his (said testator's) marriage settlement would make up the sum of £10,000 for each and every of his said children, such children, if more than one, to take as tenants in common, and not as joint tenants; and as to the residue thereof in trust to pay the interest or annual produce to his the said testator's wife during her life, and after her decease, in trust for his said younger [87] child or children, his, her, or their executors and administrators, in equal shares, if more than one, and as tenants in common. And the said testator appointed the Respondents T. B. Vandeleur and Crofton Fitz Gerald executors of his said will, and the said Respondent T. B. Vandeleur, guardian of his children until they should respectively attain the age of 21 years.

The testator died on the 9th of November, 1828, leaving Lady Frances Vandeleur, his widow, and four children, viz., the Respondent Crofton Moore Vandeleur, the Appellant Henry Seymour Moore Vandeleur, his only other son, and two daughters, viz., the Appellants Anne Frances Vandeleur and Alice Stewart, widow. During his lifetime he paid off part of the sum of £15,900 to his brothers and sisters, and also some of his father's debts, and some of his own debts contained in the said schedule, and declared such payments to be in ease of his said settled estate.

In January 1831, a bill was filed by the Respondents T. B. Vandeleur and Crofton Fitz Gerald, the executors, against the Respondent Crofton Moore Vandeleur, and the Appellants and Lady Frances Vandeleur (since deceased), stating, amongst other things, that the testator's widow and younger children insisted that the debts or sums paid off by the said testator during his life, he being tenant for life only of the lands charged, should still be considered as subsisting charges, and should form part of the testator's personal estate, but that the Respondent Crofton Moore Vandeleur, on the contrary, insisted that such payments were made in exoneration of the estates; and as to such of the scheduled debts as were the testator's own, and remaining unpaid at his death, that his personal estate was the primary fund liable to payment of [88] them. And the bill prayed that the rights of the several parties to the personal estate of the said testator might be declared, and the trusts of the testator's said will as to his personal estate might be carried into effect.

Answers were duly put in, and evidence gone into on both sides. The cause was

heard on the 12th of May 1832, before the Lord High Chancellor of Ireland, and by the decree of that date it was referred to one of the masters, to enquire and report the debts specified in the schedule annexed to the settlement, and to report whether any, and which of them, had been paid, by whom all such debts respectively were contracted, whether judgments had been entered on any and which of the said debts, and if so, whether any, and which of the judgments had been satisfied or directed so to be, and all particulars relating to such debts.

The master made his report pursuant to the said decree, bearing date the 22d of June 1832, and set out a list of the debts, which comprised, amongst others, the following items, viz.: No. 1. Bond and Warrant of John Ormsby Vandeleur to Mrs. Dorothea Burton, dated 9th of January 1796, in the penalty of £2400 conditioned for the payment of £1200.

No. 6. Bond of John Ormsby Vandeleur to Mr. John Daxon in the penalty of £6800 conditioned for the payment of £3400.

No. 8. Bond of same to the Rev. Mr. Whitty, in the penalty of £1000, conditioned for the payment of £500.

And the said Master found that these three debts still remained unpaid, and that the sum of £1200, and the sum of £3400, and the sum of £500, were all debts contracted by John Ormsby Vandeleur: that on the first no judgment had been entered up, but [89] that on the two last judgments had regularly been entered up, which judgments were then outstanding.

No exceptions were taken to the report, and it was duly confirmed. The cause was heard on further directions before the Lord Chancellor on several days, and on the 25th of May 1833, his Lordship, by an order of that date, declared that as to such of the debts and charges in the schedule to the settlement of 1800 as were paid off by the said testator in his lifetime, the same were not subsisting charges on the settled estates, but that the same were paid off in ease of such estates: and his lordship further ordered and declared, that as to the sums of £1200, £3400, and £500 in the said list or schedule to the said master's report mentioned and found to have been debts contracted by John Ormsby Vandeleur, and to be still due and unpaid, the personal estate of John Ormsby Vandeleur was the primary fund for the payment of the same, and the plaintiffs admitting assets in their hands sufficient, after the payment of the other debts, funeral expenses, and express pecuniary legacies bequeathed by the will of John Ormsby Vandeleur, it was ordered that the plaintiffs, (the Respondents T. B. Vandeleur and Crofton Fitz Gerald,) out of the surplus of the said personal estate of the said John Ormsby Vandeleur, should pay the same, and it was further ordered that the plaintiffs should be paid their costs in said cause out of the personal estate of the said John Ormsby Vandeleur, and that the several defendants should abide their own costs. This was the order now appealed from.

Mr. Pemberton and Mr. Knight for the Appellants:—It is clear that the real estate is not exonerated from the payment of these debts. If there had been an actual incumbrance on the estates when the settle-[90]-ment was made, the effect of it would have been to make the estate settled the primary fund out of which the incumbrance must be paid. That is in principle the same as the present case. Is there any distinction between such words in a settlement and in a will? There is. In a will, the words of a testator, indicating his own intention, govern every thing. A settlement is to be construed like any other contract. The Respondent here, Crofton Vandeleur, claims as a purchaser. What has he bought? In answering that question, it is important to bear in mind the distinction between a deed of settlement and a will. If this estate had been sold subject to an incumbrance upon it, he would have been liable to pay the incumbrance. Why? Because he could only take what he had paid for.—[Lord Plunkett: The difference between the case of a will and that of a deed is, that one is a contract and the other is not.]—And the present is clearly a case of contract, for the consideration is marriage and a sum of money, and the estates are taken subject to the burdens already existing on them. This case is the same in principle as that of *Noel* v. *Noel* (12 Price, 214). The debts here were not such as could ever have been properly charged on the personal estate. In that case Lord Redesdale, adverting to a similar circumstance, said: (*Ib.* p. 303) "Looking at the original constitution of the debt itself, I think a great doubt might be raised whether it ever was a debt upon the personal estate, I mean a debt which any person but a creditor had a right to demand as against the personal estate; for a creditor

may have a right to demand a debt against the personal estate, which the heir at law or devisee of the real estate may not have a right to require to be paid out of the personal estate in exoneration of the real estate. Thus, [91] for instance, if a real estate comes to a man subject to a mortgage, and upon transfer of that mortgage that person covenants for the payment of the mortgage money, (which he must do in order to obtain the loan from the person who takes the mortgage,) that is not a debt which is to be paid out of his personal estate, in exoneration of his real estate, for the benefit of the heir at law, because the debt was not originally his debt." The principle of that case must govern the present. The language of the settlement here is even stronger than in that case. The terms of the proviso are too strong to admit of doubt; they make the estates directly chargeable with the portions for the settlor's brothers and sisters, and with the debts stated in the schedule. The covenant for further assurance contains expressions equally strong. This direct charge on the real estate is a clear exoneration of the personalty. Yet the decision of the Court below has destroyed the charge thus directly fixed on the real estate, and has fixed it on the personal estate, which was not before liable. That decision is not maintainable.

Mr. Jacob and Mr. Parry for the Respondents:—The terms of this settlement are not so expressed as to exonerate the personal estate. It is doubtful whether such was the intention of the settlor at the time of making the settlement, and it is clear that such was not his intention at the time of making his will. The evidence shows that the testator had paid off several of the debts mentioned in the schedule with the view of relieving the estate of his eldest son. The argument on the other side supposes that this settlement was to operate as a contract of indemnity to the personal estate. It has no such operation. The very terms of the settlement show that such was not the intention of the parties. There is no power given to [92] trustees to raise funds for the payment of the debts of the settlor. There would have been such a power if the real estate was meant to be charged with those debts. The covenant against incumbrances does not bind the estate for the purpose supposed; it was necessary at the time, because it was intended that these incumbrances should be at once paid off. Suppose the testator had been insolvent, can it be said that the bond creditors could have claimed against the settled estates? Certainly they could not, for the charges on those estates were not created for the benefit of the creditors. The case of *Noel* v. *Noel* [12 Price, 214] is essentially different from the present. That was a case arising merely on the equity of redemption, and no trustees were required there, for the mortgagees had their own remedy in their own hands. [Lord Plunkett: Lord Redesdale in that case seemed to think that a purchaser for money, and a person coming in under a marriage settlement, stood in the same situation.]

Lord Brougham asked the Appellants' counsel, how they proposed that the estates should be charged in exoneration of the personal property.

Mr. Pemberton answered, that he should ask for the real estate to be made liable for whatever the personal estate had paid to creditors under the decree exonerating the real estate, which was the first charged by the settlement.

The Counsel for the Respondents continued:—In the case of *Duke of Ancaster* v. *Mayer* (1 Brown's Chan. Cas. 454), Lord Commissioner Ashurst, in delivering the opinion of the Court, referred to *Walker* v. *Jackson* (2 Atk. 624), where Lord Hardwicke said, the general rule is, that the [93] personal estate shall be first applied; and the Lord Commissioner added, "unless there are express words or a plain intent to the contrary." The case afterwards came before Lord Chancellor Thurlow, when his Lordship said, "it would be highly advantageous to property, if there was a settled rule where the personalty should be applied to the payment of debts, and where it should be exempted from them. One step had been taken towards such a rule by its being laid down, that charging the real estate in any way, is not of itself an exemption of the personal estate; that the personal estate being the fund first liable, where it is to be aided by either a legal or an equitable fund, it must be in the first place applied. I have always understood that in order to exempt the personal estate, the testator must express an intention so to do, I therefore take the rule to be, that neither the charge of the debts upon the real estate, nor the gift of the personal is sufficient of itself to exempt it." In *Tait* v. *Lord Northwick* (4 Ves. 816), it was held, that the personal estate is the natural fund for the debts, and can only be exempted by the intention to exempt it, expressed in the will; a charge upon real estate, however anxiously created, is not of itself sufficient. In *Serle* v. *St. Eloy* (2 P. Wms. 386.

S.C. 2 Eq. Cas. Ab. 375), this rule was carried still further. There a testator devised his lands in D. to an infant at her age of 21, subject to the incumbrances thereupon, and the rents during the infancy to be paid to her father, and devised all his other lands to trustees to pay his debts; the lands in D. being mortgaged, it was held, that the mortgage should be discharged by the monies arising from the sale of the other lands.

[94] Mr. Pemberton in reply:—There is not one of the cases cited on the other side which can govern the present. The case of *Serle* v. *St. Eloy* never met with the approbation of the profession—[Lord Brougham: Mr. Cox, in his edition of Peere Williams, says (2 P. Wms. 386 n.), that that case was affirmed upon appeal, but he mentions it as one that was not always approved of.*]—In that and the other cases, the question arose upon wills, and the distinction between wills and deeds of settlement has already been pointed out. The subsequent declarations of the testator cannot affect the construction of the settlement. The case of the *Duke of Ancaster* v. *Mayer* does not apply to the present; the circumstances are totally different; and the present case must be governed entirely by the case of *Noel* v. *Noel*, in which the principle acted upon was, that a settlement makes the real estate primarily liable for those debts charged as in this manner upon it.

Lord Brougham:—The case of *Noel* v. *Noel* [12 Price, 214] is certainly one of considerable importance, and its application to the present deserves to be fully considered.

Lord Plunkett:—At the time I made the order now appealed from, I felt considerable difficulty upon the subject. After a careful examination of the case, I pronounced the decree, but I felt doubtful whether it was right or not. I therefore desired that there [95] should be a further examination into the case. *Noel* v. *Noel* [12 Price, 214] was mainly relied on, in the argument in the Court below, and I felt it to be a serious thing to come to a conclusion opposite to that of Lords Eldon and Redesdale; but still that case did not appear quite to govern the present.

Judgment postponed.†

Lord Brougham:—My Lords, there was a case of *Vandeleur* v *Vandeleur*, which stood over for judgment on appeal against an order of the Lord Chancellor of Ireland. The case was this: John Ormsby Vandeleur being seised in fee simple of estates in the counties of Limerick and Clare, on his marriage, in 1800, with the Lady Frances Moore, in consideration of that marriage, and of £6000, her portion, conveyed those estates to trustees in trust for himself for life, and after his decease for two terms to raise younger children's portions, and to secure a jointure for his widow, remainder in strict settlement for the first and other sons of the marriage, with remainder to the settlor in fee. A proviso is expressly added to the following effect:

"Provided always, and it is hereby declared and agreed, by and between the parties to these presents, that all and ever of the said towns, lands, tenements, hereditaments, and premises, hereby granted and conveyed, shall in the first place stand and be charged [96] and chargeable, and the same are hereby declared to be charged with the several sums due for the portions of the brothers and sisters of the said John Ormsby Vandeleur, amounting to the sum of £15,900, and also with the judgments and bonds hereinafter mentioned, and which several sums are particularly set forth in a schedule hereunto annexed, and amount to the sum of £12,700."

A covenant follows against incumbrances with the exception of "the several sums due by judgment or bond to the different persons in the schedule hereunto annexed,

* The Attorney-General, in arguing the case of *Tweedale* v. *Coventry*, says, (1 Bro. Chan. Cas. 252) that the case of *Serle* v. *St. Eloy* is not accurately reported, "that subsequent to the devise of the estate subject to the incumbrances upon it, the devise of other lands was to pay *all* his debts, though the word *all* is omitted in the report."

† See very learned notes by Mr. Cox on this subject, introduced in the cases of *Howel* v. *Price*, 1 P. Wms. 294, and *Evelyn* v. *Evelyn*, 2 P. Wms. 664; and see also a recent case where it was held that an intention to exempt personal estate need not be so manifested that every person must admit it: it is quite sufficient if it be so expressed as to convince the Judge who has to adjudicate upon it. *Booth* v. *Blundell*, 1 Meriv. 193. 210.

amounting in the whole to the sum of £12,700: And also other than and except the sum of £15,900, the portions due to the brothers and sisters of the said John Ormsby Vandeleur, with all and every of which said several sums the said lands are hereby charged."

There is also a covenant for further assurance, but with the like exception. It runs, "except as before excepted," referring to the exception in the preceding covenant. What the settlor may have done afterwards signifies not. Nevertheless he showed that he consented; he had burthened his settled estates with the debts, for on paying off part of the portions, £15,900, of his brothers and sisters, and also part of the debts in the schedule, £12,700, he declared such payments to be in ease of the settled estates. It is further to be observed, that part of the debts in the schedule, and part of those paid of, were contracted by the settlor's father, and part were his own debts.

A bill having been filed by the executors of J. O. Vandeleur against his eldest son and the younger children and the widow, to have the rights of the parties declared, the trusts of the will carried into effect, and the necessary accounts taken, and an answer having been put in by the defendants, it was referred [97] to the master to ascertain what debts, in the schedule comprised, remained unpaid, and by whom these were contracted. The master reported that there were three bonds unpaid, one for £1200, one for £3400, and one for £500, in all of which J. O. Vandeleur was the obligor; the two last only being secured by judgments, the first by a warrant on which no judgment had been entered up. This report being confirmed, the question, which alone was agitated between the parties below, and is in contest before your Lordships, came before the Lord Chancellor of Ireland for his decision, namely, whether the estates which the eldest son, Crofton Moore Vandeleur, took under the settlement, were so charged with the debts in the schedule reported still due to the amount of £5100 that they fell upon him, or whether these debts were a charge on the personal estate, to be borne by that estate alone in exoneration of the realty. His Lordship held that the personalty being the fund primarily liable, must exonerate the real estate, and that the surplus of the personal estate should be so applied after payment of other debts not in the schedule, funeral expenses and express pecuniary legacies. His Lordship did not allow any parties the costs except the plaintiffs, the executors, who were to be paid out of the personal estate.

This decree is brought here by appeal, the noble and learned Lord who made it having expressed considerable doubts respecting the question, and having recommended that the opinion of this house should be taken upon it.

I am of opinion that the decree is erroneous, and ought to be reversed, except as regards the costs of the suit below.

As between volunteers there can be no doubt [98] whatever of the rule. The personal estate is primarily liable, and must relieve the real, on which debts are charged, unless they have been charged on that realty exclusively in exoneration of the personalty. This exclusive charge may be either in express terms or by manifest intention, gathered from construction, the intention of the testator being the sole rule; and even if the parties here were to be considered as equally volunteers, we should be entitled to examine the instrument in question, with the view of ascertaining whether or not the personalty was intended to be exonerated. Hence, this case may be regarded in two lights: first, as if the question lay between volunteers, and next, upon the ground of the holder of the estates being a purchaser under the settlement.

First: If we had the case of volunteers to consider, the question would turn upon the intention of the settlor to relieve the personal estate, and charge the real estate exclusively. Has he shown such an intention in this case? The words are strong. The estates are declared to be in the first place charged with the debts which were set forth in a schedule for the purpose of specifying to what charge precisely the settled estates are to be subject; what burthen they are to bear. In the covenants too he excepts these same debts. He covenants that for the objects of the settlement the estates are free, discharged, and saved harmless against all debts and charges, except the jointure of his mother, and except the debts scheduled, and he covenants for further assurance, but not against the debts scheduled. It may be observed too, on the principle of *noscitur e sociis*, that the only exceptions besides these debts, are those of the family

debts, or brothers' and sisters' portions, and mother's jointure, both of which are unquestionably charged on the real estates, [99] and on these only, the personalty having nothing to do with them. But for the exception in these covenants for quiet enjoyment and further assurance, the personal estate would have been liable in respect of those incumbrances, as well as in respect of a deficient conveyance. What then is the object of the exception? Plainly to exempt the personal estate from eventual burthen, in the one case, and certain liability, in the other, of and to the debts thus owing. There seems, therefore, some reason to hold that, even regarded as the case of volunteers, the personalty might be held to be exonerated in the peculiar circumstances of this settlement. But the other is the principal ground of my opinion.

Secondly, the tenant last in possession takes under the settlement, and he takes as a purchaser. Suppose Mr. Vandeleur had sold his estate and left it charged with the debts in the hands of the purchaser, it is plain that the purchaser would have been liable, not only to pay the creditors if they had gone against them, but if they had gone against the executors or other personal representatives of the vendor, the purchaser would have been liable to repay whatever was thus obtained. Now how is this different from the present case?

It is said that the purchaser must have been liable, because he would have paid so much less price for an estate so much the less valuable as the charge amounted to. In all probability he would have done so, but it is not of necessary consequence; he might have had the caprice of paying the same price, and still the estate would have been liable in his hands, and at all events this, the diminished price, is an accident and not a circumstance essential to the question, and which can govern its results. The settlor, when he leaves the [100] estate charged, means to give so much less, means to put in settlement so much less property. Can we say that this is not considered by him in his settlement? He would answer, "Had I not charged the debts on those two estates, I should only have put the Limerick one in settlement and have left out the Clare one altogether, in which case I might have sold it and paid the debts." But is it quite correct to say that the objects of the settlement do not gain less in the bargain, in consideration of the estate being charged? On the contrary, may it not be considered that if they had been free the Lady Frances Moore's portion would have been more than £600, or, that if they had been free, and so the eldest child had been better off, her Ladyship would have been satisfied with a smaller jointure. The whole transaction must be viewed together, and all the provisions are parts of one scheme or plan, or arrangement. But it is quite enough to say, that the amount of what is given on either side, never can enter into an argument in the consideration of a settlement, because the purchasers under it take not as paying any price, but in a wholly different way. They execute then their part of the consideration, as it were through the parties to the marriage contract; the settlor was here one of these, and he expressly gives the estates subject to the debts, and thereby makes the issue of the marriage take only so much as remains after payment of them. No conceivable distinction can, therefore, be taken between such a person and a purchaser under a settlement. The one is as little a volunteer as the other. The simplest and plainest view of this case seems to be this: What did the settlor convey? What did he put into the settlement of real estate? Was it the whole estate, or was it only these estates, after deducting certain debts [101] in the schedule? That the amount of these remains undetermined till his death, because he might pay part (as he did in point of fact), makes no difference. It only makes the deduction an uncertain sum, the thing deducted a sum uncertain in amount during his life; but the thing in respect of which the deduction was to be made, was quite certain all the while; it was the debts scheduled to such amount as might remain of them unpaid; that is, whatever of these debts scheduled remained such, remained in existence as debts on his, the settlor's decease. Lastly, it seems impossible to allow this demand on the equities of the parties to be affected, by anything that was done by the settlor after his marriage. All rights must be taken to be as they were established at the date of the conveyance, otherwise a party might alter the rights of others, by things done after the contract was completed. Hence, neither any directions in his will, nor the state of his affairs at his decease, could possibly alter the construction, always of course excepting the circumstance of his paying off the debts, for that is expressly contemplated by the word "debts," on which the whole is grounded by the nature of the

charge. And this last observation applies not merely to any arrangement and right to be raised upon the exoneration of the personalty, by express words in the will, in so far as one of the scheduled debts is concerned, and none other; a proviso which plainly never could prove anything, because whatever impression the testator and the settlor might have had on his mind when he made his will, the only question is, what he did convey before by his settlement; but the observation applies also to the whole argument for the view taken on the decree, because that view proceeds upon the principle of the personal estate continuing liable **[102]** at the testator's death, and so exonerating the real assets descended.

The cases of *Noel* v. *Noel* (12 Price, 214), and *Waring* v. *Ward*,* contain matter confirming the view which I have felt it necessary to take of this question, though they do not come up to absolute decisions upon the point.

I have, therefore, humbly to move your Lordships, that the decree appealed from be in part reversed, and that it be declared that the debts in the schedule reported unpaid at the testator's death, be and stand as a burthen on the settled estates, in the counties of Limerick and Clare, and that the personal estate of the testator in the hands of the executors (plaintiffs in the suit below), be exonerated therefrom. In other respects this decree ought to stand, and no parties have any costs except the executors (plaintiffs), who are to have, according to the decree, their costs out of the personal estate, and also they are to have the costs of their appeal out of the same fund.

The judgment of the House of Lords was afterwards entered in the minutes in the following form:

It was this day (May 15) *ordered* and *adjudged*, that so much of the decree complained of as declares the personal estate to be the primary fund for payment of the several sums of £1200, £3400, and £500 therein mentioned, be and the same is hereby reversed: and it is further *ordered* that the executors, the plaintiffs, are to have their costs of the suit in the Court of Chancery (Ireland) out of the personal estate according to the directions of the said decree, and that they do also have their costs of this appeal out of the same estate.

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[103]

APPEAL

FROM THE COURT OF CHANCERY.

JOHN HARCOURT POWELL,—*Appellant;* ANNA GRIGBY,—*Respondent.*

[Mews' Dig. viii. 494; S.C. 9 Bli. N.S. 646.]

By a marriage settlement, certain freehold lands, together with the mansion-house and park of the settlor, were given to trustees to pay to the settlor's wife, if she should survive him, £1000 a year clear from all deductions whatever. The settlor by his will confirmed the settlement, and gave the mansion-house and park to his wife for life, remainder to his nephew, to whom he also gave his copyhold estates in England and his estates in Pennsylvania, the latter free from all incumbrances whatever: he created two rent-charges, payable out of his real estates in England. HELD, that the devise to the wife of the lands charged by the settlement was not intended to merge the charge in the settlement, and that she was, therefore, entitled to enjoy the mansion-house and park without any deduction being on that account made from the annuity, which was to be raised entirely out of the other English estates held by the nephew.

By Indentures of Settlement, dated 28th and 29th of December 1826, executed in contemplation of the marriage of Joshua Grigby, then of Drinkstone, in the county of Suffolk, with the Respondent, Anna Grigby, then Anna Crawford, spinster, after

* 7 Ves. 332. The observations particularly referred to are to be found at pp. 335-6.

reciting the intended marriage, etc., it was witnessed that in consideration thereof, and for making a provision for the Respondent, should she survive her husband, he did grant, etc., **[104]** unto certain persons therein named, the mansion-house in which he then lived, and divers freehold lands, with the park, etc. (expressly excluding his copyhold property), to hold the same, with their appurtenances, to the use of Joshua Grigby, and his assigns, for his life, without impeachment of waste; and after his decease, to the use and intent that the Respondent, and her assigns, in case she should survive him, should, from and immediately after his decease, during her natural life, receive and take, out of the said hereditaments and premises, one annuity of £1000 free and clear of and from all taxes and deductions whatsoever, in full of her jointure, and in lieu of dower; and if it should happen that the said annuity of £1000, or any part thereof, should be behind and unpaid for the space of thirty days, it should be lawful for the Respondent to enter and distrain on any part of the premises mentioned, or to enter and hold the same, and to take the rents and profits thereof, and of every part thereof, until she should be satisfied the annuity of £1000 and all arrears thereof, and also so much thereof as should accrue or grow due during such time as the Respondent should continue in the possession of the same premises after such entry, together with such costs, etc., as should be occasioned by the non-payment thereof, and subject to, and charged with the said yearly rent or sum of £1000, and the means and remedies thereinbefore provided for recovery thereof, to the trustees for the term of 99 years, for the further and better securing the payment of the annuity of £1000, as the same should become due unto the Respondent at the times appointed, for which a power was given to the trustees to levy the arrears or to mortgage the premises for payment of the same.

[105] The marriage was duly solemnized shortly after the execution of the settlement.

On the 10th of February 1829, Joshua Grigby made his last will and testament, duly executed to pass real estates. The will contained the following among other provisions:—"I give and devise unto my wife, Anna Grigby, and her assigns, for and during the term of her natural life, all that my mansion-house, with the yards, gardens, stables, coach-houses, and appurtenances now in my own occupation, at Drinkstone aforesaid, and also all that my park thereto; and I direct that trees and timber shall be cut down off my estates in the parishes of Hawstead, Hessett, and Drinkstone, and sold to pay the expense of any repairs, painting or glazing, which in the opinion of the said Anna Grigby, shall at any time be required for any of the said hereditaments so given and devised to her for life; also for the expense of insurance of the said premises from fire, which I direct shall be done, and that my nephew John Harcourt Powell (being the Appellant) or his heirs, executors or administrators shall point out, at proper times, what trees shall be felled for those purposes, and if he or they neglect, or refuse to do so for one month after notice in writing shall be given to him or them, then the said Anna Grigby shall cause to be cut down, and sell such trees as she shall think proper for those purposes, and I confirm the settlement made on my marriage with my present wife. And I give and devise, and direct to be paid out of all the rest of my real estates in Suffolk, unto my sister Charlotte Grigby, during her life, £220 a year, to be paid by equal payments, the 1st day of January, April, July and October, free of all charges. I direct that a yearly sum of £15 be paid by the aforesaid payments, to the widow **[106]** of Thomas Eaves, my bailiff, for her life, and that she be permitted to live without rent in the house she now resides, and subject to those two annuities, and other conditions above specified, I give and devise all my real estates in England, from and immediately after my death, and also all the above-mentioned hereditaments so given to my said wife for her life, and from and after her decease unto my said nephew John Harcourt Powell, his heirs and assigns for ever; also I give and devise unto the said John Harcourt Powell, and his heirs for ever, all my estate in the State of Pennsylvania, without any incumbrance or restriction whatsoever; and I give and devise to my said nephew, John Harcourt Powell, and his heirs, all and every my trust estates, messuages, lands, and hereditaments, and all my mortgages in fee, to hold the same according to the respective trusts, natures, and tenures thereof: and I direct that all my paintings and portraits in my house at Drinkstone, be enjoyed with the same by my wife for life, and after her death to go with the house, and subject to the pay-

ment of my debts and the expenses of carrying this my will into effect. I give and bequeath all my household furniture, plate, linen, china, wine, stores, all the rest residue and remainder of my personal estate and effects whatsoever and wheresoever, and of every kind, unto my said wife Anna Grigby, for her own sole use and benefit."

The testator died on the 6th of March 1829, and the Respondent and Appellant respectively entered into possession of the premises devised to them. In July 1831, the Respondent filed her bill in Chancery, to have the arrears of her annuity paid to her in full from the time of her husband's death, without any deduction on account of the mansion, park, and other [107] premises then occupied by her. The Appellant in his answer insisted on the liability of all these premises to contribute towards the payment of the annuity. On the 9th of June 1832 (see the case reported 5 Sim. 290), the Vice-Chancellor decreed in favour of the Respondent, and ordered the arrears of the annuity to be raised by mortgage upon the premises held by the Appellant.

The present appeal was presented against that decree.

Mr. Knight and Mr. Preston for the Appellant:—This rent-charge is *primâ facie* a charge upon the whole estate. It would be so in the hands of an ordinary purchaser. It is doubtful whether the rent-charge is not extinguished by the devise. It is only the accident of the term that preserves it at all, if indeed even that can be said to preserve it. It is a general rule, that where there is a rent-charge upon land, and part of that land comes into the possession of the owner of the rent-charge, he loses the rent-charge (Litt. 222 and Co. Litt. 147 b.). The Respondent here, by accepting the devise, discharged the rent-charge. The term is only an accessory security for the thing, and if the thing itself is gone the security for it is gone too. The rent-charge here is gone. If the Respondent had wanted to enforce her annuity at law, she must have gone against the terre tenant. This Appellant is a termor, not the terre tenant. She is one of the terre tenants. She could not be demandant and defendant at the same time, and that is the true reason why the rent-charge is extinguished; but if not extinguished, then there is nothing in the will to show that the Respondent does not take the land devised to her, subject to all the incidents to it. The provisions as to the [108] repairs of the house, by no means show that she was to take it free from all incumbrances whatever. The direction in the will upon this subject, was given in order that the mansion-house should be kept up for the benefit of the family, not for the Respondent's exclusive advantage. If there had been a mortgage on this mansion-house and park, she would take them subject to the mortgage, and this jointure is in effect a mortgage. That it was not the intention of the testator that the Respondent should enjoy the lands devised to her free from this incumbrance, is plain, for he knew how to express his intention, and might have used here, as he has done in other parts of the will, expressions to show that these lands were to be free from such incumbrances. When giving the annuity to his sister, and the widow of his bailiff, he says, that it is to be paid out of all the rest of the estate; why could he not use the same expression here, if he had the same intention? He created those two annuities as new rent-charges on the estate; if he had meant this to be a new rent-charge, he would have used the same terms in creating it. If it is the old rent-charge created by the settlement, then it is a charge upon the whole of the estate, and could only be so recovered at law or in equity. If this was a quit rent, or an ancient fee-farm rent, the lands would clearly be liable in her hands. It is the same thing in principle with this annuity. The mere fact, that she was the wife of the testator, cannot supply the want of clear words of exemption. *Knight* v. *Calthrope* (1 Vern. 347) will probably be relied on by the other side, but that case is clearly not law, for there no term existed, and there was no settlement by the will, so [109] that the rent-charge was clearly extinguished. The judgment in that case was, therefore, erroneous in principle. In the present case it may be admitted, that it was the intention of the testator to preserve the rent-charge *modo et formâ* as it was granted, but that was upon the whole of the estates, not on part of them.

Mr. Pemberton and Mr. Tinney for the Respondent:—The general rule as to extinguishment of a rent-charge (Litt. 222. and Co. Litt. 147), stated on the other side, may be admitted, but if, instead of coming in as by purchase, the party comes in as heir, there is no extinguishment, but the rent may be apportioned (Litt. 224. and Co. Litt. 149 b.), for there the heir comes in by act of law, and not by his own act. For

the purpose of this case, if it is to be decided by that general rule, the Respondent is entitled to enjoy equal privileges with the heir. But the intention of the testator must decide this case, for it is admitted that, as a general rule, there would be a merger operating on the land burdened with the rent-charge, but for the proof of an opposite intention on the part of the testator. That opposite intention is marked with sufficient plainness in this case. Suppose here, that the testator had simply given his mansion-house and park to his wife before going to a stranger, and had expressed his anxiety that she should enjoy them in the most ample and beneficial manner: if he had stopped there, no one could have believed that he meant that the rule of law should apply, and that she should lose the rent-charge. But he has done much more. The case of *Knight* v. *Calthrope* is law, and fully **[110]** warrants what is now contended for, but it is not so strong as this case, for there there was no confirmation of the settlement by the will. Here there is an express confirmation of it. The expressions of the testator as to the completeness of the enjoyment of this property by his widow are very strong, and he has given the mansion-house and park first, then confirmed the settlement, then given other bounties, and then given the real estate to the Appellant. The subsequent dispositions of the will, not overruling the first, must be taken subject to them. It is absurd to suppose that he intended to provide, as he has provided, for securing his wife against the expense of repairing the mansion-house, and yet meant that the rent-charge, on which she was to be maintained, was to come partly out of that very mansion-house. The expressions as to the annuities to his sister and his wife, instead of being against the Respondent, are in her favour. He was then creating two new charges, and if he had not specially appointed out of what fund they were to be satisfied, they would have been payable partly out of the property devised to his wife. To protect her against such a mischief, he made this special provision.—[Lord Brougham: Might she not repudiate the devise for life and take her annuity?]—Yes, but if she did, she would either be rejecting the wish of her husband, to occupy the mansion-house and park, or else in complying with it, by living there with crippled means, would be injuring herself and defeating the wish which he entertained, that she should live in comfort and affluence as his wife was entitled to live.

Mr. Preston, in reply:—There never was a lawyer who thought *Knight* v. *Calthrope* was law.—**[111]** [Lord Brougham: The law as laid down by Lord Jeffries in that case is too general. There is no mention of intention in the report of that case in Vernon. The principles of law and the cases throw the burden of proof on the party who denies the merger, but Lord Chancellor Jeffries throws it there upon the party who sets up the merger.]—That case is contrary to all principle, but it is the only authority to be found in favour of the decree now appealed from; if that case cannot stand, this decree must be reversed.

There is no case in which, even if the rent-charge was taken by act of law, it would not be liable to apportionment. Wherever a widow by act of law becomes endowable, or takes a portion of the property in lieu of dower, she is uniformly obliged to contribute to the burdens charged upon the property of which she so becomes possessed. The question now discussed must have been present to the mind of the testator when he gave two other charges out of the residue of the land, and where he wished to fix a charge on a particular portion of property he well knew how to attain his object.

Lord Brougham, after stating the case, said, My Lords, the question in this case arises upon the construction of a will, and is in substance whether a rent-charge payable to the wife, created originally by settlement, is to be paid with arrears entirely out of the residue of the estates not devised to the wife for life, or whether those which are so devised to her are to bear a portion of the charge. The law that would regulate this case being clear, and being admitted to be so, namely, that there would be **[112]** a merger operating upon the land burdened with the rent-charge, but for some intention on the part of the testator of an opposite kind being proved, which shall prevent that law from taking effect, the whole question resolves itself into one of fact, to be arrived at by conclusions drawn from principles of law, namely, whether or not there exists in this case sufficient proof of intention to contradict this rule of merger. The Vice-Chancellor on the facts of this case held, that there was evidence of this intention sufficient to prevent the merger, and decreed that the estates in the settlement, other than and except these estates, were liable to pay and make good

the jointure; and that the estates devised to the widow for life were free and exempt from liability to contribution thereto. On the best consideration that I can give the case, I am of opinion that he came to a sound conclusion. Let us advert to the circumstances which are to be gathered from the relative situation of the parties, and see whether they do not justify his conclusion. But first one word with respect to the principle of law: I shall say nothing upon the distinction taken as to the holder of an estate, on which there is a charge, coming into possession of it by act of law, or by his own deed; for this case must be decided on another ground. The principle of law on which I shall proceed has been stated distinctly enough, without going back to the times of Littleton and Coke, in *Chester* v. *Willes* (Ambler, 246). That report in Ambler is incorrect in its references to the cases in Vernon (*Thomas* v. *Kemeys*, 2 Vern. 348, and *Powell* v. *Morgan*, id. 90), for there does not appear from the report in Vernon any intention in one of **[113]** these cases to prevent a merger. I cannot find any case exactly in point with the present.

As to the case of *Knight* v. *Calthrope*, I doubt whether we should ever have heard of this appeal if it had not been for that case. Counsel relied on it unnecessarily in the court below. The language there was not half so strong against merger as in this case. That case is not now law; if it was, it would be inconsistent with *Chester* v. *Willes*, for in the last Lord Hardwicke threw the burden of proof on the party who said that there was no merger; while Lord Chancellor Jeffries had held that there was no merger unless it was proved that one was meant to take place.

We now come to the application of the law to this case. I set aside the relation of husband and wife, for that proves but little; but I think that there are four circumstances which, when taken together, bring the case within the rule as laid down by Lord Hardwicke. The first of these is, that from the beginning the testator intended that his wife should enjoy the mansion-house and park in the manner most beneficial to herself, and he treated it throughout as a part of the property which did not yield any profit; nay, more, he provided a fund out of which reparations were to be made, and he made his wife the judge, without control, of some of the repairs that might be wanted. Moreover, these repairs were to be done by the devisee of the reversion, and within a limited period of time, and if within that period he did not elect what trees should be cut down for the repairs, she was to decide upon them. With this favourable mode of treating her it is most improbable that the testator should throw on her the burden of paying a portion of this rent-charge out of pro-**[114]**-perty which he throughout treated as yielding no profit. This forms the second of the four grounds on which I think that the Vice-Chancellor came to a sound conclusion. The third is the principal ground of the whole. After having so provided for his wife, he expressly confirms the settlement made on his marriage. It was necessary to do that; but it is observable that the confirmation is coupled with the preceding direction by the conjunction "and," as if it was in addition to them; and this mode of confirmation must be taken to mean, "notwithstanding what I have given you in my will, I confirm the settlement." This is the most simple and probable mode of reading the will. Then, again, and lastly, the estate given to his wife is expressly exempted from contribution to the annuities created for the benefit of his sister and the widow of his bailiff; and to aid the construction I have been putting on the will as showing the intention of the testator, there is a gift to the Appellant of the estates in Pennsylvania without any incumbrance or restriction whatever. This is not in itself a strong circumstance, but it illustrates the general view taken of the case with respect to the testator's intention as to the incumbrances subject to which the English estates given to the Appellant were to be taken by him. On the whole, I incline to agree with the Vice-Chancellor on this subject of construction, which is always, more or less, one of uncertainty. Looking at the circumstances of this case, I see abundant reasons to justify me in supporting his decision, and none that would justify me in reversing it; and my opinion proceeds not in any way upon *Knight* v. *Calthrope*, as reported in Vernon, or referred to in the Equity Cases Abridged, but on a ground consistent with the decision in *Chester* v. *Willes*, **[115]** namely, that the will shows an intention on the part of the testator to prevent a merger. I do not think, under all circumstances, that this is a case which requires costs.

Judgment affirmed without costs.

APPEAL

From the Court of Exchequer in Equity.

ROGER HOLDSWORTH, JOHN ROBSON, R. S. THOMPSON, and WILLIAM WRIGHT,—*Appellants;* THOMAS LODINGTON FAIRFAX, Esq. and BENJAMIN EAMONSON, Clerk,—*Respondents.*

[Mews' Dig. v. 23, 1249; S.C. 8 Bli. N.S. 882.]

Lord Fairfax, by a codicil to his will, in the year 1671, gave all his tithes of Bilborough in fee (subject to an estate therein for the life of R. S.) to Henry Fairfax and his heirs and assigns, to the use of a preaching minister there, to be nominated by said H. F. and his heirs. The heir of H. F. conveyed the tithes with other property to trustees for sale for payment of his debts, and they were accordingly sold and conveyed by the said trustees in 1716 to R. F. and J. H. and their heirs, on trust as to the tithes to the use of a preaching minister to be nominated by R. F. and his heirs. J. H. (who was only trustee for R. F.) surviving R. F., became seised of the legal estate, and his descendants continued so seised in succession until 1826, when his heir-at-law conveyed the said tithes upon the original trusts to T. L. F., the heir of R. F. T. L. F. had in 1721 nominated B. E., the preaching minister of Bilborough. Held, in a suit by T. L. F. and B. E. for an account of tithes in Bilborough, that this was a valid nomination of B. E.

It appeared from the evidence, that the tithes of Bilborough had been appropriated to an alien priory, dissolved by stat. [116] 27 Hen. 8th; that Henry 8th afterwards demised them for 21 years by the description of *omnes decimas garbarum et foeni;* that Edward 6th, by letters patent, granted them to H. and W. and their heirs, by the description of *omnes illas decimas garbarum, granorum, bladorum, foeni, lanae et agnellorum ac alias decimas nostras quascunque*, etc., and that the title to them under that grant was vested in T. L. F. and his nominee. There was no mention of rectory or advowson in the grant. There was no trace of any endowment for a vicar or curate at any time in Bilborough. Held, that the grant included the rectory and comprised all tithes of every description arising in Bilborough, and the decree ordering an account of them to T. L. F. and B. E. was affirmed.

This was an appeal from a decree of Lord Chief Baron Sir William Alexander. The bill, filed by the Respondents in Easter Term 1826, prayed against the Appellants, and other Defendants who are not parties to the appeal, an account of the single value of all titheable matters (except corn, which they were ready to yield) had and taken by them respectively from lands in their respective occupations, and that they might respectively pay to the Respondent, the Rev. Benjamin Eamonson, what, upon taking such account, should appear to be due to him.

The bill stated, among other things, that Thomas, Lord Fairfax, being, at the time of making the codicil therein and hereinafter mentioned, and thenceforth to the time of his death, seised in fee-simple of all the tithes of corn, grain and hay, and all other tithes whatsoever, great and small, arising, etc. within the parish of Bilborough or the titheable places thereof, duly executed a codicil to his will, dated the 11th of November 1671, and thereby gave to Richard Stretton, his domestic chaplain, "all his tithes of Bilborough [117] and Sandwith, in the county of the city of York, for and during the term of threescore years, if he, Richard Stretton, should so long live, provided he would supply the office of a preaching minister there, or procure one to do it; and afterwards the remainder in fee of the said tithes he (the testator) gave to Henry Fairfax, of Oglethorp, and his heirs and assigns for ever, to the use and behoof of a preaching minister there, to be nominated by the said Henry Fairfax and his heirs." That the said testator died without having altered or revoked his said codicil, and thereupon the said Henry Fairfax (who, by the death of the said Thomas Lord Fairfax without issue male, became Lord Fairfax) became seised of the said tithes and premises, subject to the said estate therein of Richard Stretton, and continued so

seised to the time of his decease, and died intestate as to the said tithes and premises, and that the same thereupon descended to his eldest son and heir-at-law Thomas Lord Fairfax, who died so seised thereof to the uses aforesaid, whereupon the same descended to his eldest son and heir-at-law Thomas Lord Fairfax, who, being so seised thereof to the uses aforesaid, by indentures of lease and re-lease, bearing date respectively the 13th and 14th of July 1716, for the considerations therein mentioned, granted and conveyed to Robert Fairfax (the great grandfather of the Respondent, T. L. Fairfax) and John Hardwick, their heirs and assigns (amongst other heriditaments), all the said tithes of Bilborough and of Sandwith, and the advowson or patronage, donation and nomination of a preaching minister to the parish church of Bilborough, to hold unto and to the use of the said grantees, their heirs and assigns for ever, in trust, nevertheless, as to the said tithes of Bilborough and [118] Sandwith, to the use and behoof of a preaching minister there, to be nominated by the said Robert Fairfax and his heirs. And by an indenture, dated the same year, John Hardwick acknowledged the consideration to have been paid by Robert Fairfax out of his own monies, and that his name was used in trust only for Robert Fairfax and his heirs; and he covenanted to convey the premises therein-mentioned accordingly, so as such conveyances and assurances for and concerning the said tithes should be to the use of a preaching minister there, to be nominated by Robert Fairfax and his heirs. That the said Robert Fairfax died in the year 1725, leaving John Hardwick him surviving, and the legal estate of the said tithes and premises became solely vested in him; and that by divers mesne conveyances, and ultimately by indentures of lease and release dated respectively the 19th and 20th March 1826, the release being made between William Parkins (who was the eldest son and heir-at-law of Richard Parkins and Catherine his wife, the great niece and heiress-at-law of the said John Hardwick) of the first part, the Respondent T. L. Fairfax of the second part, and Jonathan Gray, gentleman, of the third part, the said tithes of Bilborough and Sandwith, were (with other things) conveyed by the said William Parkins unto the Respondent T. L. Fairfax, his heirs and assigns for ever, upon the same trusts, nevertheless, as to the said tithes, as the said William Parkins held the same, and as were mentioned in the said in part stated indenture of release, of the 14th of July 1716, and that the said advowson or patronage, donation and nomination of a preaching minister to the parish church of Bilborough aforesaid, previously to the year 1821, descended upon and became and was then vested in the Re-[119]-spondent T. L. Fairfax, the heir-at-law of the said Robert Fairfax; and the Respondent B. Eamonson had been since the year 1821 the minister of the said parish church, to which he was in that year duly nominated by the Respondent T. L. Fairfax, and licensed by the Archbishop of York, and had ever since officiated in the said church as minister thereof, by performing service therein: and during all the time the Respondent B. Eamonson had been and then was entitled, under the trust aforesaid, to receive all and every the tithes arising, growing and renewing within the said parish of Bilborough and the titheable places thereof.

The bill further stated, that the Appellants and the other Defendants thereto, then were, and long previously to the appointment of the Respondent B. Eamonson as minister as aforesaid, had been respectively the occupiers of divers farms, lands and tenements in the parish of Bilborough, and that certain payments by composition had at times been accepted by the former ministers of the said church from the occupiers, for the time being, of the said several farms, lands and tenements, in satisfaction of tithes; that the Rev. Mr. Lambe, the last minister, accepted and received from such occupiers respectively a composition of 5s. per acre: and the Respondent B. Eamonson, on being appointed minister, accepted and received from them a similar payment in lieu of tithes, until such composition was dissolved by mutual consent as between him and the Appellant R. Holdsworth, in 1823, and by written notices to the other Appellants in 1824, from which periods respectively the bill charged, in the usual manner, the perception of tithes, by the Appellants and the other Defendants, of the titheable matters on their respective farms, [120] lands and tenements without accounting for the same to the Respondent B. Eamonson: and further charged, that no other person than the Respondent B. Eamonson claimed, or was entitled to the said tithes, and that the composition payment of 5s. accepted by him and his immediate predecessor, was in lieu of tithes of all titheable matters

taken by the Defendants from their respective lands, and not in lieu of the tithes of corn only.

The Appellant, R. Holdsworth, by his answer, denied that the Respondent, T. L. Fairfax, had a right to nominate a minister to the church of Bilborough, and that the Respondent, B. Eamonson, was duly nominated thereto. The other Appellants, and the Defendants who are not Appellants, by their joint and several answer to the Bill, said, amongst other things, that they were informed, and believed, that the prior and convent of the Holy Trinity, within the City of York, were, at the time of the dissolution of that priory (27th Henry 8th), seised of certain portions of tithes, described as "*decimae garbarum de Drynghouses, in Knapton, Bilborough, et certorum clausorum infra dominium de Sandwith*," and that Thomas Lord Fairfax was, at the time of making his codicil in the Bill mentioned, seised in fee simple of the said portions of tithes in Bilborough, and the closes within the Lordship of Sandwith, which had belonged to the said prior and convent, and that these portions comprised the tithes of corn and grain only, and no other tithes, of certain parts of the parish of Bilborough. All the Appellants and the other Defendants admitted their information and belief that Thomas Lord Fairfax was, at the time in the Bill in that behalf mentioned, seised in fee simple of the tithes of corn, but of no other tithes, arising within certain parts of the parish [121] of Bilborough, and of certain closes within the Lordship of Sandwith; and that he executed such codicil, of such date, to such purport and effect as in the Bill was mentioned. They also admitted their respective occupations of certain farms, etc. in the parish of Bilborough and Lordship of Sandwith, and the perception by them respectively of all the tithes arising from them, without accounting for the same, except the tithe of corn; and they said that compositions had been paid at various times to the Respondent B. Eamonson, and to his immediate predecessor, for the tithes of corn and grain only, and not of anything else growing on their farms, except such of their farms as paid no tithes or were covered by moduses which they particularly described, and some of which are mentioned in the subjoined decree.

The Lord Chief Baron, having heard the cause in December 1829, by his decree, bearing date the 11th of November 1830, directed an account to be taken of the value of all and every the titheable matters and things (except corn) taken by the Appellants and the other Defendants from the lands in their respective occupations, except the lands in the occupation of the Appellant J. Robson, belonging to the Free Grammar School of Newark-on-Trent, and his farms called Newhall, Moscars and Normans, as to which he ordered the bill to stand dismissed; and he ordered that the Appellants and the other Defendants should severally pay to the Respondent, B. Eamonson, what should upon such account, when taken, be found due from them respectively, with costs of suit to both Respondents, who were ordered to pay J. Robson his costs, as far as the bill related to his said farms of Newhall, Moscars and Normans. (See the report of the case, with the Lord Chief Baron's judgment, [122] 1 Younge, 79 to 111, where the deeds and ancient documents, and other evidence in the cause, and in this appeal, are very fully stated.)

The appeal was from the whole decree, except so much thereof as directed the bill to be dismissed, with costs as to J. Robson's said farms.

Mr. Agar and Mr. Koe for the Appellants:—The questions in this appeal are, first, whether the Respondent, T. L. Fairfax, was, in the year 1821, entitled to the tithes devised by the codicil of Thomas Lord Fairfax, and to the nomination of a minister to the church of Bilborough, pursuant to that codicil; secondly, whether the tithes devised by Thomas Lord Fairfax's codicil, under which the Respondents made title, were the tithes of corn only, which the Appellants are willing to yield, or all tithes whatever, both great and small, arising on the lands mentioned in the codicil.

It was admitted in the court below that the Respondent, T. L. Fairfax, is not the heir-at-law of Henry Fairfax, the devisee named in the codicil of 1671, and that he does not claim the tithes or the right to nominate the minister through any consanguinity with him. The descent of the right to the tithes was broken by the heirs of Henry Fairfax, whose son and heir, Thomas Lord Fairfax, for the purpose of securing payment of his debts, conveyed to trustees with power of sale all his lands, tenements, tithes, etc. His (the last-mentioned Lord Fairfax's) creditors, after his death, filed their bill against the trustees, and against his eldest son and heir-at-law, who was also

Thomas Lord Fairfax, and compelled a sale of the trust estates for the payment of the debts and other incumbrances. At that sale Robert Fairfax, under whom the Respondents claimed, purchased part of the hereditaments, **[123]** including the manors and tithes of Bilborough, etc., and they were conveyed to him, and to his trustee John Hardwick, their heirs, etc., by the indenture of July 1716, recited in the pleadings, in trust as to the tithes, to the use of a minister to be nominated to the church of Bilborough by the purchaser and his heirs. That conveyance was executed by the trustees appointed to pay Lord Fairfax's debts, and the consideration paid by Robert Fairfax was applied in discharge of those debts and other incumbrances. The devise of the tithes, by the codicil of 1671, to the use of a preaching minister was a purely charitable trust, to be executed by Henry Fairfax and his heirs only. The trust could not be sold or otherwise alienated *Attorney-General* v. *Rigby* (3 P. Wms. 145) for a pecuniary consideration or for payment of debts, and therefore the suit in Chancery to compel a sale of the estates of Thomas Lord Fairfax could not affect the nomination of a minister or the tithes of Bilborough, of which that Lord Fairfax was only trustee. It is a rule of the courts of equity that a trustee shall not derive any benefit to himself from the trust. If a charitable trust could be sold it would be liable to abuse, and the objects of the trust would suffer by the sale. The case of the *Attorney-General* v. *Brentwood School* (3 B. and A. 59), on the authority of which the Respondents rest their case, was different from this, and not at all applicable. If the tithes and power of appointing a preaching minister had passed by the conveyance to Robert Fairfax and John Hardwick, the same would have been vested in the heir of John Hardwick, the survivor of the two, in the year 1821, when the Respondent B. Eamonson was nominated to be preaching minister at Bilborough, and for some **[124]** years afterwards. When an advowson is conveyed to a trustee or mortgagee, it is necessary that the nomination and presentation to the benefice should be made by the person in whom the legal estate is vested, and not by the person who is entitled to the beneficial interest. B. Eamonson was never nominated by the heir of John Hardwick. The tithes, and the right of nomination of a preaching minister, were not conveyed to the Respondent, T. L. Fairfax, until the 21st March 1826, and there did not become due from the Appellants any tithes whatever in Bilborough between that time and the 9th of May 1826, when the Respondents filed their bill. This point was only slightly noticed by the Lord Chief Baron at the end of his judgment. But it was important to consider whether, if Mr. Fairfax could have a legal title at all to nominate the minister, he had that title in 1821: for if he had not, Mr. Eamonson was not duly appointed, and therefore had no right to any tithe.

The devise, by the codicil, was only of a portion of tithes, and not of a rectory, or of a benefice, which entitles the possessor to tithes generally. It is incumbent upon any person, and more especially a layman, who claims a portion of tithes, to prove clearly to what monastery or other ecclesiastical body such tithes belonged, of what such portion of tithes consisted, and in what manner and by what conveyances he derives his title thereto, or that he should establish his title to such tithes in a court of law, before he is entitled to an account in a court of equity. *Charlton* v. *Charlton* (Bunb. 325); *Norbury* v. *Meade* (3 Bli. 211). It appeared from the several ministers' accounts, which contained an account of all the tithes and hereditaments to which the alien priory of the **[125]** Holy Trinity in York was entitled, that the only tithes to which that priory was entitled in Bilborough, were the tithes of corn, which were given to the Crown upon the dissolution of that priory in the 27th of Henry 8th. They were demised by that monarch to Sir Leonard Beckwith for 21 years, under the description of the tithes of sheaves and hay, and were then worth £6 10s. a year. The bill of particulars by which John Wright and Thomas Holmes required to purchase the tithes of Bilborough from the Crown, described the tithes to be the tithes of corn only, and to be of the yearly value of £6 10s., and to be demised to Sir L. Beckwith at that rent; and although King Edward the Sixth, by his letters patent, granted to Wright and Holmes "all those his tithes of corn, grain, blades, hay, wool and lambs, and other his tithes whatsoever arising in Bilborough, then or lately in the tenure of Sir L. Beckwith, formerly belonging to the late priory of the Holy Trinity in the City of York"; yet where a bill of particulars had been proved, which showed what tithes the parties agreed to purchase from the Crown, courts of equity have construed letters patent granted in pursuance thereof, not to extend to more tithes than

were mentioned in the bill of particulars. The purport of the letters patent to Wright and Holmes was a grant of all the tithes in Bilborough, then or lately in the tenure of Sir Leonard Beckwith, to the late priory of the Holy Trinity formerly belonging, and not of all tithes whatever. It appeared by the lease to Sir L. Beckwith, which had not expired at the date of the letters patent, that the only tithes demised to him were the tithes of corn and hay (*garbarum et foeni*), which lately belonged to the priory of the Holy Trinity; And all the ministers' or collectors' accounts, of the [126] priory of the Holy Trinity, stated that such priory was entitled only to the tithe of corn in Bilborough; therefore, if the Respondents were entitled to any tithes in Bilborough, it would be to the tithe of corn only, but the decree here appealed from directed the Appellants to account for all tithes whatever, which far exceed all the tithes mentioned even in the letters patent; and it further directed that account to be taken for six years before the filing of the bill, although the legal title was not vested in Mr. Fairfax until 1826, a few weeks before the filing of the bill. On these grounds, and after citing many cases * in support of them, they submitted that so much of the decree as was appealed from ought to be reversed.

Mr. Simpkinson and Mr. Duckworth for the Respondents:—The case attempted to be made for the Appellants is, that the Respondent Fairfax had not the right of nominating the minister of the parish of Bilborough; that the other Respondent was not well appointed; and lastly, that if both these objections should be overruled, still the Appellants were not liable to account for any tithes except the tithes of corn which are not in dispute. They allege that the benefice was a mere charitable trust in Henry Fairfax and his heirs, and was not alienable. It is quite true that the tithes were given, by Lord Fairfax's codicil, in trust to the use of a preaching minister, and could not be conveyed away from the object of the trust; but the nomination of the minister was on a different footing, not a charitable trust in Henry Fairfax, but property, as much as an advowson would have been, [127] and which could be alienated and conveyed like other ecclesiastical preferments. The right of nominating the minister of this parish was, with other things, conveyed away for sale by the descendant and heir-at-law of Henry Fairfax, and it was actually sold in 1716, under a decree of the Court of Chancery, when Robert Fairfax, the ancestor of one of the Respondents, became the purchaser. There was no distinction between this case and the common case of advowsons, which were constantly the subjects of sale and assignment; so also the right of nomination to a benefice or a school was clearly assignable; *Attorney-General* v. *Floyer* (2 Vern. 747); *Attorney-General* v. *Master of Brentwood School* (3 Barn. and Adol. 59). The latter was a case sent by the Master of the Rolls for the opinion of the Court of King's Bench, and the question for consideration there was the right of nominating the master of a grammar school, founded and endowed by a private individual by virtue of the King's letters patent, which ordained that the school should be in the patronage and disposition of the founder and his heirs, by whom the schoolmaster and wardens should be nominated. All the Judges of that Court certified that the right of nomination was lawfully alienable, and no case could be stronger than that in support of the title of the Respondent Fairfax. But this was not the case of a foundation by Thomas Lord Fairfax; he being the rector impropriate, and holder of the small as well as of the large tithes, as his will and other documentary evidence showed, was bound to provide a minister for the parish, there being no endowment for a vicar or curate, *Bonsey* v. *Lee* (1 Vern. 297); and, being aware of [128] that objection, he availed himself of the Act 17 Charles 2, c. 3, s. 7, then recently passed, to give the tithes in trust in perpetuity for the benefit of a minister or curate. Though the tithes could not be diverted from the minister, the right to nominate the minister was clearly alienable. The case of the *Attorney-General* v. *Rigby* was not applicable to this case.

It was also urged for the Appellants, that the right of nomination, if it was at all in T. L. Fairfax, was not in him in 1821 when he nominated Mr. Eamonson, because the legal estate was in the descendants of Hardwick. But by the terms of the deed of 1716, the right of nomination of the minister was conveyed to Robert Fairfax and his heirs; that was, of course, the legal right of nomination. It was proved in the

* The same cases that were referred to in the argument in the Court below. 1 You. 85 and 86.

cause that the two ministers immediately preceding Mr. Eamonson, were nominated by the heirs of Robert Fairfax, and that the Respondent, T. L. Fairfax, was the heir-at-law of Robert Fairfax. But supposing the legal right to have, in 1821, been in Parkins, the heir of Hardwick, as trustee, they submitted that he was bound to appoint the nominee of the person beneficially or equitably entitled, and that if he refused to do so a bill would lie to compel him, *Gully* v. *Serjeant Selby* (1 Strange, 403). They further cited, upon this part of the case, 17 Vin. Abr., Title *Presentation*, pp. 300, 314 and 324. Presentation was not necessary to this benefice; the nomination to it was reserved, by the deed of 1716, to Robert Fairfax and his heirs: and in pursuance of that deed, T. L. Fairfax, the heir-at-law, nominated Mr. Eamonson. The question then was, whether Eamonson and the patron had not a right to the tithes when they filed their bill? That a person, **[129]** who is equitably entitled to tithes, has a right to file his bill for an account of them, is a proposition which is supported by the cases of *Crayhorne* v. *Taylor* (2 Bro. P. C. 512), *Lowther* v. *Bolton* (3 Gwill. 1120), and the late cases of *Glegg* v. *Legh* and *Cherry* v. *Legh* (1 Bli. N. S. 302 and 306), in which Lord Eldon overruled Lord Redesdale's dictum in *Norbury* v. *Meade*, which was overruled also by Lord Lyndhurst in *Elliot* v. *Davenport*.

Upon the other question in the cause, namely, what tithes were devised by the codicil to Lord Fairfax's will, the learned counsel referred to the documentary and other evidence read in the Court below, and in their arguments they cited the cases there cited, and adopted the reasoning of the Lord Chief Baron upon the effect of the evidence, concluding from it that Lord Fairfax was seised not only of the tithes of corn but also of the tithes of hay and all other tithes, great and small. They observed, upon the word *garbarum*, which the Appellants would confine to "*sheaves, or perhaps hay*," that it extended not only to hay, *Barsdale* v. *Smith* (Cro. Eliz. 633), *Oglander* v. *Lord Pomfret* (3 Gwill. 1244), but also to flax, *Anon* (1 Eag. and You. 369), to peas and beans, *Sims* v. *Bennett* (2 Gwill. 887), to woad, *Baskerville* v *Clarke* (3 Gwill. 1567), to seed-tares, *Dawes* v. *Benn* (1 Barn. and C. 751), and even to agistment, *Illingworth* v. *Leigh* (3 Gwill. 1614).

With respect to the objection on behalf of the Appellants, that the letters patent of Edw. 6 to Holmes and Wright, could not grant more than they required by their bill of particulars to purchase, the learned counsel cited two acts, 1 Edw. 6, c. 8, and 7 Edw. 6, **[130]** c. 3, confirming grants of Henry 8 and Edward 6, notwithstanding any mis-recital or mis-description, and cases decided on those statutes, *Dickinson* v. *Reade* (1 Gwill. 358), *Baker* v. *Bacon* (Cro. J. 48), *Regina* v. *Lewis* (1 Leon. 119), and two anonymous cases in Dyer's Reports, pp. 269*a* and 350*b*, insisting, upon these authorities, that the rectory passed by King Edward's letters patent, notwithstanding any mis-description of the tithes, and that that doctrine was adopted by Mr. Justice Bailey in the case of *Dawes* v. *Benn* (1 Barn. and C. 762). Lord Fairfax was seised, in 1671, of all the tithes that were granted by these letters patent.

Upon another question, argued in the Court below, but not much insisted on in the appeal, namely, whether the decree and proceedings in a former suit (*Fairfax* v *Wright*), for tithes of the same lands between the minister nominated by the heir of Robert Fairfax and an occupier, were admissible as evidence in this suit, the following cases were cited: *Scott* v. *Allgood* (3 Gwill. 1372), *Travis* v. *Chaloner* (3 Gwill. 1237), *Freeman* v. *Phillips* (4 M. and S. 486), *Illingworth* v. *Leigh* (3 Gwill. 1614), *Ashby* v. *Power* (3 Gwill. 1238).

Mr. Agar, in reply, insisted that the Respondent's bill was defective in form, and that the authority of the case of *Norbury* v. *Meade*, which he before cited to that effect, was not shaken by what Lord Eldon said in *Cherry* v. *Legh*. That was not like this case, and Lord Redesdale was, in matters of pleading, better authority than Lord Eldon. The case of the *Attorney-General* v. *Rigby* showed that one cannot sell or mortgage a trust for a charitable purpose. The **[131]** legal estate having been in Parkins till 1826, the nomination of Eamonson, in 1821, by T. L. Fairfax alone was not sufficient, even if the right to nominate the minister had been well derived to his ancestor Robert Fairfax, and therefore no tithes were due to them when the bill was filed.

The case having stood over for consideration, it was, on this day (July 9), ordered, without any observation, that the petition of appeal be dismissed, and that the decree of the Court below be affirmed, without costs.

APPEAL

FROM THE COURT OF CHANCERY.

JAMES STALEY,—*Appellant;* JOHN KING and THOMAS HINDLE,—*Respondents.*

[Mews' Dig. i. 843; S.C. 8 Bli. N.S. 716.]

King gave Kemp an undertaking in writing in these words: "Mr. Kemp, when the title to the Philpot-lane estate is perfected, and the same shall be regularly conveyed to me by all the parties, I will be accountable to you for the sum of £3000 upon receiving a proper release from you and Mr. Wilson.—John King." The title was perfected, and the estate was conveyed to King, and he continued in the undisturbed possession thereof, but refused to account with Kemp for the £3000. Kemp and B. filed a bill against King, alleging that the £3000 was the consideration for Kemp's equitable interest in the estate, and for his procuring a conveyance of the same to King; that he borrowed money of B. on the assignment to him of the above undertaking, and that Wilson was Kemp's agent. King, by his answer, denied that Kemp had any interest in the said estate, or that he procured the conveyance of it to King, but he said that it was for Wilson's interest he agreed to give £3000, and that Kemp's name was used in the undertaking in order to protect Wilson from any claim by his assignees, he being **[132]** an uncertificated bankrupt; that the dealing was with Wilson, and through him with the vendors of the estate. HELD, in the absence of proof of the allegations in the Bill, that certain letters from Wilson to B. justified the inference that Kemp was not entitled to any account from King in respect to the undertaking; and the decree dismissing his bill was affirmed with costs.

In January 1821, Thomas Bignold and Robert Kemp filed their bill in Chancery against John King, which was afterwards amended, thereby stating, among other things, that, in the year 1818, Robert Kemp entered into a contract for the purchase of lands and hereditaments in Philpot-lane, London, at a very low price; that shortly afterwards he contracted with King to sell to him his equitable interest in the said lands and hereditaments at a premium of £3000; and it was stipulated between them that Kemp should procure the conveyance to be made to King immediately from the vendors, and that, upon the conveyance being executed, King should pay the vendors the sum contracted to be paid to them by Kemp in part of the purchase-money, and should pay Kemp the further sum of £3000, the consideration of the transfer of his equitable interest.

The bill further stated, that Kemp being in immediate want of £3000, and the investigation of the title and the preparing of the conveyance being likely to occasion delay in the payment of the £3000, Kemp requested King to give him an undertaking in writing for the payment of that sum, in order that Kemp might thereby be enabled to raise £3000 immediately; and that accordingly King gave Kemp the following undertaking in writing: "Mr. Kemp, when the title to the Philpot-lane estate is perfected, and the same shall be regularly conveyed to me by all the parties, **[133]** I will be accountable to you for the sum of £3000, upon receiving a proper release from you and Mr. Wilson for the same. I am yours, John King. 15th June 1818." That after that undertaking had been given, Kemp applied to Thomas Bignold, and requested him to advance to him the sum of £3000, upon an assignment to Bignold of the agreement so entered into with King; that Bignold was induced to agree thereto, upon condition that he should not have to wait above three months for the fulfilment of King's undertaking; that accordingly a memorandum of the transfer of the interest of Kemp in the said agreement with King, and of the benefit of the aforesaid undertaking, was drawn up; and the same was sent to King, and was then in his possession or power; and that memorandum was as follows: "Esteemed friend King, be pleased to pay Thomas Bignold, or his order, pursuant to thy letter to me, dated the 15th inst., the sum there mentioned;

and his receipt shall be thy discharge. Thine, R. Kemp. 27th June 1818." That the undertaking of the 15th of June 1818 was by Kemp put into the hands of Bignold, and he paid the £3000 to Kemp, in consideration of the transfer to him of the benefit of the said agreement with King. That afterwards, in consequence of difficulties made by King, which occasioned more than three months delay in the performance of his said undertaking, it was agreed between Bignold and Kemp and Richard Wilson, (the person in the undertaking, dated 15th of June 1818, named) that the said sum of £3000 paid by Bignold should be returned to him; but that Bignold, who was then a creditor to a considerable amount of Kemp and of Wilson, should from time to time make further advances to them; and should hold the said undertaking, signed by King, as security **[134]** to him, as well for the payment of the sums then due to him from Kemp and Wilson respectively, as also for the payment of all such sums as he should thereafter advance for the use of Kemp and Wilson, or either of them. That Bignold, on the faith of such agreement, and also of King's said undertaking, made further advances to a considerable amount to Kemp and Wilson respectively before the year 1821; and that there was, in that year, justly due to Bignold, from Kemp and Wilson respectively, a sum exceeding £5000. That it was agreed between Bignold and Kemp that Bignold should take to the said undertaking signed by King, and all the benefit thereof, for his own use, in discharge of all right of personal demand by way of action against Kemp for the amount due from him to Bignold. That some time after the memorandum, dated the 27th June 1818, was deposited with King, the title of the said lands and hereditaments was perfected, and Kemp procured the conveyance of them to be made from the vendors immediately to King, and such conveyances were duly executed, and King was in the undisturbed possession of the said lands and hereditaments. That Bignold and Kemp had applied to King, and requested him, upon the execution of a proper release, to pay Bignold the said sum of £3000, being the consideration money for the aforesaid assignment or transfer of Kemp's interest in the said premises, but that King absolutely refused.

The bill charged that King had not paid any part of the £3000 to Bignold or Kemp, and that Wilson acted as the agent of Kemp in making the contract for the purchase of the said lands and hereditaments, and had no interest in such contract, and that such contract was in writing, and duly signed by the vendors or their agent for that purpose, and that if the **[135]** said agreement between Kemp and King for sale of Kemp's equitable interest as aforesaid, was not made and entered into by Kemp personally, on his part, it was made and entered into by Wilson, as agent for Kemp. And the bill prayed, among other things, for a discovery and account of what was due for principal and interest, on King's said undertaking and agreement, and that he might be decreed to pay to Bignold what should be found due on taking such account upon a proper release being executed to him.

The Respondent, King, put in his answer, which was to the effect hereinafter stated; but before any further proceedings were taken, Bignold was declared a bankrupt, and the Appellant and another person, since deceased, were appointed his assignees. Kemp died insolvent, since the filing of the bill, and the Appellant having obtained letters of administration, became his legal personal representative. In January, 1828, the Appellant filed his bill by way of bill of revivor and supplement against the Respondent King, making the other Respondent Hindle, a party defendant, as the surviving assignee of Richard Wilson, who had been declared a bankrupt in 1816, and continued to be an uncertificated bankrupt in the years 1817, 1818, 1819 and 1820. The supplemental bill, which was several times amended, after stating the original bill and the prayer thereof, and the subsequent matters as above stated, and that it was filed by the Appellant, with the consent and authority of the creditors who had proved debts under the commission against Bignold, charged that King was still in possession of the said lands and hereditaments, and that if the agreement between Kemp and King, for the sale to King of Kemp's equitable interest as aforesaid, was not made and entered into by Kemp personally, it was made and **[136]** entered into on his part by Wilson, as his agent; and everything thereinbefore mentioned to have been done or transacted by Kemp, which was not done or transacted by him personally, was done or transacted by Wilson as his agent, and that King had in his possession or power, divers documents, letters,

papers, and writings, relating to the matters in the bills mentioned, and material to be produced. And the supplemental bill prayed, that the suit might be revived against the Respondent King, and that he might answer the same, and that the Respondent, Hindle, might also answer the said original bill, and the supplemental bill, and that the Appellant might be at liberty to prosecute the original suit and might have the benefit thereof, and of the proceedings therein, and of the facts in the supplemental bill stated, against the Respondents respectively, and that it might be declared, that no release from Wilson or Hindle to King was necessary, or that Hindle might be ordered to execute such release if necessary, and that a receiver of the rents and profits of the said lands and hereditaments might be appointed, etc.

The Respondent, King, by his answer to the original bill in 1821, and to the supplemental bill in 1828, denied that in the year 1818, or at any time, Kemp entered into any contract or agreement for the purchase of the lands and hereditaments in the said bills mentioned, but this Respondent believed, that the said lands and hereditaments had, in that year, been put up to sale by public auction by Mr. Burton, auctioneer, and that the same having remained unsold, Burton afterwards offered them for sale by private contract. And Respondent was informed, and believed it to be true, that Richard Wilson, then and at the time of filing the Respondent's first answer being an **[137]** uncertificated bankrupt, afterwards applied to Burton, and contracted with him for the purchase of the said lands and premises for his own use and benefit for the price of £10,500, and that such contract was reduced into writing, and signed by Wilson, who therein also undertook to pay some deposit in respect of his said purchase within a certain period therein limited, but failed so to do; and shortly afterwards Wilson was introduced to this Respondent by Robert Kemp, and represented to be the *bonâ fide* purchaser of the said lands and hereditaments upon speculation, and that he (Wilson) was then unable to complete his contract, and that the price contracted to be paid for the same was a very low price, and that the said bargain was advantageous to the purchaser. And this Respondent denied that Kemp did contract with him to sell his pretended equitable or other interest in the said lands or hereditaments, but he admitted that, influenced by the representations of Wilson and Kemp, touching the value of the said premises, he (this Respondent) was induced to consent to give to Wilson £3000 to relinquish the benefit of his contract in favour of Respondent, and to pay to Wilson the said sum, over and above the price contracted by him to be paid for the said estate, as soon as the title thereto should be approved and the conveyances perfected. And this Respondent and Wilson immediately afterwards went to the house of the said Burton, and Burton, at the request of Wilson, and well knowing this Respondent, consented to cancel the said contract between him and Wilson, and the same having been accordingly cancelled, a new contract in writing was drawn up and signed by and between Burton and this Respondent, for the sale and conveyance of the said estate, at the same price which Wilson was to have paid for the same.

[138] This Respondent, by his answer, further admitted, that after a very considerable lapse of time from Respondent's first entering into such contract with Burton, Kemp requested Respondent to give him an undertaking in writing for the payment of £3000, for the better security, as this Respondent then understood, of Wilson, and to protect him by such payment to or in the name of Kemp, against any claims that might be set up by Wilson's assignees, in respect of the monies to be paid to him by this Respondent under such agreement, and not in order that Kemp might thereby be enabled to raise the said sum of £3000 immediately, or for any other purpose: and Respondent did give to Kemp an undertaking in writing of the date, and to the purport and effect in the bill mentioned, and he was solely induced to give such undertaking as evidence that he would pay the £3000 upon the contract being completed; and that the name of Kemp was made use of in such undertaking at the desire of Wilson, for the purpose of protecting him from any claims that might be set up by his assignees to the said £3000. And Respondent was still further induced to give such undertaking upon an understanding between all parties that this Respondent should on the completion of the purchase retain in his hands the sum of £500 out of the said sum, which Respondent had agreed to give Wilson for the transfer of his interest in the contract, for the purpose of liquidating certain claims which Respondent had against Kemp; and this Respondent admitted

that some memorandum of an intended transfer of the interest of Kemp (who was considered by Respondent as a mere trustee for Wilson) in the said agreement with this Respondent, was drawn up by Kemp and sent to this Respondent; but Respondent had since lost or mislaid the same, and was unable to set forth [139] whether it was in the words or to the effect in that behalf mentioned in the bill.

This Respondent further admitted, that some time after the said memorandum was sent to him, the title of the aforesaid lands and hereditaments was perfected, and the conveyance thereof executed to this Respondent, and he had been since in the undisturbed possession of them; but Kemp did not procure the said conveyance to be made from the vendors thereof to Respondent, and Kemp's interference in the completion of the said purchase was wholly unnecessary, and he never did interfere therein, or take any trouble about the same, after he had introduced Wilson to this Respondent, and brought about such contract between them for the transfer of the interest in the said purchase. This Respondent admitted that he had not yet paid the said £3000, or any part thereof, to Bignold and Kemp, or either of them, and he was advised that Wilson, as an uncertificated Bankrupt, was not competent to enter into such contract as aforesaid, and that Respondent could not with safety pay him or any person for his use the said £3000 without the consent of Wilson's assignees, but he was always ready to pay the same to Wilson or his assignees, or any person legally entitled under his and their authority to receive the same, upon having a release or discharge duly executed to this Respondent for the said money; and he insisted that to whomsoever the said sum of right belonged, this Respondent ought in nowise to be charged with any interest whatsoever in respect thereof, the same having been agreed to be paid by him as a mere loan or premium. This Respondent had no knowledge of several of the matters alleged in the supplemental bill, and he denied that the contract between him and Wilson for the sale to him of Wilson's equitable interest in the bill men-[140]-tioned, was entered into with him by Wilson as the agent of Kemp; and he did not believe that Bignold paid Kemp the £3000 in the bill mentioned.

The Respondent, Hindle, put in his answer to the original and supplemental bills in December 1828, stating the bankruptcy of Wilson, as it was stated in the said bills, and that Wilson was an uncertificated bankrupt in the years 1817, 1818, 1819 and 1820, and Respondent, as his sole acting assignee, claimed such rights and interest as Wilson had, if he had any in the matters in question in the suit; but he did not know that Wilson, if he had not been a bankrupt, would have had any right or interest therein.

The case was heard by the Vice-Chancellor in 1831, when the Appellant's counsel, in support of his case, read passages from the answer of King to the original bill, and some letters written by Wilson to Bignold, which were proved as exhibits in the cause. One of these letters, dated the 25th of January 1820, contained the following passage:

"It has always been known to you, the money in King's hands has always been the only tangible means I had to settle my affairs with you, and in order to make this the more certain, and to afford me temporary assistance, and to add to your better security, was the only grounds for my placing in your hands the only document which can relieve the above difficulty now, although I find that I miscalculated on your support for temporary matters, still I never despaired of your support when an effectual arrangement took place in my affairs, and particularly after the repeated assurance to support me when an arrangement took place: it is true I have no right to call upon you to lend me money against your wishes, but I consider I have a just claim to call upon you for the necessary support or return of that which is the only [141] instrument I have to depend upon, and which was deposited with you upon faith and honour, and if I know you at all, it only requires you to be reminded of what becomes your duty to do, what conscience dictates to be just between man and man; and I think you cannot be the man that would wish to keep me in this situation after I have surmounted the great difficulties I have with Pickfords, leaving out of the question your own interest in the completion of the arrangement, but when that is taken into the consideration, I say it is a reflection upon your understanding not to take the most effectual means possible to forward it, and it is nothing but a strong conviction on my mind of your not having a proper view of the bearing of

this business that can at all excuse you with me; however, I trust enough has been said to claim that attention it deserves, to either do the one thing or the other, and either way will accomplish my object of a final settlement of all difficulties.—I am, Dear Sir, yours truly, R. WILSON."

Another letter by the same to the same, in 1820, was as follows:

" Dear Sir—By the arrangement now made with Pickfords, I shall be able to effect an arrangement with creditors with a loan of £500 instead of £2000, on the receipt of the agreement from Mr. —— which I expect every post. It is my intention to send off a person to each creditor, with the means to pay the composition as agreed upon, and get, at the same time, their signatures to the *supersedeas;* to do this and pay all expenses, and some other contingencies, will require £500, which, if you are disposed to assist me with, I can only say it will confer a lasting obligation; with regard to security, you know as much of my means **[142]** and situation as I can tell you, and therefore I have nothing to say on that head further than I am disposed to make any arrangement you may think necessary, and that is within my power.—I am, etc. R. WILSON.

" Thomas Bignold, Esq."

Another letter from Wilson to Bignold, written between July and November of the same year, had this postscript: " I was glad to hear the other day that you had got possession of the £3500 from King; I hope this is correct."

It was proved by a clerk in the bank of Perring and Co., in 1818, that in that year a sum of £3000 was, by a check drawn on them by Bignold, placed to the account of Kemp.

The Vice-Chancellor made the following decree: after reading certain orders made in the cause, one of which was made shortly before the hearing for payment by King of the £3000 into court, which was accordingly paid in by him, and was vested in the purchase of £3681 consols, and after reading the accountant-general's certificate, whereby it appeared that the said sum in Bank 3 per cent. annuities was standing in his name in trust in the cause, etc., his Honor ordered that the said £3681, and a sum of £55 cash, on the credit of the cause, be transferred to the Respondent King, etc.; and further ordered that the bill be dismissed with costs.

The Lord Chancellor, before whom the matter was brought by appeal in December 1831, pronounced his judgment thereon in January 1832, dismissing the appeal with costs.

The Appellant further appealed to this House against the said orders of the Vice-Chancellor and Lord Chancellor.

[143] Mr. Knight and Mr. G. Richards for the Appellant:—King, by signing the undertaking of the 15th of January 1818, bound himself to pay the £3000 to Kemp, as soon as the title to the estate was perfected. He admitted in his answer that the title was completed soon after, and that he continued in the undisturbed possession of the estate. He had no right to dispute the title of Kemp, or of the Appellant, who is Kemp's personal representative, to receive the £3000. The right of suing on the undertaking was vested in Kemp, who, with the consent of Wilson, lodged the same with Bignold as security for advances to Kemp and Wilson. Bignold did make the advances upon the faith of the security of the undertaking. As the assignee of Bignold and the administrator of Kemp, in one character or the other, if not in both, the Appellant was entitled to demand from King payment of the said sum with interest on the same, from 1818. The other Respondent, the assignee of Wilson, made no claim; if he, or the creditors of Wilson, had any claim to this money, they would surely have brought it forward.

The Solicitor-General (Sir C. C. Pepys) and Mr. Pemberton for the Respondents, (Mr. J. Russell and Mr. Purvis were with them):—

The Appellant had not established any of the material allegations on which his claim was founded, and the case stated by him, in the bills, was entirely fictitious and contrary to the truth; he pretends that Kemp had some equitable interest in the premises in Philpot-lane, and that King agreed with Kemp to give him £3000 for that interest. On these two allegations his suit proceeded, and they were both utterly false; Kemp never had any interest, legal or equitable, in **[144]** the premises in Philpot-lane; King never purchased, nor agreed to purchase of him any interest in these premises; neither Kemp nor Bignold had at any time such an interest in the

matters of this suit as entitled them to sue King. No consideration moved directly or indirectly from either Kemp or Bignold for the undertaking of the 15th June 1818, and neither of them had any interest in the undertaking or in the sum mentioned in it; but even if Kemp had had any valid claim against the Respondent King upon that undertaking, such claim was the proper subject of an action at law, and was not a matter of equitable jurisdiction.

If the Appellant was constituted sufficiently for the purposes of this suit personal representative of Kemp, which was not the case, still he would not be entitled to any relief in that character, because his claim in the character of such personal representative had been introduced into the record irregularly; neither was he entitled to sue as assignee of Bignold, because he had not shown that the supplemental bill was filed and the suit prosecuted with such consent of Bignold's creditors as was required by the Bankrupt laws.

The evidence read in the Court below, which was the only evidence in the cause, not only did not prove the allegations contained in the bills, that the money in question belonged to the Appellant, either as the assignee of Bignold or as the personal representative of Kemp, but, on the contrary, distinctly proved that the same belonged to Wilson, an uncertificated bankrupt, to whose assignee, or to any other person entitled, the Respondent King was willing to pay the money, but without interest.

[145] The Lord Chancellor, after touching on the points urged in the arguments, recommended their Lordships to postpone their judgment until he could have time to consider the question.

His Lordship, in moving the judgment, said (Aug. 12): This, My Lords, was an appeal from my own judgment in the Court of Chancery, affirming a decision of his Honor the Vice Chancellor. I stated, in the course of the arguments at your Lordships' bar, the difficulties which I felt upon the questions that were brought for your decision. The principal one was this: it appeared that the Respondent, King, had made the contract in his undertaking nominally with Robert Kemp, in whose right the Appellant claims; but then it was urged that the name of Kemp was used for Wilson's name, as he was an uncertificated bankrupt; and if the property was purchased in his name, his assignees might hear of it, and could come upon it. That latter suggestion appeared so reasonable, that it satisfied me, in the absence of all proof to the contrary, as it had satisfied the Vice-Chancellor in the Court below; and I shall not now detain your Lordships further on the case than to move that your Lordships affirm the judgment appealed from, and with costs.

By order of this date (Aug. 15), the decree of the Court below was affirmed with £419 for their costs to the Respondents.

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[146] APPEAL

FROM THE COURT OF CHANCERY.

The Right Hon. the Earl of DURHAM,—*Appellant:* JOHN WHARTON, Esq., and SUSAN MARY ANN, his Wife,—*Respondents.*

[S.C. 10 Bli. N.S. 526; 3 My. and K. 472; 5 Sim. 297. Commented on and followed in *Powys* v. *Mansfield*, 1836, 3 My. and Cr. 359, 374; *Chichester* v. *Coventry* 1867, L.R. 2 H.L. 76; and *Dawson* v. *Dawson*, 1867 L.R. 4 Eq. 515; and see *Leighton* v. *Leighton*, 1874, L.R. 18 Eq. 472.]

W. L. bequeathed £5000 to the daughter of his brother J. L. charged on his real estates, and authorized the interest thereon to be raised for her maintenance, if J. L. should so direct; and he devised his real estates so charged to J. L. in fee. J. L. bequeathed £10,000 in trust for his daughter for life, and after her death, in trust *for her children*, and declared that that sum should be in addition to the sum to which she was entitled under W. L.'s will. The daughter afterwards married. Her father advanced to her husband £15,000 as

her marriage portion, and, by the settlement, pin-money and a jointure for the wife, and portions for the *younger children of the marriage*, were provided out of the husband's property, and the £15,000 were declared to be in satisfaction of the sums to which the wife was entitled under W. L.'s will. The father died in 1794; no demand was made for the £10,000 until 1826. HELD by the Lords (reversing the decrees of the Vice-Chancellor and Lord Chancellor) that the £10,000 legacy was satisfied by the marriage portion, assuming, as one ground of their judgment, that the daughter was apprised of the contents of her father's will soon after his death.

The case has been twice reported, first by Mr. Simons, vol. 5, p. 297, where the wills and other instruments, upon the effect of which the question in the cause arose, are fully stated; and again, upon appeal, by Messrs. Mylne and Keen, vol. 3, p. 472, **[147]** where the Vice-Chancellor's decree, affirmed by the Lord Chancellor, and now appealed from, is set forth, in substance. The latter report also contains (pp. 473 and 474) the only positive evidence that was given, on behalf of the Respondents, of their alleged ignorance of the contents of General Lambton's will up to the year 1826.

Another allegation of the Respondents, which was strongly urged by their counsel in the Court of Chancery and before the Lords, but as strongly denied on the other side, was that Mrs. Wharton was the favourite child of her father. The witness examined on behalf of the Respondents on that point, deposed that he knew General John Lambton, the testator in the cause, for 10 years before his death, and had frequent opportunities of seeing him and his four children (including the Respondent, Susan Mary Ann Wharton), in London, and in the county of Durham. Deponent never heard the said John Lambton express any particular affection or regard for any one of his four children in preference to the other, but he thought that Susan was his favourite child; and his reason for thinking so arose from the circumstance of her being the person employed by the others, when deponent and they were together, to speak to the testator to effect any private object, though of a trivial character. Deponent was not aware, after so long a time, of any particular circumstance touching the matter in question, but his general impression, and the feeling of his mind was, that Susan Mary Ann was the favourite child of her father.

The Master, to whom the cause was referred by the Vice-Chancellor's decree, by his report made in pursuance thereof, and dated the 20th of April 1834, certi-**[148]**-fied that he calculated interest on the legacy of £10,000 to the Respondent, Susan Mary Ann Wharton, at the rate of 4 per cent. per annum, from the death of the testator, in March 1794, up to the date of the report, and he found the legacy and the interest thereon to amount together to the sum of £26,038 7s. 1d. This report was confirmed.

Lord Durham appealed as well from the order confirming the report, as from the decree of the Vice-Chancellor and the decree of the Lord Chancellor affirming it.

Mr. Bickersteth and Mr. Pemberton (Mr. Stephenson was with them), for the Appellant, pursued nearly the same course of argument that was used by the counsel for the Appellant in the Courts below, relying chiefly on the rule of courts of equity, by which a legacy given by a father to a child is held to be adeemed or satisfied by a portion, subsequently given by the father upon the marriage of that child. The propriety of applying that rule to this case was confirmed by the identity of the sum advanced on the marriage of the Respondents with the amount of the sum named by the testator in his will as the intended portion of his daughter. It was assumed in the Courts below that these sums did not exactly correspond in amount, because there might have been an arrear of interest, alleged to amount to £2000, on the £5000 due to Mrs. Wharton at the time of her marriage, under the will of her uncle, William Lambton; but it might be seen by looking into that will, that no interest could become payable on that legacy to Mrs. Wharton until she attained the age of 21 or married. The trustees of that will were authorized, until the legacy became payable, to pay her father the **[149]** interest of it for her maintenance and education, if he so directed them, but no such direction was given by her father. Mrs. Wharton resided with, and was maintained by her father until her marriage, which took place on the same day on which she attained the age of 21. It was, therefore, a mistake to suppose that any interest was due to her on that legacy at the time of her marriage,

and the legacy itself was then paid, together with her portion, making together the sum of £15,000.

The Master reported that the legacy of £10,000, together with the interest on it since the general's death, amounted to £26,000 and upwards. If it should be held that that legacy was not adeemed, still all claim to interest on it must be considered to be barred, by reason of the length of time which the Respondents permitted to elapse without bringing forward their claim, for it was impossible, under the circumstances, to suppose them ignorant of the bequest in General Lambton's will.

In addition to the authorities referred to in the reports of the case in the Courts below, they cited *Platt* v. *Platt* (3 Sim. 503) (in which they said that the Vice-Chancellor, after full consideration, pronounced a decision quite opposite to his decree in the present case), and *Weall* v. *Rice* (2 Russ. and Myl. 251), decided by the late Master of the Rolls.

Sir William Horne and Mr. Knight (with whom was Mr. Pole), for the Respondents, used the same general arguments and cited the same cases that they had successfully urged before the Vice Chancellor. They distinguished the case of *Weall* v. *Rice* from **[150]** this, admitting that the Master of the Rolls there came to a proper conclusion. As to the case of *Platt* v. *Platt*, they observed that, as reported, it was inconsistent with the authorities that were referred to in the report. That case came before the Vice-Chancellor in 1830, and his Honor might be said to have more experience in the decision of the present case in 1832, or to have considered the circumstances to be different. The probability was that his Honor's attention had not been drawn to the difference between the limitations in the will and in the settlement in that case, as it was in this; certainly his Honor had not the slightest notion, on hearing this case, that he had ever decided any such point; for he had in vain asked counsel, and so did the Lord Chancellor on the appeal, to refer him to any case, in which, the limitations of the portions in the will and settlement being different, the one was held to adeem the other. It was, therefore, to be inferred that the point said to be decided in *Platt* v. *Platt*, was never brought before either of the Courts in the arguments in the present case.

Lord Lyndhurst, (on the last day but one of the Session of Parliament, after having moved judgments in other cases), observed, that this was a case of importance, both as regarded the sum in dispute and the principle of law involved in it. There was a difference of opinion upon the question between those noble and learned Lords who had heard the case. Under these circumstances, therefore, it would not be fitting that any decision should be now given, in the absence of the noble and learned Lord who had decided the question in the Court below. It was necessary that some communication should take place between his noble and learned friend, and another noble and learned Lord **[151]** (Lord Devon), who had attended to the case, and himself, and the result of that communication might be to remove the difference of opinion which existed. At all events, such a difference of opinion now existing, it would not be right, as regarded his noble and learned friend, who was absent (Lord Brougham had left London in ill health), or just to the parties concerned in the case, that judgment should be given at present.

Judgment was postponed.

Lord Lyndhurst (19 Aug.):—The facts of this case are very particularly stated in the fifth volume of Mr. Simons' Reports; is is unnecessary, therefore, that I should enter into any minute detail of them. William Lambton by his will bequeathed to his niece, Susan Lambton, now Mrs. Wharton, a legacy of £5000, and he charged this with other legacies upon his real estate, which he devised to his brother, General John Lambton; General John Lambton by his will bequeathed £10,000 to Susan Lambton, and afterwards, upon the occasion of her marriage with Mr. Wharton, he gave her a portion of £15,000, and it was stated, in the articles of agreement upon the marriage, that such portion was in satisfaction of all sums that she was entitled to under the will of the testator's brother, William Lambton. The question in the cause is, whether that marriage portion is to be taken as a satisfaction, not only of the sum to which she was entitled under the will of William Lambton, but also as a satisfaction or ademption of the portion bequeathed to her by

the will of her father: whether she is entitled, in addition to the £15,000 given on her marriage, to the £10,000 under her father's will.

There are some circumstances in this case which **[152]** strike me as singular. General John Lambton died in the year 1794; no claim to this legacy was made till 1826, a period of 32 years. It is stated, on the part of Mr. and Mrs. Wharton, that they were wholly unacquainted with the circumstance of any legacy having been bequeathed to her by her father. Now it appears that immediately after the death of General John Lambton, his will was read at Lambton Hall, in the presence of Mrs. Wharton's brother, William Henry Lambton, the sole executor of General Lambton, in the presence also of Ralph John Lambton, her brother, who was one of the trustees of her marriage settlement, and of Dorothy Lambton, her sister, who took a legacy of £10,000 under the will. It is very extraordinary, therefore, that Mrs. Wharton should have had no knowledge of any legacy having been bequeathed to her by her father's will. It is the more extraordinary, as upon a recent occasion she stated that she had considered herself the favourite child of her father, and thought it extremely probable that she should have a legacy under his will. This would naturally have led to inquiry. It appears to me, under these circumstances, very difficult to believe (the parties living on good terms together, and Dorothy Lambton herself taking a legacy of £10,000) that it should never have come to the knowledge of Mrs. Wharton, her sister, that she also had been mentioned in the will, and that a legacy of £10,000 had been bequeathed to her.

But there is some evidence which has been insisted on for the purpose of leading to the conclusion that, in truth, she had no knowledge of this legacy. It seems that Lord Durham was desirous of selling a part of the property on which the legacy was charged, and he entered into a treaty for that purpose with **[153]** Lord Eldon. Lord Eldon required an indemnity against this legacy, in consequence of which, Mr. Ward (who was the solicitor of Lord Durham), waited upon Mr. and Mrs. Wharton, and had a conversation with them on the subject of the legacy, and in the course of that conversation Mrs. Wharton stated that she had never heard that she was entitled to a legacy under her father's will. But nothing stated by Mrs. Wharton, who is a claimant and party in the cause, can be made use of as evidence in her favour, although addressed to the agent of Lord Durham. All the presumptions then are strongly in favour of the conclusion that it must have been known at or soon after the death of General Lambton, that Mrs. Wharton had been mentioned in his will, and that a legacy of £10,000 had been bequeathed to her. Whatever inference, therefore, can be properly raised from this circumstance, ought to be raised against the claim of Mr. and Mrs. Wharton.

Another point urged in the course of the argument was, that the amount of the two sums in the wills did not correspond with that in the settlement. It is true that the legacy left by William Lambton amounted to £5000, and the legacy bequeathed by General Lambton to £10,000, those two sums together making £15,000. On the other hand, the marriage portion amounted to £15,000. But then it is said there was an arrear of interest due on the legacy of £5000 at the time of the marriage, amounting to upwards of £2000; so that the sum on the one side would, on that calculation, have been in the whole £17,000 or upwards, and the sum on the other side only £15,000. Now assuming these facts to be as I have stated them, still it does not appear to me that they at all affect this **[154]** case. It is not necessary, in order to raise the question of ademption, that the sums should exactly correspond. There are many cases (and many were cited in the course of the argument at the bar) in which the proportional difference was much greater than is supposed to have existed in the present instance. But, in truth, there is no evidence in this cause to show that any arrear of interest was due; and after a lapse of 32 years we cannot, under the circumstances of this case, assume that any such arrear existed.

It was also argued, that the limitations under the will are widely different from the limitations under the settlement, and that such difference would prevent the principle of ademption from being applicable to this case; and indeed, the point was alluded to in the judgment of the Vice-Chancellor; but I apprehend that this will not prevent the application of the principle of ademption, and that the authorities are all the other way. In the case of *Trimmer* v. *Bayne* (7 Ves. 508—516),

which was cited in the course of the argument, Lord Eldon expresses himself in these words: "The Court does not inquire whether the portion by the will is entirely and absolutely to the child, or what is afterwards advanced in this form, a settlement upon marriage, which not being a performance of a covenant or satisfaction of a debt, yet is a presumed satisfaction of the intended portion;" and in another case, *Baugh* v. *Read* (3 Bro. C. C. 191, and 1 Ves. jun. 257—263), which was referred to for another purpose, and in which this point had been insisted on in the argument, Lord Thurlow thus expressed himself: "Upon the marriage of his daughter he transfers part of that specific sum so men-**[155]**-tioned, I agree, to different uses; yet I doubt whether, though not to the same uses, it will not operate as an ademption, if not a satisfaction, being given as an advancement upon marriage." But there is a case of *Monck* v. *Lord Monck* (1 Ball and Beat. 298), decided by Lord Redesdale which is directly in point: Lord Redesdale says, "It was pressed upon me by the counsel for the plaintiff, that the variance in the provision by the settlement and the will distinguished this case. That is a circumstance which may avail to prove it not to be in satisfaction of a debt or covenant, but never of a legacy given as a provision. This distinction was taken by Lord Hardwicke in the case of *Clarke* v. *Sewell* (3 Atk. 98), and in *Trimmer* v. *Bayne* this doctrine is recognized by Lord Eldon, wherein he states the question to be, whether, on the limitations being different, it was an ademption; and he lays down this rule, that where a parent or person in *loco parentis* gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, advances money in the nature of a portion to that child, that will amount to an ademption of the gift by will, and it will be presumed he meant to satisfy the one by the other." The same point was also decided in *Platt* v. *Platt* (3 Sim. 503), by the present Vice-Chancellor. "Although there is a material difference," he observed, "between the provision made by the will and the provision under the settlement, still the one is a satisfaction of the other." The question was thus raised and presented to the mind of the Vice-Chancellor, and his Honor in that case decided in favour of the ademption. I conceive, therefore, that the circumstance of the **[156]** limitations being different does not at all affect the question.

Another point raised was this, that by the terms of the settlement the £15,000 were to be in satisfaction of all that Mrs. Wharton was entitled to under the will of her uncle, William Lambton, and it was therefore contended, that as this provision was stated to be in satisfaction of a debt due by General John Lambton, it could not also be taken to be in satisfaction or ademption of what she otherwise would be entitled to under his will. I have never felt the force of that argument. It was necessary, as far as related to the debt, that the provision in satisfaction of it should be in terms expressed; but as far as related to the provision by the will, it was not necessary, because that effect is produced by operation of law.

The case of *Baugh* v. *Read*, to which I before referred, was cited as an authority upon this point. That case is reported both in Brown and in Vesey, junior; the best report is in Vesey. It does not appear to me, after carefully considering that case, that it supports the position for which it was cited. By the terms of the will the legacy there given was in satisfaction of a debt due under the settlement made on the marriage of the testator. As far as related to the portion—a portion of £5000—in the instrument by which it was created, there was a covenant on the part of the daughter that she would, when she came to the age of 23, assign the sum that she was entitled to under the will of her grandfather. These circumstances are widely different from those of the present case; but still it was not with reference to them, as I collect from the different parts of the report, that Lord Thurlow decided the case; he **[157]** decided it with reference to the nature of the fund out of which the legacy was to be paid. That appears from many passages in the report, and it is also confirmed by the concluding passage, in which Lord Thurlow says, "it is impossible to say this is either a satisfaction or an ademption. It is not express enough. I think the father intended to give this right to a sum, expected to accumulate before his death by the addition of all these sums at least, if not of others: therefore it does not come up to that point which I should have thought it reached," (that was with respect to the ademption), "and perhaps have been wrong in so thinking, if it had been a certain sum distributed in certain

proportions" (1 Ves. jun. 265). Such are the grounds on which that case was decided, and which in truth have no application to the present question.

I have now stated to your Lordships, the various objections which were urged at the bar for the purpose of leading your Lordships to the conclusion, that the general rule of ademption could not be applied to the present case; it appears to me that none of them are sufficient for that purpose, and that the general rule of law ought in this instance to prevail. I am, therefore, of opinion that the judgment should be reversed.

I wish to add, that the parties on both sides deprecate further delay, and are anxious for the judgment of your Lordships.

The Lord Chancellor put the question, and the decrees and order appealed from were reversed without costs.

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[159]

APPEAL

From the Court of Exchequer in Equity.

FRANCIS MORGAN,—*Appellant;* HERBERT EVANS, JOHN JENKINS and PHILLIP HURD,—*Respondents.*

Cross Appeal.

HERBERT EVANS,—*Appellant;* FRANCIS MORGAN, JOHN JENKINS and PHILLIP HURD,—*Respondents.*

[Mews' Dig. i. 128, 369; xi. 725; xiii. 1449. S.C. 8 Bli. N.S. 777, *q.v.*]

J. M. had been W. L.'s solicitor, and his agent in obtaining money on mortgages and otherwise, and also receiver of the rents of his estates; on a bill filed by W. L. against him and the mortgagees, a decree was made for a general account against J. M. and for the taxation of his bills of costs, notwithstanding there were settled accounts, signed by W. L., and securities given by him, and the vouchers delivered up to him. The decree having directed the examination of the parties, touching the matters in dispute, W. L. and J. M. filed interrogatories for their respective examinations. J. M. answered; W. L. refused to answer; whereupon an affidavit was filed by J. M., pursuant to an order of court, verifying the facts to which his interrogatories were directed; Held by the Lords, reversing the decision of the Court of Exchequer, that this affidavit ought to be taken as evidence of the advances of money stated in it as constituting the debt claimed by J. M. from W. L., and for which J. M. held and produced W. L.'s bond.

The Master having, pursuant to the decree and to subsequent orders in the suit, made his general report, to which no [160] objections were taken, nor exceptions allowed, nor did any error appear on the face of it; Held that the report could not, by an order made on the hearing for further directions, be sent back to the Master to be reviewed.

J. M. having recovered judgments against W. L. upon warrants of attorney, which purported to carry interest, and having by the decree been made accountable for the rents, received from W. L.'s estates, with interest; Held that under the circumstances the judgments also ought to carry interest.

On appeal and cross-appeal, the former being allowed and the latter dismissed, the Lords, holding that the Appellant in the appeal ought, as the representative of mortgagees, in a suit originally instituted to redeem mortgages, to have had the final decree, with costs, in the Court below, gave him costs in the cross-appeal, by way of compensation.

This is the fourth appeal to the House of Lords from the Court of Exchequer, in a suit originally instituted in the year 1783 by Sir Watkin Lewes, against John Morgan, William Farrer, James Morgan, Henry Wilder and George Morgan; all since deceased. The cause is reported, in several stages, in 3d Anstruther, 769;

4th Dow, 29; 5th Price, 42; and 3d Younge and Jervis, 230 and 394; to which, respectively, particular references will be made. The Appellant, Francis Morgan, is the sole personal representative of John Morgan, who was the principal defendant in the original and continued suit. Herbert Evans, the Respondent in the first appeal and Appellant in the cross appeal, is the heir at law of Sir Watkin Lewes; the other Respondents are his legal personal representatives.

Sir Watkin Lewes, by his bill, filed as above-mentioned, afterwards amended by adding his wife and **[161]** daughter, and the wives of John and James Morgan as parties, stated several indentures executed by him and his wife, one of which, dated December 1772, was a mortgage granted by them of certain estates in Pembrokeshire, for securing £5000 with interest at 5 per cent. to a Dr. Kent: another, dated in March 1775, was a settlement of their estates in the counties of Carmarthen and Glamorgan; in which settlement the premises therein mentioned were limited to the said James and George Morgan, brothers of the said John Morgan, for a term of 500 years; upon trust to raise by sale or mortgage £12,000, of which sum £5000 was to be applied to pay off Dr. Kent's mortgage; the residue to be paid to Sir Watkin Lewes for his own use. The bill, after stating that Chardin Morgan, another brother of John Morgan, was substituted for James, in the trusts of the above-mentioned term, further stated that John Morgan, being Sir Watkin's solicitor and agent, prepared several of the indentures therein mentioned, and that having formed to himself a plan of getting Sir Watkin's estates, or a chief part of them, into his possession, proposed to lend him money on the assignment of the said term, and of the premises therein comprised; and that in order to induce him to comply with that proposal, he assured Sir Watkin that he would advance or procure the money for him at 4 per cent. interest; and that in prosecution of such plan, and by means of such promises, he prevailed on him (Sir Watkin) to execute certain instruments which he (John Morgan) had drawn up. The purport of these instruments was then stated; one was a mortgage, dated 2d June 1775, from Sir Watkin, his wife and the trustees of the premises comprised in the term to William Farrer and James Morgan, to secure **[162]** the payment of £6610 with interest at 5 per cent.; Another was a mortgage, dated 2d of April 1776, from the same to the same, of the said premises for the then residue of the term, to secure the payment of £8000, with interest at 5 per cent., which sum was composed of the above £6610, and a further alleged advance of £1390: And a third of the instruments was a further mortgage, dated 3d April 1776, of the same premises and term, subject to the last-mentioned mortgage, to secure payment of £4000 with like interest to Henry Wilder.

The bill then stated, that a great intimacy had for several years subsisted between Sir Watkin Lewes and John Morgan, and that Sir Watkin used to employ him as his attorney and solicitor in most of his affairs, and particularly in preparing the several mortgage deeds and securities before-mentioned, and esteemed him to be a man of honour and integrity, and therefore placed so entire a trust and reliance on him, that he would, and did, readily execute any deed or writing which he (John Morgan) produced to him to be executed, without minutely or at all examining the contents thereof; and that, under such faith and confidence, he executed the several mortgage deeds and securities before-mentioned to Farrer and James Morgan, and to Wilder, without examining them. The bill charged that the said several sums of £6610, £1390, and £4000, making together £12,000, mentioned to be the respective considerations of the said several mortgages, were not *bona fide* advanced by Farrer and James Morgan, and Wilder, or any of them, or any other person on their behalf, to Sir Watkin, or to his said trustees; and also charged, that when the mortgage for £6610 bore date, although Sir Watkin was made to give a **[163]** receipt for £6610, with interest from that date, as if then received, he, in fact, only received £800: and that the greatest part of the pretended consideration of £6610 was never advanced, but was made up of bonds, notes and other securities, before given by Sir Watkin, and of some other sums before charged to him on some other occasions, the particulars whereof John Morgan had never disclosed; and that the £1390 was not advanced, but great part of it was kept in the hands of John Morgan, who, notwithstanding, charged interest for the whole of the said sums, as if they had been actually and *bona fide* advanced to Sir Watkin Lewes.

The bill next stated, that in 1778 and 1779, actions of ejectment were brought by

the said mortgagees against Sir Watkin and the tenants of the premises comprised in the term, and also against the tenants of other lands of Sir Watkin not comprised therein, and judgments were recovered in the actions, and John Morgan, by force thereof, got into possession of the estates as agent to the mortgagees; and the bill also stated, that actions of debt were brought by James Morgan, as executor of Chardin Morgan, then deceased, for £1547 19s., pretended to be due upon bonds; and by John Morgan, for £1142, pretended to be due to him upon bond, and for £569, pretended to be due to him on an award in the bill stated; and that judgments were recovered against Sir Watkin in the said actions; and that John Morgan, by virtue of executions sued out on these judgments, seized a quantity of timber that was cut down for the use of Sir Watkin on one of his estates in Glamorganshire, not comprised in the said term.

The bill prayed that an account might be taken of all dealings and transactions between Sir Watkin **[164]** Lewes and the defendants, and in particular between him and John Morgan, of what was really due to them respectively on account of the matters stated in the bill; and that an account might be taken of the rents and profits of Sir Watkin's estates, received by the defendants or any of them; and that so much of the sums of £6610, £1390 and £4000, as should appear to have come to the hands of Chardin Morgan and George Morgan respectively, might be answered by James Morgan, as the representative of Chardin Morgan, and by George Morgan accordingly; and that the award in the bill mentioned might be declared to be void, and that John Morgan might be compelled to make out and deliver to Sir Watkin Lewes proper bills of his fees and disbursements claimed to be due to him, and that the same might be referred to be taxed; and that on payment to the defendants respectively of what should be found due to them on the taking of such several accounts, Sir Watkin might be let in to redeem the estates comprised in the 500 years term, and might be restored to the possession of them, and of the other estates in the possession of the defendants, and not comprised in the term; and that a receiver of the rents and profits of the estates comprised in the said term might be appointed until such redemption could be had; and that the defendants might be restrained from all further proceedings at law against Sir Watkin, touching the matters aforesaid, and from disposing of any timber then remaining unsold, and from cutting down any other timber growing on Sir Watkin's estates.

John Morgan, by his answer, stated, that his acquaintance with Sir Watkin Lewes began in 1773, **[165]** and that he procured for him, at his request, in the years 1774 and 1775, five several sums of money, viz. £500, £220, £120, £950, and £400, all which were the monies of Chardin Morgan, and were *bona fide* advanced to Sir Watkin, and that he executed five several bonds to secure payment of the same sums respectively, with interest, to Chardin Morgan; that upon a deliberate settlement of such bonds, in 1775, with the interest due on them, and with other monies advanced to Sir Watkin, the sum total then acknowledged by him to be due from him was £2400, for which he executed a bond to Chardin Morgan, bearing date 28th February 1775, consolidating the said five bonds. The answer next set forth the consideration for the mortgage for £6610, averring that the whole of that sum was *bona fide* advanced to or for the use of Sir Watkin, and that it was made up partly of funds vested in William Farrer and James Morgan, as trustees of the marriage settlement of John Morgan and his wife, amounting to £4209 7s. 1d., which, together with 12s. 11d. advanced by John Morgan, and with the said bond of £2400 assigned to them, for full consideration, by Chardin Morgan, made up the sum of £6610.

The answer, after stating that John Morgan was by indenture appointed receiver of the rents of Sir Watkin's estates, to keep down the interest of the mortgages and to account for the surplus to Sir Watkin, averred the further advance of £1390 by Farrer and James Morgan to John Morgan, as Sir Watkin's attorney, for the use of Sir Watkin; and of £4000 by Henry Wilder, as a trustee of the marriage settlement of James Morgan and his wife; and that the said sum of £1390 consisted of £1200, the produce of certain bonds described in the answer, **[166]** and of £190 in cash advanced by John Morgan, and was added by way of further mortgage of the premises comprised in the 500 years term, for securing to Farrer and James Morgan payment of the same with interest, as well as of the £6610, the two sums making together a mortgage to them of £8000; and, subject thereto, the same premises were,

by indenture of the 3d April 1776, assigned by way of subsequent mortgage to secure payment of the said sum of £4000 with interest to Wilder. John Morgan, by his said answer, set forth several other sums as actually advanced by Chardin Morgan for the use of Sir Watkin, for which bonds or other securities were given by Sir Watkin; and he stated, that an account of various sums, advanced from time to time by himself, was delivered to Sir Watkin, and that he, after minutely examining such account, and making some deductions therefrom, allowed the same, and underwrote as follows:—"February 24th, 1777, settled and allowed the above account, errors excepted; the balance, after deducting £55, being £567, paid by note of hand—*Watkin Lewes;*" and that Sir Watkin gave such note of hand, whereupon all the vouchers produced by John Morgan, on the settlement of the account, were delivered up to him.

The answer further stated, that an action was brought by John Morgan for the said £567, and for five several sums of £200, £100, £60, £35 and £35 alleged to have been advanced to Sir Watkin, or for his use; and a verdict was recovered therein for £1142, including interest; upon which Sir Watkin executed a warrant of attorney to confess judgment against him for £2000, to secure £1142 with interest thereon; and that John Morgan recovered another verdict, and judgment thereon, for a further [167] sum of £569 due to him for bills of costs; and he caused writs of elegit to be issued against certain estates of Sir Watkin not comprised in the 500 years term, on those judgments and on a judgment for £1547 19s., recovered by James Morgan against Sir Watkin, for monies advanced to him by Chardin Morgan.

The other defendants also put in their answers. No witnesses were examined. Before the cause was heard, an order was made, by consent of all parties, directing the mortgaged estates to be let, and the rents to be paid to John Morgan as receiver.

On the hearing of the cause * on 2d of July 1796, it was decreed that an account be taken by the Deputy Remembrancer of all dealings and transactions between Sir Watkin Lewes and John Morgan; and of all sums of money received by John Morgan, as agent to Sir Watkin and to the defendants, the mortgagees; and when and how such sums were applied; and that it be referred to him to tax the several bills of costs claimed to be due to John Morgan from Sir Watkin Lewes as his attorney, or otherwise, and to report what he should find due to John Morgan on account thereof; and to take an account of the rents and profits of the mortgaged estates, and of the timber which had been felled thereon, and on the estates not in mortgage, received by John Morgan or by any person by his order or for his use, or which without his wilful default he might have received; and likewise an account of the rents and profits received by him of the estates not in mortgage, and of which he had been in possession under the several judgments in the pleadings men-[168]-tioned; in the taking of which several accounts, and in the taxing of the bills of costs, all just allowances were to be made, and all parties were to be examined upon interrogatories touching them as the Deputy Remembrancer should direct, and he was at liberty to report special circumstances, etc.; and if in taking the said accounts, and in taxing the bills of costs, it should appear that any vouchers in support of any articles were lost, then John Morgan was required to make oath that such vouchers did exist, and of the contents or purport of them, and that the same had been delivered up to Sir Watkin Lewes, etc.

Under that decree interrogatories were exhibited by Sir Watkin Lewes for the examination of John Morgan, and his answer thereto was put in soon after, but no further steps were then taken to prosecute the decree.

On a motion made on behalf of Sir Watkin Lewes on the 20th of June 1801, opposed by John Morgan, an order was made for a separate report of all dealings and transactions between them in respect of all monies actually received and paid on account of the mortgages and judgments, and of all monies received by John Morgan as agent to Sir Watkin and the mortgagees, and of the application thereof, and of the rents and profits of the mortgaged estates, and of the estates not in mortgage, possessed by John Morgan under executions, and of the timber, etc.

In pursuance of that order, the deputy remembrancer made a separate report,

* See a report of the case, with the arguments and judgment, 3d Anstruther, 769-777; see also 4 Dow, 29, and 5 Price, 42-59.

dated July 1802, whereby he found, amongst other things, that in the year 1773 Sir Watkin Lewes applied to John Morgan to raise money for him upon mortgage, and that pending the negociation for a loan, John Morgan advanced to him divers sums, the monies of his brother Chardin, and took Sir Watkin's bonds to **[169]** Chardin for securing the repayment thereof, with interest, and these bonds were afterwards consolidated by Sir Watkin executing to Chardin Morgan a bond, dated the 28th of February 1775, for £2400. And he found that by indenture, dated the 4th of May 1775, and made between C. Morgan, John Morgan, W. Farrer and James Morgan, the last two being trustees of the marriage settlement of John Morgan and Amelia, his wife, after reciting the bond for £2400, and that the money advanced thereon was the proper money of John Morgan, and that the name of Chardin was made use of in trust for John, Chardin Morgan, by the direction of John Morgan, assigned that bond to Farrer and James Morgan. The report then set forth the mortgage for £6610 to Farrer and James Morgan, and found that the said sum was made up of the bond for £2400, of a sum of £4209 7s. 1d., produced by the sale of certain trust funds vested in Farrer and James Morgan as trustees as aforesaid, and of 12s. 11d. added thereto by John Morgan; and that the bond for £2400 was deposited by them with John Morgan, and the £4209 7s. 1d. was paid by them into his hands, as the agent both of Sir Watkin and of the mortgagees; the report next set forth the further mortgage for £1390 to Farrer and James Morgan, and that the same was made up of £1200, arising from the sale or other trusts vested in them as trustees as aforesaid, and of the sum of £190, added by John Morgan of his own money, and that the £1200 was received by John Morgan, whom the report then charged with the whole sum of £1390 as money actually received by him, as agent to Sir Watkin Lewes and the mortgagees. The Deputy Remembrancer next set forth the mortgage for £4000 to **[170]** Wilder, as trustee of James Morgan's marriage settlement, and found that the same was received by John Morgan as agent to Sir Watkin Lewes, and to Wilder, the mortgagee; all which said sums of £6610, £1390, and £4000 made together the sum of £12,000; and he found, in respect of the application of the £12,000, that John Morgan, as agent for Sir Watkin Lewes, paid to him or for his use the whole thereof: that in May 1778 Chardin Morgan died, having appointed James Morgan his executor; and in July of that year Sir Watkin Lewes executed a warrant of attorney to enter up judgment against him at the suit of James Morgan, as such executor, for further securing the principal sums of £1000 and £300 and £120, secured previously by a bond to Chardin Morgan, amounting, together with interest, to the sum of £1547 19s., and which judgment was entered up accordingly; and he found that in the said month of July Sir Watkin executed another warrant of attorney to enter up judgment against him, at the suit of John Morgan, for the sum of £1142, and which judgment was entered up accordingly: and he found that in 1779, John Morgan obtained a judgment against Sir Watkin for the further sum of £569 on account of bills of costs; and that over and above the said several sums, John Morgan had received as agent for Sir Watkin Lewes several other sums particularly mentioned in a schedule to the report, amounting together to £1340 4s., and that he had thereout paid on account of Sir Watkin £790 0s. 9¾d., and retained £530 3s. 2¼d. residue thereof towards the discharge of bills of costs claimed to be due to him.

In taking these accounts, the Deputy Remembrancer received the several securities executed by Sir Watkin **[171]** Lewes, and the accounts settled between him and John Morgan, as evidence that the sums mentioned in them had been *bonâ fide* advanced.

Sir Watkin Lewes took ten exceptions to the report. They were all overruled by the Court of Exchequer, by a decretal order dated 9th of February 1804, and from that order Sir Watkin and his daughter appealed to this House, as far as it overruled the 1st, 2d, 3d, 4th, 5th, 6th, and 10th exceptions.*

Upon the hearing of that appeal, in 1807, the Lords reversed the order of the Court of Exchequer as to the last-mentioned exceptions, and ordered the same to be allowed, and that it be referred back to the Deputy Remembrancer to inquire and certify, as to the first exception, what sums were advanced by John Morgan as the considerations of the bonds consolidated by the bond for £2400, and when, by whom, to whom, and in what manner such sums were paid. As to the third exception,

* The exceptions, and the Lord Chief Baron's judgment overruling them, are amply set forth, 5 Price, pp. 63 to 76.

that the same should be allowed as to the 12s. 11d., it appearing by the said report that such sum was not advanced by Farrer and James Morgan; and that the Deputy Remembrancer should inquire and certify when and in what manner the bond for £2400 was cancelled, and whether the same was ever, and when, delivered up to Sir Watkin. And as to the fourth exception, that the same should be allowed as to £190 (part of the £1390), it appearing by the said report that the same was not advanced by Farrer and James Morgan; and that the Deputy Remembrancer should inquire and certify whether Farrer and James Morgan did ever, and when, and in what manner, receive from Chardin Morgan £1200; and, if they did **[172]** receive it, whether they advanced the same, or any, and what part thereof, and in what manner, to Sir Watkin or to John Morgan as his agent. And as to the fifth exception, that the Deputy Remembrancer should inquire and certify how far the application of the £12,000 was consistent with or different from the account set forth in the answer of John Morgan to the bill. And as to the sixth exception, that he should inquire and certify whether the several sums of £1000, £300, and £120 were ever, and when, and in what manner, received by John Morgan from Chardin Morgan, to the use of Sir Watkin Lewes; and when and in what manner John Morgan first gave him credit for such sums.*

Under that order, which was made an order of the Court of Exchequer, the Deputy Remembrancer made his second separate report. Sir Watkin Lewes took exceptions thereto; the exceptions were, after argument, allowed, and the Deputy Remembrancer was ordered to review his second report. In pursuance of that order, the Deputy Remembrancer made his third separate report in June 1809. To that report also Sir Watkin took exceptions, most of which were allowed, and it was ordered that the Deputy Remembrancer should review his last-mentioned report as to the matter of the exceptions so allowed.†

[173] On the 11th of July 1810, an order was made, on motion on behalf of Sir Watkin Lewes, consented to on behalf of the Defendants, that it should be referred to the Deputy Remembrancer to take an account and make a separate report of the principal and interest due, or claimed to be due, to the Defendants, or any or either of them, upon the securities in the cause mentioned, and otherwise, together with the costs directed by the decree made on the first hearing to be taxed, with interest from the filing of the bill in 1783, deducting thereout and giving credit for the rents and profits of the estates in the pleadings mentioned, and other monies received by the Defendants, or any of them, for the Plaintiff's use; and in taking the accounts, the Deputy Remembrancer was to make half-yearly rests, and apply the overplus, if any, after keeping down the interest of all the said monies, in reduction of the principal monies; and that upon payment by the Plaintiff of what should be found due from him upon taking such accounts, together with the costs of the Defendants, they should deliver up possession, and execute a proper re-conveyance to him of the estates. (This report was to be without prejudice to any question in the cause.)

In pursuance of the order of May 1810, the deputy remembrancer made his fourth separate report in June 1811, and Sir Watkin again took exceptions, which were allowed, by an order dated the 5th of July 1813, overruling exceptions taken to that report by John Morgan and other Defendants, and the report was referred back to be reviewed; and it **[174]** was further ordered that the Deputy Remembrancer should compute interest on the principal sums of £4209 7s. 1d. and £4000, which would appear after revision of the report, in respect of the allowed exceptions, to be all that was really advanced as considerations of the mortgages to Farrer and

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* See this order, 46 Lords' Journals, p. 75, and the observations of Lord Redesdale and Lord Erskine, Chancellor, 5 Price, pp. 78 to 97. One of the points decided was, that as between solicitor and client settled accounts, or securities executed, are not evidence that the sums therein mentioned were advanced to the client.

† See these several reports and exceptions, and the decisions of the court upon them, 5 Price, 100 to 135. The subject matter of them was the consideration for the bond for £2400, and for the mortgage for £1390, Sir Watkin Lewes contending that these sums were never advanced; that John Morgan received for him only £4209 7s. 1d. as the consideration for the mortgage to Farrer and James Morgan for £8000, and that out of the £4209 7s. 1d. John Morgan advanced to Sir Watkin only £3681 5s. 6d.

James Morgan, and to Wilder. And it was further ordered that he should take an account of the rents and profits of Sir Watkin's estates in mortgage and not in mortgage, received by Farrer and James Morgan, and by Wilder, or by John Morgan, and also an account of the monies received by them for timber cut down on the estates; which accounts were to be carried on from the foot of the account mentioned in the deputy remembrancer's report of the 16th of July 1802; and that what should have been stated as so received should be carried to the mortgage account, and set off against what should be found to be due for principal and interest on the several mortgages in the pleadings mentioned.

From that order the defendants, who had taken the exceptions, which were thereby overruled, appealed to this House, and the Lords made an order in April 1816, reversing parts of the order appealed from.*

The order of the Lords having been made an order of the Court of Exchequer, the Deputy Remembrancer, in pursuance thereof, made his fifth report the 1st of February 1817, and thereby certified, in consequence of the allowance of Sir Watkin Lewes's exceptions, that **[175]** no evidence had been produced before him of the actual advance of £500 as the consideration of the bond for £500 of 31st January 1774, one of the bonds consolidated by the bond for £2400; that the sum of £4209 7s. 1d. proved as the consideration of the mortgage of the 2d of June 1775, together with the sum of £4000 received by John and James Morgan, of Wilder, as the consideration of the mortgage of the 3d of April 1776, making together the sum of £8209 7s. 1d., constituted the total amount of the mortgage monies actually received by John Morgan, as agent to Sir Watkin Lewes, and to the mortgagees, in respect to the mortgage transactions; and that he had proceeded to compute interest on the said sums of £4209 7s. 1d. and £4000, and to take the account of the rents and profits, and of money received for timber felled, from the foot of the account mentioned in his report of the 16th of July 1802, and had carried the monies so received to the mortgage account, and set the same off against the said principal and interest; and he found that on the 3d of September 1804, the monies so received by John Morgan for the said rents and profits and timber, exceeded the said principal sums, and all interest thereon to that time, by £999 7s. 10d.; and he found that since the 3d of September 1804, and previous to the 6th of June 1810, John Morgan had received, in respect of subsequent rents and profits of the said estates, several sums of money, amounting, together with the said £999 7s. 10d., to the sum of £4993 10s. 10¾d.

To that report John and George Morgan, and also Sir Watkin Lewes, took exceptions. The first exception of John and George Morgan was, that the Deputy Remembrancer, instead of having found that on the 3d of September 1804, the money received by John **[176]** Morgan, for rents and profits and timber, exceeded the principal sums of £4209 7s. 1d. and £4000, and all interest thereon to that time, by £999 7s. 10d., and that since that day, and previous to the 6th of June 1810, he had received in respect of subsequent rents and profits, several sums amounting, together with the sum of £999 7s. 10d., to £4993 10s. 10¾d., he not having been directed or warranted by the decree or orders to make such rest in the computation of interest on the principal sums, nor to have made a rest in the account of the rents and profits and money received for timber, *he ought to have carried* on the computation of interest on the principal sums, and the account of the rents and profits and money received for timber, down to the period of making his report, and then to have set off the amount of the principal and interest against the amount of the monies received for rents and profits and timber; and ought to have certified, as the fact was, that although the plaintiff had not brought down his charge for rents and profits received by John Morgan beyond the 6th of June 1810, yet John Morgan had brought in the accounts of money received for rents and profits down to the month of December 1816, up to which date the deputy remembrancer ought to have brought down such account.

* The questions for decision in that appeal, together with the observations of Lords Eldon and Redesdale, are reported 4 Dow, 29; and the substance of the several orders, reports and exceptions made and taken in the suit from its commencement is there stated. See also 5 Price, 139; and for the order of their Lordships in that appeal, see 50 Lords' Journals, 547.

All the exceptions were over-ruled, and the report was confirmed by an order dated the 8th of November 1817. By two orders, dated respectively 18th and 27th of the same month and year, John Morgan was restrained from receiving any further rents of Sir Watkin Lewes's estates, and he was ordered to pay into Court £4993 10s. 10¾d., being the amount of the balance found by the last report to remain in his hands, in respect of the rents and profits received by him, and **[177]** he and the mortgagees were ordered to give up to Sir Watkin the possession of the estates; and a reference was directed to the Deputy Remembrancer to take an account of the rents and profits received by them and John Morgan, and to compute interest at 5 per cent. on the sum of £4993 10s. 10¾d., from June 1810 to the time when the same should be paid into Court: and it was ordered that John Morgan should bring into Court the sum of £4000, the principal money secured by the mortgage to Wilder; and that the Deputy Remembrancer should make a separate report as to the amount of rents and calculation of interest distinct from his general report.*

From the several orders of the 8th, the 18th and the 27th of November 1817, John and George Morgan presented a petition of appeal to this House. That appeal was not decided until 1825. John Morgan had in the meantime been taking steps to prosecute the original decree of the 2d of July 1796. In November 1816 he carried in a state of facts before the Deputy Remembrancer, and exhibited interrogatories for the examination of Sir Watkin Lewes, which were allowed by the Deputy Remembrancer in 1818. Sir Watkin refused to put in his examinaiton in answer: On the 25th of June 1818 an order was made that he should show cause why the said state of facts should not be taken as confessed by him; on the 13th of November 1818 that order was discharged, and it was ordered that in case Sir Watkin should make default in filing his examination to the interrogatories, by the 1st of the then next term, John Morgan should be at liberty to make an affidavit of **[178]** the several facts to which the interrogatories were intended to apply, which affidavit the Deputy Remembrancer was to take into his consideration, and proceed in the accounts and inquiries before him under the decree of 1796. Sir Watkin did not put in any examination, and on the 12th of February 1819, John Morgan filed his affidavit in pursuance of that order. These different proceedings were stated in a supplemental paper presented to the House of Lords, for the purpose of the last-mentioned appeal; but before that appeal was disposed of all the parties to it died.

The cause and the appeal were revived by and between the present parties, and the appeal was decided in 1825. By the order (see the order, 57 Lords' Journals) then made by the House of Lords, it was adjudged that the order of Court of the 8th of November 1817, over-ruling the exceptions, should be affirmed; that the orders of the 18th and the 27th of November 1817 should be reversed, and that the Court of Exchequer should proceed in the cause, according to the decree of the 2d of July 1796, and to the order of the 11th of July 1810 (*vide supra*, p. 173).

That order of their Lordships having been made an order of the Court of Exchequer, the Master, in pursuance thereof, made his general report, dated 11th December 1826, thereby finding, among other things, that John Morgan, from the year 1774 to the year 1778, both inclusive, was employed as attorney, solicitor and agent to Sir Watkin Lewes, and received or charged himself as agent to Sir Watkin, with the several sums secured by the mortgages in the pleadings mentioned, making together £13,000, on the several days on which the mortgages were respectively dated, and that he paid, or applied to the account of **[179]** Sir Watkin, the whole of the £13,000; that he also received as such agent several other sums, amounting together to £1340 4s., and paid or applied the same to Sir Watkin's accounts; that in 1778, John Morgan recovered a judgment against Sir Watkin for the sum of £1142, composed of several minor sums; and in 1779 he recovered another judgment for the further sum of £569, claimed by him to be due from Sir Watkin for bills of costs; that all the bills of costs claimed to be due to him from Sir Watkin, as his attorney, solicitor or otherwise, were before taxed by the Deputy Remembrancer, who by his separate report thereof, confirmed by an order of court, 2d July 1812, certified that he taxed the said bills at £3829 0s. 6d, from which sum, after

* The arguments of counsel and the observations by the Court in making these several orders are reported, 5 Price, pp. 139 to 167.

deducting the sum of £2034 1s. 1d., received by John Morgan in money and security, there remained £1794 19s. 5d. due to him in respect of costs. The Master further found that the several sums of £6610, £1390, £4000, and £1000, secured by the mortgages, were received and paid by John Morgan as agent to the mortgagees, and to Sir Watkin; and that the principal monies due to him from Sir Watkin, on account of the matters aforesaid, were as follows:

The judgment recovered in 1778	£1142	0	0
The judgment recovered in 1779	569	0	0
The balance of the taxed costs	1794	19	5
Further monies paid to divers persons	107	2	5
Making together the sum of	£3613	1	10

The Master found that John Morgan, as agent for the mortgagees, received for rents and profits of the mortgaged estates, to Michaelmas, 1817, (from which [180] time they were paid into Court by the receiver), several sums of money, amounting together, after deduction of payments on account of the estates, to the sum of £32,966 12s.; that he received for rents and profits of the estates of Sir Watkin, not in mortgage, to July 1794, inclusive, several sums, amounting together to £1818 2s. 6d., and thereout paid on account of the estates, £76 6s. 11d., which being deducted from the receipts, left £1741 15s. 7d.; and that he received for timber felled on the mortgaged estates, £739 15s. 7d.; and that the said several sums of £32,966 12s., £1741 15s. 7d. and £739 15s. 7d., making together, £35,448 3s. 2d., constituted the total amount received by John Morgan for rents and profits of the said estates.

The Master further found, in pursuance of the directions of the order of the 11th July 1810, which was made part of the last order of the House of Lords, that the principal monies due on securities to the mortgagees, and the costs, consisted of the following particulars: three sums, secured by the before-mentioned mortgages, viz. £6610, £1390, £4000; the sum of £1547 19s., secured by the judgment recovered by James Morgan in 1778; (this last sum included the before-mentioned mortgage for £1000, and also a further mortgage for £300, on a decree in Chancery in a cause of *Lewes* v. *Popkin*;) the sums of £1142 and £569 secured by John Morgan's judgments in 1778 and in 1779; and his bills of costs, as taxed, at £1794 19s. 5d., all which several sums together made £17,053 18s. 5d., and included all the principal monies before mentioned to be due to John Morgan, except a simple contract debt of £107 2s. 5d. before mentioned; and the Master computed interest on the mortgage monies and costs, and set forth an account [181] of the interest, deducting such part of the principal money, as the surplus of the rents and profits, after keeping down the interest, had from time to time been sufficient to satisfy. And he again set forth the sums received from time to time for the rents and profits, together with the sums paid by the receiver for interest, pursuant to the order of the 27th of November 1817, out of the rents and profits received by him, and he made rests in the account of interest, and rents, and profits, half yearly, and applied the overplus, after keeping down the interest of the mortgage monies and costs, in reduction of all the principal monies and costs, as far as the same would extend; and he set forth the amount of the interest upon the mortgage monies and costs from time to time remaining unpaid, after deduction of the rents and profits received, when the same amounted to less than the interest due, and the amount of the overplus of such rents and profits, from time to time, when the same exceeded the interest due; and he found that there remained due, of the said principal monies, interest and costs, at the date of this report, after the deductions aforesaid, the sum of £3597 1s. 10d.; and in taking the accounts, he did not allow to the representatives of Chardin Morgan and John Morgan any interest on the said judgments.

The Appellant, F. Morgan, took two exceptions to that report; by the first, insisting that the Master, instead of having computed interest on the mortgage monies and costs, and having applied the overplus of the rents and profits, after keeping down such interest, in reduction of the principal monies due on all the securities, comprising the judgments, ought to have computed interest on the principal monies

due upon the judgments, as well as upon the mortgages and costs, [182] and applied the overplus of the rents and profits after keeping down the interest *of all the principal monies*, in reduction of the *sum principal monies*. By the second, he insisted that the Master, instead of having certified that he had not allowed to the representatives of Chardin and John Morgan any interest on *the judgments*, ought to have allowed interest on *all the judgments*, and to have stated the accounts so in his report.

These were the only exceptions taken to the general report, and they were overruled by an order, dated 4th of February 1827, which is one of the orders now appealed from.

The cause was brought on for hearing for further directions on the 3d of May 1827; when upon the application of the Respondents, without any previous notice to the Appellant, and without objection or exception to the report by the Respondents, the Chief Baron ordered that it should be referred back to the Master, to review his report, having regard to the first exception taken by George and John Morgan to the fifth separate report (see this exception, pp. 175 and 176, *supra*), and to the order of the Court, made the 8th of November 1817, whereby the said exception was over-ruled and the report confirmed, and also to the order of the House of Lords, dated 5th of July 1825; and that the Master should inquire, and report how far those proceedings ought to vary the balance stated by him in his report; and if he should find that such proceedings ought to vary the same, it was further ordered that he should correct such balance accordingly; and he was directed to tax F. and James Morgan their costs of the inquiry, such costs when taxed to be paid by Herbert Evans, [183] and the Master was at liberty to state special circumstances. (This is the second order now appealed from.)

On the 10th of December 1828, the Master made his report in pursuance of that order, and he found that all principal monies and interest due upon the mortgage securities were fully paid on the 3d September 1804, and that John Morgan at that date had received, for rents and profits and produce of timber felled, the sum of £999 7s. 10d. beyond all the principal money and interest due to and received by him for the mortgagees; and he further found that by his report of the 11th of December 1826, not having the said exception and orders particularly brought to his consideration, he certified that John Morgan received several sums of money, amounting together to £13,000, as agent for Sir Watkin Lewes; and which now, having regard to the said exception and orders, he found to be incorrect, and instead thereof he found that he received only £9209 7s. 1d., viz. £4209 7s. 1d. of Farrer and James Morgan, being the consideration for the mortgage of £6610, £4000 of Wilder, being the consideration for the mortgage of £4000; and £1000 of Chardin Morgan on an assignment of the benefit of a decree in the cause *Lewes* v. *Popkin*. And he certified that having found by his former report that John Morgan had paid to or on account of Sir Watkin £13,000, which included £2400 for the bond dated February 1775, and £31 19s. 5d. interest thereon, making together £2431 19s. 5d.; but the validity of that bond being questioned, and the allowance of these two sums being objected to, without sufficient evidence of the consideration of the bond, he had, having regard to the said exception and orders, required the Appellant F. Morgan, who, as executor of John Morgan, claimed [184] the benefit of the bond, to prove the consideration thereof, but he declined to produce any new evidence, relying on the report made on the 11th of December 1826, and on the evidence then produced, viz., an account, dated 24th of February 1777, signed by Sir Watkin Lewes (vide *supra*, p. 166), and the affidavit of John Morgan, sworn on the 12th of February 1819; and the Respondents Evans, Jenkins and Hurd having produced before him the separate reports made by the Deputy Remembrancer on the 15th of July 1802 the 10th of May 1808, the 13th June 1809, and the 25th of June 1811, together with the order of Court made on the 5th of July 1813, and the orders of the House of Lords made on the 8th of April 1816, and the 5th of July 1825, he had taken the same into his consideration, as explanatory of the first exception to the fifth separate report of the Deputy Remembrancer, and the said orders of Court and of the House of Lords, and had thereupon disallowed the said sum of £2431 19s. 5d., but he allowed, in lieu thereof, several payments appearing, by the separate report of the 25th of June 1811, to have been made by John Morgan, to and for the use of Sir Watkin Lewes,

amounting together to £1315 10s., which payments John Morgan had treated as satisfied by the bond for £2400; and the said sum of £1315 10s. being less than £2431 19s. 5d. by £1116 9s. 5d., he had deducted the last-mentioned sum from the £13,000, leaving the sum of £11,883 10s. 7d., which, having regard to the said exception and orders, he found to be the correct total amount of the several sums of money paid or applied by John Morgan to the account of Sir Watkin Lewes, and from which sum of £11,883 10s. 7d. being deducted the aforesaid sum of £9209 7s. 1d. received by John Morgan, there remained £2674 3s. 6d. due [185] to John Morgan on balance of such receipts and payments. He therefore found that the said exception and orders ought to vary the balance stated in his former report; and in order to ascertain how far the same ought to be varied, he had taken an account, in which he charged F. Morgan, as executor of John Morgan, with the said sum of £999 7s. 10d., and the monies appearing by his former report to have been received by John Morgan and Francis and James Morgan subsequently to the 3d of September 1804, for rents and profits of the estates, amounting in the whole to £17,097 9s. 2d., and he had allowed to F. Morgan the aforesaid sum of £2674 3s. 6d. balance in favour of John Morgan, and the other monies appearing by his said report to be remaining due from the estates of the said Sir Watkin Lewes, exclusive of the mortgage monies, amounting in the whole to the sum of £7835 4s. 4d., of which sum he found that the £1794 19s. 6d. balance of taxed costs was the only sum which carried interest; and in taking the accounts he had made half-yearly rests, as directed by the order of the 11th of July 1810, and applied the overplus of the rents and profits, after keeping down the interest on the said sum of £1794 19s. 5d., in reduction of all the said principal monies, so long as any part of such principal monies remained unpaid; and he found that, instead of there being a balance of £3597 1s. 10d. due from the estate of Sir Watkin Lewes at the date of his former report, as therein stated, there was then due to that estate from F. Morgan, as executor of John Morgan, £6534 7s. 7d. And he further certified, that Francis and James Morgan had, since the date of his former report, received under the mortgage assignment of the decree in *Lewis* v. *Popkin*, £1000, and [186] £300, which sums formed part of the judgment for £1547 19s., one of the securities mentioned in the former reports, and that £247 19s. only remained due on that security; and also that they had received £300 of rents and profits of Sir Watkin Lewes' estates; he therefore found that the said balance of £6534 7s. 7d. ought to be further varied in respect of these sums received since the former report. And he found that the balance due from F. Morgan, as executor of John Morgan, to the estate of Sir Watkin Lewes, amounted to the sum of £8227 10s. 2d.

To this report also the Appellant took exceptions, all which were over-ruled by the Lord Chief Baron, with costs, by an order dated the 12th of May 1829, which is the third order now appealed from.

The cause was heard, on further directions, before the Lord Chief Baron, and by an order dated the 6th of July 1829 (which is the fourth order under appeal), it was ordered and decreed, that the Master's last report be confirmed, except as hereinafter mentioned, and that F. Morgan, as personal representative of John Morgan, was entitled as against Sir Watkin Lewes' estate to be allowed in account interest at £5 per cent. from the 28th February 1775, being the date of the bond for £2400, upon the principal sum of £1315 10s., to any amount not exceeding, with the said principal, the sum of £4800, the penalty of the bond. And it was accordingly ordered, that the Master should review his last report, by allowing John Morgan's representative interest upon that sum of £1315 10s., at £5 per cent., from February 1775 up' to the time when the same should have been paid off and satisfied, the said principal sum and interest not to exceed the penalty of the said bond, and that in reviewing his report, he should, after satisfaction of the mortgage debts, due from the estate of Sir Watkin [187] Lewes, apply the rents of the mortgaged estates in satisfaction of the judgments, before he should apply the same in satisfaction of the principal sum of £1315 10s. and interest thereon, but without disturbing the application of such rents in the payments of the bills of costs and interest thereon. It was further ordered that the Master should inquire, having regard to the above directions, when the debt due from Sir Watkin Lewes' estate to John Morgan's estate was satisfied, and what balance, if any, was due to the former from the latter on the day when such debt was satisfied, and that he should compute interest at £4 per cent.

upon the balance, if any, which he should so find, from the day upon which the debt due from Sir Watkin's estate to John Morgan's estate, was satisfied, and also upon the monies which, since that day, had been received by John Morgan's representative, or the mortgagees or their representatives, out of the estate of Sir Watkin; and that he should add the amount of such interest to the aforesaid balances, if any, and monies since received, and that he should report how much remained due for principal and interest from the estate of John Morgan to the estate of Sir Watkin Lewes, upon the footing of the aforesaid declarations and directions. And it was declared that in the taxation of the costs in every proceeding in which the costs were not costs in the cause, the Master should allow no other costs than such as had been given by the order made in such proceeding, or were due by the general rules of the Court, and that where no costs were given by special order, or by the said rules, that he should not allow costs on either side; and that he should tax and apportion all parties (except the defendants Evans, Jenkins, and Hurd,) their respective costs, so far as the suit was to redeem the mortgaged premises; and that he should tax and [188] apportion the costs of all the parties, (except the costs of John and James Morgan and their respective representatives,) so far as the same had been occasioned by the controversy respecting the amount of the several mortgages and of the general balance due to or from Sir Watkin Lewes or his estate; and that he should deduct the amount of the costs of John Morgan, and of F. Morgan as his representative, so far as the suit was to redeem the mortgaged premises, from the balance which he should find to be due from the estate of John Morgan to the estate of Sir Watkin Lewes; and should tax Joan Wilder and Sir Watkin Lewes, and Evans, Jenkins and Hurd, their respective costs, so far as the same had been occasioned by the controversy respecting the amount of the several mortgages, and of the general balance due to or from the said Sir Watkin Lewes or his estate, and that F. Morgan, as executor of John Morgan, should pay Evans, Jenkins and Hurd their respective costs occasioned by the said controversy: and that he should add the amount of Sir Watkin Lewes' and of Joan Wilder's costs relating to the said controversy and amount of the general balance, when taxed, to the sum which he should find to be due from the estate of John Morgan to the estate of Sir Watkin Lewes for principal monies and interest, according to the directions before given. And it was further ordered that F. Morgan, as personal representative of John Morgan, should pay the amount of the said principal monies and interest, and last-mentioned costs; and that F. Morgan, Mary Ann Morgan, Joan Wilder, and all other necessary parties, should, according to their respective interests, re-convey unto Herbert Evans the mortgaged estates, free from incumbrances.*

[189] Francis Morgan appealed to the House of Lords from the orders or decrees of the 4th of February 1827, the 3d May 1827, the 12th May 1829, and the 6th July 1829.

Herbert Evans also presented his cross-appeal against so much of the order of 6th July 1829, as declared that F. Morgan, as representative of John Morgan, was entitled to interest from the date of the bond for £2400 upon the principal sum of £1315 10s., and as ordered the Master to review his report, by allowing John Morgan's representative interest upon that sum from the 28th of February 1775, up to the time when the same should have been satisfied: and also from so much of that order as ordered the Master, after satisfaction of the mortgaged debts, to apply the rents of the mortgaged estates towards payment of the judgments, before he should apply the same towards payment of the said principal sum of £1315 10s. and interest thereon, and as ordered that it should be referred to the Master to inquire and report, having regard to the above directions, when the debt due from Sir Watkin Lewes or his estate, to John Morgan or his estate, was paid, and what, if any, balance was due to the estate of Sir Watkin from John Morgan or his estate, on the day when such debt was paid, etc.

When these appeals came to be heard, the counsel on both sides adopted the suggestion of the Lord Chancellor, that it would be more convenient to argue both appeals together: but they submitted that three counsel at a side ought to be heard,

* See 3 Younge and J. pp. 230 and 394, for the proceedings in the cause from the first general report in 1827. The Lord Chief Baron prefaces his judgment, p. 236, with a summary account of the suit from its commencement.

on account of the length and complex nature of [190] the case, involving several most important questions.

The Lord Chancellor (Lord Brougham) said it was the rule of the House not to hear more than two counsel at a side in any appeal, except one of an unusual description, and even then with leave of the House. There was here an appeal and cross-appeal; the parties to one were the parties to the other, and the counsel were the same in both appeals; in reality there was only one appeal.

Sir Edward Sugden and Mr. Pemberton argued the case for the Appellant, F. Morgan: (Mr. Lowndes was with them):—

This Appellant was entitled to the allowance of interest on the judgments recovered by Chardin Morgan and John Morgan, mentioned in the Master's first general report, as well as by the express terms of the order of the 11th July 1810,—which, by the order of this House of the 5th of July 1825, was incorporated with the decree of 1796, as the basis of the report to be made,—as from the nature of the debts for which the judgments were recovered, and from the nature of the dealings and transactions between Sir Watkin Lewes and the defendants in the suit; *Godfrey* v. *Watson* (3 Atk. 517), *M'Clure* v. *Dungin* (1 East, 436), *Bann* v. *Dalzell* (Moo. and M. 228), *Tunstall* v. *Trappes* (3 Sim. 299), *Loftus* v. *Swift* (2 Sch. and Lef. 642). The Appellant, by his exceptions to that report, insisted that the Master was bound, in taking the accounts, to allow interest on the principal monies due upon the judgments. The order of the Lord Chief Baron, over-ruling the exceptions with costs, was clearly erroneous.

[191] The next order of the Court below, questioned in this appeal, was the order of the 3d of May 1827, directing the Master to review his report, dated the 11th December 1826, and which was pronounced without any objections having been brought in before the Master, or exceptions having been taken by any of the Respondents to that report,—forms which, by the practice of the Court, were necessary before the report could be varied or impeached. The only exceptions to that report were those taken by the Appellant: they were over-ruled, and the Lord Chief Baron, on the mere suggestion of the Respondent's counsel, sent back the report to be reviewed, a proceeding quite unheard of in practice.

By that order and by the two succeeding orders, which are also the subject of appeal, namely, the order of the 12th May, 1829, over-ruling this Appellant's exceptions to the Master's report of the 10th of December 1828, and the order of the 6th of July 1829, on further directions, the findings of the Deputy Remembrancer in his separate reports, under the order of 20th of June 1801, are taken as having concluded the question of the amount of the monies advanced to Sir Watkin Lewes on mortgage, and the total amount is fixed at the sum of £8209 7s. 1d., because so stated in the reports of the Deputy Remembrancer, and the subsequent accounts of interest and of the receipts of the Appellant and of those whom he represents are taken on that basis. But the findings of the Deputy Remembrancer had not in fact concluded or finally ascertained the amount of the mortgage monies, and his proceedings and inquiries under the order of the 20th of June 1801, ought not to have been substituted for the inquiries directed by the decree of the 2d of July 1796.

[192] The report of the Master on the 11th of December 1826 was correct in all respects but those to which this Appellant objected by his exceptions, and was in conformity with the evidence produced by him to the Master, and in obedience to and in pursuance of the order of this House of the 5th of July 1825.

The whole amount of the sums in the several mortgages, stated to have been advanced to Sir Watkin Lewes, had really and truly been advanced to him or for his use, and the sums were all advanced on the security of those mortgages, and ought therefore to be allowed to this Appellant with interest, and the mortgaged estates ought to stand as a security for the principal and interest. By the mode in which the accounts against the Appellant were directed, the estate of John Morgan was charged with interest upon rents received by him at the time when he was in advance for the mortgagor, and, on the other hand, no interest upon such advances was allowed to him.

The costs of this suit, it being a suit to redeem a mortgage, ought all to be borne by the mortgagor, especially as the mortgagor has by his will made various charges of fraud, none of which has been substantiated.

Mr. Tinney and Mr. Knight for Herbert Evans and the other Respondents: (Mr. West was with them):—

The decretal order of the 4th of February 1827, over-ruling the Appellant's exceptions to the report of the 11th of December 1826, was well founded. It is a general rule, both at law and in equity, that judgments do not carry interest, except where there are some special circumstances; *Clarke* v. *Seton* (6 Ves. 411). [193]There were no special circumstances in this cause to vary the general rule (see Mr. Baron Graham's observations, 5 Price, 151). The order of the 3d of May 1827, was right, because if that order had not been made, the Master's report, finding that the mortgage monies received by John Morgan amounted to the sum of £13,000, would have been in direct contradiction to the order of this House of the 8th of April 1816, to the Deputy Remembrancer's fifth separate report, to the order of the Court of Exchequer of the 8th of November 1817, and to the order of this House of the 5th of July 1825, by all which it was found and declared that £8209 7s. 1d. constituted the total amount of the mortgage monies received by John Morgan as agent to Sir Watkin Lewes, and consequently there would have been proceedings on the same record totally inconsistent with each other.

The order of the 12th of May 1829 over-ruling the exceptions taken by the Appellant to the Master's report of the 10th of December 1828, was right and necessary. It became necessary to over-rule the first exception; it was in effect an exception to the Deputy Remembrancer's fifth separate report, which had been confirmed by an order of the Court of Exchequer of the 8th of November 1817, and subsequently by the order of this House of the 5th of July 1825. The Court of Exchequer was imperatively called on to make that order as to the second, third, fourth and fifth exceptions thereby over-ruled, because the Master, by his report of December 1826, had found that the mortgage monies received by John Morgan, amounted to the sum of £13,000, in which sum was included the bond for £2400. But by the orders and exception, to which the Master was directed to have [194] regard on reviewing his report, it appeared that the mortgage monies received by John Morgan, only amounted to the sum of £8209 7s. 1d., in which sum was not included the bond for £2400. The bond for £2400 therefore became an item for the Appellant to prove against Sir Watkin Lewes's estate on the general account. It was impossible that the Master could receive the bond itself and the settled accounts as evidence of the debt on the general account, when the £2400 had been excluded from the mortgage account both by this House and the Court of Exchequer, on the ground that, as between attorney and client, the bond itself and the settled accounts were not evidence of the debt which the instruments mentioned.

The Lord Chancellor:—We have now come to the close of this long, dry and infinitely tiresome, though not unimportant case. All the counsel who argued it, both in this House and in the Court below, have felt completely tired of it, as a case of more than ordinary dryness. We must all feel great satisfaction that we are at length approaching the end of this long litigation. The cause was in Court before most of us were born; it has rolled on for half a century in the way of orders of the Court below, of appeals to this House, and of remitter to the Court, all owing to the unfortunate order of June 1801, which gave rise to five separate consecutive reports, and which was itself a manifest departure from the fundamental decree, and which gave rise to a series of conflicting decisions. This same view of that order had also struck the mind of the late Lord Redesdale, as appears from his observations in one of the appeals to this House. Let us hope that we have now come to the last stage of [195] the case; and I shall be sorry if the judgment which I shall, after further consideration, advise your Lordships to give, will lead to anything else than a final decision. I should rejoice very much if I could recommend to your Lordships to take the same view of the case that the Court below did in the judgment appealed from, which certainly was a most elaborate judgment. I should rejoice if I could come to the same conclusion to which Chief Baron Sir William Alexander came in that judgment (3 Y. and J., 236 and 395). But when I have before me the order of 1801, made by the Court of Exchequer, it is possible, I think, that we may come to a different conclusion from that Court, without doing any great violence to the principles of the Court, or the due course of justice.

I am not now about to give a final opinion on any part of the case, but I am about to state to your Lordships, in the presence of the learned counsel, the points which I desire particularly to consider. There are three main points in the case, independent of the question of costs. The first point is that which regards the bond to secure £2400; I fear I cannot, on that point, recommend to your Lordships to come to the same conclusion as the Court below did. The evidence on that point was so little dealt with in the Court below that it might as well not have been before that court at all. The next point relates to the apparent discrepancy between the answer and the affidavit of Mr. John Morgan, and the refusal of Sir Watkin Lewes to state his case by any affidavit at all, which refusal may go far towards proving that, to say the least, he was distrustful of his own case. That refusal, however, did not set up the affidavit of [196] Mr. John Morgan as conclusive of his statement, but it is competent for us to consider that there was an affidavit on one side, not attempted to be contradicted on the other; it is with a view to compare the affidavit and answer of Mr. Morgan, and note the discrepancy between them, if there be any discrepancy, and to observe on the want of an affidavit on behalf of Sir Watkin Lewes, that I am desirous to take more time to look into the papers upon this point.

The third point, which I shall have particularly to consider, is, whether interest ought to be allowed on the judgments, in respect to the defeasance in the warrants of attorney for entering up the judgments, and whether or not that defeasance was before the Court below*; but there are other grounds also on which I am inclined to think it will be necessary for us to differ from the judgment of the Court, and which I will state more fully when your Lordships come to pronounce the judgment of the House.

The further consideration of the case adjourned.

The Lord Chancellor:—My Lords, when the argument in this very important, but very complicated case, was closed at your Lordships' bar, I took occasion to [197] state the views with which I was then impressed with respect to the most material points submitted for your consideration, three in number, upon which I felt great difficulty in arriving at the same conclusion to which the Court below had come. I then advised your Lordships, for reasons which I stated, especially with a view of comparing the answer of John Morgan with his affidavit in the cause, and with a view of examining how far the question of interest on the judgments had been well dealt with in the Court below, and finally, with a view of considering the question of practice in the courts of equity, raised by the course which the Court below had taken, of referring back to the Master to review a report, to which no objections were made before the Master, and against which no exceptions were taken before the Court: chiefly with those views, I advised your Lordships to delay the further consideration of this cause. I have availed myself of the opportunity which this postponement has afforded for further examination, and I am prepared to state to your Lordships the result of the attention which I have been enabled to give to these questions; that result is, that all the difficulties which I before had in coming to the conclusion at which the Court of Exchequer had arrived, remain unabated, and that I am rather more, than less, prepared to express an opinion contrary to the judgment of that Court than I was when I last addressed your Lordships.

If, on the other hand, it is matter of anxious desire that there should be a coincidence of opinion in the Courts, and if I naturally felt a great reluctance in being called upon to advise a reversal of the decree of the Court below to so large an extent as I am about to propose; it is at the same time, on the other hand, [198] a great con-

* The defeasance on the warrant of attorney to confess judgment for £2000 at the suit of John Morgan was this: "The within warrant of attorney is given for securing the sum of £1112, together with lawful interest for the same. And it is hereby agreed and understood that no execution shall issue on the judgment to be signed by virtue thereof, provided the said sum of £1142, and interest as aforesaid, are paid on or before the 6th day of November next ensuing the date of the said warrant of attorney, and that the same shall not exclude the within named Sir Watkin Lewes from any equity he may have touching the said sum above mentioned.

solation to my mind that I have with me, I think, in some degree, the authority of opinions expressed in your Lordships' House, when the case was formerly here, and that I have with me, on a most material point, the opinion of a most acute, intelligent and learned Judge in one important stage of the proceedings in the Court below, I mean the late Mr. Baron Wood. But further, I do not hesitate to say, that some of the matters involved in this decree are so extremely clear, and the error which has prevailed below is, to my apprehension, so manifest, that I feel far less reluctance than I might otherwise labour under, in recommending to your Lordships the course which I feel it my duty to propose. I shall briefly advert to the several principal parts of the case.

In 1801, by a most unfortunate order made by the Court below, but with which the present Appellant is no way chargeable, for he resisted it, an entire departure was effected from the course which had been taken in the cause in 1796. The result of that has been to involve the whole cause, for 33 years, in a degree of inconsistency, obscurity, doubt and complexity, which I do not think I exaggerate at all when I pronounce to be without precedence or parallel.

The first point to which I wish to call your Lordships' attention is as to the effect of Mr. John Morgan's affidavit, which is a most important branch of the case; as to that affidavit I remain of the opinion which I before expressed. A question here arises, extending generally to a sum of £500, and also to other sums, all included in a larger sum of £2400, formed of consolidated items, said to be composed of the aggregate amount of various bonds and monies due from Sir Watkin Lewes to Mr. Morgan, as having been advanced by him in money, or in money's worth, and which [199] originally having consisted of different minor sums, were consolidated ultimately into one sum, secured by a bond for £2400. I agree entirely with that which Mr. Baron Wood has, in his able judgment, reported in the fifth volume of Mr. Price's Reports, admitted, and which no one can doubt, namely, that when a person claiming to be a creditor of another stood, at the time when the money was said to have been advanced, in the relation of solicitor or attorney to the borrower as his client,—Mr. Morgan was Sir Watkin Lewes's attorney,—it would not be sufficient for him, in order thoroughly to substantiate his claim against his client, merely to produce the instrument of security, even though the security be a bond; he must go further. Now, the question on this point of the case is, whether, taking the whole facts of the case together, Mr. John Morgan has not gone further, and whether he has not gone sufficiently far to have justified the Master in coming to the conclusion to which he came in the first report,—the general report, made the subject of exceptions when the decree of the 6th of July 1829, which is appealed from, was pronounced. I agree with the affirmative of that proposition: I hold that the affidavit of John Morgan was not only admissible, but I am further of opinion, that whether we take the circumstances in which it was made, whether we consider the position in which Sir Watkin Lewes had voluntarily placed himself, whether we consider his refusal to avail himself of the opportunity given of telling his own story on oath, or go back to the order of the 13th of November 1818, under which that affidavit was let in, or whether we go back the whole length of the proceedings, and consider the manner in which Sir Watkin had proceeded, and the manner in which he had failed, even [200] to attempt to offer evidence in support of the allegations of the bill; that, in all those views, and upon all those grounds, it was not only competent to the Master to take into his account the affidavit of Mr. John Morgan, which, it is not denied, was admitted by force of the order I have last adverted to, but that he was bound to give it great weight; that it was not only admissible, but entitled to the greatest credit; and I think I shall demonstrate to your Lordships that it was in the circumstances all but conclusive of that to which John Morgan swore.

First, a bill was filed against Mr. Morgan; charge upon charge was heaped upon him in that bill; there was hardly a security he had that was not impeached; there was hardly a fraud that could be committed which he was not charged with; there was hardly an accusation that could be made that was not urged against him; and, among other things, many transactions were impeached which now stand undisputed, and the decree establishing which is not appealed against. But I dwell not much upon this topic, though it carries me one step towards my conclusion. To support a bill so framed, seeking to cut down the securities of a creditor, and reflecting mate-

rially on the character and conduct of a professional man, not a tittle of evidence was adduced by the plaintiff, nay, not even an attempt was made to establish such a case; while the answer of Mr. Morgan, more or less, strenuously denied the charges, and set up his own case. Then came the affidavit of Mr. Morgan. How does that get into Court? It is easy to say that a man's own oath shall not avail him; that a man shall not decide the cause by his own affidavit, made on his own behalf; it is easy to say a party is no witness for himself. True; but, at all events, there is the oath [201] of Mr. Morgan against the unsworn allegation of Sir Watkin Lewes in his bill. But, moreover, admitting Mr. Morgan to be a solicitor, and to have acted as a solicitor of the plaintiff; admitting that he is liable to the rules governing solicitors in their dealings with their clients, and the bare production of that, which would be sufficient ground for a judgment in other cases, namely, the instrument constituting his security, is not here sufficient; admitting both the fact and the doctrine of the Court, let us look at the peculiar nature of this affidavit, and the circumstances in which it was allowed to be made use of.

The order to which I have adverted of the 13th of November 1818, is a substitute for an order *nisi* of the 25th of June 1818, calling upon Sir Watkin Lewes to show cause why the state of facts of John Morgan should not be taken as confessed by Sir Watkin Lewes. The reason which induced the Court to make that order of the 25th of June 1818, was, that there was no possibility of getting Sir Watkin Lewes to answer the interrogatories which had been filed. Mr. Morgan had exhibited his interrogatories in the accustomed manner of the Court, but no power on earth could extract an answer from Sir Watkin Lewes. When the Court found that they could not attain that, which Mr. Morgan was entitled to, namely the examination of the plaintiff on oath, they were then induced to make the order of June 1818, calling upon him to show cause why the statement of Mr. Morgan should not be taken *pro confesso*. This was found to be irregular; it was an order which the Court found, on further consideration, it could not abide by, and being an order *nisi*, on cause being shown it was discharged, but discharged for the purpose of substituting the order of the 13th of November [202] in its place. Now let us attend to that order, for it is a most material step in the cause. After discharging the order of the 25th of June, "it is ordered that in case the said plaintiff should make default in filing his examination to the interrogatories exhibited by the said defendant John Morgan before the Deputy Remembrancer, for his examination, by the first day of the then next Hilary term," (giving him, your Lordships perceive, more than two months, from the 13th of November to the 23d of January, after all the defaults he had already made,) "the said John Morgan should be at liberty to make an affidavit of the several facts to which the said interrogatories so exhibited by him for the said plaintiff's examination were intended to apply, which affidavit the said Deputy Remembrancer was then to take into his consideration." This order, therefore, gave the defendant leave to make his own statement, on oath, of his own case, and the Deputy Remembrancer was to take that statement into his consideration in the further proceedings in the cause, provided Sir Watkin Lewes contumaciously persevered in refusing to answer the interrogatories which Mr. Morgan had filed against him.

The Chief Baron, in his judgment, relied, I think, too much upon the consideration that this affidavit of Mr. Morgan was only to be receivable in evidence, and was not ordered to be binding upon the Remembrancer. I agree in that opinion. But though the exigency of the order did not require that it should be binding upon the Remembrancer, I am about to show that the circumstances in which the order was made, and still more, in which the affidavit was made and filed under that order, were such as to make it, in all reason and upon all principle, the bounden duty of the Remembrancer and of the Court, when the report should [203] come before it as a matter calling for ultimate decision, to give the greatest, I had almost said the most implicit, credit to the affidavit of John Morgan. Sir Watkin Lewes was to have about ten weeks to repent of the course he had taken, to abandon his contumacious refusal to answer, and to put in his examination. He did no such thing. With a power of answering he chose to be silent; with liberty given to him to tell his own tale on oath, he chose to abandon that privilege; with facilities afforded him, which, above all others, no honest party, conscious that he had nothing to conceal, and satis-

fied that his case was a sound one, would have coveted, namely, the liberty of telling his own story, and making it evidence for himself, he rejected the proffered boon, repudiated the privilege given him and remained as silent as before. This he did with this alternative levelled at him by the order of the 13th of November, 1818, that if he did not answer upon his oath, not merely he should lose the opportunity which other litigants consider of great advantage, namely, of having his own affidavit, in answer to the interrogatories, taken as a portion of the evidence in the cause, but his adversary, John Morgan, should be allowed to come in with his affidavit, and to tell his story upon his oath; yet still he would not swear. This to my mind is conclusive.

It has been suggested on behalf of Sir Watkin Lewes, that he was not a man of good judgment, or clear understanding; but he had a keen sense of his own interests; he knew his own affairs; he was well educated, intelligent, and acute; he was a barrister of some standing before he quitted the bar; a man engaged in business all his life; a man of litigious habits, who scarcely ever allowed a day to pass, when a motion could be made for or against him in the [204] course of his cause, without attending it himself in person. To say that he was not aware of the consequences of his not complying with the former orders, and answering his adversary's interrogatories, is unreasonable; to pretend that he was not aware of the necessary effect of the order of the 13th of November, 1818, and that the consequence was not present to his mind as of necessity following, namely, that Mr. Morgan's affidavit would be let into the cause in default of his answering, is vain and fanciful. No one acts without some reason in important matters; no one acts without some motive. Can man's imagination conceive any but one reason, any but one motive, which could seal the lips of Sir Watkin Lewes, after the order of the 13th of November 1818, and prevent his adopting the favourable alternative when the Court gave him his choice of answering the interrogatories? One, and but one, reason can any man's imagination devise for such conduct, consistently with the belief of Sir Watkin being a person of sound mind, namely, that he knew that, if he were to answer the interrogatories upon his oath, and to answer truly, he must tell a story more unfavourable to himself than any which John Morgan would tell. I do not stop short of that conclusion, that he was aware that nothing which Morgan would truly swear against him would be worse for him than that which he himself, if he told the truth, must swear in answer to Morgan's interrogatories: I go further, and infer that it would be more to his prejudice to tell the story himself than to have the story told, which he expected to proceed from Morgan. It was this among other reasons which prevented Sir Watkin Lewes from swearing; there is no other way of explaining his refusal to answer, and his embracing the alterna-[205]-tive of accepting the case made by his adversary's evidence.

From this conclusion, what inference can be drawn but that, in effect, Sir Watkin Lewes's affidavit is before us. It may be called John Morgan's, but it appears to me that in truth it is Sir Watkin Lewes's, for he had the opportunity of telling his own story, and was warned that if he did not, his adversary should be heard to tell his; when, therefore, he embraces the alternative of silence, and prefers his adversary being heard, he, in effect, gives credit to that story; *dum tacet, loquitur,* and the affidavit, by acquiescence, may be considered as his own; it may be called the affidavit of John Morgan, but it is in reality the statement of Sir Watkin Lewes. This, then, is the common case of a party swearing against another, that other having the opportunity of answering and abandoning that opportunity, and allowing the affidavit of his adversary to stand against him; and it is every day's practice, in all the Courts on both sides of Westminster Hall, in such a case, to hold the party that does not answer, as confessing that he has no answer to make to his adversary's statement, and as clothing his adversary's statement with a full and conclusive authority against him.

Those are the grounds upon which I hold that the affidavit of John Morgan, admitted under the order of the 13th of November 1818, is not only competent, but almost conclusive evidence of the fact of the advance of the money which he therein sets forth. He produces also the instrument in confirmation of his statement, the instrument being not sufficient of itself only, because he stands in the relation of a solicitor to a client; but then the instrument is corroborative of the affidavit. This view, which

I have now [206] taken, disposes of a large portion of the case; it disposes of those exceptions which were taken by the Appellant to the Master's second report, and which were over-ruled by the Court below; I mean the report of the 10th of December 1828, by which the Master disallowed the sum of £2400 and allowed in lieu of it £1350. I shall enter into the details of that report when I come to the particular alterations which I think ought to be made in the decree made on further directions.

I proceed now to observe upon other questions raised by the consideration of that report of the 10th of December 1828. One objection I have to that report is a material one, but I know not whether, in point of regularity, I should not object to the whole of it: for I have great doubt, and much more than doubt, of the propriety of the order which was made on the 3d of May 1827, referring back to the Master to review the report which had been made on the 11th of December 1826; I have a strong opinion against the fitness and regularity of that order, referring back the report; if it ought not to have been referred back, that would put an end to the report of the 10th of December 1828, which was founded upon the reference. The former report was reviewed in consequence of that order; it was altered and re-constructed on principles dictated by that order, the erroneous order, in my opinion, of the 3d of May 1827. I shall proceed to state the grounds on which I differ from the Court below, as to that order.

With respect to the report of the 11th of December 1826, the more I consider it the less objection I am disposed to make to it, whether in reference to the evidence in the whole case, or its alleged consistency, on the one hand, or the discrepancy set up, upon the [207] other, with the previous orders of your Lordships' House. I do not incline to think that it materially differs from those orders; I am quite certain, that with those orders, the report of December 1828, which was, as it were, forced upon the Master by the order of the 3d of May 1827, cannot so well stand as can the report of December 1826. But it is not necessary, in the view I have taken, to go much at large into that question; for I am of opinion, that it was irregular in the Court, and contrary to the rules of practice, to send back to the Master the report of the 11th of December 1826. No exceptions had been taken by the Respondents, nor had any previous objections ever been brought in before the Master to that report: it was sent back to the Master as upon disapproval of the report itself by the Court, and a further inquiry was directed by an order made the 3d of May 1827, upon a hearing for further directions. Now, generally speaking, that cannot be done: the practice of the Court prohibits it, wisely and upon solid grounds. The Master ought not to be surprised by the exceptions, without notice being given him by way of objections. I take the rule, as fixed, to be that you cannot except to the Master's report without first taking objections before the Master. If it should so happen that a party is taken by surprise when he means to except, and if from accident, or any contrivance, or through excusable neglect, he has been deprived of the opportunity of regularly taking in his objections to the report, he may file an affidavit showing the circumstances, explaining in what the surprise consists and tracing it to its source. If he shows that he has been surprised by the sudden signing of the Master's report, or anything which precluded him from the opportunity of taking in his objections, on satisfying [208] the Court of that, by affidavit of the fact, he may have special leave of the Court to file exceptions, without having previously taken in objections before the Master; that is the practice of the Court, and from that practice the order of the 3d of May 1827 was a departure.

But this is not all. There is a general order of Court of the 20th of July 1793, which prohibits exceptions from being received to a report, except on the signature and certificate of counsel that he has examined them and thinks them well founded; and, moreover, there is a deposit, being half the amount of what is deposited in the case of an appeal, which is £20, as a security for costs to the other party, in case the exceptions are over-ruled. It is not mere matter of form but of substance, that parties should not be allowed to pass by all those regulations; that in the first instance objections should be taken, so that the Master may reconsider the matter referred to him and make a right report, instead of one open to exception; otherwise needless litigation would be occasioned in the Court when the report might have been set right in the Master's office. In the next place, there is the security to the other party that he shall have the certificate of counsel, and to the Court that its time shall

not be needlessly occupied; and there is also the security by the deposit. But if parties, without making objections to the report, while still before the Master, without security against frivolous objections, by the deposit and signature of counsel, shall be permitted, on the hearing for further directions, to raise exceptions and to have the whole matter referred back to the Master on those exceptions so taken, it is clear that all the regulations which have been made for the benefit of the Court and the suitors, [209] to save time and to avoid unnecessary litigation and expense, are all useless.

Cases were referred to, in which it is said that the Court will upon further directions alter the Master's report. I do not deny that there are authorities to that effect. But I hold that the only case in which the Court will upon further directions disallow a report, is, where there is error in law appearing on the face of the report, which would be a blot upon the proceedings of the Court, in which case the Court will set that error right, upon a hearing for further directions. In *Adams* v. *Claxton* (6 Ves. 226), Sir William Grant says, "No exception is taken to the report, but the whole matter appears on the face of it, and therefore it is contended that it is open to inquire whether the Master's conclusion is right, and I apprehend it is so open;" and he inclined to the consideration of the matter, and came to a different conclusion from that to which the Master had come in his report. But how can the Court apply this practice to other cases, except by taking the proposition negatively, and laying down that, though the error does not appear on the face of the report, there may still be exceptions regularly and formally taken? But that is contrary to the case of *Brodie* v. *Barry* (1 Jac. and W. 470), where it is said that, "on a petition to confirm a report, and praying consequential directions, a party cannot, without presenting a counter petition, show cause against the confirmation, except upon grounds appearing on the face of the report." In the present case no error appeared on the face of the report; but still it was referred back to the Master to enter into a new inquiry. I hold that it was erroneously referred [210] back, and so far that the order of the 3d of May 1827 was wrong.

But even if the report had been regularly referred back, even if we had a right to listen to the contention on the part of the Respondents, if leave had been asked, and the Court had given them leave to file exceptions without that previous procedure of carrying in objections before the Master,—which I hold to be matter of substance as well as form,—it appears to me that this order of the 3d of May 1827 could not be correct; that it would have been erroneous to have referred back the report on the ground taken by the Chief Baron, namely, that that report could not stand, though not excepted to, because a judgment of the House of Lords was set at nought by it, the report being contrary to an order of the House. I have showed that it was not contrary to the order of the House, and that therefore on that ground the order of May 1827 was not warranted. I have thought it fit to address myself thus particularly to this part of the case, because it has been a good deal argued at your Lordships' bar, but I knew not that it was necessary to the alteration which I am about to propose in the decree.

I now come to the third question, that which relates to interest not being allowed on the judgments. That, generally speaking, judgments do not carry interest, either at law or in equity, is admitted, unless there be something special in the dealing of the parties, or some agreement between them, or some other order made in the particular case to take it out of the general rule. I find that in this case there is a peculiarity and special matter quite sufficient for the purpose. In the first place, the warrant of attorney, [211] with the memorandum indorsed, on which judgment was entered up in Trinity term 1778, specified in the defeasance, that the within warrant of attorney was to secure the sum of £1142, together with the lawful interest for the same. Now if that warrant is in the cause *cadit questio;* but supposing that it is out of the cause—a reference to it was much objected to on the argument, and I did not feel satisfied that I was entitled to import it into the cause—but supposing we leave it out entirely, I am still of opinion that interest should be allowed upon this judgment. First of all, nothing can be more harsh or less equitable than that the monies which John Morgan received, the rents of Sir Watkin Lewes, of which he had perception, should be all charged with interest against him, and in favour of Sir Watkin, and yet that the monies which he advanced for Sir Watkin, and for securing

which he had recovered judgments, should bear no interest. In the next place, can anything be more extraordinary than the judicial opinion which holds, that the words of the order or decree, or whatever it may be, embracing "securities, mortgages, bonds and costs," do not embrace judgments? And yet that is the construction which has been supported in the Court below. That interest should be allowed on the bonds and not on the judgments is not a very consistent proposition.

Let us look at the order of the 11th of July 1810, the governing order, as I think, upon this point, and see whether a reasonable doubt can be entertained that under the term "securities," judgments must be comprehended. There is a judgment entered up on the part of the Appellant, on a warrant given by the person who had borrowed the money, to the person who had advanced it. The question is whether, in [212] legal acceptation, or common parlance, judgments of any kind, but especially a judgment entered up on the warrant to confess a judgment, given by the debtor to the creditor, does not come within the description of "securities" in the order of July 1810; that order obtained by Sir Watkin Lewes, and consented to on the part of his adversaries, was, "that the Deputy Remembrancer should take an account, and make a separate report of the principal and interest due to the said defendants, or claimed to be due to them, or any or either of them, upon the securities in that cause mentioned, and otherwise," etc. His Lordship, after reading the order, as set forth p. 173, *supra*, proceeded: I entertain no doubt, on the whole matter, that the word securities includes and comprehends this judgment as much as any other security.

This construction of that order affects a very material part of the case, for it affects a sum, large unfortunately from the efflux of time, arising from the accumulation of interest, with rests, which that order of the 11th of July 1810, gives upon the sums contained in the two judgments, one for £1142 entered up in the Court of King's Bench, in Trinity term 1778; the other for £569, entered up in the same Court in Easter term, 1779; there is therefore to be accounted for the interest which ought to have been allowed upon the sum of £1700 and a fraction, being the amount of those two judgments mentioned in the report of the 11th of December 1826, sent back to be reviewed by the order of the 3d of May 1827, but which, in my opinion, ought not to have been sent back.

I have now, my Lords, gone through the whole of the three points, on which I find it impossible to agree [213] with the Court below. There remains only the question of costs for me to consider, and upon that I did not profess to feel any great doubt when the case was last before your Lordships. We are here dealing with the case of mortgagor and mortgagee, and unless we can find anything to except it from the general rule, the costs of the mortgagee must be allowed to him. That is the general rule. There are cases of exception to that rule, but it lies on the mortgagor to show the ground of exception, and that is not done here: I am therefore of opinion that costs ought to have been given. The order of the 20th of June 1801 (the order for the first separate report, p. 168, *supra*), was obtained by Sir Watkin Lewes, resisted, as I understand it to have been, by Mr. Morgan, and imposed upon him by the Court in favour of Sir Watkin. It is hardly possible to say how much of this tedious and costly litigation sprang from that order; if I were to say nine parts in ten of the whole costs have originated in that order,—if I were to say 99 parts in a 100 of the difficulties which have occurred, have arisen from the same source,—I should hardly exaggerate; if I were to say, that from that order arose the complexity and obscurity, which involve every part of the case, and which leave me in the predicament of not being quite certain, even at this moment, whether I have that accurate knowledge of it, which a 10th part of the time that I have given to it, if bestowed on almost any other case that I have ever known, would have enabled me to feel confident that I had attained. I am sure that at any rate, great difficulty and great expense have resulted from that unfortunate order of June 1801, which was made in substitution for a different order, under which [214] the parties had been acting since the month of July 1796.

I shall now shortly go over the different parts of the decree in which I differ with the Court below; I shall direct a copy of the minute in my hand to be given to Mr. Courtenay, and I am glad to see that the parties have the benefit of Mr. Gurney's note of that which I have stated. It is desirable that the note should also

be communicated to Mr. Courtenay, that he may more perfectly understand what I mean to express; and I have no doubt the parties will furnish it to him for his assistance in drawing up the order of your Lordships' House, so that every error, as to the details, may be avoided, and an accurate decree at length be made. First of all, I shall advise your Lordships to alter the decree of the 3d of May 1827, as far as it refers back to the Master the report of the 11th of December 1826. Secondly, I shall advise your Lordships to alter the order of the 12th of May 1829, and the decree of the 6th of July 1829, over-ruling the Appellant's exceptions with costs, and confirming the report of the 10th December 1828, and to declare that John Morgan had sufficiently proved his advance of £2400, in respect of Sir Watkin Lewes's bond or bonds (one was a substitute for several others), and therefore that the Master's report of the 10th of December 1828, ought not to have disallowed the sum of £2431 13s. 1d., or allowed in lieu thereof £1315 10s. Thirdly, to declare that interest should have been allowed on the judgments mentioned in the report of the 11th of December 1826, viz., on the sum of £1142, and £569. Fourthly, to declare, that so far as is necessary for working out the object of those declarations and making those proposed alterations, the order of the **[215]** 20th of June 1801, should not have been substituted for that of the 2d of July 1796. This is necessary for effecting the views which I am submitting, though it will be found to be more of form than anything else. Fifthly, I shall advise you to allow the order of the 4th of February 1827, over-ruling the Appellant's exceptions, and to allow those exceptions only so far as is necessary for working out the object of the second and third declarations, and also as to the Appellant's costs. Sixthly, to alter the order of 12th May 1829, and so much of the decree of the 6th of July 1829,—the main operative decree,—as consists of formal declarations in the first instance, and also as far as regards the Appellant's costs, and to allow him his costs in that behalf in which he is charged with the Respondent's costs.

With respect to the cross appeal, I advise your Lordships, that it be dismissed, and the judgment of the Court below affirmed on that behalf, with the costs of that appeal to F. Morgan; and I have no hesitation in saying, that I am moved thereto by this consideration, not that I think the parties were not obliged to bring before this House the cross appeal; it might perhaps have been avoided, but as I have no power of allowing the Appellant, the representative of Mr. Morgan, his costs in the principal appeal, I am disposed on that account, which I might not otherwise have done, to allow the costs in the cross appeal to him, the Respondent in that appeal. He has been brought here by this erroneous judgment of the Court below, and in consequence of the conduct of Sir Watkin Lewes,—particularly in obtaining the order of the 20th of June 1801, in offering no evidence in support of those charges he had made in his bill, and refusing to answer the interrogatories. Those circumstances make me regret that your Lordships cannot **[216]** give to the party who has been dragged into this litigation, his costs in the first appeal, which is the source of the principal expense; but he is Appellant, and therefore we can give him no such costs. That, however, induces me to think that he ought to receive his costs in the appeal in which he is Respondent, though if that had stood alone, I might not have advised your Lordships to give him those costs. The result will be to give him his costs in the cross appeal, but to give no costs in the principal appeal to either party, each paying his own costs in that appeal.

I should also advise that the further consideration of the case be adjourned, in order to prepare the minutes of the order for carrying into effect these views which I have detailed to your Lordships.

The further consideration of the case was adjourned accordingly.

The following is in substance the order entered on the minutes of this date (Aug. 15). It is ordered and adjudged, that the said order of the Court of Exchequer, of the 4th of February 1827, over-ruling the exceptions taken by the Appellant, F. Morgan, to the Master's report of the 11th of December 1826, be, and the same is hereby reversed, and that such exceptions be allowed, and that it be referred back to the Master to review his said report. And it is further ordered and adjudged, that the decretal order of the said Court of the 3d of May 1827, be, and the same is hereby reversed; and that the decretal order of the said Court of the 12th of May 1829, be, and the same is hereby also reversed; and that the ex-

ceptions taken to the Master's report of the 10th day of December 1828, be, and the same are hereby allowed. And it is further ordered and adjudged, that so much of the decretal [217] order of the said Court of the 6th of July 1829, as directs that the receiver of the rents and profits of the mortgaged estates should pass his final account, pay in his balance, and be thereupon discharged, and the recognizances entered into by him be vacated, be, and the same is hereby affirmed; and that the residue of the last-mentioned order be, and the same is hereby reversed. And it is further ordered, that it be referred to the Master, to tax the costs of the late Respondents, John Morgan and Amelia his wife, William Farrer, the Rev. James Morgan and Mary Ann his wife, Henry Wilder and George Morgan, and also the costs of their representatives in the suit, and charge the same against the mortgaged estates, and ascertain the sum due and owing to the Appellant, F. Morgan, in respect of the principal, interest and costs. And it is further ordered and adjudged, that the said petition and cross appeal of Herbert Evans be, and the same is hereby dismissed; and that the said Herbert Evans do pay or cause to be paid to the said Respondent, F. Morgan, the sum of £230 for his costs in respect of the said cross appeal; and the House doth declare that F. Morgan is entitled to be allowed all such monies as have been paid by him for costs or otherwise, under any order or orders which are hereby reversed; and he is to be at liberty to apply to the Court of Exchequer in respect thereof. 66 Lords' Journals, p. 993.

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[218]

APPEAL

FROM THE COURT OF CHANCERY.

The Honourable ROBERT KING,—*Appellant;* THOMAS HAMLET,—*Respondent.*

[Mews' Dig. vii. 272. S.C. 9 Bli. N.S. 575; and in Ch. 4 Sim. 223; 2 My. and K. 456. Discussed in *Talbot* v. *Staniforth*, 1861, 1 J. and H. 500, and *O'Rorke* v. *Bolingbroke*, 1877, 2 A.C. 828. See the Money-Lenders Act, 1900.]

An expectant heir, under pecuniary pressure, mortgaged his reversionary estate, and entered into other obligations to secure payment of goods, purchased at the shop prices, with the intention of selling or otherwise disposing of them, for the purpose of obtaining money to supply his immediate wants; his father, the tenant for life of the estate so mortgaged, was privy to the transaction, and did not dissent; the expectant heir, on receiving the goods, so dealt with them that they could not be restored to the mortgagee. Held by the Lords, affirming the decree of the Court below, that such heir had no equity to have the transaction rescinded, or to be relieved against the securities.

This case has been reported twice already, first by Mr. Simons, 4th vol. p. 223, upon a motion for an injunction to restrain the Respondent from suing the Appellant on the securities executed by him; and again by Messrs. Mylne and Keene, 2d vol. p. 456, on the hearing of the cause. The latter contains the judgment of Lord Chancellor Brougham, whose decree, dismissing the Appellant's bill and dissolving the injunction against the Respondent, was the subject of this appeal. His Lordship's judgment having proceeded on the fact of the Appellant's father being aware of the nature of the transaction between him and the Respondent, and consenting thereto, the evidence produced on both sides on that and on other facts assumed in the judgment, but still controverted [219] by the Appellant, is here subjoined. The depositions will also serve to show the circumstances of the case.

The following is the substance of the depositions of the Appellant's witnesses:—

Mr. Serjeant Lefroy deposed, amongst other things, that he was in London for a few days in the beginning of September 1828, and, previously to his leaving Ireland, had been requested by Lord Lorton to see Mr. Newland about a communication which Lord Lorton had had with him on the subject of a sum of money which was to be advanced by the Respondent to the Appellant, on the security of the Appellant's

estates, Lord Lorton having stated to deponent his own incompetency to judge how far it would be advisable for him to accede to the proposal which had been made by Mr. Newland, and which was, that Lord Lorton (as his lordship informed deponent) might have an assignment made to him of such security as the Appellant should give to the Respondent for the sum of money so to be advanced by the Respondent: that in consequence of such request deponent called upon Mr. Newland, in company with his son, Mr. Anthony Lefroy; and Mr. Newland on that occasion informed deponent that Respondent was about to lend Appellant a sum of money, amounting, as deponent then best recollected, to £8000 or thereabouts, upon the security of the Appellant's estates; and deponent informed Mr. Newland of the reason of deponent's calling upon him, and stated that Lord Lorton understood that Respondent would be willing to assign to Lord Lorton any security the Respondent might obtain from the Appellant, so as to enable Lord Lorton to get a control over the property of the Appellant, and prevent him from further involving himself: deponent stated to Newland that he was anxious to know [220] whether such was Respondent's intention, and although he found from Newland's reply that there was a willingness on the part of the Respondent to make such assignment, yet no specific agreement for that purpose was entered into between deponent and Newland: that Mr. Newland showed deponent a draft of the intended mortgage, and deponent looked over parts of it, but without paying any particular attention to it, and did not read it; and deponent shortly afterwards communicated to Lord Lorton what passed at his said interview with Newland; and deponent further stated, that neither Mr. Newland nor any other person did at that interview, or at any other time, inform him, or state in his hearing, that the consideration of the intended mortgage or security, or any part of such consideration, was to be formed of goods sold or to be sold by Respondent to the Appellant, and that he did at such interview believe and understand that money, and money only, was to be the consideration for the intended mortgage; nor did he at any time before the execution of that security know or suspect that the consideration, or any part of it, was formed of goods.

Mr. Anthony Lefroy, son of Mr. Serjeant Lefroy, and son-in-law of Lord Lorton, deposed, among other things, that being in London for a few days in the month of September 1828, he accompanied his father to the house of Mr. Newland, at the request and on the behalf of Lord Lorton, and on that occasion a conversation took place between deponent's father and Newland relative to some money transaction between Appellant and Respondent, but deponent did not take any active part in the matter thereof, the same being a legal matter which deponent did not understand. Newland did not on the occasion of the said interview, [221] or at any other time, to the best of deponent's then recollection, inform him or give him any reason to know or suspect that the consideration for any intended mortgage was to be formed wholly or in part of goods sold or to be sold or delivered by the Respondent to or for the use of the Appellant; and deponent did not, to the best of his then recollection, then, or at any other time, inform Lord Lorton that goods formed or were intended to form, or be in any manner connected with the intended mortgage.

Mr. John Bridges deposed, that he was in 1829 and 1830, and still is, employed in partnership with N. Mason, as solicitor for the Appellant and Lord Lorton, and in the month of January 1829 deponent did, by letter and notice, on their behalf, make several applications to the Respondent, in order to induce him to receive back the goods which he had sold to the Appellant, and to deliver up the securities he had taken; and deponent believed that if the Respondent had agreed to comply with these applications, the Appellant would have been, by the assistance of Lord Lorton, in a situation to restore to the Respondent the whole of the goods; and deponent believed that the Appellant had not any present income or means of support at any period between the month of September 1828 and the month of September 1829.

This deponent, on his cross-examination on the part of the Respondent, said that he had not received, nor did he expect to receive, any money from Lord Lorton, on account of costs in this suit, nor any guarantee as to the payment of the costs of deponent and his said partner in conducting this suit: in fact, they had already received through the Appellant a sum, which, to the best of deponent's belief, would be more than sufficient to cover the costs, and deponent had no reason [222] to believe that Lord Lorton would in any manner, as to costs, or in any other pecuniary

point of view, gain or lose by the result of this suit. And deponent further said that the balance due from Mr. Robins, in respect of the net proceeds of the sale of the articles in question in the cause, was in the first instance received by deponent from Robins, and placed to the credit of Lord Lorton in his account with deponent and partner. The whole, however, of the balance so received from Robins, together with a larger sum, was forthwith expended by deponent and his partner in the discharge of private debts contracted by the appellant, and for which Lord Lorton was in no way liable, so that in effect no part of the proceeds of the said sale was paid to Lord Lorton, or on his account.

Lord Lorton deposed that Appellant was his eldest son, was then 26 or 27 years of age, and entitled to a reversionary estate in fee, subject to deponent's life estate, in certain lands, etc. in Ireland, and in the re-settlement of these lands, etc. When the Appellant was about 23, deponent granted him an allowance of £800 a year out of said lands, which was the only property the Appellant had at the time of making that settlement. That after disposing of the said allowance the Appellant had not any income or property in possession for his support until his marriage in December 1829, and deponent did not know where the Appellant resided in April, May, June, July, August, September and October 1828, and the Appellant did not during any part of that period reside with any of the members of his family, and deponent had not any sort of control over him during those months. The Appellant had, in or prior to the month of September 1828, involved himself in pecuniary embarrassments, but deponent did not at that time know, nor had he **[223]** the means of ascertaining the extent and particulars of his embarrassments, nor any means of preventing him from increasing them. Deponent knew a person of the name of James Ferrall, from the spring of 1828, and became acquainted with him in consequence of Ferrall's having introduced himself to him by a letter to deponent's brother, stating that he (Ferrall) had heard that a son of deponent's was then in the hands of sharpers; and in consequence of the said letter deponent had an interview with Ferrall in Portland-place, previous to which deponent had not any knowledge of or acquaintance with him. That deponent had subsequent interviews with Ferrall, who on some of those occasions informed him that the Appellant was endeavouring to raise money upon post obits in various ways, and particularly a large sum from the Respondent, whom deponent had never seen. And Ferrall mentioned Mr. Newland as being the person in treaty with the Appellant on behalf of the Respondent in respect of such loan. And deponent, some time in or about May 1828, had an interview with Newland for a few minutes only, when Newland made some proposition to him, but the particulars of which he did not recollect, and being desirous to waive the business altogether he did not then, or at any time, come to any arrangement with any person on the subject of such proposition. Deponent requested Mr. Serjeant Lefroy, who was to pass through London about the end of the summer of 1828, to see Newland and Ferrall relative to some proposition made or about to be made on the part of the Respondent respecting loan transactions, in which the Appellant was concerned, with a view to prevent deponent getting into difficulty in regard to the said transactions, as he had reason to believe that the said **[224]** persons were endeavouring to get deponent to enter into a counter security to the Respondent; and deponent was afterwards given to understand by Mr. Lefroy himself, as deponent best recollects, that Mr. Lefroy did see Newland respecting the said matter, but what occurred at such interview deponent did not know. When he requested Mr. Lefroy to see Newland, he believed, from what passed from Newland at the interview he had with him at the United Service Club, that the Respondent was acting *bona fide* through Newland with regard to the loan of £8000, which deponent was given to understand had been made to the Appellant by the Respondent, and respecting a mortgage to be given by the Appellant of his reversionary estate, but deponent does not now recollect whether he did or did not form any belief that the Respondent would, in case of his completing the said loan transaction, make any assignment to this deponent, or whether deponent did in any manner interfere in such matter. Neither Newland, nor Mr. Anthony Lefroy, nor Mr. Serjeant Lefroy, nor the said James Ferrall, nor any other person did, at any time prior to the date and execution of the mortgage which deponent had been given to understand was given by the Appellant to the Respondent for securing £8000 in any manner inform deponent, nor did he at any time before the date and

execution of such mortgage in any manner learn, or for any reason suspect, that any goods formed wholly or in part the consideration for the said mortgage; and deponent did not hear anything respecting the said mortgage until after it had been executed: and upon being informed that articles of jewellery formed the consideration for the mortgage, it was proposed to deponent by some of his friends that if he would advance a sum of between [225] £2000 and £3000 it might be the means of bringing the matter to a conclusion with the Respondent, and deponent did assent to such proposition, with a view of getting Appellant clear of all dealing with the Respondent; but whether deponent did or did not authorise any steps to be taken thereon he does not now recollect.

Lord Lorton, in his cross-examination, said he was not interested in the event of the suit, except as being the father of the Appellant, he could not feel indifferent to his success. The solicitors for the Appellant were recommended to him by deponent, whose solicitors they are, and with them deponent was in occasional communication on the subject of the suit, but they were employed by the Appellant himself, and acted principally under his direction. Deponent did not agree or undertake in any respect, or in any event, to pay or secure the costs of the suit.

Mr. Ford deposed that the Appellant was in great pecuniary embarrassment in the months of March and April 1828, and was desirous of raising a loan of £8000 or £10,000; that some time in April or May in that year Newland called upon deponent and asked whether he was not concerned for the Appellant, and on deponent's answering in the affirmative, Newland said that he had a client who would lend him £10,000, and deponent requested to know the name of the client, which Newland declined giving; and he then asked deponent to name the security, which deponent explained to him to be the securities before-mentioned; whereupon Newland requested deponent to furnish him with an abstract of the title to the property, and in consequence thereof deponent did shortly afterwards deliver to Newland an abstract of the title; that various meetings were subsequently had between [226] deponent and Newland on the subject of the terms and conditions of the said required loan; that Newland would not on any of those occasions tell the name of his client, but after some days he informed deponent that his client would not make the advance all in money, but one moiety in goods and the other in Bank notes, and the goods should consist of silver or plate; that Newland some time afterwards informed deponent that his client, whom he then stated to be the Respondent, had no ready-money to lay out, but would complete the contract to the extent of £8000 if the Appellant would take the whole in goods, which should be all plate; that deponent communicated the matter to the Appellant, who appeared then to be in great want of money, and desired deponent to conclude the last-mentioned contract with the Respondent. The mortgage was accordingly executed by the Appellant the 28th of October 1828, at the Respondent's house of business, and the consideration actually given for the same consisted of articles of plate, jewellery, diamonds and pearls, selected by the Appellant, assisted by deponent, in the presence of the Respondent. Deponent advised that the whole consideration should be taken in silver plate, but the Respondent objected, and said the amount should be taken out of his general stock. The Appellant had not any use or occasion for the said goods otherwise than for the purpose of selling them in order to raise money; and of that deponent believed that the Respondent was aware, from the general circumstances of the case, and the total inapplicability of the said goods to the Appellant's then situation in life or his wants, not being a housekeeper, nor married, nor about to marry. The goods so selected were not delivered to the Appellant at the execution of the mort-[227]-gage, the Respondent refusing to deliver them until the mortgage deeds were registered in Ireland, and until Newland was paid £400 for his charges for the mortgage, and it was about a month from the execution of the mortgage when the said goods were delivered to deponent on behalf of and for the Appellant. The goods were not valued by any jeweller or other person on behalf of the Appellant at the time they were selected.

Mr. George Henry Robins deposed that on the 8th of December 1828 he advanced to some person, for the use of the Appellant, the sum of £2500 on security of the articles of plate and jewellery in the pleadings mentioned; and that he did in the month of March 1829 sell the said goods by public auction. The sale was well

attended, and the said goods were sold for the best and highest prices which could be reasonably got for them, the purchasers thereof being principally dealers; and the money produced by the sale was £3482 7s. 2d., which, under the circumstances, was as much as such goods could be reasonably expected to sell for at a forced sale, of which description the said sale was. The amount of the net proceeds arising from the sale, after deducting the said sum of £2500 and the sum of £318 4s. 6d. for commission and expenses, was £528 10s. 9d., exclusive of the sum of £37 9s. 6d., the amount of part of the said goods which were at the said sale bought for the Appellant. The goods were in the same plight and condition at the time of the sale as when they came to this deponent's possession, except that they were not so clean. The Respondent did not attend at the sale, and neither deponent nor any other person was instructed to bid on his behalf, nor had deponent any communication with the Respondent [228] relative to the sale of the goods; his instructions were received from Ford.

The following witnesses were examined on behalf of the Respondent:—

Mr. Montague Newland deposed, that previous to the purchase by the Appellant of the before-mentioned articles of plate and jewellery in October 1828, it was agreed between the Respondent and deponent as his solicitor, and the Appellant and Mr. Ford as his solicitor, that the said articles should not be delivered to the Appellant until the deeds forming the security for payment for them should be registered in Ireland, and the requisite searches made there for prior incumbrances. That, after the said deeds were registered, and the searches made, in the month of November 1828, deponent gave an order authorizing the delivery of the said articles to the Appellant. That, in April 1828, previous to the negotiation respecting the said articles, deponent was applied to by Mr. Farrell, and Mr. Burt, a solicitor, to know if any client of deponent's would advance the Appellant about £5000 or £6000, in consequence of which deponent communicated with a gentleman who, on inquiry, declined making the advance; that Farrell and Burt then applied to know whether Mr. Hamlet would assist the Appellant, and they proposed that the advance should be partly in money and partly in goods, and should be secured on an annuity and a reversionary interest belonging to the Appellant; that deponent accordingly proposed to the Respondent to make an advance, and, to the best of his recollection and belief, mentioned to him that the Appellant wished to have part in money, but whether deponent said anything about money or not, the Respondent said that he should not object to let the Appellant have goods to the amount [229] proposed, and it was ultimately agreed that the transaction should wholly consist of goods; that at the commencement of the negotiation, Burt acted as the solicitor of the Appellant, but in an early stage of it Mr. Ford stated himself to be then the Appellant's solicitor, and the negotiation was then carried on and concluded between deponent on the part of the Respondent, and Ford on the part of the Appellant; that it was first proposed that the payment for the goods should be secured by mortgage on the Appellant's annuity of £800, and on the reversionary life estate to which he was entitled on the death of his father; that, in the course of the negotiation, the Appellant disposed of the whole of his annuity, and the Respondent hesitated very much whether he would accept the remaining security on the Appellant's contingent reversion; that Farrell intimated to deponent that Lord Lorton was very desirous to save the reversionary estate from being absolutely disposed of, and that if the Respondent would accept a mortgage not redeemable within four years as his security, Lord Lorton would pay off the debt and take an assignment of the mortgage, and with that prospect deponent recommended to the Respondent to accept the proposed mortgage; that it was at first proposed that the goods to be purchased should amount to £5000, but afterwards Farrell proposed that the credit should be increased to £8000, and it was then agreed that goods to that amount should be purchased by Appellant of Respondent; that Farrell, on repeated interviews with deponent in the course of the negotiation, declared most distinctly that Lord Lorton was aware that the Appellant was to have goods and not money from Respondent, as the consideration for the proposed mortgage, and that Lord [230] Lorton concurred in the transaction, though deponent understood from Farrell that his Lordship would not make himself an avowed party to it on account of the dealing, and deponent believed at the time, and still believes, that Farrell was acting as an agent

for Lord Lorton, and was in communication with him upon the affairs of the Appellant, and was authorized to state Lord Lorton's concurrence in the said transaction, for Farrell showed deponent letters that he had from Lord Lorton relating to the affairs of the Appellant, and it was from one of these letters that deponent first learned that the Appellant had sold a portion of his annuity; that the only interview which deponent had with Lord Lorton previous to the completion of the said purchase, was by the introduction of Farrell at the United Service Club, in June 1828, by desire of Lord Lorton; that on the 3d of September 1828 deponent received a letter from Mr. Anthony Lefroy, requesting to see deponent upon particular business, and on the 5th of that month Mr. A. Lefroy and Mr. Serjeant Lefroy called upon deponent, and upon that occasion deponent handed the draft deed of mortgage to Serjeant Lefroy for his perusal, and whilst he was engaged in perusing the draft, deponent and Mr. A. Lefroy entered into conversation respecting the transaction between the Appellant and Respondent, in the course of which deponent perfectly remembers and can positively state, that he mentioned to Mr. A. Lefroy that the transaction was entirely for goods, and deponent at the same time pointed out how much better it would be for Lord Lorton to advance his son the money, and take the mortgage himself: as, if the Appellant were to sell the goods purchased of the Respondent, there must be a considerable loss sustained by him, upon which Mr. A. Lefroy replied, [231] "Oh, never mind the sacrifice, so that the estate is saved," or expressions to that effect, and deponent had no doubt but that Mr. A. Lefroy distinctly understood, that the Appellant was to have goods and not money on the security of his reversionary estate; that Mr. Serjeant Lefroy was in the same room with deponent, and Mr. A. Lefroy, whilst the said conversation was going on, and though engaged in perusing the draft, yet as the conversation passed in an ordinary tone of voice, deponent thinks it scarcely possible but that Mr. Serjeant Lefroy must have heard what was said by deponent and Mr. A. Lefroy. At the same interview deponent pointed out to Mr. Serjeant Lefroy the advantage which would accrue to Lord Lorton by permitting his son to deal with his reversionary estate by mortgaging it, as such an act would have the effect of confirming the family settlement; and in reply to deponent's observations, Mr. Serjeant Lefroy stated, that on his return from the continent, he should certainly recommend to Lord Lorton to redeem the mortgage which the Appellant was about to grant; that deponent did not upon any occasion after his earliest communication with the Respondent upon the subject of an advance to the Appellant, give the friends or father of the Appellant to understand that he was to have money from the Respondent on the proposed security; that the said draft remained in the same state as when it was perused by Serjeant Lefroy, except that so much as related to the charging of the annuity, which, at the time the draft was drawn, had not been disposed of by the Appellant, was subsequently struck out, in consequence of the Appellant's having assigned the same.

Deponent, on his cross-examination in behalf of the Appellant, said, he applied in person to the Respondent in April or the beginning of May 1828, for the first time, [232] on the subject of the required loan, and then told him that Appellant wished to deal with him to the amount of £5000, and wished an advance of some money, upon which the Respondent desired him to investigate the Appellant's title to the proposed security, and if he approved of the same and obtained the sanction of Lord Lorton to the transaction, he would supply Appellant with shop goods to the amount of £5000, in the same way as he did his other customers, at the market prices of his shop; that deponent did at the commencement of the said transaction believe and understand that the Appellant was a young man of the age of 25, and that he was not then living under his father's roof, or under his control; and deponent on his first interview with Respondent, on the subject of the said loan, informed him that the Appellant was then of age, and living independently as a Member of Parliament, and he did not then or at any other time inform the Respondent of the Appellant's situation with his father, or of his rank, connexions and expectancies or otherwise, relative to his wanting to raise a loan, or having occasion for money, save as hereinbefore stated; deponent did not then know or suspect that the Appellant had no use for the said goods, or some of them, nor that he did not intend to keep the whole of them, but deponent suspected, heard and believed that the Appellant did

intend to sell some of the said goods. Deponent, after communicating with the Respondent relative to the required loan, stated to Ford, that he would endeavour to get the Respondent to advance some money, as well as to let the Appellant deal with him for goods upon the security of the reversionary property and annuity, but such intention was not carried into effect on account of the Appellant having disposed of the annuity and thereby leaving no fund [233] applicable to the payment of interest and premiums of insurance; that in June 1828 deponent was introduced to Lord Lorton by Farrell, who appeared to be on intimate terms with his Lordship, and deponent did then converse with Lord Lorton, relative to the Appellant's wish of raising money, and strongly urged him, to advance the Appellant any money he might stand in need of, and take the security of the reversionary estate and annuity to himself in the name of a trustee, to prevent the Appellant further incumbering the same; and Lord Lorton said he would consider the proposal, but did afterwards, as deponent was informed, decline the same on account of its not being convenient to him to advance the money. Deponent did not inform Lord Lorton, nor lead him to believe, save as aforesaid, that the Appellant was raising money; Lord Lorton did evince and express his anxiety to preserve the family estate, as the best means of checking the Appellant in his career. At the time deponent had that interview with Lord Lorton, it was contemplated by deponent that the greater part, and by the Respondent that the whole, of the advance required by the Appellant, should be made up of goods to be sold and delivered to him by the Respondent, but deponent did not inform Lord Lorton of either of the said matters, or state to him anything relative to goods, deponent having left Lord Lorton under an impression that his Lordship would advance the money himself; previous to, and at the time when deponent showed the mortgage draft to Mr. Serjeant Lefroy, it had been settled and agreed by Farrell, and by deponent, and by the Respondent, that he should sell to the Appellant goods to the amount of £8000, for which he was to have the proposed mortgage security. Deponent did [234] not inform Ford at any time, that the Respondent could not advance the whole of the loan in cash, or that he would advance half in cash and the remainder in goods, but he did say to him that the Respondent would allow the Appellant to deal with him for goods, and take security for the amount of such dealing. Deponent attended at the shop of the Respondent on the 28th of October, and took with him the proposed mortgage deed engrossed and ready for execution, and also a promissory note for the sum of £8000, and a warrant of attorney for entering up judgment in his Majesty's Courts of Record in Ireland against the Appellant, at the suit of the Respondent for the said sum and interest. Ford and the Appellant were in the said shop when deponent went there, and were then selecting some articles of goods, and they continued so doing in the presence of deponent and also of the Respondent; and the articles so selected formed the consideration for which the mortgage and other securities were prepared; and the Appellant then and there executed and signed the said mortgage and warrant of attorney and promissory note, after the goods were selected and set apart.

Deponent advised the Respondent not to part with the goods until deponent's demand of £400 for his costs as solicitor in the said business was satisfied, and the deeds properly registered, and the securities made perfect by the searches for incumbrances etc.; and the Respondent retained the goods for about a month after the date and execution of the mortgage security, for the reasons before stated.

John Henry Woolbert, shopman to the Respondent, deposed that he assisted in selling to the Appellant on [235] the 24th of October 1828, articles of plate and jewellery, and in taking his orders for some spoons to be manufactured for him, and the prices charged for the said articles respectively were the lowest prices at which such goods were usually sold by the Respondent at that period; that it was the practice for every article exposed to sale in the Respondent's shop to be labelled with the price thereof; not in private marks, but in plain common figures, intelligible to every person; and it was invariably the practice for every article so labelled to be sold at the price marked without any abatement or deduction whatever, except for prompt payment, in which case the usual discount of five per cent. was allowed to the purchasers. The prices of articles sold by the Respondent were determined by adding to the cost price a profit of about 25 per cent. on jewellery, of about 17 per cent. on articles of plate generally, and of about 12½ per cent. on

silver forks and spoons and other similar articles of small plate. The price of the articles selected and purchased by the Appellant was labelled on each article according to the usual mode adopted in the shop, and the prices were the ordinary prices charged to customers in general for similar articles, and the selection was made from the general stock of the Respondent, at that time exposed for sale to customers in general, and the selection of the said articles by the Appellant and Mr. Ford was made freely, not in any respect controlled by deponent or any person acting on the part of the Respondent, nor did deponent or any person acting for Respondent in the said sale intimate to the Appellant, or Mr. Ford, that they must not select all articles of plate, but must take some jewellery, or say anything to that effect.

Deponent on his cross-examination deposed, that [236] at the time the Appellant came to select the said goods, deponent did not know or believe or suspect that the Appellant and Respondent were not dealing by way of *bonâ fide* purchase and sale of goods in the usual course of trade, or that the said transaction was by way of loan, or that the goods were to be substituted for money, or that the Appellant had no use or occasion for the jewellery selected for him, or that he did not intend to keep the same; and by an observation made by Ford on that occasion, that some of the articles would do for the Appellant on his marriage, and some of the articles of plate having been made to the particular order of the Appellant, deponent believed that he did intend to keep the articles, and he then believed, from the appearance of the Appellant, that he was at that time of the age of 23 or 24 years, and unmarried; but did not know or believe or suspect that the Appellant was not a housekeeper, or that he was in embarrassed circumstances, or intended to sell or dispose of, or pledge, or otherwise to raise money on or by means of the said goods.

John Evans and John Rowe Snow, two more of the Respondent's shopmen, deposed to the same effect; and the latter further said, on his cross-examination, that Mr. Ford took an active part in the selection of the goods for the Appellant, and that it was not unusual for persons purchasing goods in the Respondent's shop to be accompanied by their law agents or solicitors, and he named two purchasers who were so accompanied.

Christian Etzerods, a jeweller and diamond worker, John Linnett, a goldsmith, and Samuel Norman, a silversmith, being examined on behalf of the Respondent, and cross-examined for the Appellant, said they saw and valued the goods, of which respectively each [237] of them had most knowledge, while they were in the possession of Mr. Robins or of his bankers, and they considered the prices at which they were sold to the Appellant fair and reasonable, and such as jewellers generally charged. Mr. Linnett would give £4000 for the whole if he wanted such articles.

Sir William Horne and Mr. Pemberton (Mr. J. B. Parry was with them), for the Appellant.

The case was to be considered by their Lordships in two points of view; first, supposing Lord Lorton to be altogether unconnected with it, and secondly, supposing him to be connected with it. The bill was filed by the Appellant alone. It was proved in evidence that the transaction proceeded from a negotiation with the Respondent, for a loan of money; it was not the case of a sale of goods in the course of the Respondent's trade, but an advancement of goods, instead of money, to supply the Appellant's necessities. Under the mask of trading, a method was adopted of lending money at an extraordinary rate of interest, the Respondent taking advantage of the Appellant's necessities. The very nature of the goods must have satisfied the Respondent that the Appellant's object was not to obtain goods, but an advance of money. They comprised many articles of the same class: for example, three diamond necklaces, a diamond and ruby necklace, and a pearl necklace, and the price of the latter alone exceeded £1500. Did the Respondent, an intelligent tradesman, and man of the world, suppose that the Appellant mortgaged his reversion with a power of sale, insured his life at a considerable cost, and gave his note for £8000 payable on demand, with warrants of attorney for both England and Ireland, so that neither he nor his property could have any escape, [238] at a time that he was separated from his family, and had, to the knowledge of the Respondent, disposed of his only present resource, the annuity provided for him out of the family estates—did he suppose that the Appellant entered into such liabilities and paid an attorney's bill to the amount of £400 in order to play with

such toys as diamond, ruby, and pearl necklaces? The Respondent well knew that the Appellant obtained them only for the purpose of supplying his urgent occasions for money. The extent, as well as the nature of the purchase, proved it: the Appellant's attorney selected most of the articles, and according to his evidence, wished to avoid jewellery, and to obtain plate as a more ready money article, but this the Respondent's shopman would not permit. The goods were detained by the Respondent for a month, till the deeds were registered, and the attorney's bill paid —a singular mode of treating a customer for £8000 worth of jewellery, although the securities carried interest immediately from the day they were executed, and therefore, as against the Appellant, it was a ready-money transaction. A month after the selection of these articles, they were sent by the Respondent to the office of the Appellant's attorney; from his office they quickly found their way to the auctioneer's warehouse, and having been submitted to public auction, they were sold at prices so ruinous to the Appellant, that it would have been acting mercifully towards him, if the Respondent had at once deducted 60 per cent. from the £8000 proposed to be advanced and taken a security for the £8000 at five per cent. interest. Unless an end is put to this branch of equitable jurisdiction, this transaction cannot stand. Where a shopkeeper knows that the sale of his goods in his shop is simply nominal, and that [239] they must be really sold in a very different market, equity relieves against a pretended sale in the shop, and treats it as a loan having an usurious tendency and as a catching bargain, and allows him only the sum realised by the sale in that market, to which he knew they were destined. *Barker* v. *Vansommer*.*

This Appellant was an expectant heir. It is not denied that an expectant heir may well mortgage his expectancies for a *bonâ fide* advance of money; but he cannot borrow money in the shape of goods, and then mortgage his expectant property to secure the amount of the bill; if he be rash enough to do so equity will protect him from the consequences. A sale by him out and out of his reversion at an undervalue cannot be maintained; a mortgage is a partial sale, and may operate as a total alienation, and therefore is governed by the same rule. This was simply an attempt to evade the rule and to secure to the Respondent 30 per cent. principal, beyond what he actually parted with. The transaction was such as induced the Respondent, not to consult his own regular professional advisers, but he put the matter into the hands of Mr. Newland. The Respondent was throughout aware that the Appellant was a young man unmarried, not a housekeeper, and not living under the control of his father. While this very transaction was in progress, the Appellant was compelled by necessity, as the Respondent knew, to sell the whole of the provision made for him only shortly before, in [240] resettling the family property. The transaction commenced in an application for a loan of only £5000 in money, but because the proposed loan changed its character, it was necessary to enlarge the amount to £8000, in the delusive hope that it would realise £5000; but to the Appellant the produce was only £2730. The Respondent did not even make his customary rebate of £5 per cent. for ready money, which in this case would have amounted to £400, although the mortgage carried interest at £5 per cent. from its date. The real nature of the transaction could not be stated with safety; in the mortgage, therefore, the Respondent described himself not as a goldsmith in Sidney's-alley, but as an esquire, in Cavendish-square; it stated, not a dealing for goods, but a debt from the Appellant to the Respondent of £8000, and the Appellant was made in the body of the deed to admit the receipt of the £8000, and a receipt was indorsed on the deed, and signed by the Appellant, which, contrary to the truth of the transaction, represented the £8000 as then paid down in money. Advantage was taken of the Appellant's necessities, not only by the substitution of jewellery for money, and by the retention of the goods until Mr. Newland's demand of £400 for his costs was satisfied, but also by the oppressive nature of the securities. Powers of sale of the Appellant's reversion in the

* 1 Bro. C. C. 149. As the counsel read Lord Thurlow's observations in that case, Lord Lyndhurst expressed a doubt whether the facts were correctly stated in the report to warrant the observations referred to. The agent for the Appellant afterwards, as the reporters have been informed by one of the counsel, procured and sent to Lord Lyndhurst the pleadings and briefs in the case, and the report in 1st Brown was found to be correct.

family estates in case of default in payment of even any half year's interest; policies of insurance for £8000; warrants of attorney for entering up judgment against him in England and Ireland; a judgment in Ireland; a promissory note for £8000, payable on demand, although, by the deed, three years' credit was given: all attested the grinding, griping nature of the transaction, and the absolute dominion which the Appellant's neces-[241]-sities had given the Respondent over him. Was this then a case in which a court of equity ought not and was not bound to relieve?

Next as to Lord Lorton's knowledge of the dealing. Even was it to be assumed, contrary to the fact, that the Appellant's father was informed by the Respondent or his agents of the real nature of the transaction, that would not afford a sufficient reason for withholding all relief from the Appellant. The father's knowledge would not destroy the son's equity. But where the transaction was behind the father's back, that circumstance was in general unfavourable to the lender, and formed an additional reason for treating the case as opposed to public policy. Again, if it was to be assumed that Lord Lorton's object was to obtain a power over the Appellant's expectant estate, and that with such view he encouraged the Respondent to furnish the Appellant with goods to the amount of £8000 on security of that expectant estate, in order that he (Lord Lorton) might afterwards get an assignment of the mortgage, as the Appellant had no knowledge of his father's interference or of his having any intention of that kind, such interference could not defeat the expectant heir's own equity to be relieved from the imposition practised upon him. In truth, Lord Lorton, as the evidence proved, never knew that it was intended to advance goods and not money to his son; and when the real transaction was disclosed to him, he refused any assistance to his son, except upon the condition that the Respondent would take back the goods, which he refused to do. Now the Respondent's equity is made to rest upon the communications with the father: such a defence only the more strongly marks the nature of the case against the Appellant. The subsequent sale of the goods by the Appellant, [242] though it might modify, is not sufficient to deprive him of the relief which equity affords to expectant heirs against oppressive bargains. The sale did not put it out of the power of the Court to administer a specific measure of relief, since the cost price and the sale price (which included the manufacturer's and shop profit of the goods), and also the value upon a sale by public auction, and the expenses attending such a sale, all distinctly appeared in evidence. The Respondent himself occasioned the sale, by his refusal to take back the goods and rescind the transaction. There are no facts or circumstances in this case to justify the conclusion that the pressure of the Appellant's necessities ceased from the time he offered to return the goods to the Respondent. On the contrary, it was proved in evidence, that the Appellant continued wholly destitute of any property or income in possession, until December 1829; and that the offer of assistance from the Appellant's friends to redeem the goods from Mr. Robins was conditional, on the Respondent's agreeing to receive back the goods. And if his father's qualified offer, which was not accepted, is to deprive the Appellant of his equitable title to relief, such a rule will in future deter parents from offering in such cases a reasonable assistance to their sons; since, if the proffered assistance should prove ineffectual, it will be made the ground of upholding the very transaction which it was their object to avoid. Such a doctrine is against principle, and altogether unsanctioned by legal authority.

In addition to the cases referred to in the argument and judgment in the Court of Chancery, the cases of *Gowland* v. *De Feria* (17 Ves. 20) and *Portman* v. *Taylor* (4 Sim. 182) were cited.

[243] Mr. Knight and Mr. Stuart for the Respondent:—All argument upon the sale of reversionary interest by an expectant heir, might have been spared in this case. This was not the sale of a reversion, but the borrowing of money at interest, or, which comes to the same thing, the purchase of goods for a money price, and giving the reversionary property as security for payment. The transaction sought to be impeached was proved by the evidence to have been perfectly fair; and the Appellant was competent to bind himself thereby, and did knowingly and deliberately so bind himself.

It was proved beyond contradiction or doubt, that the Respondent refused all along to allow the Appellant to purchase his goods on the security in question,

unless Lord Lorton, the Appellant's father, was informed of the transaction; and Lord Lorton not only was not kept in ignorance of the negotiation, but encouraged the prosecution of it. The draft of the mortgage deed was sent to and perused by Mr. Serjeant Lefroy, the Appellant's brother-in-law. It was impossible to suppose that Serjeant Lefroy, or any man conversant with conveyancing, could mistake the object of that deed and fancy it was a security for the advance of money.

The relief now sought on behalf of the Appellant, is to compel the Respondent to deliver up his securities, upon receiving the inadequate price for which the articles purchased from him by the Appellant were allowed to be sold by auction, after Lord Lorton had interfered, through his own solicitors; the Appellant himself being a purchaser of some of the articles at that sale, pending the first suit commenced by Lord Lorton's solicitors for the Appellant, with Lord Lorton's concurrence, praying to rescind the transaction upon a redelivery of the goods, and also praying that [244] the goods might be kept in safe custody in court; which first suit was allowed to be dismissed for want of prosecution. That sale produced between £3000 and £4000, which was not near the value of the articles, but yet was as much as could be reasonably expected under all the circumstances. It was a general auction of a vast variety of goods, there being only 75 articles of those purchased by the Appellant of the Respondent. The allegations in the present bill as to the value of the articles, are not only wholly unsupported by evidence, but there is clear evidence that the articles were of the full value for which they were sold to the Appellant, and for which the security was taken.

There is no proof that the Appellant was under any pecuniary pressure when he executed these securities, and no reason to say that advantage was taken of his distress. He was in all these transactions accompanied by his own attorney. There is no case in which relief has been granted without the restoration of the goods, except that of *Barker* v. *Vansommer*, which was a mere device, shift and conspiracy to commit fraud and obtain usurious interest, and was wholly different from this case, in which neither usury nor fraud exists. The true nature and essence of this transaction sought to be set aside is, that goods were transferred to the Appellant on credit, at the ready money prices, he giving security for payment with interest; that the Appellant took the goods and converted them to immediate use, the imprudence of which conduct was his own affair; and that he now prays relief, not on the principle of restoration, but by fixing the Respondent with a loss, amounting to the difference between the price at which the goods were sold in his shop, and the price which, after much damage, [245] they fetched at auction, which was a forced sale. That is what the Appellant calls equity: he would have back his estate in the state in which he mortgaged it, but he would not restore what he received in consideration, nor an equivalent. There is no reciprocity in that sort of dealing; there is no equity in it, and the House will not sanction it.

The learned counsel, after referring to the judgment of the Lord Chancellor in the Court below, adopted his Lordship's course of reasoning, and, in addition to the cases there mentioned, they cited and commented on the other cases which had been referred to on behalf of the Appellant.

Sir William Horne in reply:—The transaction was tainted in its origin. The contract was admitted to be for goods, which were to be sold forthwith to raise money for the Appellant. If the goods had continued in the possession of the Appellant, and if he offered to return them, and the Respondent refused to take them, would the Appellant have lost his equity by reason of a subsequent sale, and inability to restore them? But it was in evidence, that an offer was made to restore the goods, and was refused. The Appellant being under continuing pressure, and not being able to pay Mr. Robins the £2500 advanced by him on the goods, was obliged to raise that sum by sale of them. But the sale of the goods made no difference in this case. The Appellant's equity was in the original transaction; if that was against the principles of the courts, it could not be reconciled to them by any subsequent conduct of the Appellant, who never for one moment was free from his embarrassment until he filed the bill. He relied on the case of *Barker* v. *Vansommer* before cited.

[246] Lord Brougham, in moving that the case be adjourned for further consideration, observed at the same time that he did not think there was any ground

to say, that the general principle acted upon in courts of equity, in the cases cited, was involved in this, but there were peculiarities in it not to be found in those cases.

Lord Lyndhurst having this day (Sept. 5) moved the judgment of the House in other cases, said, with respect to this case, "I attended during the arguments and paid every attention to the reasoning of counsel at the bar; I have since very carefully and deliberately read the papers, the pleadings and depositions, and also the elaborate judgment of Lord Brougham in the Court below; the conclusion to which I come is, that I see no ground whatever to dissent from the judgment so pronounced."

It was accordingly ordered and adjudged that the appeal be dismissed, and that the decree complained of be affirmed, but without costs.

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[247] APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

The Rev. JOHN BOUVERIE and Sir THOMAS STAPLES, Baronet,—*Appellants;* the Right Hon. HECTOR JOHN GRAHAM, Earl of NORBURY, and Others,—*Respondents.*

[Mews' Dig. vi. 1441; xv. 1653. S.C. 9 Bli. N.S. 611.]

A testator devised his estates to his eldest son, but charged certain of them with legacies to his younger children, specifically charging one of such legacies amounting to £10,000 upon one of his estates, and another legacy of £20,000 upon a different estate. He then made other devises and bequests, and directed that a certain house and his residuary property should be sold in payment of his debts and in ease of his real estates. The legatee of the £10,000 filed a bill to have the trusts of the will declared and executed. Creditors were directed to come in, and the estates specifically charged with payment of the debts were found not sufficient for that purpose. The Court afterwards directed a reference to the Master to take an account of the debts, and that in taking such account he should report the order and priority of such debts and incumbrances, and particularly that he should inquire and report whether any and what sum remained due to the person entitled to the legacy of £20,000 and the priority thereof. This legacy had been assigned to trustees under a marriage settlement, and they were not parties to the suit, but went in with others upon the reference to the Master. The Master made a report of the amount of the debts, and found that this legacy was a charge affecting this particular estate, but was only next in priority after the payment of the judgment and bond debts of the testator. Held that such finding was right.

By a settlement made in 1743, upon the marriage of John Ponsonby with Lady Elizabeth Cavendish, cer-[248]-tain lands situate in the county of Cork, and among others the towns and lands of Aghavine, Bryades, Ballymorrisheen, Cooleloughfinny, Cornweagh, Gortcorkeran, and Garryjames (named in this suit as the lands of the first denomination), were settled to the uses of the marriage.

William Brabazon Ponsonby was the eldest son of that marriage; he attained 21 in the year 1765, and by an indenture dated 6th November 1769, he joined his father in making a tenant to the precipe for suffering a recovery, and in Michaelmas Term 1769 a recovery was suffered, pursuant to such indenture, of the said barony, etc., in the county of Cork, excepting and reserving thereout the said towns and lands of the first denomination, which recovery was to enure to such uses as should be declared by any deed to be thereafter executed by John Ponsonby and William Brabazon Ponsonby jointly.

William Brabazon Ponsonby shortly afterwards married the Honourable Louisa Molesworth, and by deed, dated December 1769, made a re-settlement of the Cork estates, excepting as before the seven townlands of the first denomination, mentioned in the indenture of November 1769.

John Brabazon Ponsonby was the eldest son of this marriage.

In Trinity term 1777, John Ponsonby and William Brabazon Ponsonby suffered a recovery of the seven towns and lands of the first denomination, and by the deed to lead the uses, dated 24th May 1777, it was declared that such recovery, when suffered, should enure to such uses as should be declared by any deed executed jointly by John and William Brabazon Ponsonby under their hands and seals; and by indenture dated 16 June 1777, executed by them, they conveyed the seven townlands to trustees, upon [249] certain trusts, with a power to themselves, or the survivor of them, to revoke such trusts and appoint others. This power was exercised by the said William Brabazon Ponsonby, after his father's death, by a deed poll, dated the 20th June 1788, appointing the seven townlands to himself in fee.

John Ponsonby, by will, dated 5th July 1781 (in pursuance of a power reserved to him by the settlement of October 1769), charged the settled estates with an annuity of £300 to his second son George Ponsonby for his life. John Ponsonby died shortly after making this will.

In Michaelmas term 1802 a fine was levied, and a common recovery suffered, by the said William Brabazon Ponsonby and John Brabazon Ponsonby, of the manor and lands, excepting the seven townlands of the first denomination, but including the seven other townlands of the second denomination.

By a settlement, dated in January 1803, and made on the marriage of John Brabazon Ponsonby with Lady Fanny Villiers, William Brabazon Ponsonby, the father, and John Brabazon Ponsonby, his son, conveyed the manor of Inchiquin, and the lands before mentioned, situate in the county of Cork, "save only and except the seven townlands of the first denomination, and saving also and reserving out of said grant and conveyance seven other townlands, called the seven townlands of the second denomination, part of the said manor, (that is to say) the town and lands of Kilnatoragh, Ballyvarrigheitra, Drissanmore, Drissenbeg, Mullarys, Ballycoleman and Barnacoley East," which it was thereby declared were not intended to pass by any general words in the said deed contained, but were to remain subject to such uses, trusts and purposes as might thereafter be [250] limited and expressed respecting the same, jointly by the said William Brabazon Ponsonby and John Brabazon Ponsonby his son, to the use (subject to the jointures of Louisa Ponsonby and Lady Fanny Villiers) of William Brabazon Ponsonby for life, remainder to John Brabazon Ponsonby for life, remainder (subject to an intervening term of years for raising younger children's portions) to the use of the first and other sons of the said John Brabazon Ponsonby, severally and successively in tail male, with similar limitations to the brothers of John Brabazon Ponsonby, and their respective sons, and with the ultimate remainder to William Brabazon Ponsonby in fee.

By a subsequent indenture, dated the 4th February 1803, and which deed was executed by John Brabazon Ponsonby, but was *not* executed by William Brabazon Ponsonby, it was expressed that William Brabazon Ponsonby and John Brabazon Ponsonby did thereby grant the said towns and lands of the second denomination unto trustees, upon trust to permit William Brabazon Ponsonby and John Brabazon Ponsonby during their lives, or John B. Ponsonby after the death of his father, by sale or mortgage, to raise such sums of money as they should find necessary for their convenience.

William Brabazon Ponsonby, by his will, dated 23d December 1803, after reciting, that, by his marriage settlement, a sum of £8000 was provided for his younger children, to be divided amongst them in such shares as he should appoint, and that on the marriage of his third son, Richard Ponsonby (now Bishop of Derry), he had appointed £1000, part of a sum of £8000, for the younger children of the said Richard, if two, £2000, if three, £3000, and if four, [251] or more younger children, £4000; the testator did appoint the remaining £4000, of the sum of £8000, as also such further parts thereof as should be raised on the contingency of Richard not having a younger child or children, to be divided equally amongst his the said testator's younger children, namely, William Ponsonby, George Ponsonby, and Mary Elizabeth, the wife of Earl Grey, and Frederick Ponsonby; and after further reciting, that the testator was seised in fee of the fourteen towns and lands situate in the county of Cork, and excepted and reserved out of the settlements of 1769 and 1803 respectively, and also reciting that he was seised in fee of the estate of Bishops Court,

with Clarke Paddock, and of a freehold interest in the lands of Oughterard, in the county of Kildare, and that he was seised in fee of an undivided moiety of an estate in the county of Londonderry, the testator devised the said several lands, situate in the county of Cork, to trustees, upon trust, out of the rents and profits of the said lands to pay to the testator's wife, Louisa Lady Ponsonby, an annuity of £400, in addition to the jointure provided for her by her marriage settlement, and a principal sum of £600, to be paid to her upon the day after his decease; and he devised his estate of Bishops Court, and the other premises before-mentioned, of which he was seised in the county of Kildare, to his wife for the term of her life, and after her decease to his eldest son, John Brabazon Ponsonby, and his heirs, subject to the payment of a sum of £20,000 to the testator's fourth son, George Ponsonby, which he thereby charged on said Bishops Court estate, with interest for the same at the rate of £5 per cent. from the day of the death of his wife: and the testator, by his will, devised to his said eldest son his said county of Cork estate, meaning [252] thereby the fourteen townlands in the will mentioned, subject to the incumbrances then chargeable thereon, and to the payment of all such debts as he the testator should owe at the time of his death; and also if his wife, Lady Louisa, should survive him, to pay to George Ponsonby £1000 yearly during the life of his wife, with power to the said George to levy the same by distress, etc.; and he devised his estate in the county of Londonderry to his second son, William Ponsonby, upon a condition in the will mentioned; and after certain other bequests and directions he did thereby direct that his house in Henrietta-street should be sold, and that the money arising therefrom should be applied towards payment of his said debts; and all the residue of his property the testator bequeathed to persons named Peter Metge and Dennis Bowes Daly, for the purpose of being sold, and the money arising therefrom to be applied towards payment of his debts, in ease of his real estates; and the testator appointed his wife, the said Louisa, sole executrix of his will, and by a paragraph added to the will, immediately before execution and publication, as a further provision for the Respondent, Frederick Ponsonby, bequeathed to him a sum of £10,000, to be paid out of the estate in the county of Cork, which he thereby charged with the payment thereof, with interest at the rate of £5 per cent. from the day of his decease.

The testator, W. B. Ponsonby, was created Baron Ponsonby early in the year 1806, and died on the 5th of November in that year, leaving the Respondent, John Brabazon Lord Ponsonby, his eldest son and heir.

Upon the death of the said William Brabazon Lord Ponsonby, his widow entered into possession of the [253] Bishops Court estate, as tenant for life under his will, and held the same till her death: and the present Lord entered into possession of the fourteen townlands in the county of Cork, purported to be charged by his father's will as aforesaid; and William Ponsonby entered into possession of the devised estates in the county of Londonderry. By indenture of assignment, dated 10th June 1812, being the settlement made on the marriage of George Ponsonby, the fourth son of the testator, with Diana Julietta Margaretta Bouverie, the legacy of £20,000, and all interest to grow due thereon, were assigned to the Appellants, upon certain trusts declared in that indenture.

On the 11th September 1813, Frederick Ponsonby filed his bill in the Court of Chancery in Ireland against the present Lord Ponsonby (one of the Respondents), and others, praying that the trusts of the will of the testator, William Brabazon Lord Ponsonby, might be carried into execution, and that the present Lord Ponsonby might be obliged to make his election, whether he would abide by the will of his father, and permit the whole of the fourteen townlands in the county of Cork, or a competent part thereof, to be sold for payment of the debts, legacies, and annuities, charged thereon by his father, or whether he would claim any part of them adversely to the said will, and that the Respondent, Lord Ponsonby, and all persons claiming by or under him, might be for ever bound by such election; and in case he should elect to take the reversion of the estate and lands in the county of Kildare, expectant on his mother's death, that his, the plaintiff's legacy of £10,000, and the interest thereof, might be decreed well charged on the fourteen townlands, and that the same, and all other incumbrances charged thereon by the testator's will, might be raised by sale [254] of the whole or a competent part of the fourteen townlands, and have priority to any debts or incumbrances of the testator: and on the other

hand, if Lord Ponsonby should make his election to claim any part of the several townlands adversely to his father's will, that in such case the plaintiff's legacy of £10,000 might be decreed well charged on such of the fourteen townlands as should appear liable to the debts and legacies of the testator, the late Lord; and that so much of the debts and legacies as the same should not be sufficient to pay, might be deemed charges upon the reversion of the estate and lands in the county of Kildare; and that such of the fourteen townlands as were liable to debts and legacies, might be sold for payment thereof, and in case of deficiency, that the reversionary estate and lands in the county of Kildare, or a competent part thereof, might be sold to make up such deficiency, and that all necessary accounts for the purpose might be directed and taken, and in particular an account of the plaintiff's legacy of £10,000, and of the sum due to him on account of his proportion of the sum of £8000 under the settlement of 6th December 1769, and that the same might be raised by sale of a part of the estates comprised in that settlement.

Lord Ponsonby, by his answer, elected to take under the will, preferring the reversion of the Bishop's Court estate, and other lands in the county of Kildare expectant on his mother's decease, together with the other property devised to him by the will, to any interest he might otherwise have in the fourteen townlands; and he thereby consented, in order to make his election the more decisive, that the fourteen townlands, or a competent part of them, should be sold for payment of the plaintiff's demand, and all other legacies, annui-[255]-ties, and debts charged thereon or otherwise affecting the same.

On the 9th March 1814, a decree was made directing an account of the late Lord Ponsonby's debts, etc. and declaring the present Lord bound by the election.

On the 16th December 1814, the Master made a report of the debts, and on the 13th March 1815 an order was made on further directions,—directing payment of the debts and of the legacy of £10,000, and ordering a sale of the fourteen towns and lands in Cork for that purpose. A supplemental bill was filed by Frederick Ponsonby, on the 4th April 1818, stating that the present Lord had incumbered the lands in Cork, and had thereby divested himself of the power of making a valid election with regard to the seven towns and lands of the first denomination mentioned in the deed of January 1803, without the consent of his creditors, and praying that if the creditors should refuse to release the lands, etc., a competent part of the Kildare estate should be ordered to be sold to make up the deficiency occasioned by the charges now discovered to have been made upon the Cork estate.

The Respondent, Lord Ponsonby, by his answer to the last stated bill, admitted having mortgaged the said seven townlands, and charged them as in the bill stated. By a supplemental decree made on the 22d June 1818, it was ordered (amongst other things) that the decree of the 13th of March 1815 should be confirmed in all respects, except as to the sale of the seven townlands of the second denomination excepted out of the said settlement of January 1803, and afterwards made the subject of the said indenture of February 1803, which lands it was then admitted [256] were not subject to the debts and legacies of the testator; and it was ordered that the seven other townlands, those of the first denomination, which were the fee simple estate of the testator, should be forthwith sold for the purposes expressed by the former decree, subject, as to the townlands of Gortcorkeran, to the jointure of £400 a year charged thereon for the Respondent Frances, the wife of the Respondent the Bishop of Derry; and the Respondent Lord Ponsonby having defeated his father's will as to the first seven townlands, and disabled himself from making any valid election with regard thereto, or to the reversion of the Bishop's Court estate, it was decreed, that in case the other seven townlands thereby decreed to be sold should be insufficient to pay off the whole of the debts and legacies of the testator, sought by his will to be charged on the fourteen denominations, that then so much of the debts and legacies, and the interest due thereon, as should remain unpaid after the application of the money to arise from the sale of the lands so decreed to be sold, should be charges upon the Respondent Lord Ponsonby's reversion of and in the said Bishop's Court estate, and the other lands in Kildare; and it was ordered that the same should be raised by sale of that reversion, or a competent part thereof, subject to the use for life by the said will given to the testator's widow, which sale was ordered accordingly,

and that any residue of the money to arise from such sale, after payment of the debts, legacies, and costs, should be paid to the parties entitled thereto.

The testator's widow (then Lady Fitzwilliam) died on the 1st September 1824.

The lands were sold, and the net purchase money applied, pursuant to an order dated 15th December [257] 1825, as far as it would go in payment of judgment debts reported due from the testator.

The cause again came before the Lord Chancellor on bill of revivor, and by an order bearing date the 6th of March 1828, made by his Lordship, it was referred to Mr. Connor, one of the Masters, to take an account of the debts of the said testator proved and reported, and which remained unpaid, and to report the priority of such debts, and whether any and what sums remained due to the said George Ponsonby on account of his said legacy of £20,000, and the priority thereof, and out of what fund the same was payable; and it was further ordered that the Master should inquire, whether it would be necessary that the Bishop's Court estate should be sold forthwith, and before he should have made his report, and if so, it was ordered that he should proceed to a sale of that estate accordingly. Under this order of reference the Appellants went in before the Master upon the inquiry as to the £20,000, and the Respondent and other creditors also carried in their claims.

Mr. Connor made a separate report under the last stated order, dated 29th November 1828, finding that it would be necessary that the said Bishop's Court estate (which was inferior in value to the amount of the charges and incumbrances appearing to affect it) should be sold prior to making his report on the other matters referred to him; and by his further report, dated 27th June 1831, he found that the Bishop's Court estate was sold on the 9th November 1829, pursuant to his separate report, for the sum of £38,000; and he further found that there remained due to the several persons thereinafter named the several sums thereinafter stated on account of the several debts and legacies of the testator, after the [258] application of the purchase money of the seven town-lands sold as aforesaid, and that the several debts and legacies of the testator thereinafter specified were incumbrances affecting the residue of the estates of the testator, according to the order and priority thereinafter set forth; the Master then stated the several judgment and bond debts (including £19,384 12s. 5d. due on bonds to the Respondent the Earl of Norbury) remaining due from the said testator, and the Master then stated, that there was due to the Appellants, as trustees under the settlement of George Ponsonby, the sum of £24,717 18s. 8d. on account of the said legacy of £20,000, and that the same was a charge affecting the said Bishop's Court estate, and was next in priority after payment of the said several judgment and bond debts. The said Master then stated the several simple contract debts remaining unpaid.

The Appellants filed objections to the last report on the ground that the said Master ought to have found that the said sum of £24,717 18s. 8d. was a charge affecting the said Bishop's Court estate prior to and in exclusion of the said several judgment and bond debts. These objections were argued before the Lord Chancellor of Ireland, who, by an order of the 12th November 1831, overruled the objections. This order was the subject of the present appeal.

By an order, dated 11th February 1832, it was referred to Master Connor, to report the funds in the bank to the credit of the cause, which report was made on the 20th of that month, and by a further order, dated 5th March 1832, payment was made according to the allocation of claims made in the preceding report.

By an order, made on the same day by the Master of the Rolls, the carriage of the decree in the said cause, [259] and of the proceedings thereunder, was given to the Respondent the Earl of Norbury, a reported creditor in the cause.

On the 11th of February 1834 the Appellants presented their petition of appeal against that order of the 12th November 1831, praying that that order might be reversed, and that the sum stated in the report of the 27th of June 1831, as due to the Appellants in respect of the legacy or charge of £20,000 and the interest thereof, might be declared as against all persons parties to, or who had come in under and taken the benefit of the several decrees and proceedings in the said causes or any of them, a charge upon the said Bishop's Court estate and the other lands in the county of Kildare, devised by the will of the testator, William Brabazon Baron Ponsonby, deceased, prior to the several and respective judgment debts and debts

upon bond or other specialty which had been proved in the said causes, or either of them, and which remained unpaid at the date of the same report; or that such report might be sent back to be reviewed so far as related to the priority thereby assigned to the said legacy or charge of £20,000 and the interest thereof.

Mr Tinney and Mr. Lloyd for the Appellants:—This is not a creditor's suit, a fact which must be borne in mind throughout the argument. In all cases where the testator is seised of real estate, the creditors have two sorts of remedies respecting it. They may claim under the will and seek payment of their debts under the devise made by the testator for that purpose, or they may claim paramount to the will, in which latter course of proceeding the particular creditors here would come in under the Irish statute of fraudulent [260] devises, passed in the reign of Queen Anne, which corresponds exactly with the English statute of fraudulent devises, 3 William and Mary, c. 14. If the creditors claim under the will, they cannot touch any estate of which the testator died seised, and which is not expressly given for the payment of his debts. They must be confined to proceeding against those only which he charged with payment of the debts. If they mean to claim paramount to the will, that claim should be distinctly stated in the proceedings. It is not so stated in this suit, and therefore cannot govern the decree of the Court. The plaintiff in the original suit was Frederick Ponsonby, and the object of the suit was to raise the legacy of £10,000, granted by the will to him. The Master, therefore, has gone out of the suit in making this report in favour of the creditors. It has never been contended, that the parties coming in under this suit are able to touch the Londonderry estate. Then why should they be able to charge the Kildare estate, and especially to make their claims a charge prior in rank to one which, by the will, is expressly imposed upon it? The original decree of March 1814 simply directed that the will of Lord Ponsonby should be carried into execution. A subsequent proceeding in the same suit cannot extend the effect of that decree to what it was never intended to touch. The decree establishing the election of the present lord to take under the will made both the denominations of the Cork estate subject to the payment of debts. There is no principle of equity which, while supporting the will, can make other estates, besides those charged in it with the payment of debts, also liable to such payment, and liable too in the first instance. The object of the supplemental bill was to vary that decree, so far as related to the election of [261] the present lord, in having disabled himself from making the required election in a full and ample manner, and the decree made on the hearing of the supplemental bill was to this effect, that the second seven denominations of the Cork estate were not liable to the payment of the testator's debts, but that a competent part of the estates possessed by the testator in fee simple, should be sold for that purpose. Then came the reference to the Master, who made the order now appealed against. The objections taken to the order are not merely of a technical nature, but involve the question of the mode of administering assets in equity. The foundation of the claim of the Respondents is in the Irish statute of fraudulent devises (4 Anne), the words of which are the same as those of the 3 William and Mary, c. 14, ss. 2 and 3. By that statute devises made to defeat the claims of creditors are to be void as against them, and they are to have power to go against the heir or devisees. But then the question arises, whether creditors are to go against one particular devisee and not against the rest, and so deprive one of the benefit of the will and leave the other in full possession of all its advantages.—[Lord Brougham: The words "devisee and devisees," are used in the Act. The first word refers to cases where there is one devisee, the other to those where there are more devisees.]—There is no case directly decided on the words of this statute; but the principle on which a court of equity proceeds is distinctly stated in *Knight* v. *Knight* (3 P. Williams, 331), where it was decreed that though the creditor may sue the heir only where the heir is expressly bound, yet as the personal estate is the natural fund to pay all debts, and as the [262] executor must make it appear that he has performed all the covenants of the testator, a covenantor must join the executor with the heir in a suit brought upon a covenant in which the testator had bound himself and his heirs; and Lord Chancellor Talbot there observed, that "Equity delights to do complete justice, and not to do it by halves, as first to make a decree against the heir and then to leave him a suit against the executor." This

is the principle on which courts of equity administer assets: that principle must be adopted here; and an order which selects a particular estate as primarily liable to the debts of the testator when he possessed other estates, and when the selection would affect the rights of a particular legatee, cannot be supported. It would be making a decree against one party and then leaving him a suit in equity against another. The principle stated by Lord Talbot is recognised in *Mador* v. *Jackson* (3 Atkins 406), where Lord Hardwicke said, "The general rule of the Court is, that where a debt is joint and several, the plaintiff must bring each of the debtors before the Court, because they are entitled to the assistance of each other in taking the account." That is precisely the case here, and the order ought not to have been made without other parties being brought before the Court. There is an objection to the order too upon the statute against fraudulent devises; so that whether it is set up as a proceeding by parties taking under or against the will, it is equally invalid. The fifth section of that statute declares that a *bonâ fide* alienation, made before a suit brought, shall be relieved from liability to payment of the testator's debts. Here there was an assignment of this claim to the Appel-**[263]**-lants as trustees, on a good consideration, the consideration of marriage, on the 10th of June 1812; and the bill here was not filed till the 10th December 1813. Under this statute, therefore, the estate on which the charge vested in them is imposed, is altogether relieved from the claims of the Respondents.

Mr. Knight and Mr. Parry for the Respondents:—The Bishop's Court estate is like all the rest of the testator's property, primarily liable for the testator's debts before it can be applied to any other purpose. If the legatee had wished to obtain this estate in satisfaction of his legacy, there is but one way of his doing so; he must first pay all the testator's debts. In a case, therefore, where it is admitted that the testator died indebted, the Court was bound to direct an account of the debts; and if the estate on which they were specifically charged was not sufficient to meet them, the Court was then bound to direct that other estates should be held liable to their payment before those other estates were applied to the payment of mere legacies. The creditors are entitled to payment at all events, and must be paid, whether under the will or under the statute, and whether they are the plaintiffs in the original suit, or come in under it. In a bill for administering the trusts of a will, the Court is not bound to administer those trusts exactly as they are found in the will. Every such bill is necessarily a bill for the payment of debts, and the trusts cannot be carried into execution till the debts are paid. By the order of the 6th March 1828, which is unappealed from, the very question now brought before this House was expressly raised, for by that order the Master is directed to report the priority of the debts, and whether any sum was due to George Pon-**[264]**-sonby on account of the legacy of £20,000, and whether the Bishop's Court estate should be sold forthwith. The necessary effect of reporting (if the Master had so reported) that the legacy was prior to the bond debts, would be to entitle the legatee to take the purchase money of the Bishop's Court estate out of Court, and leave the creditors to get payment how they could. The opposite result would not necessarily follow from the report as it stands, for if the Court below sees reason to do so, it may still examine what other assets there are for the payment of creditors before taking possession of these estates for that purpose. The Appellants here are too late with their appeal, for they have allowed nearly three years to elapse without appealing, and many things have been done in the mean time founded upon the order against which they have at last thought fit to appeal. A court of equity, and this House is now sitting in that capacity, will not allow of such delay on the part of an appellant. It is quite clear on every ground that the order is sustainable, and the appeal ought to be dismissed with costs.

Mr. Tinney, in reply:—The substance of this appeal is, whether creditors who have a large personal estate to resort to, can come in under this suit and insist upon payment out of this particular estate.—[The Earl of Devon: I do not think that that is the question which we have now to consider; the real point is on the abstract opinion of the Master relative to the priority of the debts or the legacy.]—That is the question in point of form, but it cannot well be decided without the other question being first determined. This was not necessarily, nor otherwise, a

suit for the administration of the assets of the testa-[265]-tor. The suit was merely that the trusts of the will might be carried into execution. A judgment or a bond creditor would not be bound by such a suit, but might take the estate in spite of the will; he cannot therefore be allowed the same advantage as in a suit in which he would be bound by the course of the proceedings.—[Lord Brougham: In any suit of this sort the bond creditors may come in as if the suit was their own.]—They could not do so here, for all depends on the form of the suit.—[Lord Brougham: Then the result would be that the proceedings in the suit must be stopped, to enable another suit to be instituted and the creditors to come in.]—In that case the Londonderry estate and the Henrietta-street estate would be brought into the account, neither of which is touched by the present suit or the order now the subject of appeal; it is impossible to carry on the purposes of the will without having all the estates brought into the account; the creditors are bound to get all the property administered, and the Court will not suffer them to select what property they please for payment of their own debts. The legatee has not been guilty of laches; he had no right to complain till the last order, the order for payment, was made; till then he was not affected by the report. The direction to sell the reversion here must be construed in the same manner as a direction to sell an estate with a mortgage upon it: the estate may be sold, but it will be subject to a claim in respect of the mortgage. The supplemental decree states that so much of the debts, legacies and interest as should be found to be due should be decreed to be a charge and incumbrance on Lord Ponsonby's reversion in the Bishop's Court estate; that means his reversion after the payment of the charge of £20,000. What is [266] to be satisfied out of the estates directed to be sold? The legacies and charges upon the Cork estate. Yet it is now in substance argued, that these legacies and charges may be satisfied out of the reversion of the Kildare estate. To make this estate liable to the order, there must be a suit for the general administration of assets.—[The Earl of Devon: Does not the order of the 6th March 1828 show that this is a suit for the administration of assets?]—No, it does not amount to that.—[Lord Brougham: It directs that an account shall be taken of legacies and debts, and that the Master shall then proceed to a sale of the estate.]—But that order has reference entirely to the Bishop's Court estate, and was made upon the death of the tenant for life, for the purpose of ascertaining the particular charges on that estate, and not for any other purpose. Suppose that this was the case of an ordinary mortgagee, and an order of this kind had been made, that would not interfere with his priority as mortgagee. The legatee here is the prior incumbrancer and stands in the same situation as the mortgagee. The testator's debts were charged originally on the Cork estate. They are now charged by substitution on the Kildare estate; but that substitution cannot take effect till a prior charge on that particular estate has been satisfied. The substitution cannot in this way be made a prior charge. There are not in this suit parties sufficient to justify the Court in doing what it has done.—[The Earl of Devon: Can you object to want of parties upon exceptions to the Master's report?]—Yes, there was a case * at the last sittings at the Rolls bearing upon this subject. It was a question on proving a legacy before the [267] Master. The legacy was given by two distinct instruments. The Master reported that there was but one legacy. The defendant, the party claiming the legacy, had died before the Master made this report. The case then came on for further directions and distribution, and the Master of the Rolls said that he could not direct a distribution of the whole property in the absence of the representatives of the party that had died, and he directed a fund to be set apart equal to both the legacies claimed by that party.—[The Earl of Devon: That case is not in point.]—But it shows the rule on which courts of equity proceed. Now, as to the statute of fraudulent devises; suppose that this, instead of being a mere equitable estate, had been a devise to trustees to raise the £20,000, the estate in fee would have been given them for that purpose, and on the marriage settlement of George Ponsonby they would have conveyed over; that would have been an alienation before a creditor's suit, and would have been an answer to the application of the provisions of the statute. The assignment to the trustees of this charge is equally

* We have not been able to learn the name of the case.

an alienation that renders the statute inapplicable. [Lord Brougham: But is there not an objection here on the score of lapse of time; this order was made in 1831; you have allowed other things to be done in the mean time, and have not appealed till 1834].—The laches of lying by for two years is not sufficient to deprive a man of a right. We did not allow the funds to be distributed, but appealed when the order for distribution was made; that was, at the first moment that the report of the Master was about to be put into operation.

The Earl of Devon:—My Lords, this was a case heard before Lord Brougham and myself; we have [268] consulted together on the subject, and the opinion which I have formed, and am about to state to your Lordships, has his full concurrence. This was a case of considerable importance in point of amount, but the point raised in it was a very short one. It was an appeal from an order of the Lord Chancellor of Ireland on an application made, in the form of a motion, to set aside or to review a finding by one of the Masters of the Court of Chancery of Ireland, and the simple question was, whether the Master was right in the conclusion to which he had come upon the inquiry directed before him. The case originally was a suit for legatees, and it is not necessary to repeat the statement of the earlier proceedings in the cause. The duty of the Master depended on the terms of the reference made to him by the Court; he was directed to make a certain inquiry, and the only question is, whether he has answered that inquiry correctly? The reference to him was in these terms. [His Lordship read the terms of the order of reference and of the finding by the Master upon that reference, see *ante*, p. 257.] The persons who objected to this finding, did so, and went before the Court to vary it or set it aside, on the ground that the Master ought to have declared that the legacy was a charge prior to the debts, and that it had not been satisfied. The question was, whether the Master was right in finding that this legacy was a charge after the debts? We are of opinion that the Master was right in his finding. His duty depended on the terms of the reference made to him, and we think he has fulfilled that duty. It was argued at the bar that this was not a suit for the administration of general assets, but that the £20,000 legacy was to be paid out of the particular estate, which therefore was in the first [269] instance liable to satisfy this charge; and till that charge was satisfied, it was liable to no other. But it appears to us that there is no principle on which it can be contended that the judgment and bond debts of the testator are not a lien and a charge upon this particular estate, in preference to any charge in the way of legacy that he may have created upon it; and if he had still continued in possession of this estate, such judgment and bond debts would have had a priority of charge upon it in preference to any such charge or legacy. His own directions cannot alter this state of things. In the further progress of the cause the Court below may find it necessary to say that the creditors who have charges upon other estates as well as upon this, shall in the first instance be paid out of those other estates, in order that no persons may be disappointed, and that the legacies which are charged upon one particular estate, may be, if possible, satisfied out of that estate; but with that the Master had nothing to do. That is what the Court may or may not think proper to be done in any subsequent stage of the cause. The only question for the Master was, whether this particular legacy had a priority over other charges with respect to this particular estate. We think that he was right in saying that there was such a priority; we are therefore of opinion that the order of the Lord Chancellor was correct, and that that order must be confirmed, and the appeal from it be dismissed: and we think this so clear that we recommend that the appeal should be dismissed with costs.

Order of the Court below affirmed accordingly.

[270]

APPEAL

FROM THE COURT OF EXCHEQUER IN EQUITY.

The Most Honourable HENRY DE LA POER, Marquis of Waterford,—*Appellant*.

The Rev. THOMAS KNIGHT, Clerk,—*Respondent*.

[Mews' Dig. v. 777; S.C. 9 Bli. N.S. 307; 2 Y. and C. 22; and see 11 Cl. and F. 653.]

A Plaintiff filed a Bill in the Court of Exchequer for an account of tithes, and for discovery and relief. The Defendant, being an infant, put in his answer by his guardian. The answer set up an immemorial payment in lieu of tithes, but did not make the required discovery. By the practice of the Court of Exchequer in Equity, the answer of an infant cannot be excepted to for insufficiency. When the Defendant came of age, the Plaintiff filed a Supplemental Bill against him, alleging the existence of new facts, and praying for discovery and relief. Held that such Bill could be supported.

This was a bill filed in Trinity Term, 1830, by the Respondent, who is the rector of the rectory and parish of Ford, in the county of Northumberland. The bill sought for an account of tithes claimed by the Respondent, in respect of the lands within the rectory, manor and parish of Ford. The Appellant is the lord of the manor, and also an occupier of land within the rectory. The bill also alleged that the Appellant had in his custody or power certain deeds, instruments, papers, receipts, etc., relating to the tithes of the parish of Ford; and it sought a discovery of the same from the Appellant.

The Appellant, on the 19th of February 1831, being then an infant, by his guardian put in an answer [271] to the said bill, by which it was alleged that, the parish of Ford comprised within its bounds, amongst other lands, the manor of Ford; that the lord of the manor of Ford, had from time whereof the memory of man was not to the contrary, paid, by equal half-yearly payments, at Lady-day and Michaelmas-day, to the parson of the parish of Ford, the yearly sum of £40, for the maintenance of Divine service there, and for and in lieu and contentation of all manner of tithes arising within the said manor of Ford; and that the lord of the manor of Ford had always from time immemorial used, in respect of the said yearly sum of £40, to have, and of right ought to have, the tithes arising within the said manor of Ford. The answer made no discovery upon the subject of the deeds, etc., mentioned in the bill. By the practice of the Court of Exchequer, the Respondent was precluded from taking exceptions to the answer of the Appellant, on the ground that he was an infant. The Appellant attained 21 about April 1832, and in Hilary term, 1833, the Respondent filed a supplemental bill against him for a discovery of the matters not noticed in the original answer put in by the Appellant. That bill set forth the former proceedings, and referred to the allegations and prayer of the original bill, and to the answer filed thereto.

The supplemental bill further stated, that the Respondent had lately discovered that in times past the lords of the manor of Ford, who were patrons of the rectory, and under whom the Appellant claimed, used, upon presenting to the rectory, to require and take from the person about to be presented a penal bond that he would not demand or take the tithes arising from the farm and lands within the manor of Ford, but would take and accept a sum of £40, or some [272] such sum, as and for a satisfaction for the tithes, or that they used to take some bond to some such effect; and that the Respondent had also discovered, that in time past the rectors of the parish of Ford, when no such bond as last-mentioned was given, used, upon or soon after their induction, to make or grant a lease to the then lords of the manor of Ford of all the tithes of all titheable matters arising upon or from the farms and lands within the manor of Ford; and that the sum of £40 a year, or some such annual sum, was the rent reserved in such leases, to be paid half-yearly to the rector by the lord; or some lease to some such effect were made by some of the former rectors of the parish to some former lords of the manor; or there were some instruments or agreements in writing, whereby the sum of £40 was fixed as the whole amount to be received by the rectors from the lords for the tithes of such lands as aforesaid, within the manor of Ford, or

for some tithes within the parish of Ford; and that the Respondent was advised and believed that the payment of £40, in the answer of the Appellant stated to be an immemorial customary payment, in fact had its origin in such bonds and leases or other instruments or agreements as were thereinbefore mentioned. And it was further stated, that the Respondent had lately learnt that in or about the year 1573 there was a claim made in respect of the tithes arising within the manor of Ford, by the then rector of the parish of Ford, by name William Bradforth, against William Carr, the then lord of the manor, and that a suit was instituted by the said William Bradforth against the said William Carr in respect thereof, and that the same was heard before the Council in the town of Berwick-upon-Tweed; and that on or about the 14th October 1573, a decree [273] or decretal order was made, and entered in the books of the council of the town, and by which all controversies between the said parties were directed to abide the arbitration of certain persons therein named; and that some award or arbitrament was duly made, by which it would appear that no such sum as £40 had been immemorially paid by the lords of the manor of Ford to the rector of the parish of Ford, in lieu of tithes, as was alleged by the Appellant, or by which it would appear that tithes in kind were then and now are due to the rector of Ford from the owners and occupiers of land within the manor of Ford. And that the Respondent had caused diligent search to be made in and amongst his deeds and papers, and also amongst the records kept at Berwick aforesaid, and elsewhere, to endeavour to discover the original of the award or arbitrament, or some copy thereof, but that he had failed to find the same or any copy thereof, nor was it or any copy of it amongst his deeds, papers or writings: and that the Respondent had lately discovered that the Appellant had the award and arbitrament in his custody, possession or power, or some copy of, or extract from, the same. And the supplemental bill further stated, that within the parish of Ford there was a district or portion of land, consisting of about 600 acres, and called or known by the name of the Catford Law or Hay Farm, which formerly belonged to the lords of the manor of Ford, and was part and parcel of the manor of Ford, and was held by the lords of the manor as part and parcel thereof; but that the Respondent had lately discovered that some time between the year 1598 and the year 1660, or at some time thereabouts, the then lord of the manor of Ford, sold the district or portion of land called Catford Law to one of the family of the Carrs of Etall, [274] and that the same had ever since remained and then was held by the family of the Carrs of Etall; and that the owners and occupiers of the land comprising the district called Catford Law or Hay Farm, and of every part thereof, had, ever since the aforesaid sale thereof, paid tithes of all titheable matters and things had and taken by them from their said lands, to the rector of the parish of Ford; and that within the parish of Ford there was a portion of land or district called or known by the name of Heatherslaw, and which then belonged to the Appellant, and formed part of the lands in respect of which he claimed that the sum of £40 was payable in lieu of tithes; and that the Respondent had lately discovered that the district of Heatherslaw was formerly a manor of itself, and was not part or parcel of the manor of Ford, and did not belong to the lords of the manor of Ford, but belonged to some other person or persons, whose names were not known to the Respondent, before it became the property of the lords of the manor of Ford; and that tithes in kind were always paid by the tenant of the lands in Heatherslaw aforesaid to the rectors of Ford for the time being, until some time between the years 1685 and 1717, when Francis Blake, or Sir Francis Blake, knt., the then lord of the manor of Ford, purchased the said manor of Heatherslaw of the then owner thereof, whose name was also unknown to the Respondent; after which time, and not before, the tithes of the land within Heatherslaw aforesaid were introduced into and included in the aforesaid bonds, leases or instruments whereby the said sum of £40 was received by the rectors of Ford, in lieu of the tithes of the lands the property of the lords of Ford, and that the district of Heatherslaw was not, nor ever had been, part of the manor of Ford. And [275] the supplemental bill further stated, that the Respondent had lately discovered that the Appellant had, at the time of filing the supplemental bill, in his possession, custody or power divers of the bonds and leases, or other instruments or agreements in writing thereinbefore mentioned; and had also divers old deeds, instruments and writings, whereby it would appear that the district called Catford Law formed part of the manor of Ford, and that the Appellant had also the

deeds of conveyance of Catford Law, which were executed on the occasion of the sale thereof thereinbefore mentioned; and that he had also divers deeds, instruments and writings, whereby it would appear that the district called Heatherslaw was a manor of itself, and was not part of the manor of Ford, and that tithes in kind were formerly paid for lands within Heatherslaw; and that the Appellant had also the deeds of conveyance of the district called Heatherslaw, by which it would appear that Catford Law, otherwise Hay Farm, formed part of the manor of Ford, and that the district called Heatherslaw was not part of the manor of Ford; and that the Appellant had also in his possession, custody or power, divers other deeds, etc., whereby it would appear that the sum of £40 had not been immemorially paid by the lords of the manor of Ford to the rectors of the parish of Ford, in lieu and contentation of all manner of tithes arising within the manor of Ford, or which in some way tended to show the Respondent's title to tithes in kind within the manor of Ford. And the supplemental bill prayed in the usual manner for a discovery.

The Appellant, on the 21st of February 1833, put in a demurrer to the supplemental bill, on the ground that the Respondent was not in equity entitled to the [276] discovery sought for by the said supplemental bill from the Appellant, or to any part of such discovery.

The demurrer was heard on the 4th day of May 1833, before Lord Lyndhust, Lord Chief Baron, when his lordship over-ruled the same. This was an appeal against that decision.

Mr. Swanston and Mr. Purvis for the Appellant:—The supplemental bill here cannot be supported. It would be objectionable if it was a bill filed for a discovery from an adult defendant, for it is a demand for a discovery of the rights of the defendant rather than of those of the plaintiff. It is still more objectionable as a bill against an infant. The rules of practice in suits where infants are defendants are well known and fully established, and no new rule of practice can be introduced as to them merely by analogy to suits between adults. The plaintiff, by this bill, asks for a discovery of such things as were not answered to his satisfaction in the original bill. This cannot be done. Even if he has any right to maintain the bill at all, it must be solely in respect of things which have occurred since the filing of the first bill, or at least which have since come to his knowledge, and which he could not know before. What would be the practice of the Court with regard to issuing an attachment against an infant for not answering! It has always been to favour them as much as possible. The rule as to such cases was laid down by Lord Hardwicke in *Huggins* v. *Alexander* (1 West, 131), where an infant being in contempt to an attachment for want of an answer, upon production of the attachment a messenger was ordered to bring the infant into Court, though the attachment had not [277] been served, and the time was not out, the practice being not to serve an attachment upon an infant, but to bring him into Court for his protection and advantage. In *Perkins* v. *Hamond* (1 Dick. 287), Lord Hardwicke said that an infant could not be kept in custody after a guardian had been assigned him, and that an infant defendant paid no costs of a contempt, but that the plaintiff always paid the messenger.—[Lord Brougham: The principles relating to infants' answers were much discussed in *Kelsall* v. *Kelsall* (2 Myl. and Keen, 409), where it was decided that an infant defendant who had answered had the privilege, on coming of age, to put in a new answer, stating a different case, and going into evidence to support it.]—That case is another example of the favour with which infant defendants are treated by the Court, and it shows the practice of the Court to be, that an infant defendant is not bound by his answer, but may adopt or reject it on his coming of age. Where an infant is defendant, the answer is sworn by the guardian, and the subpoena to bring in the answer is directed to him, and so is the subpoena to hear the judgment, *Taylor* v. *Attwood* (2 P. Wms. 643); and the answer of an infant, sworn to by his guardian, is not conclusive against him at law or in equity, not even after he had attained his majority, *Eccleston* v. *Petty* or *Speke* (Carthew, 79; 3 Mod. 259). In *Lucas* v. *Lucas* (13 Ves. 274) it was held, in Chancery, that no exceptions could be taken to the answer of an infant, but that the cause must be decided on the merits; and though the answer there, if it had been filed by an adult defendant, would have been deemed insufficient, it was acted on by the Court, and an injunction previously obtained was dissolved. If the [278] answer is not sufficient for the plaintiff's purposes, and if the plaintiff himself

fails in proving his own case, the bill, in the case of an infant, must be dismissed; it cannot stand over. The plaintiff here seeks to possess himself of all the advantages of a double suit by this supplemental bill. He must assert, or he will prove nothing, that he has a right, not to supply a defective answer by this bill, but a right, by a supplemental bill, to obtain an answer to an original bill. All the authorities are against such a proposition.—[Lord Brougham: Is the supplemental bill here the same as the original bill?]—It is, with the mere addition of the statement that the defendant has attained his majority. There are two passages in Mitford on Equity Pleading (3d Edit. 48, 49) which show that what is now attempted cannot be done. In the first of these that learned writer says, "Where the imperfection of a suit arises from a defect in the original bill, or in some of the proceedings upon it, and not from any event subsequent to the institution of the suit, it may be added to by a supplemental bill merely." Again: "When any event happens subsequent to the time of filing an original bill, which gives a new interest in the matter in dispute to any person not a party to the bill, as the birth of a tenant in tail, or a new interest to a party, as the happening of some other contingency, the defect may be supplied by a bill, which is usually called a supplemental bill." He then puts other cases, and proceeds: "In all these cases the parties to the suit are able to proceed in it to a certain extent, though, from the defect arising from the event subsequent to the filing of the original bill, the proceedings are not sufficient [279] to attain their full object." That is not the case here. There was no defect on the face of this record at the time when the record came into existence, and the defendant was at that time entitled to ask for a dismissal of the bill. There is a third passage in the book just quoted, where it is said (p. 263), "If any event happens which alters the interest of any party, or gives any new interest to any person not a party, the plaintiff may file a supplemental bill, or bill of revivor, as the occasion may require; and if the plaintiff thinks some discovery from the defendant, which he has not obtained, is necessary to support his case, he may file a supplemental bill to obtain that discovery." This last appears an extensive and unqualified proposition, but it occurs after the learned author had again and again explained the restrictions under which supplemental bills might be filed; and the proposition must therefore be taken subject to those restrictions.—[Lord Brougham: I see that the view taken of this case by Lord Lyndhurst in the Court below was this: Why do you come into equity for a discovery at all? Because the want of it, which the law cannot supply, would work a failure of justice; for this purpose equity is auxiliary to law, and affords relief, of which otherwise the party justly entitled to it would be deprived. That is the governing principle. Is it not a consequence of this principle, that if circumstances arise which show that the discovery has not been obtained and could not be compelled under the original bill, you may file a supplemental bill for the same reason for which you filed the original bill, namely, that otherwise there would be a failure of justice? The answer obtained from an [280] infant may be just as useless as if it had been an insufficient answer obtained from an adult. Against the adult you could file a supplemental bill; why should you not have the same remedy against the infant when he comes of age, and compel him to give an answer that may be read against him? Is there not the same reason and the same necessity for it, namely, as Lord Lyndhurst said, "to prevent a failure of justice at law?"]—The original bill was not for a discovery, but was a mere tithe suit, and no such bill could be filed against an infant, for on putting in an answer stating that he was an infant, he would be entitled to the costs of the bill. Besides, there cannot be a supplemental bill of discovery. It was admitted here in the judgment, that the plaintiff could not, according to the authority of *Usborn* v. *Baker* (2 Madd. 379), be entitled to an answer to such parts of the supplemental bill as were not contained in the original bill; how then could he be entitled to an answer to such parts as were contained there, and which had already been answered; and how could he be entitled to have the demurrer to his supplemental bill over-ruled. The case of *Boeve* v. *Skipwith* (2 Rep. in Chan. 75) certainly will not support the present case, nor does that of *Goodwin* v. *Goodwin* (3 Atk. 370), where the sole question was as to the right to introduce new matter upon an amended bill. In *Usborn* v. *Baker* it was at first urged that there was in truth no such thing as a supplemental bill of discovery, but on the authority of the passages in Lord Redesdale's book on pleading, that argument was overruled, and it was said, that where the object of the suit could

not be obtained by an amendment of the original bill, a supplemental bill might be filed. No [281] such allegation can be made with respect to the present case, nor can it be said that any of the circumstances referred to in Lord Redesdale's book upon pleading have arisen to bring this case within the rules there laid down. This is an attempt to obtain a further answer from the defendant. In that book (p. 256) it is said, "a further answer is in every respect similar to, and indeed is considered forming part of, the first answer." Now it is clear that a plaintiff could not compel an adult defendant to give a second answer to the same bill; why then can he do so with respect to an infant defendant? In *Ovey* v. *Leighton* (2 Sim. and Stu. 234) it was held that the plaintiff not having excepted to the answer to an original bill, could not except to one given to a supplemental bill, upon a principle which would have applied equally to the original answer; yet that is what is attempted to be done in the present instance. This case is one of the first impression, and if the doctrine now contended for on the other side should be admitted, will be of the greatest detriment to the practice of the Court, and will subject infant defendants to great vexation. In *Milner* v. *Lord Harewood* (17 Ves. 144) it was declared by Lord Chancellor Eldon, that the circumstances stated in a supplemental bill must be not only properly supplemental matter, but must be material to the plaintiff's case. The information here is not shown to be material; and again, the objection occurs, that the discovery demanded is of the defendant's own title by the discovery of the defendant's own documents. It is against the rule of a court of equity to allow of such a discovery, and against its practice to permit it to be made in the way now sought.

[282] Mr. Boteler and Mr. Loftus Lowndes for the Respondent:—The Respondent here seeks no more than he would be fully entitled to have, if the defendant had from the beginning of the suit been an adult. The fact that he was, when the bill was filed, an infant, interposed a difficulty in point of form, which, now that he is of age, no longer exists. Is substantial justice to be denied the Respondent, merely because of this form? The only effect of the argument on the other side would be, to get this bill dismissed, and to put both parties to the trouble and expense of a new bill. But the Appellant would gain an unfair advantage thereby, for, by Lord Tenterden's Act, the Appellant would now be barred from commencing a new suit. This injustice ought to be prevented. The cases which show that a plaintiff cannot except to an amended answer, as he did not except to the original answer, cannot apply here, for the forms of the court in this case prevented the plaintiff from taking exceptions to the answer of an infant defendant, and he cannot be punished for the forms of the Court. *Lucas* v. *Lucas* [13 Ves. 274] has been cited to show that the answer of an infant is to be considered sufficient, however insufficient it may be in itself; but there has been another case on that subject, *Meredith* v. *O'Donovan*, in which a bill was filed against a lady in her infancy, making certain allegations against her. She put in her answer in the usual manner, and an injunction, which had been previously issued, was dissolved. When she came of age a supplemental bill was filed against her, and she answered, without taking objection as to the competency of the bill. It is admitted, that no objection having been taken there, that case is not a direct authority for the present, but it shows that in practice there has been one case analogous to that now under discussion. [283] Another argument on the other side is, in substance, that when the infant attains 21, he may make a new defence, and therefore his answer, made when an infant, is not to be read against him. That is admitted, and *Kelsall* v. *Kelsall* (2 Myl. and Keen. 409), is a decided authority for that point. But that case does not touch the question involved in the present. This case clearly comes within the rule laid down by Lord Redesdale in his book on equity pleading (P. 48, 49), for the suit is here defective, as the plaintiff has not that which he is entitled to, an order to work out his relief; and the imperfection arises "from a defect in the original bill, or in some of the proceedings upon it." The same authority declares (Id. ib.) that "a supplemental bill may be filed to obtain a further discovery from defendant where the proceedings are in such a state that the original bill cannot be amended for that purpose." This case precisely falls within that description. In *Milner* v. *Lord Harewood* (17 Ves. 144), the real objection was, that the supplemental bill was for discovery only. The same was the objection in *Usborn* v. *Baker* (2 Madd. 379), and in the first the bill was refused because it did not show the dis-

covery required to be material, and in the last it was allowed on the authority of Lord Redesdale's treatise on equity pleading. In *Colclough* v. *Evans* (4 Sim. 76) a supplemental bill was not allowed, but solely for this reason, that it asked for something different from what had been asked in the original bill, and which might have been introduced by amendment into that bill. That is one of the very class of cases referred to by Lord Redesdale. But the subsequent case of *Crompton* v. *Wombwell* in [284] the same volume (4 Sim. 628) shows, that where the plaintiff discovered the new matter after the cause was in such a state that he could not amend his bill, he was allowed to file a supplemental bill. There again the rule stated in Lord Redesdale's book was adopted as the ground for the decision of the Court. There is no similarity between this case and one where a further answer is required to the same bill; the objection as to the possibility of creating perjury does not exist, for the defendant was not sworn to the truth of the first answer. The objections here are more of form than of substance. This is said to be a case of the first impression; it is so, but why? because the plaintiff, in a bill like this, is under a disadvantage as to costs, and plaintiffs will not put themselves under such a disadvantage if they can avoid it. That circumstance alone accounts for the fact of there being no precedents for a bill of this sort. Upon the whole, it is clear, that to refuse this bill would be to refuse equity in a case where the plaintiff, except for the intervention of a mere form, had a perfectly good equitable title to relief.

Mr. Swanston, in reply:—The absence of authorities cannot be reconciled with the existence of such a privilege as that now claimed by this plaintiff. The established rule of equity, is that in a suit against an infant, the plaintiff has no right to a discovery, but must prove his own case. There were other persons besides the present Appellant who were defendants in the original suit; it would be most unjust to them to keep the suit pending over their heads till this defendant came of age, in order to enable the plaintiff to file a supplemental bill for a discovery against him. [285] He was entitled, and so were they, when he put in his answer, to have the bill dismissed, and the plaintiff, if he seeks a further remedy, must seek it in a new proceeding. *Usborn* v. *Baker* [2 Madd. 379] does not carry the rule to the extent now contended for, but, like the doctrine stated in the last part of Lord Redesdale's treatise, must be taken subject to the limitations stated in the former part of that work.

Lord Brougham:—My Lords; I shall ask time to consider this case, as it is admitted to be a question perfectly new in practice, and one of first impression, as far as direct decisions on the very same circumstances are concerned, though it can hardly be said to be of first impression with respect to the principle to be derived from a whole current of authorities. It does not by any means follow, because there is no actual case where a bill was filed and answered during infancy, and a supplemental bill was afterwards allowed, that such a practice is never to be permitted; if the principle is clear, and the particular case is only a new application of the same principle, it does not by any means follow that because there never has been a judicial decision in favour of that application of the principle, the first decision on the point must be against it. There may be no such decisions, because the principle may have been deemed too clear to be debated; as, for example, it is probable that we might not find any case expressly deciding that a devise to A., with remainder to his heirs, is a fee simple, or with remainder to the heirs of his body, a fee tail. On the other hand, there may have been no case like the present, because it may have been thought that there was no principle justifying such a bill as that now under discussion. The absence [286] of authority will not alone decide my opinion on the question. I should wish to examine the matter a little further, and to consult some equity practitioners now on the bench with respect to it.

Lord Brougham:—My Lords; when this case was argued, I stated enough to show that I had a strong feeling in favour of the principle of the decision upon the demurrer in the Court below; but in order to consider one particular matter, the matter of practice, I moved the postponement of the judgment. It was admitted on all hands that this was the first case directly turning on this point, and that it was therefore a case of the first impression as to decision, although it must frequently have occurred in practice that such bills had been filed. With respect to bills for

discovery, the ordinary principle is, that a plaintiff is entitled to a discovery, whether for the purposes of a trial at law, or for relief in equity. Then comes the case of an infant. If I file a bill against an infant, and an answer is put in by his guardian, it is certain that that answer cannot be read against the infant at law, nor in equity, and I should be in so far in the same situation as if no bill whatever had been filed. There was a case in the Court of Common Pleas on this subject. Now, then, shall a party in this case be defeated of his object in obtaining relief, the infant having in the meantime come of age; or shall be allowed to file a supplemental bill, stating the facts which came to his knowledge after the answer was put in, and requiring a further answer, and a discovery? I think he may do so. It happens here that some of the facts stated in this supplemental bill did not exist at the time that the [287] answer by the infant's guardian was put in, nor till the infant had attained his majority. The demurrer amounts to saying that the party shall not do this, but that he shall be put to begin *de novo*, to file a new bill as if in an entirely new suit. It seems to me that nothing can be more senseless than to make a party under such circumstances submit to have his first bill dismissed, and to refer him to the delay and expense of a new bill, to get an answer to that to which, but for a matter of form, he might have got an answer before. On this principle I think the present case should be decided. It is quite clear from all the cases cited that the principles recognised in them, and adverted to by the text writers,—the work of one of whom, a learned person of the highest eminence, has been referred to,—would warrant the filing of this supplemental bill for a discovery; and as far as the expressions of these text writers apply, they induce the belief that those writers themselves never would have thought of filing a demurrer in a case like the present. In my opinion, this bill is in accordance with all the principles of equity, and the mere novelty of the case, as an objection against it, goes for nothing; it is the application of a well-known principle to facts justifying that application. There is no decision against it, and I think that the real and dangerous novelty would be the allowance of this demurrer. I have, therefore, no hesitation in moving that the judgment of the Court below be affirmed.

Lord Lyndhurst (Lord Chancellor):—If the information on which this plaintiff seeks for a discovery came to him so late that he could not state it in his original bill, he must be entitled to obtain it in a sup-[288]-plemental bill; this is the ordinary rule. But then we are asked to say that this ordinary rule does not apply to the case of an infant. In the Court of Exchequer the practice of the Court does not permit you to except to the answer of an infant. Is then a party to be without remedy, not only when the defendant is an infant, but after he has attained his majority?—If you do not allow a party then to get an answer as to a fact to which he could not get an answer in his original bill, what will be the consequence? Why he must begin *de novo*. That would be of no benefit to either party, but would be an additional and a useless expense. It is not according to the rules of equity to compel such a practice where it can be fairly avoided; that was the principle on which I decided the case in the first instance, and I am happy to find my own impressions confirmed so fully as they have been by my noble and learned friend.

Judgment affirmed with £100 costs.

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[289]

APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

The Right Honourable The LORD MAYOR, SHERIFFS, COMMONS and CITIZENS of the CITY of DUBLIN,—*Appellants;* The Right Honourable FRANCIS BLACKBURNE, His Majesty's Attorney-General, at the relation of JOHN M'MULLEN, RICHARD PURDY, and HENRY STAINES, on behalf of themselves and the other Householders and Owners of Houses in the City of Dublin and Liberty and Suburbs thereof, liable to Pipe-Water Rents, and all liable to Metal-Main Rents,—*Respondents.*

[Mews' Dig. iv. 606. S.C. 1 Bli. N.S. 312; 9 Bli. N.S. 395. See *Frend* v. *Dennett*, 1861, 5 L.T. N.S. 73; 4 C.B. N.S. 576; *Young* v. *Leamington Corporation*, 1882-83, 8 Q.B.D. 585; 8 A.C. 522; and *A.-G.* v. *Merthyr Tydvil Union* (1900), 1 Ch. 519.]

Certain local Acts of Parliament gave the Corporation of the city of Dublin the power to take measures for supplying that city with water, and to levy rates and rents on the inhabitants to meet the expenses that might thereby be incurred. The corporation passed bye-laws appropriating part of the revenue thus raised in a manner not strictly falling within the provisions of these Acts. Some of the inhabitants of Dublin filed an information against the corporation for an account, and the Court of Chancery in Ireland decreed an account, and held the corporation answerable for all sums which it had received and appropriated in a way not strictly conformable with the provisions of the local Acts. The House on appeal affirmed this decree.

Between the years 1775 and 1805 the Corporation of Dublin obtained from the Irish Parliament and the Legislature of the United Kingdom several Acts, for the purpose of providing a better supply of water **[290]** for the city of Dublin. These Acts were commonly known by the name of the "Pipe-Water Acts." By these Acts the corporation was entrusted with the duty of laying down wooden pipes throughout the city for the supply of water, and empowered to compel the inhabitants to receive the water so furnished, and to pay certain rates for the same, which rates were to be applied according to the provisions contained in the Pipe-Water Acts, for the indemnification of the corporation and the benefit of the inhabitants. In the year 1809, it having been thought expedient to substitute cast-iron pipes for wooden ones, the corporation again applied to Parliament, and procured the 49 Geo. 3, c. 80, to be passed, which is generally known by the name of the "Metal-Main Act." This Act enabled the corporation to borrow money for the purposes of the work, to receive rates, to apply them in defraying expenses and in diminution of the debt, and to appropriate any surplus to the formation of a sinking fund, with a view to this last named object.

The corporation proceeded for a considerable number of years to exercise the powers granted by the Pipe-Water and Metal-Main Acts, without meeting with any serious interruption. At length, however, the inhabitants, thinking that the corporation had been guilty of some breaches of trust, an information was, on the 30th day of October 1823, filed in the High Court of Chancery, in Ireland, by His Majesty's Attorney-general for Ireland, at the relation of John M'Mullen, Richard Purdy, Isaac Stewart and Henry Staines, on behalf of themselves and the other inhabitants of Dublin liable to the water rates, setting forth the particular acts of the corporation by which they conceived themselves aggrieved, and particularly charging that a sum of £2500, of the pipe-water **[291]** revenue, had for many years been misappropriated by the corporation, by voting sums thereout to the members of the corporation, and by increasing the salaries of their officers and charging the same on that revenue.

The information prayed that the corporation might be declared trustee of the rates and rents mentioned in said Act of the 49th of his late Majesty King George the Third, for the uses and purposes therein declared, and that the trusts thereof might be carried into execution, and also that an account might be taken of the monies received by the corporation, from the passing of the said last-mentioned Act, in respect of the rates or rents granted in and by that Act, and of the application thereof in each of the years in the said information mentioned, and of the expenses incurred in each year by laying down cast-iron or metal main and service pipes, or otherwise making additional alterations and improvements in the works, and also an account of the sums yearly applied in and towards the sinking fund from the time of the passing of the Act, and of the debts yearly paid off, and that an account might be taken of the money borrowed by the said corporation under the provisions of the Act, and due on the credit of the rates thereby granted, and of the money applied in payment of the interest of a debt of £67,800, and of the money borrowed, and that the balance of the rates, after deducting the expense of laying down cast-iron or metal main and service pipes, or otherwise making any additional alterations and improvements in said work, might be ascertained and applied as directed by the pro-

visions of said Act exclusively. And if it should appear that the money produced by the rates or rents so borrowed on the credit thereof had been applied to purposes not war-[292]-ranted by the Act, then and in such case the corporation might be decreed to replace such money to the account of the rates or rents, and that some proper person might be appointed to receive the rates or rents granted by the Act, or that the person or persons who then received same might pay the same into Court, to the credit of the cause, and for relief generally.

The Corporation of Dublin filed an answer to the information, in which it was alleged that the corporation had set forth how and in what manner, and when the rates had been received and disposed of; and it was denied that the corporation had misapplied the rates and the pipe-water rents.

And the corporation insisted that, from the fluctuating and variable nature and amount of the rents, it could not with any degree of certainty be stated at what period the debt and interest thereon, or the debt only, would or ought to be paid off, but that according to the best calculation on the subject, it appeared that in the latter end of the year 1826, there would be paid off, in principal and interest, the sum of about £100,000, and that there would remain to be paid in that year the sum of £99,600. It was admitted that the metal-mains would be subject to less decay than wooden ones, and the repairs thereof less expensive; and in support of the right to make the annual payments of £2500 out of the pipe-water revenue, the defendants referred to certain resolutions passed in the Assembly of the corporation in the years 1779 and 1809, authorising those payments. In July 1824, Lord Manners, then Lord High Chancellor of Ireland, before whom the case was heard, directed that the information should stand dismissed, with costs.

The relators appealed against this decree, and on [293] the 11th of May 1827, this House ordered that the decree should be reversed, and that the mayor, sheriffs, etc. of Dublin, should account for and apply the rates and rents in the manner mentioned in the Act, and that it should be referred to one of the Masters of the Court of Chancery in Ireland to take an account of all sums of money received by the corporation under the Act, and of the application of the same, and to state the balance of such account appearing at the end of each year respectively; and also an account of all sums of money borrowed at interest upon the credit of the rates and rents granted by that Act, and by the Acts therein recited, and which were necessary for the purpose of making such reservoirs, and laying such cast-iron or metal main and service pipes; and also an account of the several mortgages of the rents, or any part thereof for such purposes, and the costs of such mortgages, and to whom they had been made, and for what sum or sums respectively; and whether such sums so borrowed, exceeded or fell short of the sums authorised by the Act to be borrowed in the several years therein mentioned respectively.

And it was further ordered, that the Master should inquire and report the nature and particulars of the debt of £67,800 in the Act mentioned, and whether a fund had been duly provided, according to the directions of the Act, for redeeming and discharging the same, and all such further sum and sums of money as had been borrowed for the purposes, and within the several periods, authorised by the Act; and whether the mayor, sheriffs, etc. of Dublin had annually retained, out of the rate or rents granted by the Act, the sum of £2000, together with such sums of money as had been borrowed under the provisions of the [294] Act; and whether all such sums of money by the Act directed to be retained, had been appropriated and applied, as a sinking-fund, to pay off and discharge the said sum of £67,800, and such other sums of money as had been borrowed under the provisions of the Act; and generally, whether the interest on the debts had been duly paid, and whether the money received had been applied as directed by the Act.

And it was further ordered, that the Master should inquire and report whether the mayor, sheriffs, etc. of Dublin for the time being had kept accounts, as directed by the Act, of the receipts and produce, and amount of the rates and rents, and had paid and applied such part or balance thereof as from time to time remained, after retention of the several sums of money directed to be otherwise applied, as in the Act mentioned, in payment of the interest due on the money mentioned in the said Act to be then borrowed, and in laying down cast-iron or metal main and service pipes, or otherwise making such additional alterations and improvements in the works,

and in increasing the sinking-fund created by the Act; and whether any deduction had been made from the rates and rents save for collecting the same; and, if any, what deductions, and on what ground; and whether any surplus had been at any time, and when, received by the mayor, etc., and whether such excess had exceeded the sum of £500; and whether it had been from time to time added to the sinking-fund created by the Act, and paid and applied in like manner as the said annual sum of £2000 was directed to be applied; and whether the whole of the sums of money due under the authority of the said Act had [295] been fully paid off and discharged, or whether any and what parts then remained due, and why the same had not been discharged. And the Master was to take an account of costs due, and of works unfinished, and the Court was to do such things as were necessary to carry the judgment of the House into execution.

On the 19th May 1827 the Court, in obedience to this order, pronounced a decree by which it was adjudged that, by the terms of the 49th Geo. 3, the defendants, the mayor, sheriffs, etc. of Dublin, were bound to account for and apply the several rates and rents in the Act mentioned, in the manner expressed in the Act, so far as related to such rates and rents respectively. And it was referred to William Henn, esq., one of the Masters of the Court of Chancery in Ireland, to take the several and respective accounts before-mentioned, and the Master was armed with full powers to carry the decree into effect.

The Master made his report on the 18th September 1830. The Appellants took several exceptions to this report, the statement of which will fully explain the nature of the report itself. The first exception was, that the Master had improperly refused to allow an annual deduction of £1500, claimed by the corporation as an annual rent or allowance which had by long usage been appropriated by the corporation out of the pipe-water rent, as rent in respect of the estate of the corporation in the watercourse from the river Dodder to the city of Dublin, and of the works thereof and about the same, and in part compensation for the several sums of money expended by the corporation upon the pipe-waterworks, though it appeared that, by an Act of Assembly made by the corporation on the 11th January 1779, "it was re-[296]-solved, that for the future no part of the pipe-water revenue should be appropriated to any use save the several uses of carrying on the works, paying the officers, etc., until the corporation should have discharged the several sums borrowed on the credit thereof, except the sum of £1500 annually to be paid to the city treasurer for the use of the city, in compensation for the several sums expended previously to the late Act (meaning the 15th and 16th Geo. 3, c. 24,) upon the several works."

The second exception was, that the Master had not allowed a sum of £312 for interest on debentures, amounting to £5200, issued by the corporation before the passing of the 49 Geo. 3, though such debentures were still remaining due, and though interest to the amount of 6 per cent. per annum had been paid thereon by the corporation.

The third exception was, that the Master had not allowed a sum of £1000 a year, as and for a salary to the lord mayor and treasurer to the corporation, though evidence was laid before the said Master, that by an Act of Assembly, passed in February 1809, it was, on the recommendation of a committee appointed for inquiring into the revenue of the corporation, and how the same might be increased and its expenses lessened, resolved, "That it would be much to the advantage of the said corporation to pay to the lord mayor and city treasurer the sum of £1000 annually, in lieu of poundage or agency, such sum appearing to be less than the sums payable to them for poundage on an average of the preceding four years;" and that in every year since the passing of the said resolution, the sum of £1000 per annum had been uniformly paid by the treasurer of the said corporation to the lord mayor and treasurer, out of the [297] pipe-water rents, and that the same had been allowed by the corporation to the treasurer in passing his accounts.

The fourth exception stated, that if the Master had made these allowances, there would not have been found an excess of more than £500 in the hands of the corporation.

The fifth exception alleged, that if the accounts had been properly taken, the Master could not have found, as he had found, that the debt of £100,000 might have been paid off in May 1825.

In reply to these exceptions, it was contended, that the corporation had, on making

the resolutions now stated, exceeded the power given it by the Water and Metal Main Acts. These exceptions were fully heard before Sir W. M'Mahon, Master of the Rolls, and were over-ruled, and on the 7th July 1831, his Honor made a decree to the following effect:—

"That the said report of the said Master do stand confirmed. And it appearing as to the execution of the works provided for under the statute, 49 Geo. 3, that the defendants (the Corporation of Dublin), in 1823 and 1827, had laid down metal pipes for the whole estimated length of 56 miles, and that since that period they had laid down an addition of 7 miles and 35 perches of metal pipes; and it appearing that the defendants had not kept distinct accounts of the pipe-water and metal-main tax, as directed by the said Act, until the 29th day of September 1814; and it further appearing that the sum of £67,800, mentioned in the 13th section of the said statute, and theretofore charged by the Acts therein referred to, upon the pipe-water tax and water works in the pleadings mentioned, and the sum of £32,200 borrowed under the provisions of the statute (and making to-[298]-gether £100,000) had not been paid off by the said defendants, by the application of the funds provided for that purpose by the statute, and directed thereby to be so applied, and that the sinking fund created and appropriated by the Act had not been applied by the defendants pursuant to the provisions of the Act, and the trusts vested thereunder in the defendants, and that only the sum of £25,500 had been redeemed, and that a balance of £74,500 of said £100,000 remained outstanding and unpaid; and it appearing that the sum of £100,000, if the provisions of said statute in that behalf had been executed by the defendants, and the funds duly applied pursuant thereto by them, would have been paid off on the 20th day of March 1825, leaving a balance in the hands of the treasurer of the said defendants, of £1536 3s. 6½d; and it appearing that the metal-main tax was continued for two years after the 20th of May 1825, when it ought to have ceased, and that upon account of actual receipts and payments of the metal-main tax taken separately for these two years ending 20th May 1827, a balance of £7001 19s. 2d. would appear in favour of the defendants; and in taking the account for the two years of both the metal-main and pipe-water tax, and including therein the balance of £1536 3s. 6½d., and excluding therefrom the said interest of £74,500, a balance of £14,986 9s. 5½d. would appear against the said defendants: It is declared by the Right Hon. the Master of the Rolls, that the said metal-main tax ought to have ceased on the 20th day of May 1825, and ought not now to be resumed or continued; and, that the relators or other owners and occupiers of dwelling-houses within the city of Dublin and suburbs thereof, and such parts of the liberties of St. Sepulchre as are subject to pipe-[299]-water rents, ought to be exempt from the further payment of any metal-main tax, under the provisions of the statute 49th Geo. 3, and ought to be exonerated by the said defendants from any further or future liability to pay any tax or sum of money imposed or enacted under the said last-mentioned statute. And accordingly it is further ordered, adjudged, and decreed, that the relators and owners and occupiers of the dwelling-houses situate as aforesaid, ought to be exempt from such liability and ought to be exonerated by the defendants from such liability. And accordingly it is further ordered, adjudged, and decreed, that the said defendants should within six months from the date of this decree, pay off and discharge the said sum of £74,500 to the different persons who are holders of the securities or debentures for the sum of £74,500, and thereupon to procure the said holders to acquit and discharge the said securities and debentures. And it is further ordered, that an injunction should issue to restrain the said defendants, the said corporation of the city of Dublin, from further collecting or levying the metal-main tax from the owners and occupiers of dwelling-houses situate within the city of Dublin, and the liberties or suburbs thereof, and such parts of the liberty of St. Sepulchre as were subject to the payment of pipe-water rents, or from any of them, until further order." And it was further ordered that the defendants should pay to the relators the costs of the suit, except so far as related to a charge made by the relators, that in laying down the pipes the corporation had not acted with a proper regard to economy, but had been unnecessarily extravagant, a charge which the decree stated not to have been proved. The costs occasioned by this charge were ordered to be paid by the relators to [300] the defendants, and the Master was ordered to tax the costs accordingly. The master taxed the costs due to the relators in the suit at £5329 12s., and the costs due by them to the defendants

at £22 12s., leaving a balance of £5307 payable to the relators. The Master was subsequently ordered to review his taxation as to one part, and reduce it to £5153 as due to the relators, and this sum was ordered to be paid out of the balance in the hands of the corporation. The defendants then brought the present appeal against the decree of 7 July 1831.

Mr. Pemberton and Mr. Tinney, in support of the appeal, contended that the corporation had a right to appropriate the sums mentioned in the resolutions of January 1779, and February 1809, such appropriation being in furtherance of the objects of the Acts of the Legislature. The corporation had advanced money and prosecuted the works with great zeal and success, and if the letter of the different Acts had been strictly complied with there would have been a great delay in supplying the city of Dublin with water; that the corporation, in departing from the Acts in one respect, had thus conferred a benefit on the city, and ought, therefore, to be permitted, as was proposed in these resolutions, to reimburse itself the money thus laid out.

Sir W. Horne, and Mr Sugden, for the Respondents, insisted that the corporation derived all its authority under these Acts, and had no right whatever to depart from the provisions which they contained. The corporation had made no sacrifice in carrying into effect the object of these Acts, and ought not therefore to claim any advantage beyond what the **[301]** Acts had provided; and at all events there was no pretence for saying that the lord mayor was entitled to receive such a sum of money as had been assigned to him as a salary by the two resolutions of the Assembly in 1799 and 1809.

Lord Brougham:—This case was argued at great length in the course of last session, and the final determination of it was put off in consequence of some doubts entertained respecting it by Lord Wynford. In these doubts I did not concur, but if his Lordship had still continued to entertain them, the case must again have been argued by one counsel on each side. This further consideration of the case need not now be entered upon, and as a great public inconvenience would result from further delaying the delivery of the judgment, that delay ought no longer to be continued. I did intend to communicate with Lord Wynford on the subject, as, from the indisposition under which he is suffering, he is not likely for some time to be present in the House, and to ascertain how far he still entertained his former doubts, or whether they were removed. I have great satisfaction in finding that he, previous to any communication received from me, had reconsidered the case, and that the doubts which formerly possessed his mind are now entirely removed. He has authorised me to state his full concurrence in opinion with me on this case, my own opinion having been clearly in favour of the judgment of the Master of the Rolls. The communication from his Lordship states that "I now think that the judgment of the Master of the Rolls in Ireland is in every point right, and that the appeal should be dismissed with costs; I can find no legal origin for the right to pay over the sum of £1500 to the corporation. I also **[302]** think that the defendants were not warranted in paying a fixed sum of £500 to the treasurer, instead of a proper per-centage on the sums received by him, and that they had no colour of a pretence for permitting their lord mayor to take £1500 a year or any other sum out of the water tax on the citizens of Dublin. Striking these items out of the account, the debts provided for by the different Acts would have been paid off at the time mentioned by the Master of the Rolls. But if the £1500 a year and the other items had a legal origin, the Acts contain no provision for their payment out of the pipe-water or the metallic-main rates; on the contrary, a different appropriation of the money raised by them is expressly directed. The first account that we have of any right of the corporation of the city of Dublin to the water for the supply of the inhabitants is in the 6 Geo. 1,"—a statute that was passed at a time which we all know was a period of great speculation.—"It appears that the corporation had only then a stream of water running through the city, and from which the inhabitants were permitted to supply themselves by pipes introduced into it at their own expense, or by any other means. The stream is described as having anciently belonged to the corporation, which is required by the statute to incur certain expenses for securing the supply and preserving the purity of the water. I think that, although this stream is stated to be vested in the members of the corporation for the time being, they only held it in trust for the benefit of the town. They have been frequently made

trustees of property for the use of those who lived within the limits of their franchise. The application of corporation funds for the preservation and improvement of this property was as proper [303] as any use that could have been made of them. If such an application had been more frequently made, we should have had fewer complaints of these bodies. Although this is stated to have been an ancient right of the corporation, nothing appears to have been ever paid by the inhabitants of Dublin to the corporation for the benefit which they derived from it. The first mention made of this appropriation of the rent is in a bye-law passed by the corporation on the 22d January 1779, in which it is said that " no part of the pipe-water revenue shall be appropriated to any use save that of carrying on the works, paying the officers, etc., until the corporation shall have discharged the several sums borrowed on the credit thereof, except the sum of £1500, annually paid to the city treasurer for the use of the city, in compensation of the several sums expended by the city on the works." It appears from this that it was never paid antecedently to that period, and this is therefore the making of a new charge, for the benefit of those who created it. That may be ; but such a bye-law is, on every principle that is applicable to bye-laws, bad. It must be recollected, also, that it was made after the 15 and 16 Geo. 3 had directed a different appropriation of these funds. Let us now look at this statute of the 15 and 16 Geo. 3, c. 24 (Irish Act), which is the most favourable for the corporation, authorising the raising of the pipe-water rents, for the construction of new mains and otherwise extending the waterworks, and by the 11th section we shall find that the corporation is empowered to borrow, on the credit of the said rates and rents, such sums as shall be found necessary for the purposes of the Act. What right has the corporation to prejudice the creditors by a postponement of the payment of their advances by taking to itself any part of the [304] sums specifically appropriated to their payment and the completion of the waterworks. It is expressly found, that had not the waterwork rates been applied in satisfaction of the city claims and to the other purposes not sanctioned by the Act, the debts would long since have been paid off. But the 49 Geo. 3 makes this question perfectly clear. By the 11th section of that Act the corporation is empowered to borrow on interest, on the credit of the rates and rents granted by the said recited Acts and by that Act, money for the making of reservoirs and the laying of cast iron or metal main and service pipes. Among the recited Acts is that of the 15 and 16 Geo. 3, and, by the 13th section of the 49 Geo. 3, all the money raised under all these recited Acts is to be appropriated to the payment of the debt of £67,800, and to the payment of £2000 annually towards the interest of that debt, and of such sums as may be afterwards borrowed for the purpose of completing the works, and for the establishment of a sinking-fund for the reduction of these debts. By the 16th section it is enacted, that if there be any surplus, either of the money raised under that Act or of the recited Acts, the surplus shall be added to the sinking-fund above provided. If the Lord Mayor of Dublin and the corporation had any claim for the £1500, or the £1000 for the Lord Mayor, or the £1000 for the treasurer, or the interest of the money raised by the debentures, they should have asserted it at the time of the passing of that Act, which now precludes them from claiming credit in these accounts against the rates in any court of justice. I entirely go along with the noble and learned Lord in the view he now takes of this matter, though I do not entirely concur in every part of the observations [305] here made by him. I am very happy to say in this decisive manner, that he no longer entertains the doubts which formerly made him hesitate about the judgment. As we are now both of the same opinion, I shall move that the decree of the Master of the Rolls be affirmed ; and, considering who the parties are, that it be affirmed with costs, the amount of which shall be ascertained in the way in which costs are usually ascertained in this House.

Lord Plunkett :—I took no part in this case when it was argued at your Lordship's bar, having been counsel in the case in the Court below. For the same reason, when it came into the Court of Chancery in Ireland, since I presided there, it was at my request that the argument was heard before the Master of the Rolls. He decided it, as I think rightly ; and I therefore concur in the judgment now recommended to your Lordships.

Judgment affirmed accordingly.

[306]

APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

THE CORPORATION OF DUBLIN *v.* THE ATTORNEY GENERAL.

Upon an order (see *ante*, p. 293) remitting the cause to the Court below to take the accounts, etc., but containing no direction in respect to the cost of the appeal, the Court below, exercising its inherent jurisdiction, and holding that the relators should be fully indemnified, ordered payment of their costs of that appeal out of the ascertained balance, which, upon taking the accounts, appeared due from the corporation, though not paid into Court.

This order was affirmed with costs.

The costs mentioned in p. 300, *ante*, as taxed by the Master and ordered to be paid to the relators, included their costs of prosecuting their former appeal to this House. The order of their Lordships on that appeal gave no directions as to the costs of it, nor were those costs brought under the consideration of the Master of the Rolls, when he made the decree of the 7th of July 1831. Master Henn, to whom it was referred by that decree, to tax the relators' *costs of the suit*, taxed the same accordingly, to the sum of £3719 6s. 7½d., but declined to tax so much of the bill of costs as related to the appeal, which amounted to £1610 6s., alleging that he conceived he had no jurisdiction to tax them, and that such was the opinion of Mr. Courtenay, then deputy-clerk of Par-[307]-liament, but he allowed them as they were furnished to him by the solicitors for the relators, and adding them to the taxed costs of the suit, he certified that, after certain deductions directed by the decree, there remained the sum of £5306 19s. 9d. payable by the corporation to the relators for the costs of the suit as between solicitor and client.

The corporation presented a petition to the Court, praying among other things, that the Master might be ordered to review the said taxation and certificate in respect of the costs of the appeal. That petition came on to be heard before the Master of the Rolls, and his Honor, on the 25th of January 1832, after stating the object of the suit and what was alleged in the information and answer, made the following observations in his judgment:

"In 1824 the cause came on to be heard, and the information was dismissed; but on an appeal from the decree of dismissal, the House of Lords gave relief, and the winding up has given this result:—that up to 1827, a very large balance is found to be in the hands of the corporation; but taking it up to May 1825, the Master's report shows the whole debt of £100,000 would have been paid off, and a sum of £1563 3s. 6½d. remaining in the hands of the corporation; but the Master taking the account down to May 1827, finds that so large a sum as £14,986 5s. 2d. is in their hands in May 1827. On that state of facts, the decree in this cause was pronounced, reciting that sum to be in their hands, and decreeing the costs of the suit as between solicitor and client to the relators. The question now is, whether I can give the costs of the appeal out of that fund. The power is not delegated by the decree of the House of Lords. I have given this case the most attentive consideration. My [308] power can only be an inherent jurisdiction; and I have no doubt the Court possesses inherent jurisdiction, and that I am bound to exercise that jurisdiction. Here a fund exists of £14,986 5s. 2d., out of which the relators ought, in my judgment, to be indemnified. It is an ascertained sum, being the receipt of the tax from 1825 to 1827, which sum I would order into Court, if there was any use to apply it to. The case of *Noel* v. *Henley* (2 Price, 700), stands on the ground that the Exchequer held the costs came remitted to them; this, I say, does not exist in the present case. This case is not to be decided on a principle of appeal costs, but as indemnity costs to relators, whose individual interest is small. The question is, if relators instituting a proceeding, as in the present case, in which their interest is very small, and succeeding *in omnibus*, are not entitled to indemnity in every fair expense; I think they are. If it were otherwise, there would be found no person who would allow his name to be used to right a public wrong, and the consequence would be destructive; I do not think any thing technical should prevail against their

being indemnified. In the present case the relators not only recover for the citizens a sum of £74,500, but by their proceedings the citizens are relieved from an onerous taxation of £10,000 per annum. Such relators ought to be indemnified out of the fund as I have before stated. The *Attorney-General* v. *The Brewers' Company* (1 P. Wms. 376), *Moggridge* v. *Thackwell* (7 Ves. 36 ; *see* p. 87). In the latter case, on a hearing, the costs of all parties were decreed to be paid out of the fund. The case of *Mills* v. *Farmer* (1 Meriv. 55 ; *see* p. 104), decides the principle of this motion. In that case the Master of the Rolls dismissed the information : his **[309]** order was reversed on appeal, and the costs of the appeal given out of the fund. That case decided, that the costs of an appeal ought not to be visited on the parties, but if there was a fund, they should be given on the principle of indemnity. The principle, as I conceive, on which the costs of appeal to the House of Lords should be taken out of the general fund is, there being a fund whereout the costs may be paid. For these reasons, under all the circumstances presenting themselves to me in this cause, my Order is—that the Master's certificate was right in including the costs and expenses of the relators in prosecuting the appeal, subject to the review thereof hereinafter ordered ; and accordingly it ordered, that the Master in this cause, do review the items in the sum of £1610 6s., certified in his certificate, as the costs of the relators in the said appeal ; and in reviewing the same, the Master is to allow only such costs, disbursements and expenses, as were properly and necessarily incurred by the relators in prosecuting the appeal."

The Master, in pursuance of that order, reviewed the items of the said sum of £1610 6s., and reduced the same to £1474 2s. 4d., which he certified to be the amount of the costs, expenses and disbursements incurred by the relators in prosecuting the said appeal, properly chargeable against the corporation.

The Appellants claimed also of this order, and the arguments on that part of the appeal were to the following effect:—

The Counsel for the Appellants insisted that the Court of Chancery in Ireland had no jurisdiction to order the Appellants to pay the Respondents' costs of the former appeal to this House. The order of the House upon that appeal gave no direction about the costs, nor was the consideration of them remitted to **[310]** the Court below. The concluding part of the order of the House on that appeal was, " and that the said Court do all such things as shall be necessary to carry this order and judgment into execution, reserving to the said Court the consideration of further directions and the *costs of the suit*, until after the Master shall have made his report." The costs of the suit could not be intended to include the costs of the appeal. The Master of the Rolls admitted that the order of the House did not delegate to him to give the costs of the appeal. The question, therefore, was, whether the Court below had an inherent jurisdiction over these costs. The cases referred to by the Master of the Rolls did not sustain the jurisdiction. In the case of *Noel* v. *Lord Henley* (12 Price, 700) the Barons of the Exchequer held properly that the costs of the appeal in that case were left to their discretion by the terms of the order of the House, which, after varying their former decree, concluded thus: " And with these variations in the said decree, it is ordered that the cause be referred back to the Court of Exchequer to *do therein as shall be just.*" *Noel* v. *Noel* (12 Price, 213 ; see 334, and 55 vol. Lords' Journals, 773). The principle on which costs were given in the other cases referred to by his Honor was, that there was a fund in Court, out of which the costs of all parties ought to be paid in a suit for the administration of a charity. In the present case there was no such fund in Court, but the corporation was called on to pay the costs from its own funds. Master Henn declined to tax these costs ; his experience informed him that he had no jurisdiction over them, and the clerk of this House, on being consulted, replied that **[311]** these costs were not taxable by any legally-authorized officer.

The Counsel for the Respondents admitted that the House did not, in adjudicating on the former appeal, give any directions about the costs of it. The order then made was a mere proceeding in the cause, remitting it to the Court below to take the accounts ; and no direction could be given in respect to costs in that stage ; until the accounts were taken, it could not be known whether there should be a fund to answer the costs. For the same reason no order was made about the costs on the first hearing in the Court below, but when the cause came to be heard on further

directions, the decree then made contained the usual order of reference to the Master to tax the costs.—[Lord Brougham, Chancellor: Can any case be cited where the Master of the Court of King's Bench or a Master in Chancery has taken upon himself to tax costs incurred in this House?]—Such cases had occurred, and were referred to by the Master of the Rolls. If the costs asked by the Respondents were personal costs against the Defendants, the Court below could not give them, as the House gave no directions about them. But these costs were not asked personally as against the Appellants, but out of a common fund. This was a case of a charity and trust, in which cases it was the invariable practice, when there was a fund in Court or a fund with which the Court could deal, and the Court found merit in the relators, to give them not only their direct costs in the suit, but also all costs incurred in prosecuting it, out of that fund. It was true that in this case there was not a fund actually in Court, because, out of lenity to the corporation, the relators did not ask for payment of the balance of **[312]** £14,986 5s. 2d. into Court. But this lenity on the part of the relators could make no difference in their rights, nor in the jurisdiction of the Court.

In appeals from the Master of the Rolls or Vice-Chancellor to the Lord Chancellor, if a decree below should be reversed, the superior Court would not, in ordinary cases, give costs of the appeal against the failing parties, because that would be to punish them for the error of the Judge below. But in case of a charity, when there was a fund in Court, or an available fund, the costs may be ordered out of that fund. This House, sitting on appeal from a court of equity, is itself a court of equity, and has the like power.

There were several cases on this subject besides those referred to by the Master of the Rolls in Ireland. On one of the appeals in the Thelluson Will case, in 1825, the Court below gave costs of the appeal, without any direction from the House. So, also, in the cases of *Atkins* v. *Wright* (see 17 Ves. 255; 19 Ves. 299; 1 Ves. and B. 313; 55 Lords' Journ. pp. 598 and 844; and Turner and Russ. 143), there were two appeals in the same session. The orders of this House reversing the decrees of the Master of the Rolls and of the Lord Chancellor, made no mention of the costs; yet Lord Eldon, upon the cause coming before him in the Court of Chancery afterwards, gave the Appellant, after a very strong opposition, the costs of both appeals, amounting to £3000. These cases were stronger than *Noel* v. *Henley*, and the Court below, in ordering costs of the appeal, did not interfere with the order of this House, but supplied a defect in it. There remained a sum of £14,986 in the hands of the corporation, which con-**[313]**-stituted a fund out of which the costs of both parties might be paid.

Lord Brougham, Chancellor, in moving the House to affirm the decree of the 7th of July 1831, omitted to notice this part of the appeal against the order of the 25th of January 1832: but the order of the House, as entered on the Minutes, affirmed the order as to costs as well as the decree.

(1 April 1835) It is *ordered* and *adjudged* by the Lords, etc., that the said petition and appeal be and is hereby dismissed this House; and that the said decree (of the 7th July 1831) and order (of the 25th January 1832) therein complained of, be and the same are hereby affirmed, etc., with costs.—67 Lords' Journals, 77.

[314]

WRIT OF ERROR

FROM THE EXCHEQUER CHAMBER.

JAMES ANDREWS,—*Plaintiff in Error;* THOMAS DREVER, THOMAS MAWDESLEY and WILLIAM TURNER,—*Defendants in Error.*

[Mews' Dig. v. 1432. S.C. 9 Bli. N.S. 471. Followed in *Payne* v. *Esdaile*, 1888, 13 A. C. 613; and see *Scarlet* v. *Lucton School* (*Governors of*), 1836, 4 Cl. and F. 7, and *Vaux Peerage*, 1837, 5 Cl. and F. 597.]

The mere non-payment of tithes is not a sufficient answer to a claim of tithes made by a lay impropriator.

From evidence of right to tithes of all kinds in a lay impropriator up to a given time, and of perception of the corn tithe since that time by another party, a jury may, if it think fit, infer a grant of all the tithes by the first-mentioned impropriator to such latter party, who is therefore at liberty, in support of his right to the hay tithe, to give in evidence leases of that and all other tithes from the presumed grantor.

This was an action of debt, brought in the Court of King's Bench in Easter Term 1831, by the Defendants in Error, against the Plaintiff in Error, upon the stat. 2 and 3 Edward 6, c. 13, for not setting out tithes.* The declaration stated that the Plaintiffs below were proprietors of the tithes of corn, grain and hay, of certain lands in the parish of Prestbury, in the county of Chester, and that the Defendant below was occupier of the same lands. It then set forth the subtraction of the tithes by the Defendant, and claimed the treble value. There was a plea of *nil debet*, and a particular of demand, from which it appeared that the action was brought to recover the value, single or **[315]** treble, of the tithe of about 20 acres of hay, for six years, commencing with 1825. The cause was tried at the summer assizes of 1831, for the county of Chester, before Mr. Baron Bolland, when the plaintiffs obtained a verdict for £105 15s., being treble the amount specified in the particular of demand, for which sum judgment was entered up accordingly.

At the trial, the counsel for the Defendant below tendered to the ruling of the learned judge a bill of exceptions, which set forth all the material facts, stating, in substance, that in support of the Plaintiff's case, the following evidence was given:—1st. Certain letters patent of Queen Elizabeth, dated 10th November 1579, granting to divers persons, one of whom was Thomas Leigh, among various other things, "the tithes, portions and oblations, issuing, etc., out of and in the vill, fields, parish or hamlets of Prestbury; and also all the rectory and church of Prestbury, (which said rectory and premises to the monastery of St. Werburg did theretofore belong,) and all manors, glebes, tithes, etc., situate, etc., in the vill, fields, parish or hamlets of Prestbury, or elsewhere, in the county of Chester, belonging to the said rectory."—2dly. A deed of partition, dated 1586, whereby the other grantees conveyed to the said Thomas Leigh, the said manor and church of Prestbury, with all its appurtenances.—3dly. Certain leases of the tithes (comprehending, *nominatim*, every species of tithe and obvention,) arising within the township of Woodford, in the parish of Prestbury (within which township the lands of the Defendant, in respect of which the tithe was claimed, were situated), purporting to have been granted by different members of the family of Leigh, for terms of years long before expired, upon certain of which leases the receipt of rent was duly proved. **[316]** 4thly. Similar leases of the tithes arising in other townships of the same parish, purporting to have been granted in like manner by the family of Leigh; as to some of which also payment of the rent reserved thereon was duly proved.

The bill of exceptions further stated, that on the part of the Plaintiffs, Thomas Broadbelt deposed, among other matters, that in 1811 he became valuer of the tithes of the parish of Prestbury, for Mr. Richard Leigh, of Adlington, who died in 1822; that witness received tithe rent from the occupiers of the different farms; that he valued the tithes of Woodford, and, among others, those of the Defendant's lands, viz., corn, grain, barley, cattle, pasture, and meadow; that he never received any tithe in kind; that from one Martha Barber, an occupier of land in the township of Butley, in the parish of Prestbury, he once received 5s. for a tithe of hay; that was after the dispute about the hay tithe arose; he did not know of any other receipt of hay tithe; that the occupiers of land in the parish of Prestbury had, some all hay, and some both hay and corn; there were 300 farms in the parish; all these had hay grass, some had no corn; he valued the hay on each farm every year, and it was in the year 1815 or 1816 that the occupiers of the lands in Woodford first objected to pay for hay; that payment for hay was claimed, and it was always included in the valuation; since the dispute the rents had been estimated

* See the case argued in Error before the Exchequer Chamber, *nom. Bayley* v. *Drever*, 1 Ad. and Ell. 449; 3 Nev. and Man. 885. See also *Andrewes* v. *Drever*, 2 Scott, 1; 2 Bing. N. C. 1.

with reference to the corn tithe only; he could not say that he had ever received hay tithe; he never saw the tithe of hay set out.

Thomas Deane deposed, that he began to value the parish of Prestbury in the year 1818, and continued to do so till the year 1827; he valued both corn and [317] hay tithe; in the year 1825 the valuation of the hay tithe on the land of the defendant was £3; he received for corn tithe only.

Thomas Grimsditch deposed, that he had been acquainted with the Adlington estate upwards of thirty years; Mrs. Elizabeth Leigh was the first person he remembered in possession; she was succeeded by Richard Leigh; since Richard Leigh's death, in 1822, witness had been connected with the management of the property, and up to the appointment of a receiver, he received the rents for the tithes on account of the Plaintiffs; from the year 1825 he opened an account with the Macclesfield Bank, in the names of Turner and Mawdesley, two of the Respondents, and directed the payments to be made to that account; Dr. Drever, the other Respondent, was not then in the country; witness accounted to all three; witness had been a resident in the parish of Prestbury, and occupied lands in the township of Macclesfield in that parish; it was almost entirely meadow land; he had paid tithe of hay; that was after the commencement of the suit for the hay tithe. The first resistance to pay that tithe was in 1814; the claim preceded the objection, and was for a time acquiesced in. That the case for the Plaintiffs being concluded, it was objected on behalf of the Defendant that there was no evidence of any right or title in the Plaintiffs to the tithe of hay, and that the leases which had been given in evidence by the Plaintiffs were irrelevant to the issue, and ought to be withdrawn from the consideration of the jury, inasmuch as the Plaintiffs were not shown to derive any title from, or to be any way connected with the persons by whom the said leases were respectively granted. But the Court overruled both objections, and held that there was [318] evidence of title in the Plaintiffs to the tithe of hay, and that the leases were not irrelevant, and refused to withdraw them from the consideration of the jury. On the part of the Defendant, witnesses were then called, who severally deposed, that they had been formerly occupiers of land within the parish of Prestbury, but not within the township of Woodford; that they never knew or heard of any claim or payment of the tithe of hay in respect of such lands, so long as they continued in the occupation thereof; that the payments of tithe were always made in money, but that the sums paid were not more than the amount of the corn tithe in each year.

The bill of exceptions then stated, that the learned judge directed the jury, that mere non-payment of tithe was no answer to a claim of the tithe by a lay impropriator; that it was clear it was no answer to the claim even of a lay rector, and that the jury could not presume a grant from mere non-payment of tithes; that from the evidence of the grant from the Crown in 1579, and the evidence of modern enjoyment of tithes, the jury might presume, in favour of the Plaintiffs, intermediate conveyances of the rectory between that time and the year 1686, the date of the first lease produced; that the perception of the tithe of corn by the Plaintiffs, was evidence of a title in the Plaintiffs to the tithe of hay; that the tithe of hay followed that of corn, unless shown to be severed by some grant or conveyance, and that the leases were admissible evidence for the purpose of rebutting the presumption of a grant, which, it was contended on the part of the Defendant, arose from the non-payment of the tithe of hay: to all which opinions and directions of the learned judge, the counsel for the Defendant excepted.

[319] Upon these exceptions, a writ of error was sued out in the Court of Exchequer Chamber, where the judgment of the Court of King's Bench was affirmed. The case was argued before Lord C. J. Tindal, Lord Lyndhurst, C.B., Justices Park, Gaselee and Bosanquet, and Barons Bolland and Gurney (see 1 Ad. and El. 449. and 3 Nev. and Man. 885).

The Defendant below now brought his writ of error in Parliament for reversing both these judgments. In pursuance of an order for the attendance of the Judges, Lord Chief Justice Tindal, Justices Park, Gaselee, Littledale, Patteson, Williams and Coleridge, and Barons Parke, Bolland and Gurney, were present during the argument.

Sir F. Pollock and Mr. J. Jervis for the Plaintiff in Error:—In this case, a claim has been made to tithe of hay on lands from which such tithe has never been

paid. Although the question in this case cannot arise again, in consequence of the recent Act (2 and 3 Will. 4, c. 100) for shortening the time required in claims of exemption from tithes, which was passed subsequently to the institution of this suit, still, as there are many other suits pending between the respondents and landholders in the parish of Prestbury, each involving the same question, it has been deemed proper to take the decision of your Lordships in this case, which will govern all the others.

It is an established rule of law that when a party has been, for a long period, in possession, his enjoyment or exemption is presumed to be legal, derived from some grant, which has been lost or destroyed. That rule rests on the acknowledged principle that from long undisputed enjoyment a legal origin and title ought to be presumed. The only exception to the rule is the supposed exception presented by this **[320]** case. If a man enjoys a right of way over his neighbour's land for a period of only 20 years, his enjoyment is lawful, presumed to have been derived from a former grant: why should not an exemption from payment of tithes be admitted on the same principle? Although there are authorities which seem to bear out the proposition that no distinction exists in this respect between a lay and a spiritual rector, and that mere nonpayment of tithes, however remotely carried back, furnishes no answer to the claim of either, yet these authorities, when examined, will be found to rest on no sure foundation. They proceed on the assumption that the claim founded on nonpayment, as evidencing a lost grant, is in substance and effect a claim of prescriptive exemption from title altogether, which it is admitted cannot prevail against either a spiritual rector or a lay impropriator; but the two cases are essentially distinct, the one being a claim which is inconsistent with the nature and origin of the property, the other being in no respect inconsistent with either, and being at the same time in strict accordance with the rules of law as applied to every other description of property having similar qualities.

Before the dissolution of monasteries the property of the church could not be granted away from the church, and no layman could plead an entire exemption from the payment of tithes. There could therefore be no prescriptive title in a layman, whether arising from grant or from release. But when, after the dissolution, a portion of the church property came into the hands of laymen, the nature and character of that property were altered; it acquired the qualities of lay property generally, and became susceptible of every modification, of which lay property admitted. **[321]** There is nothing, therefore, unreasonable in the supposition, that the whole, or a portion of the tithes of a rectory, may have been granted away, either in perpetuity or for a term; or, what is substantially the same proposition, that an individual proprietor of lands subject to tithes, or the whole of such proprietors within a given district, should have purchased, for an adequate consideration, a release from the payment of the whole or some particular species of tithes. In the contrary doctrine, on the other hand, there is the anomaly, that time, which gives stability to all other property, impairs the security of this, by destroying the evidence of title on which it is founded, without affording any equivalent protection from the length of enjoyment.

The doctrine, of which the Plaintiff in Error complains, has been frequently questioned by very distinguished Judges, among others, by Lords Roslyn, Redesdale and Eldon, Barons Clarke and Wood, as at variance with the principles of law and of equity; and although the balance of reported decisions is against the Plaintiff, all the arguments and reasons are in his favour, the Judges lamenting that they were bound by the authorities, and looking to this House for a remedy. The cases are collected in Mr. Eagle's book upon tithes, vol. 1. c. 3, s. 6. p. 92. In the case, of *Williams* v. *Bacon* (3 Eag. and Y. 1178), on appeal from the Vice-Chancellor, Lord Eldon, (1 Sim. and Stu. 415), said, "This doctrine of presumption is of great importance in the law of the country, and ought to be settled. If you look at the cases in which the question has been discussed,—what is necessary to prove title to tithes? Some say, you must produce the grant; others that you must give evidence of the **[322]** existence of the grant; others say, if there be nothing more than nonpayment to the rector, and if the title, deeds of the landowner contain tithes, but he has not received them, that will not do against the rector; others say, you must prove that the deeds contain a fair description of what you call tithes, and that there has been enjoyment under the title;

some say, that will not do against spiritual rectors; others say, that it will, and that a jury may, in such cases, be properly directed to presume, title," etc. "In all the cases there is to be found a great difference of opinion." Similar observations were made by his Lordship, in the case of *Norbury* v. *Meade* (3 Bligh, 226-230), and Lord Redesdale there questioned at great length the doctrine that a prescription in *non decimando* was as illegal against an impropriator as against a spiritual rector. "Admitting that it is not now necessary for an impropriate rector to deduce his title from one person to another, after a grant from the Crown has been shown, because the Courts are aware that deeds of that description may be lost; and therefore, if the grant of the Crown and a recent title or possession according to that title are shown, then the Court will admit a presumption that the title has been properly deduced," still why there should be a presumption in favour of a lay rector, and not in favour of the occupier of the lands, he could not conceive. "In both cases the presumption must be founded on the probable loss of instruments, etc. The Court of Exchequer will presume a loss of deeds in favour of an impropriate rector, but not in favour of the owner of the land; that seems so unlike equal justice, that I cannot conceive how it could ever have been adopted, etc. There is such a clear distinction between ecclesiastical and lay rectors, that the **[323]** reasoning applicable to one is not applicable to the other. The ecclesiastical rector is incapable of alienating, the lay impropriator is capable of alienating. Since the dissolution of the monasteries, lay impropriations are as much lay fees as the lands out of which the tithes issue; and, therefore, I cannot conceive upon what ground there can be a distinction between the case of a person claiming a lay impropriation and the case of a person claiming lands, etc. The title is one and the same, etc. If a profit of any kind, that is to be taken out of the land, has not been taken for a vast number of years, and the lands have been enjoyed without yielding that profit to a third person, the consequence is, that the title to that profit shall be presumed to be discharged, whatever is the nature of that profit. What is the distinction between that case and the case of an impropriate rector claiming tithes? I perceive none (3 Bligh, 237-245)." *The Corporation of Bury* v. *Evans* (2 Com. 643. Bunb. 345), *Charlton* v. *Charlton* (Bunb. 325), and *Fanshaw* v. *More* (2 Eag. 92. 2 Gw. 781), are cases deciding that a layman cannot prescribe, even against a lay impropriator, in *non decimando*, a doctrine which is not disputed: for the argument is, not that the lands were never subject to tithe of hay, but that they were discharged by grant or release. In the case of *Fanshaw* v. *More*, Baron Clarke observed, "Many persons purchased discharges from lay impropriators, yet if the grants are lost these persons must lose the benefit of their purchases. It will be very hard that time, which strengthens all other rights, should weaken this," etc. "A layman may prescribe upon the presumption of a loss of a grant for a portion of tithes on the lands of another, even against the **[324]** rector of the parish, and yet cannot prescribe for the tithes of his own lands in the same way. If I, therefore, concur in this opinion, it is by mere force of authority, for the reason of the thing is strong against them." In *Fanshawe* v. *Rotheram* (1 Eden, 276), the bill prayed an account of tithe of hay; the answer was, that the hay tithe was severed from the rectory and annexed to the owners of the land in fee, but no deed of severance was produced. Lord Keeper Henley dismissed the bill, saying it was not necessary to produce the deed of severance, but to give evidence that there was one, and declaring that it was against equity to dispute a possession of 130 years; so also in *Scott* v. *Airey* (2 Eag. and Y. 342), the bill which prayed for an account of a portion of tithes was dismissed, on an exemption for 170 years, and the Court of Exchequer following that precedent in *Edwards* v. *Lord Vernon* (2 Eag. and Y. 344), dismissed the bill on an exemption for 171 years. In the case before the House, the lands have descended from father to son for ages without payment of the tithe now demanded. The argument is not that the tithes have been extinguished, but that the right of perpetuity is not in the lay rector, but in the owner of the land. Chief Baron Macdonald said, in *Lord Petre* v. *Blencoe* (2 Eag. and Y. 467), "If non-payment for any length of time forms no presumption of a grant of tithes, length of enjoyment, which, in all other cases, is the best title, seems only to weaken the claim of exemption from tithes, as the difficulty of tracing its origin is increased. But the cases prevent us from deciding upon the ground of presumption. These determinations are perhaps to be lamented." Lord Eldon, in *Berney* v. *Harvey* (2 Eag. and You. 746), stated that Lords **[325]** Hardwicke and Talbot

struggled hard against the doctrine. The case of *Vagle* v. *Edwards* (2 Eag. and Y. 344), a leading case in support of the doctrine, was disapproved of by Lord Roslyn, in giving his judgment in *Rose* v. *Calland* (5 Ves. 186). And Mr. Baron Wood, in *Norbury* v. *Meade* (2 Price, 347),disapproving of *Vagle* v. *Edwards*, and *The Corporation of Bury* v. *Evans*, asserted the broad principle that long usage and enjoyment were sufficient to raise a presumption of a grant.—[Lord Brougham:—Is there any case in which the mere nonpayment of tithes, by the terre-tenant, was held to be an answer to the claim? *Medley* v. *Talmy* (in 1696. 1 Eag. and Y. 620), would seem, from the marginal note, to be such a case, but from the statement of the facts in the context it appears there was a conveyance of the land tithe-free.]—There is a case to that effect, *Orenden* v. *Skinner* (3 Eag. and Y. 1834), which was the case referred to by Mr. Baron Wood. These are conflicting cases, and a fair opportunity is now presented to your Lordships to settle the law.

With respect to the evidence of title given by the Plaintiffs below upon the trial, it is contended that they do not show in what character or by what right they claim the tithe; that the title to it is shown to be, up to the year 1832, in the family of Leigh of Adlington; that there is no proof that the Plaintiffs are in any way connected with, or derive any title from that family; that the mere perception of the corn tithe for a short period before the commencement of the action furnishes no ground for inferring a title to the hay tithe, inasmuch as it is competent to the owner of the rectory to make a lease of the corn tithe only, retaining the rest to himself; and **[326]** that it is consistent, therefore, with the case proved by the Plaintiffs that they may be lessees of the corn tithe, without having any right to the tithe of hay.

If the presumption of a grant of nonpayment of tithes should be held admissible, the leases and counterparts given in evidence by the Plaintiffs cannot then be received to rebut that presumption, because it is quite consistent that there should be a grant or release of the tithe to an individual proprietor of land, or to the proprietors generally of the lands comprised within a particular district, and that the rest of the land in the same parish should still remain subject to the original burthen.

The Attorney-General and Mr. Temple for the Defendants in Error:—The judgment of the Court of King's Bench, affirmed in the Exchequer Chamber, was the result of the unanimous opinion of all the Judges; no one of the cases referred to, even *Medley* v. *Talmy*, or *Oxenden* v. *Skinner*, which were most relied on, was opposed to the ruling of the learned Judge who presided at the trial. The decisions were uniform, and the reluctant acquiescence of the Judges, whose opinions were cited, only showed that the current of authorities in support of the doctrine contended for by the Defendants in Error, was too strong to be resisted. Mr. Baron Wood's arguments, in *Norbury* v. *Meade* (2 Price, 547), comprised all that could be urged against that doctrine, but he stood alone against the three other Barons of the Exchequer. Two recent cases, *Ross* v. *Aglionby* (4 Russ. 489), in the Court of Chancery, and *Fairfax* v. *Holdsworth* (1 Younge, 79), in the **[327]** Exchequer, subsequently heard, upon appeal in this House (*ante*, p. 115), strongly confirmed the former decisions. But supposing mere nonpayment of tithes to be deemed sufficient to raise a presumption of a grant of such tithes against a lay impropriator, yet in the present case there was ample evidence produced to rebut such presumption, and to establish the right claimed. The documents and testimony, the admission of which was objected to on the part of the Plaintiff in Error, were properly admitted as legal evidence fit for the consideration of the jury, the same strictly bearing upon the issue in question between the parties, and being such as are universally received upon the trial of such issues; and those documents and testimony, with the other evidence produced upon the trial, were sufficient in point of law to maintain the right contended for, and to warrant the verdict as found by the jury.

The Judges were requested to give their opinion on the following question, framed for them by Lord Lyndhurst,—Whether the mere nonpayment of tithes is a sufficient answer to a claim of tithes made by a lay impropriator?

Lord Chief Justice Tindal, after conferring for a short time with the other Judges, said:—I have to state to your Lordships the unanimous opinion of my learned brothers and myself, that the mere nonpayment of tithes is not a sufficient answer to a claim of tithes made by a lay impropriator. That there can be no prescription in *non decimando* against a lay impropriator is a principle of law so thoroughly settled

that it can admit of no doubt. The only legal ground, therefore, on which the non-pernancy of tithes can [328] be set up as an answer to a claim of tithes, is, that it affords the presumption of a grant of tithes, made by the lay impropriator to the terre-tenant. So far as the authorities have been brought before your Lordships, not a single instance can be found in which there has been a presumption of a grant from the lay rector, where there has not been some positive evidence, something more than the mere non-perception of tithes from all time, as the foundation of such a presumption. The course of authorities is uniform in this respect, so as to render it unnecessary for us to enter into that discussion. But the question put by your Lordships is comprised in terms merely negative, that there has been no perception of tithes by the lay rector at any period; no positive or affirmative ground is suggested; no separation of any one species of tithes from the rest; no description, in any way, of the deed which forms the muniment of the title to the land by which the land itself is stated to be tithe free; no instance suggested in which the tithes have been treated as property by the owner of the land, either in family settlements or conveyances from one hand to another, or in leases from the owners of the tithes; in all which cases there would have been a positive dealing with the tithes as a substantive property, separate and distinct from the land; and in which the enjoyment of that property by the nonperception by the lay rector would have gone along, and have been consistent, with the documentary evidence. In these supposed cases nothing would have been wanting but the production of the original grant of the tithes from the lay rector to the terre-tenant; and the want of such original grant might well be supplied by the presumption that it once existed, and was lost by time or accident, on the ordinary grounds on which such presumptions are [329] made; but the presumption in this case, if made at all, must be grounded on the mere non-perception, and nothing else.

We are unable, however, to see how far the presumption, resting on such negative grounds alone, can be distinguished, either in principle or effect, from a prescription in *non decimando*. In both cases the evidence, and the only evidence, must be the right of the rector on the general law of the land, the occupation of titheable land by the terre-tenant, and the non-perception by the rector of tithes arising from the land in the earliest times; the claim on the part of the owner of the land is precisely the same, whether set up as a prescription in *non decimando* or the presumption of a grant; it is in both cases a claim that the land is to be held free from the payment of tithes; if, therefore, such a state of facts can be held to support the presumption contended for, it would necessarily follow that in every case the nonpayment of tithe would have the full effect of a prescription in *non decimando*, though such a prescription is admitted not to be valid at law. Upon these short grounds we have come to the conclusion which I have already stated to your Lordships.

The Lord Chancellor (Lord Lyndhurst) said he entirely agreed with the opinion delivered by the Lord Chief Justice. The course of authorities was too uniform to justify their Lordships in departing from them on the grounds stated at the bar. A departure from them would lead to this conclusion; that, though a prescription in *non decimando* could not be insisted upon, yet a party would be enabled under another form, namely, by insisting on a nonexisting grant, lost by time or accident, to avail himself of precisely the same result as by the prescription in *non decimando*. Being [330] of opinion that the decision of the Courts below was correct, he moved that their judgment be affirmed.

Lord Brougham:—I also concur with the learned Judges in their doctrine on this subject. It is not representing this case truly, in point of fact, to state that it is one in which the decisions in the courts of Westminster Hall have been in conflict, in which at one time, and down to the year 1796 or 1797, they were one way, and that since that period they have been uniformly the other. But supposing that all the courts in Westminster Hall, without any controlling power exercised by this House in reviewing the later decisions, had, for the last forty years, uniformly treated the subject in this way, I should say, even in that case, it would be a strong thing for your Lordships to reverse a doctrine standing upon a current of former decisions, which had been adopted by the judges as evidence of the law, which had been accepted by the profession, and acted upon by them in advising their clients, and which had been the foundation of many titles at present held under that supposed law. But

that is by no means the case in point of fact; no such new law has been laid down since 1797; there is no conflict whatever of the earlier decisions with the later, when those come to be examined; they may appear to be in favour of the argument contended for by the Appellant, or against the right of the impropriator; but when they are examined minutely, in no one case can it be found, that even the presumption of a grant has been set up to defeat the right to tithes of the lay impropriator, any more than of a spiritual person, where there was a mere nonpernancy unaccompanied by any other matter. The case of *Medley* v. *Talmy* is the strongest of those cases, and in that case there had been a con-**[331]**-veyance, of forty or fifty years old, of the lands in question as tithe free; and whoever holds that case to be in conflict with the decision in this, takes his account of it from the marginal note to the report, and not from the statement of the case in the context.

Agreeing with the learned Judges in their opinion, and in the grounds on which they have, through the Lord Chief Justice, stated their opinion, and also with my noble and learned friend, who has moved the affirmance of the judgment of the Court below, I deem it unnecessary for me to go into a comparison of those cases. Suffice it to say, that upon looking for the only case not cited at the bar, to which Lord Eldon alluded in *Berney* v. *Harvey*, as having been decided in the Court of Exchequer in 1727 against the law contended for, we find there is no distinct account of it to be gathered from what his Lordship said. Two cases have been suggested to me as answering the description, but when examined, neither of them does so. One is *Sweetapple* v. *Kingston* (2 Eag. and You. 1): it is impossible that can be the case, because that is principally a question of modus; the other, which a learned Judge suggested, is *Stone* v. *Rideout* (2 Eag. and You. 6; S. C. Bunb. 262); but when I look to that case, I find that it is wholly inapplicable, and does not at all answer the description, though it being in the year 1728, comes near the date of Lord Eldon's citation. We are, therefore, led to conjecture that there is no such case reported, for the industry of the Judges, and of the learned counsel at the bar, has not been able to discover it. It is said, that judges have doubted this law, but Lord Eldon, Lord Redesdale, Mr. Baron Wood, Lord Hardwicke, Lord Talbot and Lord Loughborough, have expressed similar opinions, and the whole weight **[332]** of those doubts has been pressed upon your Lordships and upon the learned Judges who have assisted you, in the argument for the Plaintiff in Error. I think the inference presses the other way. What am I to say of the law, when I find such judges as Lord Hardwicke and Lord Talbot represented, (I do not know where, for I cannot find it in their own words,) but represented by Lord Eldon, in *Berney* v. *Harvey* as having "struggled much but ineffectually against it." (17 Ves. 119). Is that not saying in terms, that the law was too strong for them. And the result of their doubts and struggle was, that they were defeated by the strength of the law, and that the decisions have been so uniform, and the law so clearly established, that they could not alter it. I have looked into Lord Redesdale's argument, in *Norbury* v. *Meade* (3 Bligh, 226), and a most strong and cogent argument it is, as Mr. Baron Wood's also is, in the particulars to which Lord Eldon refers. That argument amounts to this, that one cannot see why this should ever have been the law; that it rests on no sound principle; that the reasoning which applies to a spiritual rector does not apply to a lay rector. That is perfectly true; but there are many other cases in which a uniform course of decision has made the law and settled it; and although it originated in reasons which you cannot now discover, or whether you see it originated in error, even then you cannot unsettle the law so established. A very recent case proves this strongly; I mean the case of *Cadell* v. *Palmer* (1 vol. *ante*, p. 372), from which it is clear that the doctrine, that an executory devise is good for 21 years beyond a life or lives in being, originated in the consideration that an infant, not being of age until 21, could not bar the remainders over by suffer-**[333]**-ing a recovery or levying a fine. Ever since the decision in the Duke of Norfolk's case, professional men have acted, and parties have purchased, not with reference to the infancy, and the difficulty of levying a fine or suffering a recovery, but with reference to this, that absolutely a man could entail his lands on lives in being, and 21 years after. And what have your Lordships held in *Cadell* v. *Palmer*? And what did the learned Judges all advise your Lordships to hold? Why, that a man could devise his lands for a life or lives in being, and that the executory devise was good, which added to the life or lives a term of 21 years, in gross, without reference to infancy at all. I put the question in

that case to the learned Judges, with a view of setting it in the strongest manner, by excluding the infancy altogether. That is a remarkable instance where every person may see that a rule crept into the law *per incuriam*, and by a sort of mistake, easily explained, which, if we were to make the law now, we should not perhaps fall into, but which cannot be taken into account in order to impugn the authority of a train of uniform decisions.

I cannot conclude the observations which I thought it necessary to add on this important case, without remarking upon the course of argument pursued by the learned counsel for the Plaintiff in Error. He says, we are not bound by decisions of the Courts below, but we are only bound by our own decisions. If that were the case, we should have leisure to do nothing but to hear appeals and writs of error. We are not bound by the decisions of Courts of law; that is, we may, if we choose, do a wrong act, we may overlook the whole course of decisions in Westminster-hall. There is no doubt of that, because they have not the force of de-[334]-cisions in the supreme Court of Parliament, the last resort: but that we ought always to attend to decisions from inferior Courts, is evidenced by the circumstance, that in hearing this very case argued, we require the presence of the learned Judges in order that they may advise the House upon the question of law. If we are not to be influenced by the authorities of the Courts in Westminster-hall, why do we ask the Judges to tell us what our Journals could tell us. They cannot look into our Journals: they look into their own decisions and tell us their opinions on the authority of decided cases, and we hold that to be a great help and guide to us. A strong ground might be laid for holding a decision not to be law. The case of *Fitzroy* v. *Gwillim* (1 Term Rep. 153), was for some years reckoned bad law, yet it was never actually overruled; and the same remark may be made on the case of *Corbett* v. *Poelnitz* (1 Term Rep. 5. *vide Marshall* v. *Rutton*, 8 Term Rep. 545). What is that but saying that, now and then, a wrong decision is made and then is set right, a proposition very different from saying there is a current of decisions all one way, a uniform course of decisions without any one exception. We cannot say there is any conflict of cases here.

The judgment of the Court of Exchequer Chamber was affirmed, without costs.

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[335]

APPEAL

From the Court of Session.

The Provost, Magistrates, and Town-Council of the Royal Burgh of DUNBAR,—*Appellants:* Her Grace MARY, Duchess-Dowager of ROXBURGHE, and Others, Landward Heritors of the Parish of DUNBAR,—*Respondents.*

[Mews' Dig. vi. 750; xiii. 1894. See *Northam Bridge Co.* v. *Reg.* 1887, 55 L. T. 759.]

In a parish comprising a borough and a district of land, the management and maintenance of the poor in the landward district cannot be separate from the management and maintenance of the poor in the borough, but the poor of both must be regarded as the poor of one parish, and indiscriminately entitled to aid from the parish funds.

Long usage is of no avail against plain statutory enactments, and it can be binding on parties only as the interpreter of a doubtful law, and as affording a cotemporaneous exposition. Where a statute, expressive as to some points, is silent as to others, usage may well supply the defect, if not inconsistent with express directions of the statute.

The general question in this appeal was, whether in a parish, comprising a town and lands of large [336] extent, the poor in the landward district could be disjoined from the poor of the town, for the purpose of their maintenance, and the town funds be made exclusively liable to maintain the poor residing within the town.—It appeared from the pleadings, that the parish of Dunbar, in the county of Haddington, consists of an extensive district, having situated therein the royal burgh of Dunbar. The valuation of the landward part of the parish is £16,993 (Scots), the burgh or

municipality being proprietor of land valued at £30 (Scots), exclusive of the royalty. The total population of the parish was found, by a census taken by the incumbent thereof in 1822, to be 4945, of which number, 3267 resided within the burgh, and 1678 in the landward district. The parties to the appeal had, in the first proceedings taken by them, differed in their statements of the number of poor in the town and country part of the parish, the Respondents stating, that there were 70 within the town and 29 in the country, while the Appellants insisted that the poor amounted altogether only to 80, and that 52 of them resided in or belonged to the landward district, and 28 only belonged to the burgh; but a committee appointed by joint consent in 1834, for the purpose of ascertaining the exact number of poor in the whole parish, and the proportions in town and country, with a view to this appeal, reported that, "103 persons were then on the regular list of poor, receiving aid from the poor's fund of the parish, 86 of whom were settled within the burgh, and 17 in the landward district, but of those within the burgh some were decayed or unemployed farmers' servants. Fifty of the whole number were born and brought up in the burgh, 10 in the landward district, and the remaining 43 came from other parishes." The population of Dunbar **[337]** being chiefly seafaring persons subject to various casualties, the number of the poor there is necessarily greater than among an agricultural population of the same extent; and that circumstance, together with the recent breaking up and abandonment of a cotton manufactory in the town, by which several persons who have come thither from other places, were put out of employment and dispersed through the town, increased considerably the disproportion between the town poor and the landward poor. The funds for the maintenance of the whole poor, both of the burgh and landward district, under the administration of the kirk-session, consist partly of a small charitable donation, of collections at the church-door, and incidents at marriages, baptisms and funerals; but the greater part is supplied by assessments voted by the heritors or owners of the land and their tenants, and by contributions from the town, in definite proportions of five-sixths from the heritors, for which they assess themselves, and one-sixth from the town or community of Dunbar, in the name of cess, poor rates and other burdens from traders and proprietors within the burgh.

In the year 1823 the heritors objected to that mode of assessment as laying an unequal and unjust burden on the landward part of the parish; and in 1824 they came to a resolution that in future distinct assessments should be made for the burgh poor and the country poor, and levied from the burgh and from the heritors in the landward district separately, so that each should support its own poor. The provost and town-council objected to the proposed alteration, and after several attempts at a compromise, from 1824 to 1830, the heritors raised an action against the provost, magistrates and members of the town-council, and also **[338]** against the members of the kirk-session of the parish, as joint administrators, with the heritors, of the poor's funds. They stated, in their summons, that by the statute of 1579, cap. 74 (the foundation of poor laws in Scotland), "for punishment of strong and idle beggars and relief of the poor and impotent," it is ordained, "that the provosts and baillies of ilk borough and town, and the justice constitute by the King's commission in every parish to landwart, shall (within the time mentioned) take inquisition of all aged, poor, impotent and decayed persons, born within that parish, or who were dwelling and had their most common resort in the said parish the last seven years, etc., and upon the said inquisition shall make one register book, containing their names and surnames, to remain with the provosts and baillies within borough, and with the justice in every parish to landwart, etc.; all poor people within forty days to repair to their own parishes; and the said space of forty days being bypast, that then the provosts and baillies within boroughs, and the judge constitute by the King's commission in ilk parish to landwart, make a catalogue of the names of the said poor people, inquire the men and women where they were born, and thereupon, according to the number, to consider what their needful sustentation will extend to every oulk; and then, by the good discretions of the said provosts, baillies and judges in the parishes to landwart, and such as they shall call to them to that effect, to tax and stent the whole inhabitants within the parish, according to the estimation of their substance, without exception of persons, to such oulklie charge and contribution as shall be thought expedient and sufficient to sustain the said poor people: and the

names of the inhabitants stented, together with their taxation, to be [339] likewise registrate; and that, at their discretion, they appoint overseers and collectors in every burgh town and parish, for collecting and receiving of the said oulklie portion, who shall receive the same, and deliver so much thereof to the said poor people, and in such manner as the said provost and baillies within borough, and judges in the parish to landwart, respective, shall ordain and command, etc.; and at the end of the year, that the taxation and stent-roll be always made of new, for the alteration that may be through death, or by increase or diminution of men's goods and substance." That, by subsequent statutes, the powers previously committed to the judges in parishes to landwart were transferred to the heritors and kirk-session. That, by proclamation of William and Mary, 11th August 1692, "the heritors, minister and elders of every parish are required to meet on the second Tuesday of September next, at their parish kirk, and there to make lists of all the poor within their parish, and to cast up the quota of what may entertain them, according to their respective need; and to cast the said quota, the one-half upon the heritors, and the other half upon the householders of the parish, etc.; and the lieges are charged to apprehend beggars, and forthwith to carry them to the principal heritor of the parish where they were apprehended, if it be in landward, and to one of the baillies in towns." That by proclamation, 29th August 1693, their Majesties "require and command the magistrates of our burghs royal to meet and stent themselves, conform to such order and custom used and wont, in laying on stents, annuities or other public burdens, in the respective burgh, as may be most effectual to reach all the inhabitants; and the heritors of the several vacant parishes likewise to meet and stent themselves for the main-[340]-tenance of their said respective poor, and to appoint the ingathering, uplifting and applying of the same for the uses foresaid, sicklike and in the same manner as the heritors and elders are appointed by our former proclamation. And for preventing of any question that may arise betwixt the heritors and kirk-session in the several parishes of this kingdom, about the quota of the collections at the church doors, and otherwise, to be made by the said session, to be paid in to the heritors for the end aforesaid, we do hereby, with advice foresaid, determine the same to be half of the said collections." That by proclamation of King William, 3d March 1698, it is further provided, that "because there may some questions arise in putting the said Acts in execution, for which there can be no general rule set down, power and warrant are given to the ministers and elders of each parish, with advice of the heritors, to decide and determine all questions that may arise in the respective parishes, in relation to the ordering and disposing of the poor, in so far as it is not determined by the laws and Acts of Parliament." That the foresaid proclamations were confirmed by Acts of Parliament, and that these different enactments draw a distinct separation, as to the assessment and management of the funds, betwixt burghs and parishes to landward, giving the whole power and management, in the one case to the provost and magistrates, and in the other to the Judges, in whose place are now substituted the heritors and kirk-session; and they are quite inconsistent with the supposition, that in any parish the provost and magistrates, and the Judges, were to be conjoined in assessing or distributing the funds. That, consequently, in the case of a burgh situated in a landward parish, the provost and magistrates have, by law, the sole charge of the poor of the [341] burgh, while the Judges have the sole charge of the assessment and management for the poor of the landward district, etc. That an agreement, alleged to have been entered into in 1724, according to which the assessments for the poor have been made, was of the following import: "It is agreed by the heritors that for making foresaid sum (£120) effectual for maintaining the power of the town and parish of Dunbar, five sixth-parts of the said sum shall be paid by the heritors and tenants of the country part of the parish, and one-sixth part by the town of Dunbar and the community thereof, and that for one year allenarly; and that this agreement be binding no longer, or be a precedent any manner of way for the future." That, admitting the genuineness of this agreement, still it did not continue or purport to continue in force more than the year, and the mode of assessment contained in it was unequal and contrary to law, inasmuch as the whole inhabitants of a parish must contribute to the support of the poor equally according to their substance, whatever usage to the contrary may have prevailed. That, therefore, it "ought and should be found and declared by

decree of the Lords of our Council and Session, that the management and maintenance of the poor of the landward district, and of the burgh, are separate and distinct, and that the pursuers, as heritors of the landward district, with their tenants, and other inhabitants thereof, are not liable for the support of the poor of the burgh, but for that of the poor resident within the landward district allenarly; and the said provost, magistrates and council, as representing the community of the said burgh of Dunbar, ought and should be decerned and ordained, by decree foresaid, to sustain and manage the poor of the said burgh according to law. Or [342] otherwise, in the event of the pursuers failing in the above conclusion of their action, then in that case it ought and should be found and declared, by decree foresaid, that the power of taking up the lists of the aggregate poor, determining the assessments and managing the funds, belongs to the meeting of heritors, provost, minister and elders; and that the assessments to be imposed for the support of the aggregate poor shall be laid on the whole inhabitants of the parish equally, whether in burgh or to landward, according to the estimation of their substance, without exception of persons."

The Appellants, in answer to the allegations in the summons, insisted that it had never been the practice, in the parish of Dunbar, to separate the poor into two classes, viz. the poor residing within the landward district, and the poor resident within the burgh, or to hold the heritors, tenants and other inhabitants of the landward district, liable only for the support of the poor resident within that district, or to liberate them, in any degree, from an universal liability, along with the other parishioners, for the poor of the whole parish. It had, on the contrary, been the invariable practice, for more than a century back, to have but one assessment for the entire parish, leviable on the general body of the parishioners, and distributable among the whole poor of the parish, whether in burgh or to landward, without distinction of persons, and on a principle of the most perfect equality. They admitted that for the more convenient levying of this assessment, a distinction had so far existed between the burgh and landward districts, that the aggregate assessment laid upon the parish had been raised in distinct proportions from these two districts; the burgh, for more than a century back, paying one-[343]-sixth of the entire assessment, and the landward district taking the burden of the remaining five-sixths. They stated their belief that this arrangement, in its origin, had been founded on a comparison of the real or valued rent of the two portions of the parish. It was, in 1724, as it had been on other previous occasions, made matter of positive contract. And as there had been no interruption or challenge of the arrangement, from 1724 down to the present day, it had been universally recognised and acted upon in the parish, as the *regula regulans* in levying the parochial assessment. Moreover, so far as the proper town poor were concerned, the burden on the parish was lessened, there having been, so far back as 1753, specially mortified in favour of the poor within burgh, a sum of 1500 merks Scots. A settlement to this effect was duly executed by one Jane Binning, in March 1753, and stood recorded in the burgh books. The session and heritors annually intromitted with the interest accruing on this investment, and they applied this fund, as well as another derived from the burgh mort-cloths, for the general behoof of the whole poor of the parish. Besides the resident poor of the parish, there was a great number of stranger poor, to whom occasional aid was required to be given. There never had been but one assessment in the parish in name of poor's rate, and there never had been a separation of that assessment into two distinct funds, one applicable to the landward district, and the other to the burgh; nor a separation of the pauper population into two distinct classes of landward and burgh poor. On the contrary, the fund raised within the parish for support of the poor had invariably been levied and dealt with as one indivisible parish fund, in reference to which, the whole poor of the entire parish, whether within [344] burgh or to landward, had been admitted to equal rights; and from which no class of that poor had ever been excluded, in respect of a supposed preferable right in any other class.

Before the cause was prepared for debate, another action, involving similar questions in regard to the royal burgh of Lanark, had come before the second division of the court of session, (in which division this action also was pending,) and their lordships of that division had ordered the opinions of the other judges to be taken thereon. Their opinions were accordingly taken in that case, and afterwards in this, six (The Lord President, Lords Balgray, Gillies, Corehouse, Fullerton, and

Moncrief) of them giving substantially the same opinion in both cases, viz., that there can be but one list or roll of poor in any parish, whether entirely burghal and entirely landward, or partly burghal and partly landward; and that there cannot be two lists or rolls, one of burgh poor and the other of country poor; but that they are all indiscriminately the poor of the parish, and entitled to relief out of the whole funds of the parish. That as there is no rule laid down by any of the acts for mixed parishes, partly landward and partly burghal, each parish of that description ought to continue to follow the rule of assessment used and wont; and therefore as there has been a rule acted upon in the parish of Dunbar for a great length of time, they were of opinion that that rule of assessment ought to be continued.

Three of the judges (Lords Craigie, Medwyn, and Mackenzie), on the other hand, were of opinion, that the management and maintenance of the poor in the royal burgh and in the landward district, were separate and distinct, under the **[345]** control of the magistrates in the one, and the heritors and kirk-session in the other; and that the assessment was leviable according to totally different rules, as specifically laid down in the statutes for burghs and landward parishes respectively.

The two causes came to be finally advised by the second division on the 4th of July 1833, when their lordships of that division,* four in number, unani-**[346]**-mously concurring with the minority of the consulted Judges, the following interlocutor was accordingly pronounced:—"The Lords having resumed consideration of this cause, with the opinions of the consulted judges, decern and declare in terms of the first conclusion of the pursuers' libel, and remit to the Lord Ordinary to proceed accordingly."

[347] The appeal was from that interlocutor.

The Solicitor-General (Sir William Follett) and Mr. Murray for the Appellants:—

The law of Scotland relative to the maintenance of the poor, proceeded entirely upon a parochial system, the whole poor within each parish forming one class, to be provided for indiscriminately out of the whole funds of the parish; and there is nothing in the statutory enactments, upon which alone the poor-law is founded, either in ordinary construction, or as they have been explained by usage, which sanctions, in any case, the division of the poor of one parish into separate and distinct territorial classes,—such as the burgh poor and the landward poor in the case of a parish partly burghal, and partly landward,—or authorizes the formation of a separate list

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* Lord Justice Clerk expressed his opinion to this effect:—Six of the consulted Judges are of opinion, that the usage ought to fix the rule of assessment in the burghs of Lanark and Dunbar. The other three Judges who were consulted, have delivered a different opinion, founded entirely upon the interpretation of the statutes which ordain an assessment for the maintenance of the poor. With these conflicting opinions before me, I have given the point the fullest consideration; and, after having weighed all the arguments for and against, I must confess that my opinion coincides with that of the minority. I cannot discover on what principle usage can or ought to be introduced as the rule of the assessment. The provision for the poor, and the powers to impose the assessment, are the mere creations of statute. There is here no case of very ancient usage. But although the usage had been long and inveterate, I can see no ground for deciding that it is to be imperative or binding on the parties liable to an assessment. The usage may continue from generation to generation—the country may not complain of the usage, and the assessment may be imposed and levied for a long time undisturbed—but when any one becomes refractory, and calls in question the right or mode of assessment, we must recur to the statute. In my view of the question, usage, however continuous, establishes no right. In this state of matters we are driven back to consider the question, What is the state of the law under the statute, with regard to a mixed parish? The enactments relate to two different sets of poor, and to two distinct localities, a royal burgh, and a parish to landward. In the case of a burgh, the rule applies to every burgh which has a provost and magistrates. This is the clear provision of the Act 1579. That Act, as well as the proclamations, are recited in the statute of 1698; and in truth the Act 1579 is the very origin and basis of our system of poor laws; it lays down a clear code of regulations, both for the burghs and the landward parishes. The burghs are those

or roll of paupers to be made up with reference to such territorial division, or directs provision to be made for their maintenance out of distinct and separate funds.

While the immediate administration of the poor-laws is entrusted to the magistrates of royal burghs in parishes entirely burghal, and to the heritors and kirk-session in parishes entirely landward, the separate powers thus conferred upon the magistrates of royal burghs, on the one hand, and the heritors and kirk-session on the other, even if understood to be conferred in the case of a parish partly burghal and partly landward, ought not to disturb the primary principle of the poor law system, namely, that it depends upon a parochial arrangement; and there is no necessity, still less ground or authority,—even assuming such separate jurisdiction within the same parish,—for establishing two separate lists of poor, to be **[348]** separately provided for out of separate and independent funds.

The case of Peterhead, decided upon appeal to this House in 1802, is applicable to this question. In that case, where out of a population of 4371 persons, about three-fourths resided in the town, the other fourth being resident in the landward part of the parish, a question arose as to how the burden of building the church should be borne by the heritors, upon whom generally that burden is imposed by the law of Scotland. The Court of Session gave effect to the argument, that the expense of building that part of the church, which was necessary for accommodating the landward part of the parish, should be separately defrayed by the heritors in proportion to their valued rents, and that the expense of building that part of the church necessary for accommodating the town should be defrayed by the fuars and proprietors of houses within the town according to their real rents. This House reversed that judgment of the Court of Session, and declared that the charge of building the church was a parochial duty, which ought to be borne by all the owners of lands and houses in proportion to their real rents. And Lord Chancellor Eldon, in moving that judgment of reversal, observed, that "the expense of building or repairing a parish church was a parochial burden, which ought to fall on the property of the parish, and should not be regulated by reference to the population in different parts of the same parish." That case presented a very plausible ground for apportioning the burdens of the parish according to the population, yet it was there held, that the relative extent of population gave no rule. No absolute rule having been laid down by any statutory enactment for the **[349]** case of a parish partly burghal and partly landward, and a rule of assessment having existed in this parish of Dunbar for more than a century, there is no reason to disturb such a rule of assessment, as regards its

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which have a provost and magistrates, no matter how many parishes they are divided into. A distinct mode of assessment for the poor is provided by it. It provides how the lists are to be made up—it contans certain regulations as to begging—and it clearly defines the management by the magistrates. As to a parish to landward, the Act confides the power of assessment to a Judge constituted by the King's commission. But this was afterwards so far altered, that the powers and duty of the Judge were devolved on the heritors and kirk-session by 1597 and 1672. Then again we have, on the one hand, the proclamation of 1692, by which the heritors and kirk-session of landward parishes are to assess themselves for the support of the poor; and on the other hand, the proclamation of 1693, by which the magistrates of the burghs are empowered and required to impose the assessment. So that it appears to me there is a clear distinction between the poor themselves, the assessments, the management of the funds, and the provisions for the maintenance of the poor. With regard to the burghs, the rule extends to all royal burghs, whether they have any landward territory or not, although it is not so with the burghs of barony, which are in this question to be treated as villages. There is no express notice in the statutes or proclamations of, nor are there any provisions for, mixed parishes. They apply to the poor of the burgh and the poor of the landward parishes respectively. To me it is plain, that they lay down two systems of management which are quite distinct. When a usage has been established, it may be convenient to follow it; but whenever a question is stirred as to the matter of right, we must give effect to the law as we find it. We must, in this case, steer by the law as we find it in the statutes and proclamations. I am of opinion with the minority, and would propose in regard to Dunbar to find in terms of the first conclusion of the declarator.

Lords Meadowbank, Cringletie, and Glenlee, concurred.

principle at least, far less to introduce a rule which has never been recognised in this or any other parish, making different portions of the parish liable for the support of the poor, in proportion to the population, or to the number of paupers in each of those districts respectively.

Dr. Lushington and Mr. Keay for the Respondents:—Compulsory assessments for the support of the poor rest entirely on statutory enactment, and can neither be extended beyond nor exercised differently from what is prescribed by the statutes and ratified proclamations. By these statutes and proclamations, the management and maintenance of the poor of royal burghs is totally distinct and separate from that of the landward portion of the parish in which the burgh is situated. Express provision is thereby made for the maintenance and management of the poor of all royal burghs under the exclusive jurisdiction of their own magistrates, separately and distinctly, without reference to any landward district not within the burgh. Express provision is thereby in like manner made for the separate maintenance and management of the poor of landward parishes having a royal burgh situated therein, under the exclusive jurisdiction of the heritors and kirk-session thereof, independent of such burgh. A conjoint management and system of maintenance of the poor of the landward district and royal burgh is not only unsanctioned by the statutes and proclamations, but cannot be carried into effect without a direct and **[350]** open violation of all their most important provisions. While the system for the support of the poor is, in so far as regards the landward parts of the country, parochial, in so far as regards the royal burghs it is strictly and exclusively burghal in all its parts,—its machinery, its rules of assessment, and its extent; on the one hand extending over the whole burgh, although containing several separate parishes, and on the other, limited to the bounds of the burgh when situated within a parish. The landward districts of parishes containing royal burghs are included under the provisions in the statutes regarding landward parishes, the royal burghs being excerpted therefrom, and erected into separate districts relative to the poor, under a management peculiar to themselves, and exclusive of the landward parish. The case of Peterhead has no application here. That was not a royal burgh, but a burgh of barony, which is to be deemed equally landward with the rest of the parish in which it is situated.

There is no general consuetude to affect the construction of the statutes as to this matter, and no length of usage in a particular place can prevent the heritors and kirk-session of a parish, or the magistrates of a burgh, from reverting even from one legal mode of assessing for and maintaining the poor to another; and still less can it prevent them from turning from an illegal mode to one sanctioned by law: *Dick* v. *Fleshers of Stirling* (5 Shaw and D. 268). The practice in Dunbar, originally adopted as matter of special agreement, is contrary to law, and produces the greatest inequality and injustice.

Lord Brougham:—The parish of Dunbar, which **[351]** is of great extent, consists of the royal burgh of that name and a country or landward district. The population of the borough is about 3200, and of the landward part nearly 1700. The management of the poor is admitted to have been for above a century on its present footing, and there is no evidence of any other kind of management at any time. Both parts of the parish, the burgh and landward district, have been considered as one, without any division or difference of system or separation. There has been but one assessment laid upon the whole parish, and no distinction has been made of the poor into two classes or parties, the burgh poor and the landward poor, nor has any separate list or roll been ever made up of the two classes. The one sum assessed having been each time ascertained, the usage has been to distribute it into two portions, one-sixth to be levied in the burgh, and five-sixths in the landward part of the parish; but when received, the whole has been uniformly treated as one fund, and distributed as such among the whole poor, without any distinction. In like manner the kirk-door collection has been one for the whole parish, and in all questions of settlement a distinction has never been made between the two parts of the parish. There is some discrepancy between the statements of the parties to the appeal as to the proportions of the poor in the burgh and in the landward part. The one states the burgh poor at seventy and the landward at thirty, while the other gives the proportions as sixty to forty. But it is clear that the numbers of poor actually residing within the burgh must not be taken as a fair criterion of the proportion of persons thrown upon the parish funds by the two districts; for many of the poor who now

live in the burgh are [352] labourers formerly employed in the country, while many of the persons at all times working in the country are resident in the burgh. It is accordingly stated, and I do not find this explicitly denied, that nearly one-half, certainly more than one-third, of the poor residing in the burgh were formerly country labourers, independently of those who always lived in the burgh while working in the landward part.

In these circumstances, which compose the whole facts of the case, the Respondents, who are the heritors of the parish, naturally enough felt desirous, if they could, to shift upon the burgh the maintenance of its own poor, reckoning all to be burgh poor who reside within its bounds, although a great number of them belong properly to the country district. This desire they have in common with every part of a district which has a population of varying density, and a wealth distributed in proportions not at all relative to the number of inhabitants. There are many parishes in Scotland, as well as in England, in which eight or ten thousand persons are crowded into one corner, while not one thousand occupy the rest of the parish, and the wealthy part, being that which is thinly peopled, has to pay by far the larger share towards maintaining all the paupers that belong to the smaller and poorer district; and there is not one such parish which has not as good right as the heritors of Dunbar to complain of the irregularity in the distribution of the burthen. Such complaints, if listened to and acted upon by the Legislature, would lead to the most unjust divisions of the country. Indeed they would soon render all divisions into districts impossible. The question here is, however, not what would be admissible had we the law to [353] make anew, but what the law now is; not what right the Dunbar heritors have to complain, but what legal redress there is for their alleged grievance.

The question then which was raised before the Court below, and is now brought before your Lordships by appeal, is, whether or not the parish of Dunbar is by law divisible, or rather divided, into two districts, *quoad* the management of its poor, one of these districts being the royal burgh under the magistrates, and the other the landward part under the minister and kirk-session. The Court below, on consultation of all its Judges, held that it was so divided, and pronounced its decree to that effect, the claim of repetition being given up by consent. But this decision was made by the narrowest majority, and learned Judges of great eminence gave their countenance to both the opinions entertained. Upon a careful consideration of the whole case, I am of opinion that the judgment of the smaller number was right upon every principle of sound construction which can be applied to the statutes, and upon all the established general views of law which can govern questions of this description.

It is admitted, that there are no authorities, either of text writers or decided cases, which can be resorted to for our guidance in this question; we must attend to the statutory enactments, to the principles which are applicable to such provisions in a case of this kind, and to the usage in this parish as well as in almost all the rest of Scotland.

It is most justly observed by the Lord Justice Clerk, that the provisions for the poor and the powers of assessment for their relief, are the mere creations of statute. Every thing then must, in respect to these important matters, turn upon the statutory enactments. But I cannot go along with his Lordship, when for [354] this reason he denies that usage, however long and inveterate, could be binding and operative on the parties. It can be binding and operative upon the parties only as it is the interpreter of a doubtful law, as affording a contemporary interpretation; but it is quite plain that, as against a plain statutory law, no usage is of any avail. But this undeniable proposition supposes the statute to speak a language plainly and indubitably differing from the purport of the usage. Where the statute, speaking on some points, is silent as to others, usage may well supply the defect, especially if it is not inconsistent with the statutory directions, where any are given; or where the statute uses a language of doubtful import, the acting under it for a long course of years may well give an interpretation to that obscure meaning, and reduce that uncertainty to a fixed rule, *optimus legis interpres consuetudo*, which is sometimes termed *contemporanea expositio*; and where you can carry back the usage for a century, and have no proof of a contrary usage before that time you fairly reach the period of *contemporanea expositio*.

Let us now look to the statutes, and the first and leading one, on which all turns, is the Act of 1579, cap. 74 (Scotch). The preamble, referring to the older Acts, is

chiefly remarkable as reminding us that by those still earlier provisions all the arrangements touching the poor were of a parochial nature, and bore immediate and constant reference to parishes. No other boundary of districts is by them recognised. The Act of 1579 itself pursues the same course, and regards no division but that of parishes, unless in the case of burghs; that is, of a parish or parishes wholly burghal; and the reason why it specifies this latter case and provides for it is, not so much to deviate from the principle of regarding only parochial boun-**[355]**-daries, as to save the jurisdiction of magistrates within their own peculiar province—the royal burgh over which they preside. Thus the first enactment relates to vagrants and sturdy beggars, among whom we comprehend bards; these are to be carried before the magistrates in burghs; and in landward parishes, before justices to be appointed, or lords of regality: that is, the magistrates in burghs, and the justices and lords of regality in landward parishes, are to punish the offenders, or to take security for their conduct. The other provisions respecting vagrants are to the like effect as regards the burgh and landward parishes; with this additional circumstance, that they never once mention the burgh magistrates or burgh jurisdiction as applicable to provisions made both touching burgh and landward parishes, while once or twice, probably *per incuriam*, parish alone is mentioned, and parish jurisdiction; although it seems plain the burgh jurisdiction must be supplied for burgh parishes. This is only worth observing as evincing how much more parochial division was in contemplation of the Legislature than any other, even where parishes wholly burghal were in contemplation.

The rest of the Act is framed on the same plan. Registers or lists of the poor are to be made by inquisition taken by the magistrates of each burgh and town, and by the justices appointed in every landward parish; and the lists are to be kept by the magistrates in each burgh, and the justice in each landward parish, and all the poor are required to repair to the parish where they were born, and there settle themselves, under pain of being deemed vagrants. They are not to return to the burgh or town, but to the parish, because parochial division is the thing mainly **[356]** regarded throughout the Act, and a burgh may have more parishes than one. Here let us only observe, that in case a pauper was born in a parish partly burghal, partly landward, he complied with the statute, and escaped the penalty by resorting to and abiding in any part, burghal or landward, of the parish; but if he was born in one of two burgh parishes, he was liable to the penalty if he resorted to the other, though still he would be in the same town. The construction which would raise a distinction between the landward and burgh parts of the same parishes, must admit that a pauper born in the landward part, might safely return to and settle in the burgh part, and then he would encumber the burgh fund, and so *vice versâ* of one born in the burgh part of the parish. Now, if the division contended for by the argument of the Respondents has any meaning at all, it is that the landward poor should be sustained by the landward part, and the burgh poor by the burghal part of the parish, but that is rendered impossible by this provision respecting their several settlements. If again, to escape from the force of this consideration, it be said that the landward born poor must resort to the landward parts of the parish, and the burgh born poor to the burgh parts, I ask what provision of the Act hints at such a distinction in respect of settlement? But the matter here dealt with is of a penal nature, and highly penal, for vagrancy may terminate, by the first provision of the Act, in even capital punishment; therefore, this provision relating to settlement must be most strictly interpreted, and consequently we are not at liberty to supply by intendment a provision which is not in any way to be found in the Act; namely, that persons having a landward settlement by birth or seven years' **[357]** residence, shall go to the landward part, and those having a burgh settlement to the burgh part; the exigency of the Act is clearly complied with by the party returning to any part of the parish.

To illustrate this point further, let us suppose a pauper brought before the burgh magistrates as a vagrant, and indicted for that offence, his vagrancy consisting in having continued out of his parish, where he was born or had lived seven years last past, above forty days after the proclamation; the indictment must follow the section which constitutes the absence a constructive vagrancy, and the very words must be used. The averment must be, or rather must have been,—for it could have happened

only immediately after the Act passed, for it relates to that period,—the averment must have been, that the defendant, being born within the parish of Dunbar, and not having lived during seven years last past in any other parish, and being a pauper, did not return and repair to the said parish, and there settle himself within the space of forty days after proclamation made of a certain Act passed in such a year, etc. Now if the pauper had been in the country part and returned to the burgh part, he must have been acquitted, for the material averment of the indictment would be negatived by the evidence. No consideration of burgh or landward would ever have been had. The same may be said of the remaining provisions. The lists are to be made by the magistrates for towns, and by the justices for landward parishes; and the magistrates and justices in the parishes to landward, are to tax and stent the whole inhabitants within the parish according to their substance, and distributions are to be made among the poor by the magistrates within the burgh, and the justices in the parishes to landward **[358]** respectively: this being the only place in which any words of severance occur in any part of the Act. So testimonials are to be given by magistrates in towns, not distinguishing parishes, and by the justices in parishes to landward, manifestly in order to enable the magistrates to certify for all the parishes within the town indiscriminately. The subsequent Act laid the duties formerly assigned to justices upon the kirk-session, and the proclamations in the reign of William and Mary follow nearly the same course, only inclining more to the construction which lays the duty upon the parishes merely. In all these provisions then, we can discover only one case in which the bounds of the royal burgh and the jurisdiction of the magistrates is recognised; one case only in which there is a distinction taken between burghal and landward, and that is the case of a parish or parishes wholly burghal, and a parish wholly landward. This is no exception at all, the general principle of parochial division followed throughout the Act, for that division is here too strictly preserved; but no provision whatever is made, no notice at all is taken of a parish partly burghal and partly landward. It is considered, therefore, as a parish, and dealt with as such. The silence of the Act on this case is quite decisive, and we have no right to speak for it. When we see nothing recognised throughout but parochial boundary, we can have no right to imagine another division of landward and burghal district: burghal and landward are indeed terms used, but how used? Not as designating parts of the same parish, but as denoting two different kinds of parishes.

There is notice taken of and provision made for a burgh which is a parish, or it may be two parishes, though that is only in one or two instances. There is **[359]** likewise notice taken of and provision made for a landward parish; but no mention at all seems to be made, nor is anything at all rested upon the distinction between that part of a parish which is burghal, and that which is landward. We should be introducing a perfectly new matter, if we supposed any such division to be made; we should be really inventing a kind of district or territory wholly unknown to the law. The law is conversant with parishes. It is our most ancient division of territory, and loses itself in the most remote antiquity in every part of the island, being in England and in Scotland far beyond the time of legal memory. The law is likewise conversant with burghs, and their bounds are ascertained, though, generally speaking instituted in much more recent times. But that portion of the territory which is in a parish and not in a burgh, is wholly unknown to the law as contradistinguished from the rest of the parish. It is a part of the parish, and known as such, that is, known in relation to the parish; but we have no name even, much less a legal description of such a district. To maintain any such distinction, any such district, is contrary to all legal principle, and is, indeed, arbitrary and gratuitous. Equally so—perhaps still more violent—is the supposition which would give birth to a new jurisdiction, extending over and limited to such a district. The magistrates have their known jurisdiction in burghs, the kirk-session in parishes; but we are called upon to create a jurisdiction and to vest it in the kirk-session, comprising it within certain limits wholly unknown to the law. It is the jurisdiction of the kirk-session over that part of a parish which falls beyond the bounds of a town, but which is situated in the parish. This intention might be accomplished, the jurisdiction might be conferred, the district created, **[360]** and, its bounds being defined, the jurisdiction might be extended over that district, and limited by these bounds. The Legislature might have done this, and it may now do it. If it had been so, there would have been an end of the

question. The statute would have said so, and that would have been enough. But it must have said so expressly and plainly; no conjecture and no constructive reasoning can supply any such thing; nay, such a division of territory, and such a creation of jurisdiction, is exactly the last thing that we are at liberty to fancy, or to imply; at the same time, if for a long course of years the poor of the parish of Dunbar had been managed, as to assessment, settlement and sustentation, in two divisions, and the parish had thus been divided as it were into two, for the management of the paupers; and if the same kind of division and double administration had been uniformly followed in all, or almost all the other mixed parishes of Scotland, I am not disposed to deny that this would have entitled us to impose a construction upon the Act according to the practice or use. There being nothing absolutely self-repugnant in the division, we might have limited the case of a mixed parish, as not omitted, but capable of being raised by construction—a somewhat forced construction certainly—on the words of the Act, but raised solely by the usage being of a contemporary date, and of an uniform kind. That, however, is not the case here, and the Act therefore must be construed according to its plain intent, which excludes all such new divisions as the Respondents contend for, and the decree appealed from adopts. With this I should probably have been satisfied, but the case is considerably stronger; for the usage, both in Dunbar and elsewhere, is plainly with the construction contended for by the Appellants. It [361] would be a strong thing indeed to alter a practice so long established in this borough, upon any speculative construction of the statute. But when we find that the same usage which prevails here, has also prevailed almost every where else, it would be overlooking that which would have been a very important aid in the construction of a doubtful provision, and that which is a strong confirmation of the construction naturally put upon a provision by no means doubtful, were we to leave out of view the additional weight which this usage gives to the arguments against the decree of the Court below.

I have no hesitation, therefore, in recommending to your Lordships to reverse the interlocutor complained of.

Ordered accordingly, "that the interlocutor complained of in the said appeal be and the same is hereby reversed; and it is further ordered, that the cause be remitted back to the Second Division of the Court of Session, in order that the said Court may proceed further in the said cause as shall be just and consistent with this judgment."

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[362]

APPEAL

From the Court of Session.

The Rev. Dr. JOHN INGLIS, and Others,—*Appellants;* THOMAS MANSFIELD,—*Respondent.*

[Mews' Dig. i. 367; iv. 859. See *Metropolitan Asylum District* v. *Hill*, 1880, 5 A.C. 582.]

W. lent money on the security of an estate, which he believed, on the representation of the borrower, to contain 95 acres, and to be ample security for the sum lent. The borrower, after paying the interest of the loan for four years, became bankrupt, and the trustee on his sequestrated estate discovered that the description of the lands charged in security to W. did not comprise more than six acres. W. being advised of the objection to his security, applied to the bankrupt, and obtained from him a corroborative and supplemental bond, reciting the former deed, and subjecting the whole 95 acres, as originally intended, to secure the loan, and W. obtained infeoffment on this latter security before the trustee in the sequestration completed his feudal title. Held, by the Lords, affirming the interlocutor of the Court of Session, that the supplemental bond was void as against the trustee.

The rule with respect to costs in the House of Lords, as in the Privy Council, and in Chancery, is, that one cannot appeal for costs alone, but if an appeal be brought on the merits—not on colourable grounds of appeal, for the purpose of raising the question of costs—the House will not treat that as an appeal for costs, but will even, in affirming the judgment of the Court below, consider the

question of costs as fairly raised, and where there is hardship on the Appellant, will reverse so much of the judgment of the Court below as gave costs against him.

In the month of November 1823, Josiah Walker, then Professor of Humanity in the University of [363] Glasgow, since deceased, employed Mr. Joseph Gordon, W.S., to lend out for him the sum of £6000 on heritable security. Mr. James Stuart, of Dunearn (a friend of Mr. Gordon), wanted at the time a loan of from £10,000 to £12,000, on the security of his estate of Hillside, which appearing to Mr. Gordon to afford an adequate security for the sum wanted, he entered into a treaty for the investment of Professor Walker's £6000, and of two other sums of £3000 and £1500, for other clients, Colonel Sutherland Sinclair and Misses Ramsay. The estate which Mr. Stuart thus offered as security for the proposed loan, was represented by him as extending to ninety-five acres, comprehending all the grounds then belonging to Mr. Stuart about his house at Hillside, and known by the general name of Hillside. Mr. Gordon was, throughout the negotiation, led to believe, and he did believe, that the security would comprehend the whole of the lands; but before coming to any final resolution, he got from Mr. Stuart a valuation of the lands, framed by Dr. Coventry, on the employment of Mr. Stuart, with the view to the intended loan. That document was thus headed: "Contents and estimated value of the lands, plantations, etc., of Hillside, belonging to James Stuart, Esq., and lying in the parish of Aberdour, and shire of Fife"; the domain lands, east of the road, were stated to contain 59 acres, and were valued at £12,559, 10s.; the lands west of the road, containing 36 acres, were valued at £8736; to which were added, the mansion, offices, timber, etc., valued at £1200, all amounting, after deduction of certain burdens, to £21,655 10s. Mr. Stuart afterwards sent the titles and searches to Mr. Gordon, with a description of the lands as follows: "All and whole of the lands of Hillside, formerly called The Brewery of [364] Newton, with houses, buildings, yards, orchards, etc., etc., and whole pertinents of the same whatsoever, together with the teinds included in the said lands of Hillside, all lying in the lordship of St. Colme, barony of Beith, and sheriffdom of Fife."

Relying upon Mr. Stuart's representations, valuation of Dr. Coventry, and the description of land so furnished, as well as on the search of incumbrances and titles exhibited, Mr. Gordon adopted the above description in preparing the bonds to his clients, believing it to be the proper description of the lands and estate of Hillside, and to comprehend the whole of these lands. The bonds so prepared by Mr. Gordon were executed by Mr. Stuart on 7th December 1823. Professor Walker and the creditors in the two other bonds, were duly infeft in the lands, in terms of the bonds, on the 1st January of 1824; their sasines were immediately thereafter recorded, and they continued respectively to receive the interest of the above loans from Mr. Stuart for four years. Mr. Stuart's affairs afterwards fell into embarrassment, and his estates were sequestrated under the Bankrupt Act, on the 1st of September 1828; Mr. Mansfield, the Respondent, was in due time elected trustee in the sequestration, and his election was confirmed by the Court on 6th October following, in common form. The Act of Confirmation contained the general and usual order upon Mr. Stuart, as the bankrupt, to grant all proper and necessary conveyances in favour of the Respondent, in order to vest him with the estate; and likewise a general decreet, declaring the whole estates belonging to the bankrupt to belong to the Respondent as trustee; but this decreet did not confer any special right, or constitute feudal title in the Respondent.

The Respondent discovered, soon after his appoint-[365]-ment, that Professor Walker's security only comprehended a small part, not more than six acres of the lands which went under the general name of Hillside, and which consisted of various other parcels besides those described in the bond to Professor Walker, and were held under different titles. Professor Walker and the other heritable creditors having intimation of that discovery, took steps for completing their security, and obviating the Respondent's objection, before he as trustee had completed his feudal title in the lands. With that view application was made to Mr. Stuart, who had withdrawn to America after his bankruptcy, to grant corroborative or supplemental bonds in favour of Professor Walker and the other two lenders. Mr. Stuart agreed, and

granted such bonds. The bond in favour of Professor Walker narrated the treaty between Mr. Stuart and Mr. Gordon, the agreement for a security over the whole lands and estate of Hillside, the furnishing of Dr. Coventry's valuation, as evidence of the extent and value of Hillside, the sending of the description of the lands by Mr. Stuart to Mr. Gordon, the subsequent transmission of the searches and titles, Mr. Stuart's approval of the bonds, as prepared by Mr. Gordon, containing the above description, and then set forth, " That although from the correspondence, etc. there can be no doubt that the true intent and meaning of the covenants entered into betwixt the parties who made the said loan, and me, was, that the security granted to each of them should extend over the whole of my lands and estate known by the name of Hillside, and to which the valuation by Dr. Coventry related; and that it was understood and agreed at the time, that the description of lands engrossed in the bonds, and transcribed from the **[366]** titles exhibited, covered the whole of those lands; yet, as it has been alleged, etc., that the description in the said bonds does not comprehend the whole of the said lands and estate of Hillside, as contained in Dr. Coventry's valuation, and that the validity of the said securities is threatened to be disputed, etc.; it is, therefore, just and reasonable that I should grant the cumulative and corroborative disposition in security underwritten, etc. Therefore, etc., in farther and more full and perfect implement to him the said Josiah Walker, of the covenant and obligation entered into by me, as the condition of the advance and payment acknowledged by the said bond and disposition in security, the deed then conveyed to Mr. Walker ' all and whole my lands and estate of Hillside, in the parish of Aberdour, and sheriffdom of Fife, in Scotland, extending to 95 acres of land, or thereby.' "

This corroborative bond was formally executed by Mr. Stuart, on 20th May 1829, and infeftment in favour of Mr. Walker, was duly recorded on 13th July 1829. The Respondent had in the meantime, also taken steps for completing his title to the lands, as trustee in the sequestration, for on the 19th June 1829 he obtained a special disposition of the lands from Mr. Stuart, in implement of the prior order and decreet of the court, and he was infeft on that disposition on the 12th of August 1829.

In those circumstances, the Respondent brought his action against Professor Walker in January 1830, for the purpose of having the supplemental security reduced and set aside. Professor Walker died while the action was pending, and the Appellants, the trustees appointed by his will, were made defenders in his place.

The Lord Ordinary (Moncrief), on advising the cases, **[367]** and hearing parties thereon in February 1832, reported the cause to the Lords of the Second Division, with a note of his opinion.*

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* The note was to this effect: The summons in this case states two reasons of reduction, but it comprehends three grounds of law: first, that the disposition and sasine called for, constitute an undue preference, in violation of the statutes 1696, c. 5, and 54 Geo. 3, c. 137; second, that they amount to a fraudulent alienation, contrary to the Act 1621, c. 18; and, thirdly, that the disposition proceeded *a non habente potestatem*, in respect that it was granted after sequestration, and after the Act confirming the trustee.

The Lord Ordinary holds it to be proved, first, that there was a *bona fide* agreement concluded between Mr. Stuart and Mr. Gordon, as agent of Professor Walker, by which the sum of £6000 was to be given in loan by the latter, on the express condition of obtaining an adequate and complete heritable security; secondly, that that agreement was specific, to the effect that the security should extend over the whole lands comprehended in the report of valuation by Dr. Coventry, etc. It is impossible to raise a doubt as to Mr. Gordon's intention; for if he did not believe that he was getting a security over the whole lands in the valuation, he must be supposed to have wilfully taken what he saw to be no security at all, at the same time that he professed his determination not to lend except on complete and adequate real securities. Thirdly, it is admitted on the record, that the lands in the valuation are identically the same lands which are comprehended in the deed under reduction, with one unimportant exception: fourthly, this transaction was concluded, and the whole money *bona fide* advanced in December 1823, and bonds were then granted for carrying it into effect. The bankruptcy was in 1828. The bond to Professor Walker, in so far as it was insufficient for giving a security over the whole lands, was so made, contrary

[368] The Judges of the Second Division, on considering the cases, and hearing parties, appointed the cause to [369] stand over for the opinions of the Judges of the other Division, and of the Outer House, when opinions were accordingly given. On again advising the case, with the opinions of the consulted Judges, the following interlocutor was pronounced, 11 July 1833: "The Lords, having resumed consideration of the cause, with the opinions of the Lords of the First Division, and permanent Lords Ordinary, sustain the title of the pursuer to insist in this action; find, that the defenders have not produced a title sufficient to exclude the action; reduce, decern,

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to the agreement, on the faith of which the money was advanced. Upon the admitted facts, it is clear that it was framed in this defective manner by the fault of Mr. Stuart, whether from fraud or from error. The Lord Ordinary sees no evidence of wilful fraud, and cannot presume it; but taking it to have been by error, it was still by the positive act of Mr. Stuart as the borrower, in misrepresenting the titles, and thereby misleading the party with whom he dealt. It is not the same case as if he had simply sent the title-deeds to Mr. Gordon to prepare the bond. With the representation the error could not necessarily be discovered from the title-deeds; and the error was of so gross a nature, that, in this question, the act which produced it must be considered as *culpa lata quae aequiparatur dolo.*

On the other hand, the deed under reduction was not executed till after the sequestration and the confirmation of the trustee. But the money having been advanced on the faith of obtaining a security over the specific lands contained in that deed five years before the bankruptcy, the Lord Ordinary has no doubt that if the same deed had been granted before the sequestration, but within 60 days preceding, it must have been considered not as a security for a prior debt, but as implement of the previous specific obligation, and therefore within the exception of *novum debitum*, and not liable to reduction on the Act 1696. There is great difficulty in the question upon the third ground of reduction; viz. that the deed was executed by the voluntary act of the bankrupt after the sequestration and the confirmation of the trustee. When the point is stated in the abstract, there can be no doubt that no sequestrated bankrupt can effectually constitute a security over the estate by a voluntary deed. The estate becomes the property of the creditors, and there is an adjudication in the person of the trustee by the act of confirmation; and in this case the adjudication was special, the whole lands having been enumerated. But the case is not resolved by this general point. For, if the original contract be clear, and it be also clear that the first disposition was made imperfect by an error of Mr. Stuart, of a nature equivalent to fraud, the Court must determine whether it is competent to the creditors or their trustee to avail themselves of such an error. Mr. Stuart held the estate subject to a specific obligation to make the security good over the whole lands in the valuation. If the estate passed from him to his creditors, it could only pass as it stood in his person with that obligation; and, according to the judgment and opinions delivered in the case of *Gordon* v. *Cheyne*, the creditors could only take the right of the bankrupt *tantum et tale* as he held it. The adjudication in the person of the trustee did not divest the bankrupt feudally. An adjudication without charter and sasine has not this effect; and, certainly, assuming the existing obligation for a specific security, an adjudication by Professor Walker would have been competent after the trustee's confirmation; and, if first completed, would have excluded him. The point of difficulty is, that here the security was perfected by the voluntary act of the bankrupt; and it has been frequently decided, that even diligence, in itself competent, will be invalid to give a preference, if the creditor has only been enabled to obtain it by the collusive aid of the bankrupt. But, if there was a specific obligation to give the security, and if that obligation was binding on the creditors, the question is, Whether the pursuer has any legal interest to reduce it as granted by the bankrupt, whether the act of itself would, in other circumstances, have been warranted or not? The deeds are valid in point of form, Mr. Stuart not having been denuded. And if the thing done was an act of justice which the creditors might have been required to do, there can be no interest to reduce it, etc. The result, in the Lord Ordinary's opinion, is, that judgment for the defenders ought to follow from the equity of the statutes and the general principles of law under the cases of *Cormack*, *Gardner's Trustee* v. *Anderson* (7 S. and D. 868), *Cranston* v. *Boutine* (8 S. and D. 425), *Gordon* v. *Cheyne* (2 S. and D. 675, and other similar cases.

and declare in terms of the libel; find the defenders liable in expenses, and remit the account thereof, when lodged, to the auditor to tax and report." The appeal was from that interlocutor.

Dr. Lushington and Mr. A. Wood argued the case on behalf of the Appellants, and Sir John Campbell and Mr. Keay for the Respondent.

[370] Their respective arguments and the cases cited, are noticed in the judgment.

Lord Brougham:—My Lords, I shall take time to consider this case before I advise your Lordships to proceed to judgment. It involves a question of great importance in point of law, but I do not feel pressed by any great difficulty as to which way it should be decided. I strongly incline to an affirmance of the judgment of the Court below. I will state shortly the grounds on which I think it must be held, that Mr. Stuart had not the power to do that which forms the subject of this action. My argument proceeds chiefly upon the view of the subject which arises upon the Bankrupt Act, 54 Geo. 3, c. 137, and my opinion is, that the 29th section completely divests the bankrupt, although it does not invest the trustee completely, until his feudal title shall be made up. The bankrupt is prevented by the words of the Act from dealing with the property during the intermediate space, during which the trustee had not made up feudally his titles, but that did not enable the trustee to deal with the property, he being incapable of giving a feudal title according to feudal principles, until his investiture had been accomplished. A difficulty will arise if we are to determine this upon the statute of 1696, from the very imperfect knowledge we have of the way in which some of those cases referred to in the argument were looked at. With respect to *Houston* v. *Stewarts* (Morr. 1170), we have a current of opinions on the subject. The late Lord Meadowbank, without many exceptions the most diligent and attentive lawyer I ever remember in the practice of the Scotch law, gives an opinion of the most unhesitating nature against the authority of that case.

[371] There is a circumstance which I cannot leave out of my view, and that is the great hardship of Mr. Walker's case; and if I should ultimately be of opinion that I ought to advise your Lordships to affirm the decision of the Court below, as is very probable, I hope that I shall find that we may affirm it on the principal matter, without affirming that which saddled him with expenses. This case is a very hard one, and it is not the less hard for this, that there is no blame attachable to the party with whom he was dealing. This is perfectly reconcilable with the circumstances of the case, without imputing intentional blame to him; but Mr. Walker has been the sufferer all the same as if it had been intentional neglect, and his representatives are therefore very much to be pitied; at the same time the trustees for the creditors are not bound to give up their rights. It might have been an argument to have been addressed to him if he had been living and solvent; but the creditors stand in another situation. It becomes, therefore, advisable that, if possible, they should not be required to pay the expenses. It appears to me very extraordinary why the learned Judges in the Court below should not have thought of this further matter when they came to consider the giving of costs below. The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is, that you cannot appeal for costs alone; but you can bring an appeal on the merits: and if that is not a colourable ground of appeal for the purpose of introducing the question of costs to the Court called upon to review the case, the Court of Review will treat that, not as an appeal for costs, but will, in affirming the judgment given in the Court below, consider the question of costs as if it is fairly raised. That ques-**[372]**-tion is open to the Appellant, provided the other was not a colourable object of the appeal, and no human being can think here, that that was a colourable object; the individual who had been really injured, was entitled fairly to bring his case before the court: I shall, therefore, if I recommend to your Lordships to affirm the judgment, certainly take that matter into my consideration (see *Huband* v. *Huband*, 7 Bro. P. Cases, p. 436; *Fitzgibbon* v. *Scanlon*, 1 Dow. 270; *Tod* v. *Tod*, 1 Bligh, N. S. 645; and *Burke* v. *Spray*, 1 Russ. and Myl. 115).

Lord Brougham:—My Lords, the facts of this case are undisputed. Mr. Stuart gave Professor Walker, in 1823, a security over a parcel of his real estate of Hillside, in the county of Fife, and believed, as did the Professor and his conveyancers, that this security extended over the whole property of 95 acres of very valuable land. In this belief the sum of £6000 was advanced, and the lender was infeft in 1824. It was afterwards discovered that the title given extended over only five or six acres, and

Mr. Stuart then gave an additional security conveying the whole, but this was after he had become bankrupt, a sequestration having been awarded in September 1828, and the Respondent having been chosen and duly confirmed trustee for the creditors on the 6th October of the same year, while the corroborative security was not granted until 1829. Between the Respondent's confirmation as trustee, and his making up his title as such, Professor Walker was infeft upon the second security, and this action was brought by the trustee to reduce that second security, and all that followed upon it. The Court decreed for the reduction, and I am of opinion that the decree is well founded, and must be affirmed. There are two grounds on which **[373]** it rests: first, that the security granted was reducible under the Act 1696, as granted within the period when all preferences of the bankrupt are reducible; and secondly, that, whether it is so reducible or not, yet being granted after the adjudication of bankruptcy, and the confirmation of trustee, it was granted *a non habente potestatem*, and is a nullity as against the trustee in whom the estates real and personal of the bankrupt were vested.

With respect to the first point there is a conflict of authorities, and it becomes unnecessary to decide on which side the balance must be cast, as the second ground is sufficient for our purpose; yet the great importance of the question carries me into this discussion. That infeftment within the sixty days may be validly taken upon a conveyance made prior to that period seems not to be denied. It is agreed that an heritable right may be granted before the sixty days, and seisin may be validly taken upon it within that time, although nothing of the prior right can appear on the record. But the security itself having been here granted after the statutory period, and not merely the sasine had, we need not dwell longer on that admission, and there is certainly no small discrepancy in the authorities upon this point. Previous to the case of *Mansfield* v. *Cairns* in 1771 (5 Bro. supp. 386), the decisions were against the validity of a security so granted; but it was then held that money having been advanced before the time, on an agreement to grant heritable security for the loan, such security might safely be granted within the sixty days, and the same doctrine was upheld in the subsequent case of *Houston* v. *Stewarts*. As the provisions of the Act 1696 strike at preferences, these decisions could only stand upon the **[374]** ground that there was in such cases no preference. The Act expressly names, "All dispositions, assignations and other deeds granted in favour of his creditors, either for his satisfaction or further security, in preference to a creditor;" and I confess my own inability to discover how the party advancing the money, for example, in *Mansfield* v. *Cairns*, which never had been paid, could be considered as other than a creditor of the bankrupt, merely because he advanced it upon an agreement, and how the heritable security afterwards granted in performance of such agreement could be deemed anything but a further security. However, these two decrees plainly view the parties as standing in a different position, and the transactions as differing, so that, unable to perceive the grounds of the rule there laid down, and thinking the causes wrongly decided, I am not surprised to find them afterwards questioned by the Court. In *Spottiswoode* v. *Robertson Barclay* (Morr 1177), on 19th November 1783, the point was raised by an heritable security granted in pursuance of an obligation in a marriage settlement, and the security sustained; but Mr. Bell says, in the second volume of his Bankrupt Law, and I here quote him, not as an authority, but as the reporter of the case, that the Lord Justice Clerk Braxfield and Lord President Campbell (two of the great authorities in the Scotch law) doubted the soundness of the first decision, when a reclaiming petition was presented, and a hearing in presence ordered, which never took place, as the case was compromised; and Mr. Bell adds, that there is reason to believe the first decision would have been reversed. Now, surely, if a bankrupt is not allowed validly to perform what he has bound himself to do by marriage-contract, it is strong **[375]** to say that he can validly implement any other onerous obligation within the statutory period. It is recorded of Lord Monboddo, that he said, on the decision in *Mansfield* v. *Cairns* being pronounced, "There is no use in studying law."

In the subsequent case of *Maclean* v. *Primrose* (2 Bell, 225, n. 2), the late Lord Meadowbank, a very high authority, held *Houston* v. *Stewarts* not to be law, and in one of the cases of *Brough* v. *Duncan* (Morr. 1160), and *Trustees of Brough* v. *Spankie* (Morr. 1179), both decided in June 1793, the Court held the same opinion

upon that case of *Houston* v. *Stewarts*, regretting that the older one of *Eccles* v. *Merchieston*, prior to 1731, had been departed from; and although they said nothing of the first of these cases, which made the deviation (*Mansfield* v. *Cairns*), it is plain that this cannot stand, if *Houston* v. *Stewarts* be overruled. In the one of these cases, of *The Trustee of Brough* (the second), the Court held the statute to apply to securities given after the commencement of the sixty days, in implement of preceding obligations. There had been a holograph letter, on the faith of which a bill had been accepted, and agreeing to give the acceptor heritable security over a particular property, as soon as the writings could be made out. The security was not granted till within sixty days of bankruptcy. This was held to be struck at by the Act 1696, and it was in this case, that the Court pronounced *Houston* v. *Stewarts* to be wrong. I am glad to find that an observation I made at the close of the argument, that I could not see how the cases of Brough could be deemed good authority to displace the old case of *Houston* v. *Stewarts*, does not apply to *Brough* v. *Spankie*, but only to *Brough* v. *Duncan*. *Brough* v. *Spankie* is a perfectly good decision, according to the old law. The other case appears to me to have [376] been itself erroneously decided, at least, if the decision is held to strike at an infeftment taken within the sixty days, on a security granted before, which was the case. It is barely possible to consider that the long time which has been suffered to elapse between the date of the conveyance and the completing of the security by infeftment, which was above three years and a half, may have been a sufficient ground for the decision, as evidencing a fraudulent and collusive transaction; certain it is that this case can stand on no other ground: but with the other case, of *Trustee of Brough* v. *Spankie*, I have no quarrel at all; and thus the law would have stood clear, and ultimately consistent with the older and sounder doctrine of *Eccles* v. *Merchieston*, which had been temporarily departed from in *Mansfield* v. *Cairns* and *Houston* v. *Stewarts*.

But, unfortunately, there occurred a case in 1811, *The Bank of Scotland* v. *Steuart* (*Fac. Coll.* Feb. 7, 1811), in which the Court once more recurred to the exploded doctrine of these two ill decided cases; and excepting the fact of the title-deeds of the borrower having actually been deposited before the statutory period, for the purpose of making out the conveyance, I can find nothing to differ that from the cases of *Eccles* v. *Merchieston* and *Brough* v. *Spankie*, or to justify a recurrence to the contrary doctrine.

Upon the whole, I am of opinion that the law of *Eccles* v. *Merchieston* and *Brough* v. *Spankie* are rightly decided: that one of the Brough cases, *Brough* v. *Duncan*, is not to be supported; that *Mansfield* v. *Cairns* and *Houston* v. *Stewarts* are not to be considered as law; and that though a party taking infeftment after the statutory period has begun, on a security fully given before, is safe, yet that a bankrupt giving security after the period, in virtue of an obligation previously [377] given for a valuable consideration, whether of marriage, or loan, or purchase, is within the Act of 1696.

But the second point in the cause appears to me encumbered with no doubt, and it is in my judgment quite decisive in favour of the decree under appeal. Mr. Stuart was at the time in question under the operation of the Bankrupt Act, an Act expressly framed for making the payment of debts more equal, and for distributing all an insolvent person's estate, of whatever kind, equally among all his creditors. Now, although the retrospective operation given to the bankruptcy by the Act of 1696, may not extend to prevent a person not yet bankrupt from doing certain acts which he had previously actually bound himself to do, and which acts are, the giving of preferences to old creditors; and although certainly that retrospect is to be construed strictly, and not permitted to extend beyond what is fully expressed in the statutory words of nullity; yet it by no means follows that he is, after having been adjudged a bankrupt, empowered to do any act whatever, either original or supplementary,—either acts which he lay under no previous obligation to do, or acts to do which he had already bound himself; while he continues to have an independent and legal existence, he may be allowed to perform his obligations, although within the period during which he is by the Act enabled to give new securities, he may be enabled validly to do any act which falls not within the statutory description of preference to one creditor over the rest. But it by no

means follows that after his legal existence, as owner of any property, has altogether ceased, he shall have any power whatever, either to grant new securities for old debts, or to give one creditor any other preference over the rest, or to do [378] any act affecting his property, even though that act should be of a kind which confessedly does not fall within the retrospective operation of the statute of 1696: and indeed, without regard to the specific provisions either of that or of the later Bankrupt Acts, we may say generally, that a more strange anomaly could not well be imagined, nor any position more entirely at variance with the whole policy of the bankrupt law, and indeed more repugnant to the notion of an adjudged bankrupt, than that he should retain the power of conveying his property after he had been so adjudged by sentence of the Court, not *ex parte*, as in England, where the adjudication takes place without his knowledge, but *in foro contentioso* in a suit to which he was cited as a party. To support so singular a doctrine would require the plainest statutory enactments, and these are here all signally the other way.

First, we may observe upon the nature of the process of sequestration itself. The action of declarator of bankruptcy, given by the Act of 1696, and in lieu of which the sequestration given by the 12 Geo. 3, c. 72, extended to real estates by 23 Geo. 3, c. 18, was substituted, affected all the property of the bankrupt in the same manner in which the late Acts do; for by that Act of 1696, upon a person being adjudged bankrupt in the declarator, his acts and deeds after his bankruptcy, as well as within sixty days before it, are declared void, if done in preference of one creditor over another. This, however, bringing the question back to that which was discussed under the first head, I need dwell no longer upon it, as, in dealing with the present part, I rely on the provisions of the later statutes. I may only observe, that the earlier statutes, 12 and 23 Geo. 3, are not so express in their words vesting the trustees, and consequently divesting the [379] bankrupt, as the more recent statutes; but they assume the nature and force of sequestration to be, as no doubt it is in itself, a judicial divestment, which makes the bankrupt's power of dealing with his property cease, unless in so far as he is to obey the orders of the Court in making the conveyance to the trustees. In particular, all these Acts, old and new, contain a provision, declaring all the bankrupt's property, real and personal, at the date of the sequestration, to be a fund for distribution among his creditors; this forms the 38th section of the present Bankrupt Act, and it is the 22d section of the 23 Geo. 3, c. 18, the first Act that applied sequestration to heritable estates. In truth, the process of sequestration can mean nothing else.

Let us now see what additions are made to these things by the law at present in force to regulate the whole proceedings in bankruptcy, the 54 Geo. 3, c. 137. The trustee in this case had been confirmed as such by a decree of the Court, and we are to see how the Act treats the rights of a person so acknowledged, and how, by necessary consequence, it treats the bankrupt himself. The 29th section requires the Court to ordain (that is, to command by a judgment or order) the bankrupt to make over, within a time to be specified, by disposition or other proper deed of conveyance, to the trustee his whole estate, real and personal, specially describing the parcels in such conveyances, and the instrument is required in such form and style as may effectually vest the right in the trustee. Now suppose it had stopped here, and the Court had made the order which it has made, as much reliance is placed by the Appellant at least upon the first branch of the argument upon the analogies of our English law touching equitable estates, let us ask how our Courts would consider any act done by a bankrupt, or by any person after an order had been made upon [380] him to convey his estate to A. B. for whatever purpose! Why it is clear that he never could validly affect that estate by any act whatever, except by the conveyance which he was directed to make. It would not follow that A. B. could, before the conveyance, deal with it; but at all events the bankrupt, or other person ordered to convey, never could deal with it effectually in any manner of way. But the statute proceeds to declare and enact that in all circumstances, and whether such deed be executed or not, "the said whole estate and effects shall be deemed and held to be vested in the said trustee for the creditors." Is not this enough to divest the bankrupt? Is it not a statutory conveyance at all events out of him? Is there a better title to the substance of any right, whatever may be wanting to the forms of executing it, than an Act of Parliament, providing expressly

that such right is, by force of the Act, in one party? But at any rate, can a man's property be taken out of him more effectually than by a law of the country providing that it is thereby vested in another? Can a man's lands be more effectually tied up than by a statutory declaration and enactment? What stronger case would it have been had the Act expressly said (which would have been really superfluous) that the bankrupt should thereafter cease to do any act relating to his property so divested? But the Act goes on, and in the plainest terms assumes his being divested by the statute, and by the order which the Court is required to make; for it directs the Court to declare, decree and adjudge in its order, that the whole estate, right, title and interest which were formerly in the bankrupt, shall now pertain and belong absolutely and irredeemably to the trustee. This adjudication has in the present case been made, and, in my clear opinion, divests the bankrupt; although, until [381] the trustee makes up his title, he cannot convey by sale or incumbrance, upon plain feudal principles, still it is enough to take the property out of the bankrupt. But I read the words of the Act now, for the further and important purpose of showing that the Legislature so regarded the order of adjudication; for the Act speaks of "all the right, title and interest formerly in the bankrupt." Words cannot more clearly express that after the adjudication the estate is not in the bankrupt at all, and that all his power over it in any way, and to all intents and purposes, has ceased from and after that period. The authority of the case of *Mitchell* v. *Ferguson* (Morr. 10296) has been cited in further support of the decree, and it bears upon this branch of the argument; for the Court there held an adjudication of a real estate, subsequent to a disposition on which no infeftment had been taken, sufficient to cut down that disposition, and defeat a sasine subsequent to the adjudication, and before infeftment on the adjudication. There the sasine of the assignee under the disposition, according to my recollection, was interposed between the adjudication and the infeftment upon the adjudication.

As for the argument raised upon the analogy of inhibition, and on the 22d section, which gives the recorded petition the force of a recorded inhibition, nothing can result from that; the object of the provision is to make the mere intimation of the petition of sequestration and the first deliverance upon it, if registered, have a certain effect; and it gives that proceeding only the effect of inhibition, deeming this a sufficient protection against acts to be done while the petition is pending, and before adjudication. Nothing can be more rational than the supposition that the Act intended to give the inchoate procedure, the [382] mere presenting and intimating a petition to sequestrate, a less extensive nullifying effect than the final adjudication itself. Nothing can be more consistent than that the sequestration itself finally granted should divest the bankrupt to all intents and purposes, while the commencement of a proceeding to obtain that sequestration should only have the more limited effect of a recorded inhibition.

Much of the argument in this case seems to have been rested on the analogy of our equitable estates in England; but the Scotch law now holds no resemblance to the law of England in this particular, though both systems had one common origin. Our equitable titles are peculiar to our jurisprudence; an agreement to convey an estate for a valuable consideration executed, is, to all substantial purposes, a conveyance which vests the property in the purchaser; although, to obtain his full rights, he must resort to one Court, and demean himself as a suitor, according to one set of rules, and not another; whatever is covenanted to be done, is held in equity as done; so that a title by mere agreement is quite as paramount to any subsequent incumbrance or other previous title as a legal conveyance. This is not the law of Scotland upon feudal principles; the party who first perfects his title by sasine (and since the Act of 1617 by registration also of his sasine) is preferred to him who, at a prior time, may have paid his money on an agreement or obligation. Land is only affected by the Scotch feudal law in a certain way; any other mode of transferring it or burthening it is as inept and as inefficient as a sale or mortgage by parol would be with us. If, in this country, a man gave his money on a parol conveyance or mortgage, he would, of course, be cut out by one who the next month got a mortgage or conveyance, or even an equitable title by a written [383] agreement from the same proprietor to the same lands. This might be a hardship, and it is exactly the same kind of hardship which may happen in Scotland, and which has

happened here, with this very difference, that in Scotland writing may be as inefficient to affect the land, as parol is with us.

This consideration too is an answer to the argument that the trustee takes the estate of a bankrupt *tantum et tale*;— I refer to this, for this is the ground of the opinion, with which I totally differ, of one of the most learned of the Scotch Judges, for whose opinion I have a constant and habitual respect, I mean Lord Monerief;— he does take it *tantum et tale*, and the estate was not affected in the bankrupt's hands by the personal obligations, which were sufficient only and valid and binding against the bankrupt personally. He takes the estate *tantum et tale*, and what does that mean? *Tantum et tale*, of such kind as it was in the hands of the bankrupt. What was that? *Quantum et quale* as it was in the bankrupt. On the clearest principles of feudal law, it was not effectual or valid merely by his conveyance; that would not affect their legal estate any more than a parol conveyance in this country would convey the real estate. Between the bankrupt and the trustee there can be no privity, such as to affect the latter with any personal obligation incurred by the former, and the land not being affected by such obligation, the trustee takes it *tantum et tale*; takes it discharged from any real burthen. As to the English law, it may be further observed, that we allow some further nicety, oftentimes working great injustice to creditors. He who *posteriori tempore* obtains a legal title to an estate covered with real securities, will, by obtaining a prior equity, defeat one [384] who lent his money on an equitable title only, between the date of the two titles that now unite in one person. So that one who has lent his money this year, may be defeated, or, as it is very expressly termed, squeezed out by one who has only advanced money on the same estate a year after, but who has not concluded his equitable with his legal title.

The rigorous administration of the feudal principles of law in Scotland can work no further hardship than this, and the consideration of such topics is only important in such cases as affecting the question of costs. I am of opinion, on account of the hardship of this case, that none should be given in this House, and that none ought to have been given in the Court below. So far I shall advise your Lordships to alter the interlocutor, as costs were given in the Court below, and with that exception, for these reasons, I shall advise your Lordships to adhere to the interlocutor. I have gone with some particularity into the case, on account of the great importance of it, and particularly the discrepancy of the authorities which at first appeared to exist. I have given to them, as I stated I should, a very careful consideration, as well as to the opinions of the learned Judges in the Court below, and I have stated my opinion at some length, in order that the parties may know exactly the grounds on which the House have come to the decision. I now move your Lordships that the interlocutor be affirmed, without costs, except in respect of costs, and that that part of the interlocutor be reversed.

It was accordingly ordered and adjudged by the Lords, etc., that the interlocutor complained of, so far as the same "finds the defender liable in expenses, and [385] remits the amount thereof, when lodged, to the auditor to tax and report," be and the same is hereby reversed: and it is further ordered, that the said interlocutor, in all other respects, be and the same is hereby affirmed.

APPEAL

From the Court of Session.

DONALD M'AULAY,—*Appellant;* JAMES ADAM and DAVID BROWN, *Respondents.*

[Mews' Dig. i. 367; iv. 859. See *Metropolitan Asylum District* v. *Hill* 1880, 5 A.C. 582.]

A client having required his attorney's bills of costs to be taxed, the attorney intimated to him that in that case he would make out new accounts, in which

he would charge his full legal fees, which were not charged to that extent in the bills delivered, and accordingly he employed a person to remodel the accounts, and that person inserted in the new accounts fictitious charges, and increased other charges which were in the former accounts. The attorney denied all knowledge of the insertion of the fictitious charges, and abandoned them before the auditor to whom the accounts were by order of Court remitted to be taxed. The Court by a subsequent order instructed the auditor to report specially on the different subjects and points raised by the client's answers, imputing to the attorney a participation in the fabrication of the fictitious charges. These charges having been abandoned, the auditor made no inquiry into them, but reported on the other costs, taxing off about one-fourth of the whole bill, and no objection being lodged to that report when it came before the Court, it was confirmed with costs. HELD, that it was not competent for the client to appeal to the House of Lords against the order confirming the report, as he had not lodged objections in writing to it in the Court below.

[386] An appeal for mere costs does not lie, yet if an appeal is brought on a substantial question, not colourable, the House may deal with the costs awarded by the Court below (see the last preceding case, pp. 371 and 372). Accordingly, in an appeal which appeared to the House to have been brought for costs, but in which the order appealed from was varied materially, in favour of the Appellant, by the correction of an error, which, however, he might have prevented by a mere suggestion to the Court below, it was HELD that the Appellant is not, on the ground of that variation, entitled to be absolved from costs; but, under the circumstances, the appeal was dismissed without costs.

The Appellant is a surgeon in the Island of Lewis, (Scotland) and the Respondents are Writers to the Signet in Edinburgh. The Respondent Adam acted for several years as agent for Donald M'Aulay, sen., deceased, and for his son, the Appellant, in various lawsuits in which they were concerned. In the year 1828 Adam entered into partnership with the Respondent Brown, and during three years that the partnership subsisted, the law business of Messrs. M'Aulay was conducted by Messrs. Adam and Brown. A state of accounts between them and the Appellant, as at March 1830, was rendered to him, by which it appeared that, after giving credit for the sums paid on account, there was a balance then due to Messrs. Adam and Brown of £464 17s. 5d., exclusive of an account of expenses previously incurred to Mr. Adam, and due to him individually. That account was furnished with a view to an amicable adjustment. The Appellant, having been afterwards pressed for a settlement, desired that the accounts should be submitted to the auditor of Court for taxation, and the Respondents agreed to that proposal; but as they alleged that the accounts were stated at a lower rate than **[387]** they were entitled to have charged, they reserved to themselves the power of stating the charges at the full amount which they were entitled to demand. The accounts were accordingly referred to a Mr. Robertson, to remodel them for the auditor, and a copy of them, as remodelled, was sent to the Appellant.

The partnership between the Respondents being dissolved in July 1831, Brown, who was empowered to collect the outstanding debts due to the firm, wrote several letters to the Appellant, asking for a settlement, without effect. In the month of November of that year the Appellant, having come to Edinburgh with a parcel of cattle for sale at Hallow-fair, the Respondents raised an ordinary action against him, and thereupon attached his cattle; but upon his giving two bills of £200 each (one of which has been since paid), his cattle were liberated, the action was abandoned, and the Appellant then gave consent in writing that the accounts between the Respondents and him should be audited under the authority of the Court of Session.

The Respondents, consequently, presented a petition to the Court on the 17th of November 1831, conformably to the Act of *Sederunt* of February 6th, 1806,* and

* One of the enactments of that Act is as follows:—"In order to provide an easy method by which the accounts of practitioners, as between agent and client,

they produced therewith copies of their **[388]** remodelled accounts, one amounting to £381 10s. 11½d. for expenses incurred for the joint behoof of the Appellant and his deceased father, a second amounting to £524 10s. 11½d. for expenses incurred on behoof of the Appellant only, from which latter was to be deducted £304 13s. 8d., in respect of payments on account. The petition prayed the accounts to be remitted to the auditor of the Court to tax the same, etc. On the next day the Court granted warrant of service of the petition on the Appellant, and he was ordered to lodge answers thereto within eight days. On the 15th of December 1831 the following interlocutor, which is the first of those appealed from, was pronounced: "The Lords having heard this petition, and counsel for the parties, remit the petitioners' accounts to the auditor of the Court to tax and to report, and the parties or their agents to attend for taxing on or after the first sederunt day in January next."

[389] The Appellant afterwards obtained an enlargement of the time to lodge his answers to the petition, and in the mean time some meetings took place between his agent in Edinburgh, Mr. Roy, and the Respondent, Brown, to whom Mr. Roy pointed out many new and fictitious charges in the remodelled accounts, which were not in the accounts first rendered to the Appellant, whereupon Mr. Brown declared that he had never seen the accounts as remodelled; that he was wholly ignorant of such improper charges having been introduced, and disapproved of them, and he agreed not only to strike them off, but also to withdraw other charges which were likewise considered objectionable. A correspondence took place between Mr. Roy and the Respondent, Brown, as to other charges in the accounts, upon which they could not come to any arrangement.

The Appellant ultimately gave in his answers, in which he admitted his liability for a business account to the Respondents, but he denied that he owed all the sums charged in the accounts, founded on in the petition; and he alleged that Mr. Robertson, to whom the first accounts were referred to be remodelled, "proceeded to concoct and fabricate a new account, as large as he could make it, by inventing and inserting additional fictitious charges, and altering, remodelling and constructing documents to correspond to these. The result of the whole was the accounts now founded on in the petition, which contain charges innumerable, not in the original accounts, not actually incurred, and the mere fruit of invention. Fees are stated as paid to counsel, which never were paid; consultations are charged for, which never took place. There are borrowings and revisings and meetings set down, not one of which ever happened. There are **[390]** memorials to counsel, and copies of papers charged, none of which ever were drawn at the time, and which, if they exist at all,

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in this Court, may be checked and liquidated, the Lords do farther ordain, that it shall be competent, either to the client or to the agent, to make a summary application to the Court or to the Lord Ordinary before whom the cause may depend, or has formerly depended, to get the account claimed by the agent remitted to the auditor of Court, in order to be examined and taxed according to these regulations; which remit shall, on the application having been served on the opposite party, and produced in Court with a written intimation, be forthwith granted; and the auditor shall thereafter inquire and report upon the said account to the Court or the Lord Ordinary; and the party shall have it in their power to state objections to the report, all in manner abovementioned; and the sum so to be ascertained as the amount of the account shall alone form a charge against the client," etc. "And in case either party means to object to the report of the auditor, he shall immediately lodge with the clerk a note of his objections, stating them shortly, and without entering into argument; a copy of which note shall be transmitted by him to the agent on the other side; and the Court or the Lord Ordinary may either direct the same to be answered in writing, or *vivâ voce* at the bar, as the case may require, the expense of such discussion being always laid upon the objector, in case his objections shall not be sustained; and the interlocutor to be pronounced shall be final."

By another Act of Sederunt it is provided, "That when in any cause a report has been obtained from an accountant or other professional person, and the parties, or either of them, shall be dissatisfied with the report, the cause shall be enrolled before the Lord Ordinary for debate on the report, and a note of the objection shall be furnished to the opposite party 48 hours before the enrolment."

were drawn *ex post facto* by this Mr. Robertson, to bear out the false charges before the auditor. To the extent of about £300 the accounts now charged to the Respondents (including those of the firm, and of Mr. Adam individually), are a mere fiction.'

In illustration of these general allegations, the Appellant referred to particular charges in the accounts, and admitted that the Respondents offered to deduct a great part of them (to the amount of £180), but he said that the offer was made for the purpose of stifling inquiry, and he asked for a commission and diligence to the auditor to examine witnesses in support of these imputations on the Respondents.

These charges and imputations on the conduct of the Respondents appearing to the Court to require investigation, the following interlocutor was pronounced on the 8th of March 1832:—"The Lords, having resumed consideration of this petition, with the answers thereto, and heard counsel for the parties, appoint them to be heard before the auditor; grant commission to him for this purpose, and instruct him to report specially on the different subjects and points in question to the Court therein; and grant commission and diligence to the parties for citing witnesses and havers in common form."

When the parties were before the auditor, the Respondents requested that, instead of the accounts produced along with the petition, a new set of accounts, which had been subsequently produced by them in process, should be taxed, in which all the fictitious charges introduced by Robertson had been omitted (and which had been previously given up), **[391]** alleging, that by this course all the trouble, delay, and expense attending the commission and diligence would be saved, and that it was useless to go into an investigation concerning charges which had been abandoned, or to prove the facts regarding the remodelling of the accounts, which they had fully admitted. The Appellant objected to any accounts being taxed, except those originally produced along with the petition, unless the petitioners (the Respondents) agreed to pay all the expenses hitherto incurred; that proposal not being agreed to, the auditor proceeded to examine the accounts produced with the petition, and he taxed off £219 2s. 3½d., from a sum of £889 7s. 6½d., which sum was composed of the two accounts before-mentioned, and he reported accordingly for £670 5s. 3d. due to the Respondents.

The following interlocutor was pronounced on 15th of February 1834: "The Lords having resumed consideration, etc., approve of the auditor's report upon the accounts libelled, and in terms thereof, decern against the Respondent (the Appellant) in favour of the Petitioners (the Respondents) for the sum of £670 5s. 3d., reported upon as due, under deduction of £304 13s. 8d. paid to account, as stated in the petition, together with the legal interest on the balance, from the 17th day of November 1831, and till paid. Find expenses due to the Petitioners, including the expenses of this discussion, and of the procedure before the auditor. Allow accounts thereof to be given in, and remit the same, when lodged to the auditor to tax and report."

Two accounts of these expenses were afterwards taxed and reported; one for £134 6s. 11d., in name of Adam and Brown jointly; the other for £27 11s. 7d. **[392]** in name of Adam only; and the Court, by two interlocutors dated the 7th of March 1834, approved of that report, and decerned accordingly.

The appeal was against the three last interlocutors, and against that of the 15th of December 1831, before stated.

Dr. Lushington and Mr. Tinney for the Appellant:—

The report of the auditor ought not to have been approved of, as being directly at variance both with the order of the Court and the auditor's duty under that order. The Court ought not to have decerned against the Appellant for the sum contained in the judgment, but ought to have given credit for the partial payment of £200, and ought also to have given effect to all counter claims, which, either in name of costs or otherwise, the Appellant had against the Respondents, in connexion with the matters before the Court.

The Court ought not to have decerned the Appellant to pay the Respondents their costs, as if they had successfully maintained their judicial demand against an unjust defence. On the contrary, the Court ought to have remitted the case again to the auditor, with instructions to perform the duty which had been specially enjoined on him, or ought to have taken other steps, either by ordering a record to be

made up, or otherwise, to have the merits of the case brought fairly before them. There was sufficient evidence before the Court, and within its reach, to have warranted them in finding that the demand made by the Respondents was an unjust demand, and that the Appellant had been fully justified in his whole steps of resistance to it.

[393] Before awarding to the Respondents any sum which might be justly due on their business accounts, the Court ought to have found the Appellant entitled to the expenses to which he had been unjustly subjected in the matter of these accounts, and on ascertaining the amount of these expenses, to have sanctioned that amount as a deduction from the Respondents' accounts. As the result of this would have been to leave no balance due to the Respondents, the petition ought to have been entirely dismissed, in place of the Respondents having had given to them what they at present possess, the decree of a Court of law for the amount of an unjust claim, coupled with what is equivalent to the expression of actual censure on the Appellant, for having fairly and honestly resisted it.

Mr. Pemberton and Mr. M'Neil for the Respondents, were stopped (*Vide infra*. p. 411).

Lord Brougham:—I shall first state to your Lordships the grounds upon which I come to the opinion that, although your Lordships might be disposed to regret one or two matters admitted in the Court below, you are now precluded from entering into the consideration of them; and I shall then proceed to state the grounds upon which, as I think, the judgment of the Court below must stand, with a slight variation as regards the sum of £200 paid by the Appellant. The question arose in those circumstances.—[His Lordship stated the facts, and then proceeded.]—In consequence of the objection naturally enough taken by the Appellant to the state of the account, as being confessedly most obscure and unintelligible, even to professional men, Messrs. **[394]** Adam and Brown employed a person to remodel and arrange it, and make it more easy to be understood and consequently more fair towards the parties who were chargeable. That this was a very fit course to take, no person can deny; but then it was fit only thus far forth, that the person—the accountant,—to whom it was sent to be what was called *remodelled*, or rather classified and arranged, should confine himself to such process of classifying and arranging, so as to make that easy of comprehension which before was hardly comprehensible at all. It is one security to a party who runs up a bill with any man employed by him, whether as a tradesman or a professional agent, and who allows that account to run on from year to year, and to combine a great variety of items, that the books of the person charging him for those items—that the accounts kept regularly and from day to day of the business done by the professional person, or of the goods supplied by the tradesman,—should, in the first instance, speak for him and for themselves, and tell a tale against the customer or against the client, with the kind of authenticity, and therefore proportionate degree of credit derived from contemporary entries in books of account. Consequently, whoever makes out a bill against a client or against a customer, ought, as near as may be, to follow the entries in the order of time, and in the specification of the items in the account. If a confused statement is made in the first instance, and if the account-books will not help those persons, so charging and so making out the confused statement, to clear it up, then it becomes a very delicate matter indeed to do anything but merely new arrange, with explanations, the entries in those books: but it is by no means a proceeding to be countenanced in any court of justice, or by any man of business, with any kind of approbation, that anything further **[395]** should be done, in the way of making the account clearer, than simply explaining, apportioning, classifying, and as it were, altering the arrangement of the items. If you go beyond that, you take away the credit and the kind of authenticity derived from such books or sheets of paper, if kept in separate memoranda, and you take away, by so much, the kind of security that the client or the customer derives from that source. I therefore cannot approve of anything called *remodelling*, unless it is confined, as I have described the process, to arrangement and explanation.

After the Appellant had taken the objection, and Messrs. Adam and Brown had so far yielded to it as to say that the account should be referred to a person to remodel it, they appointed one James Robertson to that office, and from his proceedings in

discharge of that duty has mainly arisen this litigation. At the time the objection was taken to the account, Messrs. Adam and Brown said to the Appellant, or they gave him to understand, that they had charged him less than the amount they were strictly entitled to; and if it was made a matter of contentious discussion, they then might raise the charge to the usual level,—accordingly, when they appointed Mr. Robertson to perform the operation of remodelling, they desired him to take that into consideration, and see if anything could be added.

Now, I by no means intend to assert that a person who has made one charge against his debtor, and limited himself to that amount, may not honestly and correctly enough, if that charge is refused to be paid, and the justice of it disputed, say, "If you dispute it, I will charge what I have a right to do; I have not gone to the extent of my right, but I will go to the **[396]** extent of it if you defend yourself upon your right." Nevertheless, that is not the ordinary, or indeed a creditable mode of proceeding. Is it fair, because a party refuses payment of an account delivered, to say, "All I have done hitherto means nothing; all I have given you in as my demand shall go for nothing; I will ask you a great deal more?" It is not a common mode of proceeding, and if the first bill came before a jury in the course of a contest, I do not think there is any reason which could suffice to convince the jury that the first was not the proper amount of charge; unless, from circumstances which I can hardly figure to myself, the person had been kept from going in the first instance to the full extent of his claim. However, it is clear that the solicitors here did give notice to their client, for they said, "We shall charge you to the full extent, if you dispute the account." Accordingly, Mr. Robertson, so authorized, proceeded with the office of remodelling; and, in looking out for charges, he obeyed the instructions even more than to the letter, for the success that attended his exertions was such, as appeared from one expression in the correspondence, as to have surprised his employers. He raised the demand against Mr. M'Aulay, about £160 for business done since the account was rendered, and he raised it by £300 upon the whole for business not brought in before, making the account between £900 and £1000, which had been between £400 and £500. Part of that was for business newly done, and an offer was made by the Respondents to depart from another part of it.

It is material to observe that the first application made to the Court by the Respondents here—the petitioners below,—was in the usual way, to have their bill taxed; to have the account of the expenses **[397]** against their client remitted to the auditor of the Court; and it is material, for the course that the case has taken, to attend to the first part of the proceeding, which is the point from which the whole litigation sprung. The bill was presented, and served by the order of the Court, in November 1831, upon the other party in the usual form; that was then the ground of the next order, being the first interlocutor appealed from, which is in the usual form, to remit the petitioner's account, annexed to his petition, to the auditor of the Court, and the parties to attend the taxing upon that order. There had been an attendance upon the auditor; a report had been made by him, and that report had found Mr. M'Aulay liable in a large sum. It appeared that upon the report coming for confirmation by the interlocutor of the Court, Mr. M'Aulay had not taken objection to it in writing, shortly stating the reasons of his objection, and without that no further proceeding could have been had; for, by the Act of Sederunt, that order and deliverance of the Court so made, without any written objection to the auditor's report, must be final; that is admitted: but then, after the first remit to the auditor, answers were put in by Mr. M'Aulay to the petition, and upon those answers the Court made an interlocutor, which gave rise to the doubt that continues to encumber the question. The Appellant set forth several items, for which he said there is no ground, and he gave the reasons, and he set forth the conduct of Mr. Robertson, in respect of the bills delivered in by Messrs. Adam and Brown, as amounting to a gross fraud, to the fabrication of imaginary and fictitious items, and to the still more elaborate machinery of fraud, which consists in actually fabricating papers as having been written by Adam and Brown, for the **[398]** instruction of counsel, in causes long since at an end, and in which causes, no such papers had ever been written by them, or by any person, for the instruction of any counsel at all. This is a direct charge of fabrication, and of the most discreditable nature, on the part of Robertson; and though the answer did not bring the participation in the fraud as a charge against

Adam and Brown, yet, no doubt they are charged with it by implication; for they are stated to have employed Robertson, and to have used the accounts so fabricated by him; and lest any doubt should remain that this was to let in an insinuation, though not a charge in distinct terms, Adam and Brown are said in distinct terms to have made an offer to Mr. M'Aulay after using the accounts, and in order to stifle further inquiry. I look upon the answers as raising the charge of fabrication against Adam and Brown, and charging, by something more than implication, a participation in Robertson's fraud, and that groundless charge may prove not immaterial to the question which has arisen touching the expenses of these proceedings. Answers to this purport having been given in, another interlocutor was pronounced by the Court, on the 8th of March 1832, of a peculiar nature; not the ordinary and usual remit (that remit had been given before, and that remit was now ripe to be acted upon), but it was an additional order, upon circumstances emerging out of the first remit, and as adding something to the inquiry which the first order charged the auditor to make. I say, adding something to the inquiry, and I say so advisedly; because, from all I can see of these proceedings, either as far as is stated, or upon the face of the interlocutor of March 1832, or upon the face of the report of the auditor, I conceive that the auditor had omitted to mention the **[399]** earlier order, which was an order of course, and has mentioned only the second order, which has given him additional instructions. He ought to have stated both these orders, as he has proceeded upon them, and that is very material. The second order is not a direction to tax, and if the second order had stood alone, the auditor would have had no right to tax. It is this: "The Lords having resumed consideration of this petition, with the answers thereto, and heard counsel for the parties, appoint them to be heard before the auditor, (that is, it gives him the power to hear), grant commission to him for this purpose (that is, to hear), and instruct him to report specially on the different subjects on the points in question to the Court therein, and grant commission and diligence to the parties for citing witnesses and havers in common form." There is not a word here about taxing; he has no right by force of this order to tax; it only authorizes him and commissions him to hear the parties, and report specially upon the different subjects and points in question. Nevertheless, the auditor has taxed the bill from beginning to end, and taxed off £219 therefrom. He proceeded to do that regularly, independently of this order of the 8th of March 1832, by the order of December 1831; for, as that order stood, it was not interfered with, much less annihilated, by the order of the 8th of March following, or by any rescinding process of the Court, or by efflux of time, or by any alteration of circumstances or parties; certainly, therefore, that order stood with the second, and the auditor found himself acting under the exigency of two orders, a direction to tax and to report special circumstances; he was bound to follow both those orders, and to execute them. He did proceed; and then one party says, he did not comply with the **[400]** second, because he did not follow the instruction to report specially upon the different subjects and points in question therein, (and by "therein" I apprehend they mean "in the petition and answers"); and this order desires him to report specially, instead of making the taxation generally. I say he did not report specially, but reported by taxing off £219 from the account that had been sent in; that, in the meantime, a great many items were abandoned, is admitted: that they were never before the taxing officer seems not to be disputed; and at length the question came before the Court upon the auditor's report and taxation. Now, why did not the Appellant take that objection before the Court below, which is not mainly but solely relied upon before your Lordships; to wit, not that items were allowed which ought not to have been; not that the sum of £219 was too small, and that a larger sum ought to have been taxed off, but that the auditor had not complied with the instructions given by the second order, inasmuch as he had not reported on the special circumstances of the case, which is construed by the Appellant to mean the fraud and fabrication imputed to Robertson directly, and less directly to the Respondents. If the Appellant had then and there made the objection, and grounded upon it an application to send back the matter; not to remit in his favour upon the matter of the taxation, but to remit to the auditor, in respect of his not having performed what the court desired him to perform; if the Appellant had done that, and been well grounded in his application, the Court would conveniently, and would immediately have sent it back, if they thought a case was made out for doing so,

to the auditor to make a more full and explicit report. No such thing was [401] done by the Appellant; he did not say a word upon the subject; he confined himself to the question of expenses alone. However material the omission in the report, (and I do not deny that the fabrication of the accounts was the evil at that time pressing sorely upon the Appellant in his application to the Court,) he never thought of making any such objection. Can there be a doubt why? Because he was perfectly aware that he could not make such an objection; that the auditor had been very strictly called upon to perform a certain duty by the second remit; and that the items relating to the vouchers fabricated, had been abandoned long ago; and I am bound to say, in justice to Messrs. Adam and Brown, that they never persisted in them at all after they discovered what Robertson had been about. The omission to say anything about fabrications, was an omission that, it is true, pressed sorely upon the Appellant here, but it pressed rather more sorely against Messrs. Adam and Brown, whose conduct was more injuriously impeached by the other party. It is rather they, than the other party, who, upon what letters we have upon the subject, and what took place, appear to have complained of the omission of that which would strengthen their case and fortify their claim to expenses; as your Lordships are aware that a professional man can give no better reason for obtaining his expenses than the failing of an injurious charge brought against his character. That was a reason, which I can well understand, why the learned counsel, who had the conduct of the cause in the Court below, said it was a mere question of expenses, but took especial care to say nothing of the cause of complaint, the omission of which is the only ground of appeal before your Lordships. Accordingly, the Court below, in those cir-[402]-cumstances, adopted the report of the auditor, and ordered the Appellant to pay the balance with interest from 17th November. It appeared that of the two bills of £200 each, given by the Appellant when his cattle were attached, one was paid the 23d of February; of the other we have no account. That payment of £200 ought to have been credited to the Appellant; it is not credited; and that sum, with the interest on it, from the 23d of February, will reduce the sum for which the judgment is to stand; but, with that exception, I am clearly of opinion that the interlocutor below must be affirmed.

I will now proceed shortly to state what other reasons I have for rejecting the argument of the Appellant, and agreeing with the Court below; and although in stating the facts of the case, and in the comments I have made already, sufficient reasons are, in my humble opinion, afforded to support the decision; yet, on account of the importance of the question as relating to the taxation of costs, and to the conduct of professional men, I shall more distinctly state the grounds on which I think this appeal cannot be maintained. First, Let us consider whether, in point of fact, the argument raising the objection to the auditor's report is well founded, namely, that the report did not comply with the instructions of the order of the 8th of March 1832, inasmuch as it did not contain a special report on the different subjects and points in question upon the petition. I must read the words of the order as all instruments are to be read, whether they be deeds or wills or judgments, rationally, and with a view to what must be their sense, regard being had to the subject matter of them. Can I then, in fairness, say that the exigency of that order was such as to make it imperative on the auditor to report [403] specially upon all subjects and points that were in question in the petition and answers. I cannot see that he was so bound; the report must have reference to the scope of the proceedings. If it had been of a twofold nature; if it had been, on the one hand, the demand of a solicitor's bill on a private party, and, on the other hand, also an application to strike him off the roll, made by the party resisting that demand; if upon the solicitor having claimed his bill, the client not only objected to pay, but charged the attorney with malpractices, and called upon the Court to punish him, then I can understand how it would be material for the auditor, in taxing the bill, to report upon matters no longer in dispute between the parties; because, although their dispute about the bill no longer required that they should be entered into in his report, yet the other part, the punishment sought against the solicitor, might require that they should be inquired into. But there is no such second objection in this suit, or any reference to it. It never came before the Court in that way, it never was regarded by the Court in that light, it was simply with a view to the rights of the parties; that is the only question, and we cannot say that it continued to be of the slightest importance what became of the

charge of fraud and fabrication, after the items connected with it were abandoned on the part of the solicitor, and no longer in dispute before the auditor. Therefore I am disposed to put upon this the reasonable and consistent construction which I have now stated to your Lordships, and to hold that the auditor, under these circumstances, was only bound to make a special report upon those matters raised by the petition and the answers, and which should continue to be in contest between the parties before him, in his office [404] of auditor. Now, he has reported upon all those subjects, but he has not reported upon the matters connected with the fraud, those matters being no longer before him. This is the first answer to that which is alone the ground of the appeal.

But the second answer is material, because it is that upon which the principal stress is laid. Admitting then, that, in point of fact, the auditor did not comply with the order,—admitting for argument's sake, that my construction of the second order is wrong, and that he was bound to report upon all the questions raised by the petition and answers, whether those questions continued to be agitated before him by the parties or not,—then I am of opinion that the Act of Sederunt has not been complied with in the Court below, by the Appellant, in such a way as to enable him to take the objection to the auditor's report. It is said by the Appellant, that although, if the first interlocutor had stood alone, and the proceedings had been under it only, no objection whatever could be taken, except according to the provisions of the Act of Sederunt, by reducing the objection to writing: nevertheless, this proceeding before the auditor was not under the first remit, but under the second remit; and the second remit is a *causus omissus* in the Act of Sederunt, and of course anything done under it is not within the purview of that Act. I am of a contrary opinion, upon two grounds; first, I hold this to be a proceeding before the auditor, for the reason I mentioned in the first part of the argument, not only upon the order of remit of the 8th March 1832, but also upon the original order of remit of the 15th December 1831. I have shown that the one did not abrogate the other; that they might both stand together; and consequently the auditor proceeded as much upon [405] the first as the second. The first is the governing order, it is the order that commissioned him to tax; he has taxed, and is not that taxation within the scope of the Act of Sederunt? It is perfectly plain, that to take it out of the Act of Sederunt, you must clearly show facts applicable to a case to which the Act does not apply, or you must produce an exception in the Act of Sederunt, that will apply to this special case. Is there any exception? The Act is as general as words can make it; all reports, orders, and all proceedings upon taxation, must be held to be within it, because there is no qualification, no restriction whatever to confine its operation; they shall be remitted,—of course to the auditor—that applies to the amount; and the second part of the Act, by reference to the first, incorporates the first within it; and according to these regulations it is necessary, in my opinion, that the objection shall be made in writing. It says distinctly, "In case either party means to object to the report of the auditor, he shall immediately lodge with the clerk a note of his objections," etc. There is no exception; every objection taken to every report of the auditor, is to come within the scope of the Act, and to be governed by its provisions. No objection can be made, unless in compliance with the wholesome and necessary condition of being reduced, with its short reasons, into writing, that the Court may know upon what it proceeds, —that the other party may know what he has to answer, and that the officer of the Court may see to what the party objects, and by what he will bind himself, and that endless contestation upon the items of the account, as well as upon its principle, may be prevented. A party seeking to take this case out of the Act of Sederunt, is bound to show that the Act does [406] not apply to it; and upon what ground does the Appellant attempt to do that? It is this—not that the order which originally sent the matter to the auditor, is not provided for in the Act of Sederunt, but that after that order had put the auditor in possession of the case, and bound him to proceed under it, a second order was made, calling upon him to report upon special circumstances. I can see no ground for this position, or for doubting that the party was bound by the exigency of the Act of Sederunt; and having failed to comply with it, he came too late to take the objection in the Court below or in this House.

But, independent of these considerations, it appears to me that this whole appeal is an appeal upon costs, and this is the last of the reasons I shall urge as a ground

for recommending your Lordships to affirm the orders of the Court of Session. I have granted, for the sake of the argument only, that the construction I put upon the second order was an erroneous one, and that you were to take the auditor as not having complied with the second order. I will now admit, also for argument's sake, that my second argument was wrong, and that the Act of Sederunt does not apply to this case. Then it would follow that the party was not precluded from objecting to the report of the auditor. But how does that bear upon the case? Of what avail is it to the Appellant that there should have been an omission of a report upon the subject of these fabrications? In one of two ways only can that omission bear at all against the Respondents, or in favour of the Appellant, either by showing that the fabrications took away all right in Adam and Brown to be paid by M'Aulay the items connected with the fabrications, or as affecting the question of costs, and in no other conceivable **[407]** way. As to the first head, those items are out of the question,—they were abandoned,—the auditor has not allowed them,—they never were in question after the case went into the auditor's office. On the first ground, therefore, this omission is entirely immaterial. Then, on the second ground, can the Appellant avail himself of it? No, because that second ground is, that this omission deprived the Appellant of a good argument for being allowed his expenses, and against the other parties expenses being ordered to be paid by him; that is the only argument. Then, is not that an appeal for costs? If the Court of Session had given A. his costs out of B.'s pocket, instead of giving B. his costs out of A.'s pocket, that would have been admitted to be a question of costs, and therefore not a subject of appeal. The Court of Session is said to have done this; to have given A. his costs out of B.'s pocket, instead of the contrary, by means of another order, upon which they do not require the auditor to report upon a thing that they ought to have made him report upon. That is the whole argument; that the Court of Session did not give M'Aulay his costs, but made him pay Adam and Brown their costs, for want of a special report from the auditor; that if the auditor had reported specially, the Court would have allowed the Appellant his costs, but as the Court has not chosen to call for such a special report, the Appellant has not got costs, but has had to pay them. That question is particularly and exclusively a question of costs, therefore it is not a subject of appeal.

It is very likely, if we had been sitting in the Court below, we might have taken a distinction between the costs up to one point, and after that point in the case. The staggering nature of Robertson's fabrications might have inclined one to have great tenderness for **[408]** M'Aulay in the resistance he made to a claim of any kind connected with those fabrications, made by any person who had at any time availed himself of them, though he had no share at all in the fabrication of them, though he had been unjustly impeached of that participation, and though he stood perfectly fair with the Court in respect of them; yet it might have been thought that, the Respondents having employed Robertson as their agent, they should not have received but rather paid costs up to a certain stage of the proceeding; but as that would have been a very early stage at the threshold of the Court, it would have made a difference of only a few pounds, and therefore I do not know that we need feel much regret at this course not having been pursued.

I have already said that there is no ground for any impeachment of the character of these gentlemen; and, for the reasons I have stated upon the facts of the case and the correspondence, I shall recommend to your Lordships to affirm, with the alteration before suggested, the decree of the Court below; and that alteration will be in the interlocutor last appealed from, confirming the report of the auditor; and it will consist in adding the sum of £200 to the sum of £304 13s. 8d. before deducted from the account, and a clause respecting the interest on the £200.

I have not called upon the Respondent's counsel to argue this case, though I meant to suggest an alteration, because I understood they took no objection to it; the consequence is, that these circumstances will raise the question as to the costs of this appeal. Now, undoubtedly, though an appeal upon mere costs does not lie, yet if there is an appeal brought upon a substantial question, not colourable, costs may be dealt with by your Lordships. I have stated the reasons **[409]** for which I do not recommend disturbing the costs as ordered by the Court below; and in case it should be said this is not an appeal upon costs, as there is to be an alteration of the inter-

locutor to the amount of £200, it must further be observed that we cannot suffer a party to lie by and allow an error to be committed, without saying a single word to correct it, and then avail himself of that error, to the effect of letting in the question of costs, insisting that there is a blot in the decree. Why did he not remove it in the Court below? If he did not, it was not the other party's duty to do so; he shall not avail himself of that blot he has left, in order to thrust his hand through the decree, and reach hold of the question of costs of the appeal. If your Lordships were to allow any other course to be pursued as a general rule, you would see constant instances of little matters being left uncorrected in the Courts below, in order to let in the question of costs by way of appeal. I shall not, however, recommend to your Lordships, under the peculiar circumstances of this case, and as these Respondents have obtained more than their original demand—not, upon the ground of character or conduct, except that they have raised their demand,—I shall not recommend to your Lordships to give them any costs, after granting the principle as to costs by the observation I have made.

Mr. Pemberton and Mr. M'Niel, on behalf of the Respondents, expressed a wish to be heard against the latter part of the judgment, refusing the Respondents their costs, and they were heard accordingly. They argued to this effect:—

It is decided that, upon the merits of the case, the judgment of the Court of Session, decreeing for the **[410]** principal sum found due by the auditor's report, with interest, cannot now be touched. If the Appellant had meant to reserve his right to appeal against that decree, he was bound to have lodged a note of objections to the auditor's report, as expressly required by the Act of Sederunt and the rules of Court. No objections having been lodged, the report was approved of by the Court, as a matter of course; and at the same time the balance reported to be due was decreed for, and the only question remaining to be determined by the Court was as to the expenses of suit. At the moving of the report for approval, it was distinctly stated by the Appellant's counsel, that the only point remaining was that of costs, while he maintained that the Respondents were not entitled to their costs, in consequence of the great amount of charges which the auditor had struck off their accounts. By not lodging objections to the auditor's report, the Appellant gave the Court of Session no opportunity of reviewing or altering it. Unless objections are lodged, as required by the Act of Sederunt, the Court assumes, as a matter of form, that the auditor's report is right, and decerns uniformly in terms of it.

The proceedings of the Respondents in the Court of Session, for having their accounts against the appellant checked and liquidated, were regular in every respect, being not only authorised by the Act of Sederunt and regulations of Court, but expressly consented to by the Appellant himself.

The whole expenses before the auditor and the Court, having been incurred in consequence of the Appellant's refusal to accept the voluntary abatement made by the Respondents, or to allow them to withdraw the incorrect charges introduced into the ac-**[411]**-counts, and of his persisting in false and calumnious charges affecting their character, he was justly subjected to those expenses.

Lord Brougham would not restate the grounds of his judgment. He could not recommend to the House to give the Respondents costs of the appeal, after so large a sum as £200 was now to be deducted from the sum claimed by them, and adjudged to them by the confirmed report.

It was "ordered and adjudged by the Lords, etc., that the appeal be dismissed, and that the interlocutors therein complained of, be, and the same are hereby affirmed, with this variation, that the Appellant, in addition to the deduction of £304 13s. 8d., mentioned in the interlocutor of the 15th of February 1834, is entitled to a further deduction of the sum of £200 paid by him on the 23d of February 1832, under deduction of the interest due thereon from the 17th day of November 1831 until the same was paid."

[412] APPEAL

FROM THE COURT OF SESSION.

JOHN HUTTON SYME,—*Appellant*; PETER BROWN,—*Respondent*.

B., a partner and acting director of a joint-stock company, procured for S., who was not a partner, at his request, some shares in the company's stock, and received from him the purchase-money. S. afterwards refused to accept the transfer of the shares, and to pay the instalments that accrued due on them, alleging, as the grounds of his refusal, that he was induced to purchase the shares by B.'s false and fraudulent representations, and fraudulent concealment as to the credit and solvency of the company. Upon the trial of an issue directed to ascertain the truth or falsehood of these allegations, several partners in the company were admitted as witnesses for B., and the Court of Session, upon a bill of exceptions, HELD, that they were competent witnesses. The House of Lords affirmed that decision.

The question in this appeal regards the admissibility of evidence. The Edinburgh, Glasgow, and Alloa Glass Company was established as a joint-stock company in 1825. The capital stock was declared by the deed of co-partnership, to be £60,000, divided into 3000 shares of £20 each, payable at such periods, and by such instalments, as the committee of management for the time being should direct. It was also provided by the said deed, among other things, that at the yearly meetings of the proprietors, a committee of management, consisting of a chairman, deputy-chairman, and twelve directors, should be elected; **[413]** that the business of the company should be conducted by a manager, secretary, agents and clerks, and such other office bearers as might be found necessary under the appointment and superintendence of the committee of management; that the books of the company should be balanced in April, every year, and an abstract of the company's affairs should be annually made out, and should be open to the inspection of any of the partners for one month after said annual general meetings, and no longer.

The company purchased premises at Alloa, and erected buildings there for their manufactory. The first manager appointed for the company was a Mr. Marshall, who entered on his duties early in 1825, and ceased to hold the appointment in 1827. The Respondent was a partner and director of the concern from its commencement, and he was at one time proprietor of 140 shares. In the summer of 1827, being then appointed manager and acting director, he went to reside at Alloa to superintend the affairs of the company; and while he was there he was in the habit of frequent intercourse with the Appellant, who resided at Alloa, and had been a partner of the Stirling Banking Company, then under sequestration. The prospects of the Glass Company were often the subject of their conversation, and the result was, that the Respondent procured for the Appellant, by his desire, fifty shares in the company's stock, in May 1829, and fifty shares more in the June following, at £3 10s. per share, which was considerably below par. As the affairs of the Stirling Bank had not been settled, these shares, by arrangement between the parties, were to stand in the name of the Respondent, and the Appellant paid him the £350. In 1831 (see *Robertson* v. *Alexander*, 5 Wilson and Shaw, p. 1), **[414]** when the affairs of the Stirling Banking Company were settled, and the partners in it discharged from the sequestration, the Respondent pressed to have the said shares formally transferred to the Appellant, but he refused to accept the same; the consequence was, that the Respondent had to pay up two calls of £1 each share, amounting together to £200; and a demand of other instalments, amounting to £300, was soon afterwards made on him in respect of those shares.

In June 1832, the Respondent brought his action against the Appellant, stating, as above stated, among other things, and concluding that "it ought to be found and declared by decree, etc., that the foresaid 100 shares of the stock of the said company, were purchased for behoof of, and belong to, the defender (the Appellant), and the defender ought to be decerned and ordained, at his own expense, to have the said shares regularly transferred from the pursuer to himself, according to the forms, and in

terms of the contract and regulations of the said company; moreover, the said defender ought and should be decerned and ordained, by decree, etc., to make payment to the pursuer (Respondent), of the foresaid sum of £200 sterling, advanced and paid by him as aforesaid, and interest thereof, from the respective periods of advance above mentioned, and in time coming during the non-payment: and in the event of the pursuer being obliged to advance the other foresaid sum of £300, or any part of it, or to make any further advances or payments on account of the foresaid shares, the defender ought and should be decerned and ordained, to pay the amount of the same to him, with interest thereof from the periods of advance till payment; as also, generally, to free and relieve the pursuer of all [415] calls or payments exigible, or to become exigible, by or to the said company, on account of the said stock.

The defence set up by the Appellant was, that he was induced by the Respondent's false representations of the prospects of the Glass Company, to enter into the transaction, and that being deceived by the Respondent's misrepresentation and concealment in that respect, he was not bound to take a transfer of the shares, or to be responsible for the calls made in respect of them.

The court directed the following issues to be tried by a jury; first, whether, in May 1829, the defender (the Appellant) employed the pursuer (the Respondent) to procure fifty shares of the stock of the Edinburgh, Glasgow, and Alloa Glass Company, and, in the month of June 1829, fifty other shares of the said stock, for behoof of the defender; and whether the pursuer did accordingly procure said shares; and whether the defender wrongfully fails to take delivery of the said shares, or any of them, and to pay the calls effeiring thereto, and otherwise relieve him as libelled? or, secondly, whether, by the false and fraudulent representations, or fraudulent concealment of the pursuer, as to the credit and solvency of the said company, the defender was induced to purchase the said shares, or any of them?

These issues came on to be tried in July 1834, before the Lord President of the Second Division of the Court of Session and a common jury, who found a verdict for the Respondent on both issues.

The Appellant's counsel tendered a bill of exceptions to the deliverance of the learned judge, setting forth the whole of the evidence, and particularly that among the witnesses produced at the trial, in behalf of the Respondent, was Maurice Lothian, a solicitor in [416] Edinburgh, who, it was admitted by the Respondent's counsel, was then and had been for several years a partner, and also secretary of the said company; whereupon, the counsel for the Appellant took an objection to his competency as a witness for the Respondent, "in respect that he was a partner of the said Edinburgh, Glasgow and Alloa Glass Company, and as such partner was materially, directly and immediately interested in the issue of the action, inasmuch as it was for the interest of the witness that the pursuer (the Respondent), being still a partner of the company, should obtain decree in terms of the libel in this action; and in support of this objection, the said counsel for the defender (the Appellant), did offer instantly to prove, that the said Edinburgh, Glasgow and Alloa Glass Company was absolutely and irretrievably insolvent at the date of this action. But the said Lord President did overrule the said objection, and did allow the said Maurice Lothian to be received and examined as a witness for the said pursuer. Whereupon the said counsel for the said defender, did except to the foresaid opinion and deliverance of the said Lord President, and did tender their exception accordingly."

The witness was then examined and cross-examined, as were also four other witnesses, who were likewise admitted to be partners of the said company, and to whom, respectively, the same objection was tendered as was to Maurice Lothian, and upon the same grounds, and the objection was disposed of in the same way; and the same objection was taken to the deliverance of the Lord President in each case, and these witnesses also were severally examined. The bill of exceptions concluded thus: "And it being admitted by the counsel for the pursuer, that all the witnesses objected to, were part-[417]-ners of the said company, the counsel for the defender did then and there state to the said Lord President, that, in consequence of the decision of the court allowing the said witnesses to be examined, and the turn the evidence had taken, they gave up the case; and the said Lord President did direct the jurors aforesaid, to find for the pursuer on both issues, and the said jurors did accordingly so find; and inasmuch as the said several matters before mentioned do not appear by the verdict

aforesaid, the said counsel for the said defender did then and there propose the aforesaid exceptions to the opinion and deliverance of the said Lord President, in the several cases before mentioned, and requested his lordship to sign the said bill of exceptions, according to the form of the statute (55 Geo. 3, c. 35) in such cases made and provided. And thereupon, the said Lord President, at the request of the said counsel for the said defender, did sign the said bill of exceptions pursuant to the foresaid statute on the 5th day of February 1835."

The Lords of the Second Division of the Court of Session, after hearing counsel for the parties on the bill of exceptions, disallowed the same, and found the Appellant liable in expenses by an interlocutor dated the 5th of February 1835; and on the 13th of the same month, on the motion of the Respondent, the following interlocutor was pronounced: "The lords apply the verdict in this case, and in terms thereof find on the first issue, etc. (in the affirmative thereof), and on the alternative issue, find, that the defender was not induced to purchase the said shares, or any of them, by the false and fraudulent representations, or fraudulent concealment, of the pursuer as to the credit and solvency of the said company," etc.

[418] The appeal was against these two interlocutors.

Sir William Follett for the Appellant (Mr. M'Neill, who was to be with him, was obliged to go to Scotland):—The main question in this case is, whether the evidence of Mr. Lothian and of other partners in the company, was admissible for the Respondent on the trial of the issues. It may be a question whether, even with their evidence, there was sufficient proof to sustain the verdict. It is not denied that the company became a losing concern; the Appellant has averred, in reference to the exceptions taken to the admissibility of the witnesses objected to, that, at the date of the action, the company was irretrievably insolvent. This allegation must now be taken to be true. The Appellant has also averred on the record, that the grossest misrepresentations were held out in regard to the actual condition of the company; that reports were made out by the partners or persons employed by them calculated to deceive the public, and induce persons to come into the concern, and share the loss with them. By the constitution of this company, as well as at common law, all the partners are liable for the last farthing of the company's obligations; liable also to relieve each other of the loss sustained, in such a manner that that loss, from whatever cause arising, shall devolve equally on all the partners who are able to pay. If any partner should become insolvent, his proportion of the loss is to be diffused over the shares of all the others. It is therefore the interest of the whole to have as many members of the copartnership as possible. The object of the action was to make the Respondent a partner of the concern, to compel him to pay certain instalments said to have been advanced by the Respondent, and, as a necessary **[419]** consequence, to compel him to bear the share of the loss which has not yet been ascertained; and its effect may be to subject him in a liability for the whole debts and obligations of the co-partnership. If the allegations of the Appellant be true, the Respondent and all the subsisting partners of the company had a material interest to induce as many persons as possible to become shareholders of the concern, with the view of obtaining the greatest possible security against being obliged to sustain more than their rateable proportion of the loss. The risk arising from the possible bankruptcy of any of the subsisting partners, who, while solvent, may be made universally responsible, materially increases the interest of all the present partners in having new parties introduced, so as to enlarge the aggregate of individual responsibility, and improve the chances of mutual relief.

Mr. Maurice Lothian, the secretary of the company, a partner and a shareholder to a large amount, was the first witness objected to, on the ground that, as such partner, he was materially, directly and immediately interested in the issue of this action, inasmuch as it was for his interest that the Respondent, being still a partner of the company, should succeed in the action. The presiding Judge overruled the objection, on the ground that as Mr. Lothian was not a party to the record, the verdict could not be used for him in evidence, and his Lordship relied on the case of *Ralston* v. *Rowat* (1 Clark and Finnelly, 424). But his Lordship was mistaken as to the application of that case, which had no bearing on the question in this case, which is this, Had Mr. Lothian an interest in making the Appellant a partner in the company? It is the interest of all **[420]** concerned in a losing company, as this company was

admitted to be, to have as many persons bound to it as possible, because the chance of individual loss is thereby diminished. Suppose there were ten partners in a company, and one of them became bankrupt, the loss applicable to the share of that one would necessarily devolve on the remaining nine. In a company of this kind, it is not too much to suppose that insolvencies must happen. It is a fact that a large proportion of the shareholders did actually become insolvent. The action was partly for payment of instalments said to be due, and, in effect, for relief from demands that may still be made for the liquidation of the debts of the company. It is admitted that the Respondent is bound for these instalments, and he must pay them if he is able. Is it not for the interest of Mr. Lothian to obtain a guarantee for that payment? It is impossible to deny that, if the verdict is to stand, Mr. Lothian and all the other partners will be entitled to proceed directly against the Appellant for all contributions incidental to a partnership. It is surely too much, in such circumstances, to hold that the partners are competent witnesses to establish the allegations on which such a verdict must be supported. It is a settled principle in the law of Scotland, that no witness is admissible who has a clear, direct and immediate interest in the matters involved in the action, or where his interests are affected by the verdict, in the particular action in which his evidence is offered to be adduced. The objection of interest applies most strongly against the admissibility of a witness, who happens to be a co-partner of the party who offers to adduce him in any joint stock or other trading company, and where he is called on to give evidence, the tenor and import of which necessarily affect in a **[421]** material degree the interest and the funds of that company, and of the individual partners. Accordingly Tait, a high authority on rules of evidence in Scotland, says, "With regard to creditors, they have a manifest interest to enlarge the funds, and therefore, are generally inadmissible for that purpose" (Tait on Evidence, p. 355). It is also laid down in the case of the *Bank of Scotland* v. *Padon* (Fac. Coll. 10th July 1824), that an officer of any public bank, being a stockholder, is disqualified as a witness for the bank, even as to matters falling within his official department, a majority of the judges holding that the objection of interest, although trifling in its amount, was insuperable.

The fallacy of the Respondent's argument in the court below was, that the substitution of one solvent partner for another solvent partner was immaterial in a question *inter socios*, and that therefore Mr. Lothian had no interest in giving testimony, the effect of which was only to substitute the Appellant for the Respondent. The answer is this, that while the testimony so given tended to make the Appellant a partner, that object did not in any respect diminish the strong and immediate interest which the witnesses objected to had in substituting the Appellant as a co-partner to the extent of the stock which the Respondent was desirous of transferring to him; for in the event of the bankruptcy of the Respondent, the chance of relief of the witnesses and of the other partners, would be necessarily diminished, while the introduction of the Appellant as a partner, would, in a corresponding degree, give additional security to those partners, that they would be enabled to operate their relief for the share of any obligations which might in that event devolve on them. In order **[422]** to simplify the case, let it be supposed that a bankrupt company consisted of three partners, A. having two shares, B. having two shares, and C. the remaining two shares; let the loss upon the whole concern be estimated at £6000, that is, £2000 to each, and the concern not yet finally wound up, nor the amount of the loss finally adjusted. B. brings an action against D., who is not a partner, to compel him to take a transference to one of his (B.'s.) shares, and therefore concluding for relief to the extent of £1000, or of one half of whatever loss he might sustain, and he proposes to establish his case by the evidence of A. Is it not clear that A. would have an interest to make D. a partner? because A. would thereby have the additional security of D.'s name, first, for payment of B.'s share of the loss, should B. fail; and secondly, for payment of C.'s proportion should the same calamity befal him. This is not merely a contingent and eventual interest, the interest is direct and immediate to make D. a partner, because the security is thereby instantly increased. The loss and the extent of the loss are no doubt contingent, A., B. and C. being supposed all solvent at the date of the action, or at the date when the testimony of A. is admitted. But C. might fail next day, and the loss of £2000 might be so great as to bring down B., and then the effect would be, that A., instead of bearing the whole loss on the

concern, would have D., a partner to the extent of one-sixth share, liable in the first place for £1000, being one-half of B.'s loss, and for a corresponding proportion of the loss on the shares of the other partners. If this view be correct in the case supposed, does it not equally bear in the actual case before the House? It is not disputed that the concern has not been wound up, nor the extent of the loss and [423] ultimate responsibility ascertained. The number of partners only increases the additional risk, and in point of fact, several of the partners have become bankrupt.

Questions of this kind have been frequently discussed in Westminster-hall, where objections to the admissibility of partners in cases like the present have been sustained. In the case of *Ralston* v. *Rowat* (1 Clark and F. 424), already referred to, it was distinctly held, that the rules of the English and Scotch law are the same in principle as to the competency of witnesses. In England it is a principle, recognised as well in the courts of law as in equity, that a witness is incompetent who has any interest, however small, in the event of a suit, *Carter* v. *Pearce* (1 T. Rep. 163); *Radburn* v. *Morris* (3 Carr. and P. 254; S.C. 4 Bingh. 649); *Vaughan* v. *Worrall* (2 Swan. 395-399); Starkie on Evidence (105 *et seq.* 6th edit.), Phillips on Evidence (p. 59). It is important to consider, how far this test may be applied to the present case; assuming that a creditor of the company sued one of the witnesses objected to, and that such witness sought to enforce his claim for contribution against the present Appellant, could the verdict in this case be used as evidence for the witness? Certainly it might; and the record of an issue to try the fact of partnership has been admitted as evidence of that fact, *Whatley* v. *Menheim* (2 Esp. 608). This question was much discussed in the Court of Exchequer, in a case arising out of *Roe* v. *Brenton*: The lease of the manor of Trington was objected to; Lord C. B. Lyndhurst said, that was not a ground to send the case down for a new trial; and [424] *Lord Teynham* v. *Tyler* (6 Bingh. 390 and 561) was referred to. A similar question was raised in the Court of King's Bench a few days ago, as to the admissibility of documents. The question came to this, whether the verdict against the Appellant could be used for Mr. Lothian in another action? It clearly might, and therefore Mr. Lothian was not an admissible witness in the case.

Dr. Lushington and Mr. Serjeant Spankie for the Respondent:—It was not competent for the Appellant to present a bill of exceptions after formally abandoning the case before the jury, producing no evidence himself, but preventing the Respondent from producing the whole of his evidence. The Appellant in that proceeding disregarded the enactment of the 7th section of the act 55 Geo. 3, c. 35.* Instead of allowing the trial to proceed, he stopped it short and gave up the case. The Appellant therefore did not bring his case within the statute at all when he presented the bill of excep-[425]-tions; if this course of proceeding were sanctioned, it would, in many cases, lead to the greatest hardship and injustice. The case for the Respondent was opened—a large part of his evidence was disclosed—but the Appellant kept back his evidence so that its import, and possibly its meagreness, were carefully concealed from the court. If a party were allowed to prosecute a bill of exceptions in such a case, he would be in a far better situation by violating the statute, than by following it out. For if the trial had proceeded, and the Appellant produced any evidence, the court would have been bound to refuse a new trial, if that evidence had been

* By that section it is enacted, that "it shall be competent to the counsel for the party at the trial of any issue or issues to except to the opinion and direction of the Judge or Judges before whom the same shall be tried, either as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial: and that on such exception being taken, the same shall be put in writing by the counsel for the party objecting, and signed by the Judge or Judges; but, notwithstanding the said exception, the trial shall proceed, and the jury shall give a verdict therein for the pursuer or defender, and assess damages when necessary; and after the trial of every such issue or issues, the Judge who presided shall forthwith present the said exception, with the order or interlocutor directing such issue or issues, and a copy of the verdict of the jury indorsed thereon, to the Division by which the said issue or issues were directed, which Division shall thereupon order the said exception to be heard in presence, on or before the fourth sederunt day thereafter."

plainly defective; and the Respondent would then have been entitled to argue, that the admission of the witnesses excepted to was entirely immaterial, because the Appellant's evidence failed to prove deceit and misrepresentation on the part of the Respondent. The courts of law in England will not grant a new trial on the ground that evidence had been admitted which ought to have been rejected, if, exclusive of such evidence, there be enough to warrant the finding of the jury. *Doe d. Lord Teynham* v. *Tyler* (6 Bingh. 561). In the case of *Alexander* v. *Barker* (2 Cromp. and Jer. 133) the rejection of evidence, which, if admitted, would merely prove a fact established by other evidence, was held to be no ground for a new trial. The same principle has governed the decision of the Scotch courts in reference to new trials (see 3 Murray, pp. 367 and 529). The first issue in this case was proved by a mass of evidence quite irresistible. The second issue was properly the Appellant's issue; if he had produced any evidence, the Respondent would have had it in his power to show, that it was altogether trifling and inconclusive, or that it was repelled by the [426] Respondent's proofs, altogether independent of the evidence to which exception was taken.

It is difficult to understand the exact nature of the objection taken at the trial, and set forth in the bill of exceptions, to the admissibility of the witnesses in question. It is necessary to know precisely the grounds on which a party asks for a new trial, before he is allowed to gain an object involving such serious consequences to his adversary, both as regards delay and expense. Has the Appellant stated any reason for holding the witness in question inadmissible? He has set forth in his bill that the witness was incompetent in respect that he was a partner of the said Edinburgh, Glasgow, and Alloa Glass Company, and as such partner was materially, directly, and immediately interested in the issue of this action, inasmuch as it was for the interest of the witness that the Respondent, being still a partner of the company, should obtain decree in terms of the libel in this action. The glass company were not parties to the action in any shape, and therefore the objection to the witness cannot rest on that ground; neither is it pretended that the witness was liable with the Respondent in the expenses of the suit, or was connected with him by relationship. A party taking an exception to the admissibility of evidence is bound to set forth on record, in clear and unequivocal terms, the grounds in law or fact on which he rests his objection. He is bound to do so in justice to the presiding judge, who is called on to dispose of the objection; and he is doubly bound to do so in justice to his adversary, whose interests are so deeply involved.

The court, in judging of an objection to the admissibility of a witness on the ground of interest in the suit, cannot travel out of the bill of exceptions to [427] see whether in fact there is such an interest. But in this bill of exceptions no interest is stated, on the ground of which the witness could be rejected, and the objection stated by the Appellant was, in any view that can possibly be taken of it, utterly groundless in itself, and was properly overruled by the presiding judge. The alleged interest in the shareholders was, on the Appellant's own showing, totally insufficient to disqualify any witness. His plea of interest came to this—"It was the interest of all the shareholders to make the Appellant a partner of the company, because it was bankrupt in its stock; large contributions were necessary for loss; and it was advantageous for the company to have a new partner like the Appellant, liable for that loss, instead of the Respondent, who was previously liable for his own original shares." No doubt, if the Respondent had been bankrupt, then the Appellant might have pleaded that the shareholders had an interest in getting one hundred shares of the stock transferred from him to a solvent partner. But as no such averment was made, it must be held that the Respondent was just as able to pay any contribution on the stock as the Appellant was. If a question arose in any of the English courts respecting the sale of a few shares of any of the great mercantile companies, such as the Bank of England, the fire-offices, or even any of the later joint-stock companies, could an objection of interest be gravely stated in a trial respecting specific shares, if any of the conferences relative to the bargain were proposed to be proved by witnesses who had no connexion with the parties, except holding other shares in the same company? The law of England and of Scotland is the same on this point.

In this case it was more the interest of the shareholders to have the Respondent continued as their [428] partner, than the Appellant, who was so recently under

sequestration as partner of a banking company. There was not a shadow of reason for the shareholders preferring the Appellant to the Respondent, and therefore there was no reason to hold the witnesses as interested, or even to find them biased as if they had been ordinary creditors of the Respondent. It is laid down in a book of great authority that " a mere contingent benefit which may result to the witness from the event of the suit, (as that it may possibly be more easy for him to establish his own claim, in case the party calling him should succeed,) can only affect his *credit*, and not his competency, unless the verdict would be evidence for him (Phillipps on Evidence, c. 5, s. 1); and Lord Eldon, in the case of *Vaughan* v. *Worrall* (2 Swanst. 395), said, " The interest, to disqualify, must be a direct interest in the event of the cause; and courts of justice have of late struggled to convert objections to the competence, into objections to credit." And in the Scotch courts the same doctrine has been held, as in the case of the *Earl of Fife* it was settled, that " it is a direct, not a contingent, interest that disqualifies a witness. A person who is liable in damages, whichever way his evidence is given, is a competent witness " (Murray, pp. 130 and 144).

But there is still a separate ground, besides the absence of interest, on which the witnesses objected to would be admissible. The facts to which they were called to speak, were those which fell specially within their knowledge, and which no other witness could be held to be so fully and accurately acquainted with. In *Middleton* v. *Frost* (4 Carr. and P. 16), it was held, that an inhabitant of a parish was a competent witness to prove payments of rates to the collector, *ex necessitate*. [429] The facts here brought the witnesses objected to within that rule. The Appellant alleged, that he had purchased the shares on the false and deceitful representations of the Respondent alone, and in utter ignorance of the affairs of the company. But the partners and directors, who best knew the affairs of the company, completely negatived that averment, and proved that the Appellant had applied in all proper quarters to get the necessary information respecting the affairs of the company. It would be strange if the best evidence to prove the state of facts on such a point were to be excluded.

The bill of exceptions was properly disallowed on this further ground, that enough was proved *aliunde*, and exclusive of the witnesses objected to, in order to entitle the Respondent to a verdict. It was clearly established by the witnesses to whom no objection was made, that the Appellant had been resident at the seat of the works for many years, that he was incessant in his inquiries of directors, partners, and workmen respecting the prospects of the company.

Lord Brougham:—My Lords, I do not think it is necessary to give your Lordships the trouble of going through the arguments in this case. I am clearly of opinion that the interest of the witnesses objected to in this case is not that direct and immediate, and substantial, and pecuniary interest which would disqualify any of those witnesses from giving evidence on this trial. I think the Court below have properly admitted this evidence, and I am satisfied that there are some cases referred to in the argument which afford a precedent for what has been done in the Court below.

The appeal was ordered to be dismissed, with costs.

[430]

APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

The Rev. MARCUS MONCK, Clerk,—*Appellant;* CHARLES HENRY PAGET, Esq.; SIR CHARLES PAGET, and Dame ELIZABETH, his Wife; DOMINICK BROWNE, Esq., and CATHERINE, his Wife; and HENRY GEO. MONCK BROWNE, an Infant, by his next Friend,—*Respondents.*

[Mews' Dig. i. 355; S.C. 9 Bli. N.S. 506.]

G. P. Monck's estates in Ireland—being charged with a jointure for Lady Araminta, his wife, by their marriage settlement, whereby also he covenanted

for payment to her of the sum of £300, by his heirs, executors or administrators, out of his real or personal estate, immediately after his decease—were, in the year 1777, settled to his own use for life, with remainder to Henry Monck, his eldest son, in fee, subject to a trust term for raising a sum to be applied as by deed or will he should appoint. He died in 1804, having by his will bequeathed, among other things, all rents and arrears of rent due to him to Lady A., her executors and administrators, and he appointed her sole executrix. Lady A. declined to prove the will: Henry Monck obtained letters of administration, with the will annexed, received the rents, etc., and died in 1815, having by his will devised all his real estates to trustees for the use of his two daughters, their husbands and issue respectively, in strict settlement, subject to a trust term for raising a fund to pay his debts, legacies and annuities; and he thereby directed payment of £200 a-year to Lady A. and her assigns for her life, in addition to her jointure; and gave her a legacy of £500, payable in twelve months after his decease; and he gave an annuity of £400 a-year to Ann Monck, his sister, in case she survived Lady A., and upon condition of her releasing his real [431] estates from all claims; and he appointed Lady Elizabeth, his wife, his executrix. She proved the will, and filed a bill in Chancery against Lady A. and Ann Monck, against the testamentary trustees of the last-mentioned term, and of the inheritance of the devised estates, and against the persons beneficially interested therein, praying that the trusts of the will might be carried into execution, and that accounts might be taken of the debts and legacies of the testator, and of the charges affecting the real estates, etc. Lady Araminta, in her answer, claimed to be entitled to receive out of the real estates, in addition to her jointure, the said sum of £300, with interest from her husband's death; and the said annuity of £200 and legacy of £500, together with all the rents and arrears that were due to G. P. Monck at his death, and a proportionate value of the timber planted by him on the devised estates.

The usual decree for an account, etc. having been made in 1818, and Lady A. having died before any further steps were taken in the cause, Ann Monck, her residuary legatee and sole executrix, proved her will and carried in a charge before the Master in pursuance of the decree, and thereby claimed as such executrix the annuity of £200 and the legacy of £500, omitting the other claims made in Lady A.'s answer; and in her own right she claimed the annuity of £400, offering to release the estates of Henry Monck from all other claims. A final decree was made in that cause in 1821, and enrolled in 1822. In 1831 a second suit was instituted for sale of part of the devised estates, and a decree to that effect was made, and enrolled in 1832.

In 1834 Marcus Monck, the second son of G. P. and Lady A. Monck, having in 1832 obtained administration *de bonis non* to their respective estates, and also to the estate of his sister, Ann Monck, who died in 1830, moved the Master of the Rolls *for leave to prove before the Master* in the first cause the unproved demands of Lady A., or *to file a supplemental bill*, which motion being refused, he then moved the Lord Chancellor for leave to file a supplemental bill, or such other bill as he might be advised. That motion [432] also was refused. Upon appeal from his Lordship's order, the Appellant sought to make a case for leave to prove before the Master, under the decree of 1821, the unproved demands of Lady A., or for a bill of review. HELD by the Lords, without giving any judgment on the merits, that the Lord Chancellor properly refused the motion for leave to file a supplemental bill, and that the appeal was irregular in point of form, in asking for relief which was not asked of the Court below, the order of the Master of the Rolls refusing that relief not being appealed from.

Previous to the marriage of George-Paul Monck, esq., with the Lady Araminta, his wife, (the father and mother of the Appellant), a marriage settlement was executed (dated the 22d of April 1755), whereby the estates of the said G. P. Monck, situated in the county of Westmeath in Ireland, were settled on him and the issue male of the marriage in strict settlement, charged with a jointure of £800 a year

for the Lady Araminta, payable half yearly; and G. P. Monck thereby covenanted, that, in case she should survive him, his heirs, executors or administrators, should, out of his real or personal estate, pay her £300 immediately after his decease. In the year 1777, G. P. Monck and Henry Monck, the eldest son of the marriage, suffered a recovery of the settled estates, and by deed declaring the uses of the recovery, (dated the 3d of December 1777,) they were limited to the use of trustees for a term of one thousand years, and subject thereto to the use of G. P. Monck for life, with remainder to the use of the said H. Monck in fee. The trusts of the term were, by sale or mortgage of the estates, to raise such sums of money (not exceeding £15,000), and to pay and apply the same in such manner and for such purposes as G. P. Monck, by any writing under seal, or by his last will, should direct and appoint.

[433] George Paul Monck died in October 1804, leaving Lady Araminta, his widow, and H. Monck, his eldest son, and other children, having by his will, (dated the 24th of May 1790,) bequeathed all his ready money, rents, and arrears of rent due and owing to him at his decease, household goods and furniture, with the lease of his house in Bath, and all his personal estate, to Lady Araminta, her executors and administrators, subject to the payment of his funeral and testamentary expenses and simple contract debts only, declaring it to be his intention, that the property so given to her should, as far as in his power, be exonerated from payment of his bond debts, judgments, mortgages and other incumbrances, which he directed should be charged on his real estates only, and he appointed her sole executrix of his will. He afterwards, by a codicil, (dated the 25th of May 1792,) restricted the bequest of his household goods and furniture, with the lease of his house at Bath, to the natural life of Lady Araminta, bequeathing it over after her decease to his daughter, Ann Monck, her executors and administrators, but confirmed his will in all other respects. Lady Araminta declining to act as executrix, Henry Monck took out letters of administration, with the will annexed, and possessed himself of the personal estate, and received the rents and arrears of rent of the real estate, owing to G. P. Monck at his death, but never, as the Appellant alleged, accounted for them to Lady Araminta Monck.

Henry Monck died in 1815, having by his will devised all his towns, castles, lands and other hereditaments, to the use of trustees therein named, for a term of four thousand years; and subject thereto he devised one moiety of the said hereditaments to other trustees in the will named, during the life of his daughter, **[434]** the Respondent Catherine, wife of the Respondent Dominick Browne, upon trust to pay the rents and profits of the said moiety to her separate use, during her life; and after her decease to the use of the said Dominick Browne for life, with remainder to the use of their second son in tail male, with divers remainders over; and he devised the other moiety of the said hereditaments, subject to the said term, to the use of the last mentioned trustees, during the life of his daughter, the Respondent Elizabeth, wife of the Respondent Sir Charles Paget, upon similar trusts, for her separate use; and after her decease to the use of Sir C. Paget for life, with remainder to their eldest son in tail male, with remainders over. The trusts of the term were declared to be, by sale or mortgage, to raise such sums as should be sufficient to pay the testator's debts, funeral and testamentary expenses, legacies and annuities. The testator, among other bequests, directed the payment of £200 a year to his mother, Lady Araminta, and her assigns, during her life, in addition to her jointure of £800 under the above recited settlement, and £400 a year to his sister Ann Monck, in case she should survive Lady Araminta, but upon the express condition, that she released his estates from any claim that she might have on them. He also gave a legacy of £500 to his mother, to be paid at the expiration of twelve months after his decease, and he gave all his personal estates and effects to his wife, Lady Elizabeth Monck, absolutely, and directed that, if any of his debts should be paid out of his personal estate, Lady Elizabeth should in that case be entitled to be reimbursed out of the premises comprised in the term of four thousand years, and he appointed her sole executrix of his will. At the testator's death the Respondents, Catherine **[435]** Browne and Dame Elizabeth Paget, were his only children and co-heiresses at law.

Lady Elizabeth Monck proved the will, and, in March 1816, filed her bill in Chancery in Ireland against Lady Araminta Monck, Anne Monck, Dominick Browne and Catherine his wife, Charles Paget and Elizabeth his wife, and Charles Henry Paget, their eldest son; making also the

testamentary trustees of the term of four thousand years, the trustees of the fee of the estates, the incumbrancers thereon, and several others interested under the will of Henry Monck, parties defendants. The bill, after setting forth the said will, and stating, among other things, that the testator was indebted at the time of his death to a number of persons, and that several of them had applied to the plaintiff for payment of their demands, prayed (among other things), that the defendants might set forth an account of the said real estates so devised as before stated, and the right, title, interest, etc., they respectively had in them, etc.; that Ann Monck might elect whether she would accept the said annuity of £400, releasing all other claims which she might have to the said estates, or insist upon her other claims, and that she might set forth the same respectively; that an account might also be taken of the debts, legacies, and funeral and testamentary expenses of the testator, and also of any charges affecting the said lands and hereditaments, and that the several creditors and legatees of the testator might be at liberty to come in before the Master and make proof of their several demands, and that the trusts of the will might be carried into execution, and a competent part of the lands comprised in the term of four thousand years might be sold for the purposes in the will mentioned.

The different defendants appeared and put in their [436] answers to the bill. Lady Araminta Monck by her answer admitted the will of Henry Monck, particularly the bequests to her of the annuity of £200, and the sum of £500, and, with reference to the estates devised, she said that she believed they were the same estates that were comprised in the settlement of April 1755, whereby the jointure of £800 and the sum of £300 were secured to her, as above mentioned, but which sum of £300 she alleged had never been paid to her. She in her said answer set forth the will of G. P. Monck, his death, and administration to him by the said Henry Monck, and she claimed to be entitled to receive out of the said real estates, the two annuities of £800 and £200, and the two sums of £300 and £500, with interest on these two sums from the periods when the same respectively became payable, together with all rents and arrears of rents that were due to G. P. Monck at the time of his decease, and she also claimed such proportion of the value of the timber planted by G. P. Monck on the said estates, as he was entitled to under the Irish statutes in that behalf: she also claimed all the residue of his personal property, after payment of his simple contract debts, etc.

Ann Monck also by her answer, admitted the will of Henry Monck, especially the bequest to her of the annual sum of £400, and she claimed that annuity, and brought forward several other claims against the said estates, and declined to elect as prayed by the bill until her rights and claims were ascertained.

These answers were replied to, but no evidence was gone into, and the cause coming on to be heard on bill and answer in Nov. 1818, a decree was made whereby it was ordered, among other things, that the Master should take an account of the debts, legacies and funeral expenses of the testator Henry Monck, and [437] also an account of the debts, charges, and incumbrances affecting his real estates, and of the rents and profits thereof, etc. And it was declared that Ann Monck was bound to make her election between the reversionary annuity bequeathed to her by his will, and her other claims in the pleadings mentioned affecting the estates, before she was permitted to file any charge in the Master's office under the decree; and it was further ordered, that all creditors and legatees of Henry Monck, and all persons having debts, charges and incumbrances affecting his estates, should have liberty to come in before the Master to prove the same.

Lady Araminta Monck died in 1818, soon after the pronouncing of the decree, and before any further proceedings were had in the cause, having by her will appointed her daughter, the said Ann Monck, her sole executrix, who accordingly proved the will, but no bill of revivor was filed in the said cause, for the purpose of bringing her, as the personal representative of Lady Araminta Monck, before the Court.

Ann Monck, in July 1819, carried into the Master's office, her charge under the said decree, and thereby claimed to be entitled, as the executrix of Lady Araminta Monck, to the arrears of the annuities of £800 and of £200, and also to the legacy of £500, with the interest due thereon. She also elected to take the annuity of £400, bequeathed to her by Henry Monck, and offered to release his estate from any other claim that she might have thereon. But she did not, either by her said charge, or

otherwise, in her lifetime, bring forward the several other claims set forth by Lady Araminta Monck in her answer.

The Master by his report (dated January 1821) found that Ann Monck was entitled, as executrix of Lady Araminta, to an arrear of £500, on foot of the [438] said annuity of £200, and also to the legacy of £500 bequeathed to her by Henry Monck, with interest on both sums, and that she was also entitled under Henry Monck's will to her annuity of £400.

No exceptions were taken to the report; the cause came on for further directions in March 1821, when by a decree then pronounced, and which was enrolled in Nov. 1822, it was, amongst other things, ordered and decreed, that the Respondents Dominick Browne and Catherine his wife, Sir Charles Paget and Elizabeth his wife, or some one of them, should pay to the plaintiff and the several defendants and creditors their respective demands, with interest, and also the costs of the defendants; or in default thereof, that the Master should, within six months, sell the several towns and lands comprised in the said term of four thousand years, for the residue of the term, for the purpose of paying the incumbrances.

No sale took place under that decree. In November 1831 the Respondents filed their bill against Lady Elizabeth Monck, and the trustees of the fee of the real estates under Henry Monck's will. The bill set forth the will of Henry Monck, his death, and the probate of his will by Lady Elizabeth Monck, the original bill filed by her, the said order of November 1818, the Master's report, and the said final decree of March 1821; and it stated, that the Respondent Henry George Monck Browne was born after the date of the decree, and that under the limitations of the said will he was entitled to an estate tail in a moiety of the said estates upon the decease of the survivor of Catherine and Dominick Browne, and that no sale had been had of the estates comprised in the said term, and that it would be greatly for the benefit of all parties interested in the said estates that a sale of the fee and inheritance of a [439] competent part thereof should take place with the said trust term, instead of the said trust term only, and that the money arising from such sale should be applied in payment and discharge of the debts, charges, and incumbrances affecting the said estates. The bill accordingly prayed that the fee and inheritance of the hereditaments and premises in the said trust term contained might be decreed to be sold, and that the proceeds might be applied to discharge all debts and incumbrances affecting the same.

The defendants to that bill having put in their answers, the cause came on to be heard upon bill and answer in May 1832, when it was ordered and decreed as prayed. That decree was enrolled in the November of the same year. Ann Monck died in September 1830. The Appellant obtained letters of administration *de bonis non* to the estate of Lady Araminta Monck, and administration to the estate of Ann Monck, in February 1832; and he also obtained letters of administration *de bonis non*, with the will annexed, of his father G. P. Monck. On the 20th of January 1834, the Appellant, as administrator of Lady Araminta Monck, moved the Master of the Rolls in Ireland, in pursuance of notice entitled in both causes of *Monck* v. *Browne* and *Paget* v. *Monck*, "that he *might be at liberty to go before the Master* in the said *first* cause, and file a charge and proceed thereunder to prove the several unproved demands made by the Lady Araminta Monck in her said answer, (viz. *first*, her claim of £300 with interest, under the settlement of 1755; *secondly*, her claim on foot of rents, and arrears of rents of the lands and premises in the said settlement and pleadings mentioned, which were due to G. P. Monck at the time of his decease, and by him bequeathed to Lady Araminta, subject only to his simple contract debts, and [440] funeral and testamentary expenses, and which, to the amount of £7084 1s. 11d., were received and retained by Henry Monck as his personal representative; and *thirdly*, her claim to G. P. Monck's proportion of the value of the timber trees planted by him on the said estates as tenant for life thereof, pursuant to statute in such case made and provided, and which said several claims were by inadvertence omitted to be proved by Ann Monck, the former personal representative of Lady Araminta in the cause of *Monck* v. *Browne*, and which she was entitled to prove against the outstanding estates of H. Monck;) *or otherwise, that the Appellant, as such personal representative of Lady Araminta Monck, might be at liberty to file a supplemental bill*, or such other bill as he might be advised, for the purpose of establishing such demands, etc.

The Master of the Rolls declined to make any order on that motion.

On the 31st January 1834, the Appellant, pursuant to notice entitled in both causes and served on the Respondents, moved the Lord Chancellor of Ireland "*for liberty to file a supplemental bill in the first mentioned cause, or such other bill* as he might be advised, for the purpose of establishing the several unproved and unadjudicated claims made by Lady Araminta Monck in her answer in that cause, and as specified in the Appellant's affidavit filed in that cause on the 11th of January instant, or for such other order as to his Lordship should seem meet," etc.

Two affidavits were read in support of this motion; one of them, being the affidavit of the Appellant, and entitled in the first cause, and which was also used in support of the motion before the Master of the Rolls, was to this effect:—It stated the bill in the first mentioned cause, the answer of Lady Araminta Monck [441] thereto, and the decree of November 1818 therein pronounced, and that Lady Araminta died before any further proceeding was taken therein, having appointed the said Ann Monck her executrix. It then stated that Ann Monck filed her charge in the said cause as hereinbefore mentioned, but omitted the several other claims made by Lady Araminta in her answer; that is to say, the said claim of £300 with interest from the death of G. P. Monck, all or any claim on foot of the rents and arrears of rents of the said settled and devised estates due to him at the time of his decease, and amounting to £7084 1s. 11d.; and also the claim of the value of the timber trees planted by G. P. Monck on the said settled and devised estates as tenant for life thereof, and which amounted to the sum of £5000; the affidavit then stated the Master's report of January 1821, the said decree of March 1821, and the proceedings in the second cause; it then stated the death of Ann Monck in 1830, and that she had, ever since the death of Lady Araminta, her mother, resided in England, and was wholly unacquainted with the facts relating to the said unproved claims of Lady Araminta, and that she was during her life-time quite incompetent to have instructed her solicitor as to the facts and proofs incidental to those claims; the affidavit then stated, that letters of administration, with the will annexed, of Lady Araminta were granted to the Appellant in February 1832, and that thereupon he caused application to be made to the solicitor employed by Ann Monck as such executrix as aforesaid for the papers which had belonged to her in such right; and that considerable delay took place therein before the Appellant's solicitor received the same, and that thereupon very tedious searches and inquiries became necessary, and were entered into on the part of the [442] Appellant in order to ascertain the grounds on which those unproved claims were founded; and that the Appellant's solicitor used the utmost diligence to investigate the same.

The other affidavit read in support of the motion before the Lord Chancellor was the affidavit of Mr. Henry Murphy, the Appellant's solicitor. It stated, among other things, that in November 1830, the said Henry Murphy received instructions from the Appellant to procure letters of administration to Lady Araminta Monck and Ann Monck, and that he was not able to obtain the same until the month of February 1832; that upon obtaining such administrations, he was instructed to apply for, and, after much delay, succeeded in obtaining from their solicitor the papers and documents in the first mentioned cause belonging to them, and that, upon inspecting such papers, it appeared that certain claims made by Lady Araminta in her answer, and specified in the affidavit of the Appellant, had never been put forward by her said executrix. The affidavit then stated, that the reason why such claims were not put forward, was, that Ann Monck and her solicitor had not in their power any evidence to prove the same; and that it appeared by a case submitted to counsel by her said solicitor, for the purpose of preparing proofs in the first mentioned cause, that Lady Araminta Monck and Ann Monck, were not prepared with evidence as to the planting of timber, nor as to the arrears of rents, from want of certain accounts referred to in the said case, nor as to the claim under the said marriage settlement, from want of the original deeds of April 1755 and of December 1777. The affidavit then stated that due diligence was used at the time to obtain the said deeds, and that a notice in writing had been served on the [443] plaintiff in the first cause, requiring the production of the said deeds, and that no answer had been returned thereto, and that a fruitless application and search had been made for the original accounts on which the claim to the arrears of rents was founded. The affidavit further stated that, in

the months of July and October last, Henry Murphy and the Appellant had made two visits to the lands in the pleadings mentioned, and that on such occasion, Henry Murphy had discovered sufficient evidence to sustain Lady Araminta's claim for the planting and value of the timber mentioned in her answer, and he had also discovered the name of the gentleman who had been conducting clerk and assistant to the land and law agent of Henry Monck, and by his means obtained access to the papers which had belonged to the said testator's agent, amongst which the original accounts were found, and were then in the deponent's possession.

The Respondents opposed the motion, and grounded their opposition on the reasons appearing in the affidavit of Mr. Dobbin, their solicitor, which was read by their counsel, and which stated, among other things, that the final decrees in the two causes were enrolled in November 1832; that Ann Monck, in her answer in the first cause, relied on her claims under the marriage settlement of G. P. Monck; that Henry Monck bequeathed the annual sum of £200 to Lady Araminta during her life, and also a legacy of £500 and to Ann Monck an annuity of £400 during her life, upon condition of her releasing his estates from any charge, claim or demand that she might have thereon. The affidavit then stated that, about the 1st day of July 1819, Ann Monck filed her charge under the first decree in her own right, and as executrix of Lady Araminta, claiming as above mentioned; that the said [444] charge was duly proved, and the amount thereof, and of the annuity of £100, had been paid from time to time out of the funds in the cause, partly to Ann Monck, and partly to the Appellant since her decease: that Lady Araminta Monck, by her last will bequeathed to Ann Monck £3000, to the Appellant £1000, and the residue of her estate and effects to Ann Monck, and appointed her executrix. The affidavit further stated, that the deponent was altogether unacquainted with the demands stated in the Appellant's affidavit; that all the persons who must have been acquainted with the facts relating to the said demands were dead.

The Lord Chancellor, by an order bearing date the said 31st day of January 1834, refused the motion, with costs.

The petition of appeal prayed that that order be reversed, or that the Appellant might have such other relief in the premises as to this House should seem meet.

Mr. Wigram and Mr. Lancelot Shadwell, for the Appellant:—The unproved claims of Lady Araminta Monck, which her personal representative seeks to establish against the real estates of Henry Monck, consist, first, of the sum of £300, with interest from the death of G. P. Monck, in 1804; secondly, of the rents and arrears of rent that were due to him from those estates at the time of his death, which exceeded £7000, as appears from the agent's accounts; and, thirdly, of such proportion of the value of the timber planted by him on the estates, as he himself was entitled to as tenant for life under the Irish statutes for encouraging the planting of timber trees. To the first of these claims she was entitled under the covenant in her marriage [445] settlement, by which her husband bound his heirs and executors to pay that sum out of his real and personal estate immediately after his death. By his will he exonerated his personal estate from specialty debts, and directed them to be paid out of the real estates, which had been demised for a term in trust to raise money for such payments. Henry Monck was both heir and executor, and in either character bound by the covenant, but he never paid that debt. The rent and arrears of rent were expressly bequeathed to Lady Araminta, and the general bequest to her of the personal estate, carried her husband's proportion of the value of the timber planted by him.

These were all subsisting charges on the estates at the time of the decease of Henry Monck. Those who represent him and his estates, cannot object that Lady Araminta's representatives have not made these claims in due time, for as he was both heir and acting executor of his father, and received the rents and possessed himself of the personal estate, he ought to have discharged those liabilities. On his death in 1815, in answer to the bill then filed, Lady Araminta distinctly set forth her claims.

[Lord Brougham: This appears to be an appeal motion. I do not remember such an appeal in this House, but I do not deny our jurisdiction.]

The form is as your Lordship has stated: an appeal motion was made to the Lord Chancellor of Ireland, for leave to file a supplemental bill to establish those claims, the Master of the Rolls having refused to make any order on a former motion made

before him partly for the same purpose. There was unquestionably a valid charge in respect of those claims on the estates of Henry Monck, capable of being enforced at the [446] time of his death. He devised the estates to trustees, subject to a term also in trust, and seventeen years have elapsed since Lady Araminta's death; but a lapse of twenty years even will not bar equitable claims in circumstances not affording presumption of satisfaction: *Pickering* v. *Lord Stamford* (2 Ves. jun. 272 and 581).

[Lord Brougham: Why limit yourselves to twenty years? There is no fixed limitation of time. In one case a lapse of thirty-eight years was held to be no bar under the circumstances; in another, thirty-five years did not bar equitable claims; yet in a case in this House, nineteen years were held to bar a claim under a bond, though twenty years constitute the limitation in case of a bond.]

No objection can therefore be made to these claims on the ground of delay. The period of twenty years was mentioned, because the lapse of that period was set up as a bar by the Respondents.

Another objection made to these claims is, that Ann Monck, in the charge filed by her in the Master's office, "released the estates of Henry Monck from any other charge, claim or demand whatsoever that she may have thereon, save and except the several claims thereinbefore set forth." But Ann Monck's charge, whereby she elected to take her annuity of £400, in preference to the various claims which she had set forth, in her answer to the first bill, against the estates of Henry Monck, related only to what she so claimed in her own right, by virtue of her father's marriage settlement, and alleged dealings between him and H. Monck, and not to what she claimed as representative of Lady Araminta; and the claims released by her were those which Henry Monck directed by his will to be released, which were her own, and could not [447] refer to those of Lady Araminta. If the lapse of time and the enrolment of the decrees be put out of the case, that release cannot prevent Lady Araminta's representative from proceeding to prove these claims.

As to the enrolment, the terms of the decree were of so specific a nature as not to prevent any one, who had a debt to prove, from coming in afterwards. It is not unusual to let creditors go before the Master to substantiate claims, after a long lapse of time, while any part of the fund remains in court. *Gillespie* v. *Alexander* (3 Russ. 130); *Greig* v. *Somerville* (1 Russ. and Myl. 338); *Lashley* v. *Hogg* (11 Ves. 602). We ask no more than was granted in those cases; we had a valid claim at the death of Henry Monck. These claims are not barred by time, which is to be computed from the death of Henry Monck, who by his will must be taken to have recognised every debt due from him or affecting his estates. The time that elapsed before his death cannot be taken to run against debts which he charged on his real estates.

It may be asked, why did we not take out letters of administration sooner? It is not necessary for us to account for the delay, it is enough that we are creditors whose claims are not barred by lapse of time, or presumption of satisfaction, and we have a right to proceed to establish them. But the delay is easily accounted for; Lady Araminta made the claim by her answer in 1818. Ann Monck, her executrix, in order to prove the claim, should have this evidence,—first, the settlement containing G. P. Monck's covenant in respect of the £300; secondly, his will; and thirdly, proof that timber trees had been planted by him on the estates, their value, etc. She, having resided in Bath, where Lady Araminta herself had resided and died, [448] was not in a situation to collect all this evidence, although she used all due diligence to procure it.

[Lord Lyndhurst:—The claims here made were as against an executor. A new solicitor after a lapse of years came in, and he claimed for the representative when the cause was wound up. A recognition of such claims would lead to new claims on every change of solicitors in suits, after all the proceedings in them were brought to a close.]

The House should look to the merits of this case. It cannot be inferred from the fact of Ann Monck making some claims, and omitting to make others for want of proof of them, that she intended to abandon those which she omitted. The Appellant has only recently obtained possession of the evidence necessary to support the unproved claims of Lady Araminta, and is ready to establish them, if permitted.

The estates of Henry Monck are still unsold, and are amply sufficient to satisfy all the claims on them, and the Appellant does not seek to disturb in any manner the existing proceedings in the causes. We hope, therefore, that your Lordships will make an order giving him leave to go before the Master, or to take such proceedings as he may be advised to take in pursuance of the proceedings under the decree.

Mr. Pemberton and Mr. Lowndes for the Respondents:—The Appellant now asks what he did not ask by his motion in the Court from whose order he appeals. He does not now ask for leave to file a supplemental bill, but for leave to go in and prove his claims before the Master under the decree, which leave was refused by the Master of the Rolls, and which the Appellant, as appears by his notice of **[449]** motion, did not ask at all from the Lord Chancellor, from whom he asked leave only to file a supplemental bill. The Master of the Rolls refused the motion, because the person whom the Appellant represents was a party to the original cause, and ought, before the hearing of the cause, to have produced evidence of the claims alleged in her answer. No one ever heard of a party in a cause, applying for leave to go before the Master under the decree. The Appellant now asks leave to file a supplemental bill, not for the purpose of reviewing or disturbing the decree, but to establish his claims. It is not necessary to obtain leave of the Court to file a supplemental bill.

[Lord Lyndhurst to Mr. Wigram:—Why did you not file your supplemental bill without coming to the Court for leave, claiming the benefit of the decree, and that the Court would stay proceedings on it, and the appropriation of the funds?]

[Mr. Wigram:—We could not venture to do so without leave of the Court.]

The Counsel for the Respondents:—The claims of the Appellant are as groundless in substance as his appeal is irregular in form. Lady Araminta Monck possessed herself of her husband's personal estate, out of which the £300 and the price of the timber also, whatever it was, were payable. Both these claims were therefore annulled. They were in fact claims against herself, and were founded on a misapprehension. The arrears of her jointure, and of the annuity of £200 and the legacy of £500, were claimed by her executrix with interest; the Master reported that she was entitled to them, and these sums have been paid to Ann Monck as such executrix, or to the Appellant.

[450] Ann Monck, in the charge filed by her in the Master's Office, expressly "released the estate of Henry Monck from any other charge, claim, or demand whatsoever that she might have thereon, save and except the several claims hereinbefore set forth." But it is suggested that the present claims were not released, that she did not know of them at the time. When Ann Monck carried in her claims on her own account and as representative of her mother, under the decree in the first cause, she and her solicitor were perfectly aware of the various demands which had been set up by her mother. Counsel had been consulted as to the possibility of maintaining them. It could not therefore have been from inadvertence that they were abandoned, nor is it so pretended by Mr. Murphy's affidavit: it is of no importance whether they were abandoned on the ground that they were unfounded, or that the party interested did not think fit to be at the trouble or expense of seeking for evidence to support them, or that she chose voluntarily to release her brother's estate from them: it is sufficient that having the sole legal and the sole beneficial interest in the subject, she did in fact abandon those claims, in the same manner as she abandoned all claims in her own right beyond those arising under the will of Henry Monck.

On the motion of the Appellant, no order could be made that would have given him any right which he has not without order, and the order, which by his motion he sought to have pronounced, would, if it operated at all, have the effect of altering a decree pronounced thirteen years ago, and enrolled upwards of eleven years ago, and not capable of being reversed or altered; and no reason is given for the delay that has taken place in making the present claims.

[451] Mr. Wigram, in reply:—It is a rule that though the prayer of a bill asks only for general relief, you may afterwards ask for any specific relief; but your Lordships seem to be of opinion that on a notice of motion a party must ask specifically for the relief he wants, lest the other be taken by surprise. As there

was a clear understanding on the other side of what the Appellant meant to ask, I apprehend your Lordships will observe that there is no fear of surprise.

Lord Brougham:—Whatever doubts I may have of the merits of this case on the lapse of time, I have none on the form of the proceedings, the course of which is very manifest. There was, first, a motion before the Master of the Rolls for leave to go before the Master and take the benefit of the decree in the first suit, or, in the alternative, to file a supplemental bill, or for such other relief as the Court may direct, which last words I consider as nothing or, at most, as mere surplusage. The Master of the Rolls refused that motion, he did not grant leave to go before the Master or to file a supplemental bill, nor did he give the Appellant any other relief.

The next thing the Appellant did was to go before the Lord Chancellor, not with an appeal motion, which he might have made, to discharge the order of the Master of the Rolls, which would be opening the two alternatives of the former motion,—it would be a complaint that the Master of the Rolls had not given leave to go in to prove the claims before the Master in ordinary, or to file a supplemental bill,—but, instead of that, the Appellant made another and different application to the Lord Chancellor. It was only "for leave to file a supplemental bill, or for such other relief as the Court may direct." That motion therefore was con-[452]-fined to an application for leave to file a supplemental bill; because I hold it to be perfectly clear that, in case of a prayer for relief appended to a specific motion or intended to be made part of the case, the notice of motion which is intended to apprise the opposite party of what is to be asked, must convey to him something more specific than the general alternative, "such other relief as the Court may direct;" and that, under that prayer, nothing can be given by the Court except what is incidental to the particularity which precedes, and is something short of the whole of that particularity, or, at all events, something *ejusdem generis*. I hold it, therefore, to be clear that under the notice of motion in this case, before the Lord Chancellor, it was not competent to his Lordship to have given leave to go in and prove the claims, that not having been asked for, but only leave to file a supplemental bill, unless,—which sometimes happened before myself in the Court of Chancery,—the other party consents, which would be consenting to the amendment of the motion in Court, and would have been, in effect, consenting to the order asked for, without notice at all. It would have amounted to a waiving of the objection that might be taken for want of notice. That is not, however, pretended to have been done in this case.

That is my opinion on this notice, which is only for leave to file a supplemental bill, taking it as if nothing had passed previously to this notice, and as if no reference had been made to what passed previously. But the case appears still stronger from the reference which is made in the notice to what passed at the Rolls. Coupled with the confining of the notice given before the Lord Chancellor to one of the alternatives, it was exceedingly calculated to mislead and to make [453] it be believed that, upon further consideration, the Appellant had advisedly refrained from asking both of the alternatives, which had been refused at the Rolls, and therefore had confined his application before the Lord Chancellor to one of the alternatives.

From the order of the Lord Chancellor refusing that relief, namely, leave to file a supplemental bill, this appeal has arisen: an appeal against what? Not an appeal against the order refusing leave to go in and prove, but to file a supplemental bill; that is the shape of the case, as it would first seem to come before us; but observing that the case in that shape was not likely to be successful, and finding that it might be held that the Court of Chancery had been right in refusing leave to file a supplemental bill, as contrary to the course of proceeding, and that the decision of your Lordships might be in affirmance of that refusal of leave to file the supplemental bill, the Appellant applies now, for what? That he may have the benefit of the suit and file a bill of review, or institute a new suit after the decree has been made, which is a common case when a bill is dismissed; because if you do not get leave to file another, you are met by the plea of that decree, and therefore the Appellant wishes to avoid the difficulty by having a bill of review. He feels that he has no claim with respect to the supplemental bill, that the Court below was right in having refused to give that unnecessary leave—so unnecessary, that if

this order was to be affirmed, or if it had never been appealed from, the Appellant might just as well file such a bill, and have made an application for any benefit under the suit incidental to the supplemental bill, which he might have filed, as if the Court had given him leave. In this instance, that being the case, the Appellant seems to have mended his hand, [454] and to have been minded to retrace the steps, which he had taken in a wrong direction in Ireland, and instead of making the application here, for leave to file a supplemental bill, he was minded to make an application such as that which he had made before the Master of the Rolls, but not before the Lord Chancellor; namely, for leave to go in and prove the claims. That appears to have been the course which the Appellant has adopted here, but that is not a course in which we can carry him through, because the question before us is, Has or has not the Lord Chancellor in Ireland well decided in refusing leave to file a supplemental bill? And we are of opinion that his Lordship rightly refused that leave in the case before us. I do not wish to be understood, in what I have said, as by any means encouraging the Appellant to file a supplemental bill; for aught I know it is the worst thing he can do. I should rather hope that the parties may settle their differences without a suit. After a lapse of seventeen years from the death of Lady Araminta Monck it will not serve the purpose of the Appellant to say that the delay was caused by want of a personal representative? But who is the personal representative? The Rev. Henry Monck, the Appellant; he took out letters of administration in 1832; he was of age, and might have administered many years ago; the eldest son was of age in 1777; it is very likely that at that time the Appellant also was of mature age. Then why was there no representative? It will hardly do for him to explain the lapse of time, by saying there was no personal representative, for he might have been personal representative during any one of those periods, and he did not choose to make himself so. On all these grounds I have no hesitation in recommending your Lordships to affirm [455] the decision of the Court below, and to affirm it with costs, to be taxed.

Lord Lyndhurst:—I agree with the noble and learned Lord's opinion of the irregularity of this appeal in point of form, and I recollect that Mr. Wigram, in his opening address, was extremely desirous of getting rid of the idea that the decision of the Lord Chancellor was a confirmation of the decision of the Master of the Rolls; because he thought that that might have some effect upon your Lordships' decision, and he therefore took occasion to state that the motions stood in different circumstances; but the whole scope of his subsequent argument was to show that they were the same motions, whereas they were quite different.

With respect to the merits of the case, these claims are claims in a general account. In the year 1802 the original testator died, and Henry Monck did not die until the year 1815. There were thirteen years therefore in which Lady Araminta Monck might have filed a bill for a general account; she never thought proper to do so, and therefore it is not improbable that the result of that general account would not have been advantageous to her.

I think, therefore, upon the whole, that the decision of your Lordships should be to affirm the decision of the Court below, and to affirm it with costs of the appeal.

The order of the Court below was accordingly affirmed, with costs.

[456]

APPEAL

FROM THE COURT OF CHANCERY.

THOMAS FOSTER, GEORGE CLEEVE, and JAMES BAIKIE, Esquires,—*Appellants;* Sir CHARLES COCKERELL, Baronet,—*Respondent.*

[Mews' Dig. i. 331; ix. 1562. S.C. 9 Bli. N.S. 332; and, in Ch., 1 My. and K. 297; 2 L. J. Ch. 84. Explained in *Ward* v. *Duncombe* (1893), A. C. 390, where the principal authorities are collected and examined; and see *In re Wasdale* (1899), 1 Ch. 163.]

A second incumbrancer of an equitable interest, by giving notice of his incum-

brance to the trustees in whom is vested the legal estate, obtains priority over a previous incumbrancer who has not given such notice.

Where there is an appeal against a decision of a Court of Equity, this House may consent to hear the appeal argued, but will not give judgment till the decree of the Court has been duly enrolled.

By indentures of lease and release, 21st and 22d February 1812, George, late Duke of Marlborough, conveyed estates in Berks, Bucks, Wilts and Herts, to certain trustees named in the said indentures, in fee, upon trust to raise monies to pay off annuities before then granted by the Marquis of Blandford, and also, if they thought proper, to pay the specialty or simple contract debts of the Marquis. For these purposes, the trustees were empowered to sell the estates, or in the meantime mortgage them, and to re-purchase the annuities; and, if the trustees should think proper, but not otherwise, to pay the debts of the Marquis, and pay any ultimate surplus of money raised in the life-time of the late Duke to his Grace, and the surplus of money raised after the late Duke's death to the Marquis; and it was declared that the trustees [457] should stand seised of the estates unsold in trust for the late Duke for life, and after his decease, in trust for the Marquis in fee.

By indenture of the 13th August 1812, the trusts were enlarged, and the trustees were empowered to raise money to pay interest of debts, at the time of the date of the release of February 1812, due and owing by the Marquis of Blandford, and also the premiums of insurance on policies effected on his life, for the better securing of such debts. The trustees were also authorised to raise money upon annuities, in order to carry the objects of the deed into effect, and, subject to such trusts, to pay the surplus of monies raised in the life-time of the late Duke to him, and the surplus of monies raised after his decease to the Marquis. This deed also declared the trustees to stand seised of the estates unsold for the late Duke for life, and after his decease, in trust for the Marquis in fee; and it was declared that the trustees might exercise partially or wholly the trusts for paying the debts of the Marquis, at their discretion.

By indentures of the 8th, 12th and 14th June 1813, the Marquis granted to the Appellant, Thomas Foster, an annuity of £447; to the Appellant, George Cleeve, an annuity of £750; and to William Walter, since deceased, and now represented by James Baikie, an annuity of £775. By another indenture of the 14th June 1813, made between the Marquis of Blandford of the first part, Thomas Foster of the second part, George Cleeve of the third part, William Walter of the fourth part, and Edward Howard, as trustee, of the fifth part, after reciting the indentures of the 21st and 22d of February, the 13th of August 1812, and the grants of annuity of the 8th, 12th and 14th June 1813, the Marquis [458] granted to Foster, Cleeve and Walter, powers of distress and entry upon the estates comprised in the indentures of 21st and 22d February 1812, for securing their annuities; and he demised the same estates to Howard, as trustee, for 500 years, for better securing those annuities. The Appellants' annuities were further secured by warrants of attorney, on which judgments were entered as of Michaelmas Term, 1813, and docketed on the 19th of November 1813. Memorials of the four last-stated indentures, by which the three last-mentioned annuities were granted, and of the warrants of attorney securing the same, were duly enrolled on the 28th and 30th days of June 1813.

By an indenture, dated the 10th day of November 1814, and made between the Marquis of Blandford of the one part, and the Respondent, Sir Charles Cockerell, of the other part, after reciting the said indentures of lease and release of the 21st and 22d February 1812, the Marquis of Blandford conveyed, in consideration of a sum of £20,000, to the said Respondent, his heirs, etc., all the manors, messuages, tithes, hereditaments, monies and premises to which the Marquis was then entitled, under the trusts of the said indenture of the 22d of February 1812, with their appurtenances, and all his estate and interest therein, to hold, receive and take the same to the use of the Respondent, his heirs, etc., according to the nature and quality thereof respectively, in as beneficial a manner as the Marquis of Blandford could or might have held and enjoyed the same if the said indenture had not been executed, subject to a proviso for redemption therein contained.

The late Duke of Marlborough departed this life on the 30th of January 1817,

and the Marquis of Blandford succeeded to the title. In March 1819, the Re-[459]-spondent caused notice in writing of the indenture of the 10th of November 1814, and of the Respondent's claims under the same, to be given to the trustees under the previous deeds.

The trustees, in pursuance of the trusts of the deeds of the 21st and 22d of February 1812, sold the manor of Oakley, in the county of Bucks, part of the estates comprised in the indentures, and received the purchase-money thereof, in the life-time of the late Duke, and they disposed of the purchase-money under the trusts vested in them.

After the death of the late Duke, the trustees sold the other estate in the said county of Bucks, called the Shabbington estate, and also the estates in the counties of Herts and Wilts.

The White Knights estate, in the county of Berks, was also contracted to be sold under the direction of the Court of Chancery; but before the sale was completed, the estate was recovered from the trustees by a party claiming a prior title thereto (see *Cockerell* v. *Cholmeley*, *ante*, vol. i. p. 60).

The trustees had a surplus of the purchase-monies, arising from the sales of parts of the estates in Bucks and Wilts, and they invested parts thereof in Exchequer-bills, which they deposited in the hands of their bankers, Messrs. Coutts and Co.

The annuities granted to the Appellants having become greatly in arrear, they filed their bill in the Court of Chancery, as of Michaelmas Term, 1824, against the trustees, the Respondent, and certain other persons, whereby, after stating the grants of the annuities to them, and the deeds creating and securing the same, and stating that the trustees had sold some part of the estates comprised in the said indentures of 21st and 22d of February 1812, in the life-time of the late Duke, and had sold the residue thereof subse-[460]-quently to his death, and that the trustees had satisfied all the trusts preceding the ultimate trust for the payment of the surplus of the trust-monies, it went on to allege, that after satisfying such trusts, the clear surplus of the trust-monies amounted to a very considerable sum, which they had retained in their hands; the bill therefore prayed, that an account might be taken of the estates and hereditaments comprised in the indentures of lease and release of the 21st and 22d of February 1812, and of the rents and purchase-money thereof, received by the trustees, or by any person by their order, or for their use, or which, without their wilful neglect or default, they might have received; and that an account might be taken of the sums paid under the trusts of the indentures, and an account of what was due to the Appellants, respectively, for the arrears of their respective annuities; and that the amount of such arrears might be paid to them respectively, out of the monies which, upon the taking of the account, should be found due from the trustees, and that a sufficient part of the trust-monies might be set apart to meet the future payments of the annuities.

The defendants put in their answer, and the Respondent specially stated, in his answer, his claims under the indenture of the 10th of November 1814, and the notice of such claims given to the trustees in March 1819, and his ignorance of the agreements of the 8th, 12th and 14th of June 1813, or of those annuities or any others being secured upon the estates comprised in the indentures of 1812.

The cause was heard before the Master of the Rolls on the 18th of February 1830, and by the decree made by his Honor, bearing date upon that day, it was referred to the Master to take the accounts prayed by the Bill, and also to take an account of what was due for principal money on the several charges on the [461] estates comprised in the said indentures, distinguishing what was due on each; and to inquire as to the dates of the several and respective charges and incumbrances, and the sums for which the same were given, and the particular premises subject thereto respectively, and the priorities of the respective charges with regard to each other; and further directions were reserved.

The Master, by his general report, dated on the 24th of December 1832, after stating the accounts, and the notice of the Respondent's incumbrances given by the Respondent to the trustees, found that the Appellants were entitled to a priority of claim over the Respondent, in respect of the annuities secured on the estates comprised in the deed of February 1812.

The Respondent took exceptions to this report, and on argument before the

Master of the Rolls (1 Myl. and Keen, 297), his Honor held that, by reason of the notice given to the trustees, the Respondent was entitled to a priority over the Appellants in respect of the rights secured to him by the indenture of the 10th of November 1814; he therefore made an order allowing the exception.

The present was an appeal against that order.

Mr. Treslove and Mr. Tinney for the Appellants:—The equities of the parties here are equal, and there is no ground on which the Respondent can claim a priority over the previous incumbrancers. It is clear that the Respondent, having made no inquiry for incumbrances of the trustees before he took the security, and having given no notice of that security until nearly five years after its date, could not have sustained any injury by the omission of the Appellants to give earlier notice to the trustees of the security which they possessed. Their omission there-[462]-fore does not give him any title to priority in equity. That brings back the question of priority to that of the date of the instruments, and then the case is clearly in favour of the Appellants. The priority of date here gives priority of right. It was held to do so in *Small* v. *Oudley* (2 P. Wms. 427), which was a case of an assignment of part of a stock in trade in favour of a particular creditor, that assignment being only made on the day before the party committed an act of bankruptcy; and the mere want of notice has been distinctly decided not to affect the rights of an incumbrancer prior in point of time. In *Tourville* v. *Naish* (3 P. Wms. 306), Lord Chancellor Talbot held that where the thing assigned is only a chose in action, though the assignment be without notice, yet as no legal estate passes, the first assignment has priority over others. The principle to be deduced from all the cases where a second has been allowed to take priority over a first incumbrancer, amounts to this, that he shall do so only where there is such negligence on the part of the first incumbrancer as amounts to a fraud, *Evans* v. *Bicknell* (6 Ves. 183), *Jones* v. *Gibbons* (9 Ves. 407), *Cooper* v. *Fynmore* (3 Russ. 60), or such as brings the other party into grievous difficulties.—[Lord Lyndhurst (Lord Chancellor): Does not the omission to give notice in such cases, always enable a party to commit a fraud?]—It may or may not do so, but the bare possibility that such a consequence may arise from the omission to give notice, will not of itself defeat the right of a first incumbrancer; nor will the earlier notice of a second incumbrancer have that effect unless there has been a culpable negligence on the part of the first; there has been no such negligence [463] here, and as the Respondent took the security without making any inquiry, it is clear that if the Appellant had given notice, the Respondent would not have been in any better situation on that account, for he did not take the trouble to ask whether any previous incumbrance existed. The case of *Ryall* v. *Rowles* (1 Ves. sen. 348; S. C. 1 Atk. 165) will of course be relied on by the other side. That was a case in bankruptcy, and the expressions used in some of the judgments there are too general. The reports of Mr. Justice Burnett's judgment in Vesey and in Atkins are different from that which was left by that learned Judge himself, and which is to be found in Lincoln's-Inn Library (Hill's Collection, 11 B. fol. 315). That report makes Mr. Justice Burnett say, "Having considered the case of mortgagees of goods, I shall next consider the case of assignments of a share in trade which consists partly of things in action and partly of things in possession; and I shall first consider the three mortgages of a seventh share of the bankrupt's moiety in trade, to three strangers," (for in *Ryall* v. *Rowles* there were several mortgagees of the stock in trade, utensils, debts and profits); "and then I shall consider his assignment of the whole moiety to one in trust for his partner. But before I go into the consideration of this matter, I beg leave shortly to consider the case of a mere chose in action, and the simplest is, that of a bond which is not assignable at law, but which is certainly assignable in equity. And why? but because the assignor can furnish his assignee with the means of reducing it into possession by giving him authority to sue in his name, and putting the bond into his hands to prove the debt. Why, therefore, is not the delivery of these means of reducing a chose in [464] action into possession, as requisite upon such an assignment, as the delivery of the thing on the conveyance of a thing in possession?"—[Lord Lyndhurst (Lord Chancellor): So far that corresponds exactly with the report.]—It does, but we now come to another part. "Suppose then, a trader assigns over a bond debt, and the assignee permits the assignor to continue in possession of the bond, why is not this within the words and intent of the statute? The

assignment is a conveyance of it in equity." That is what the Appellants contend in the present case.

The assignment is a complete conveyance, and the right of the assignee is perfect as against another incumbrancer, though, as in *Ryall* v. *Rowles* [1 Atk. 165; 1 Ves. Sen. 348], it may not be perfect as against the assignees of a bankrupt. Again, Mr. Justice Burnett said, "A share in trade may be a chose in action, which can only pass by assignment, as was the case in *Small* v. *Oudley*, 2 P. Wms. 427, which was held good, though made but the day before the assignor became bankrupt. But that was the assignment of a share in another man's trade, which the assignor himself was not in possession of, consequently could deliver no possession of, nor could continue in possession after assignment." This latter distinction applies precisely to the present case. The right assigned to the Appellants was a bare right, not a thing in possession; the assignor was not in possession of it himself, and consequently could neither, in the words of Mr. Justice Burnett, continue in possession of it, nor deliver possession to another person. So far, therefore, as that case touches the present, it is in favour of the Appellants, but is a case depending altogether on the statutes of bankruptcy, and is not therefore a direct authority on the point. After that case there was no other on the same point **[465]** till the case of *Wright* v. *Lord Dorchester* occurred before Lord Eldon. That case was never deemed important enough to find its way into the reports. It is first mentioned in argument in *Loveridge* v. *Cooper* (3 Russ. 49 n.), and is commented on in the judgment in that case. *Wright* v. *Lord Dorchester* was there treated as a case of little authority, and in fact it was not more than a conditional decision of the cause; for after dissolving the injunction to restrain payment of some money, Lord Eldon required the party in whose favour he had done so to give bond to return the money, in case the decree should finally be made against him. The next case is that of *Cooper* v. *Fynmore* (Id. 60). There it was distinctly laid down, that in order to deprive the first incumbrancer of his priority, it was necessary that there should be such laches as in a court of equity amounted to fraud, and that mere neglect of notice was not sufficient to postpone him. That case was decided in 1814, and then came the cases of *Dearle* v. *Hall* (Id. 1), and *Loveridge* v. *Cooper* (Id. 30). In the latter of these cases Lord Lyndhurst said (Id. 58), "Where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person who in fact is not the owner. This doctrine is not confined to chattels in possession, but extends to choses in action, bonds, etc.; in *Ryall* v. *Rowles* it is expressly applied to bonds, simple contract debts, and other choses in action. It is true that *Ryall* v. *Rowles* was a case in bankruptcy, but the Lord Chancellor called to his assistance Lord Chief Justice Lee, Lord Chief Baron Parker, **[466]** and Mr. Justice Burnett, so that the principle on which the Court there acted must be considered as having received most authoritative sanction. These eminent individuals, and particularly the Lord Chief Baron and Mr. Justice Burnett, did not, in the view which they took of the question before them, confine themselves to the case of bankruptcy, but stated grounds of judgment which are of general application." His Lordship then went on to observe on what was said by Chief Baron Parker as to notice; but it is remarkable that nothing is said in that case by Mr. Justice Burnett on that subject. The observations of the Chief Baron, therefore, must have been uncalled for by the argument or the case, and cannot have great weight attached to them. The authorities, therefore, only go to this extent, that the negligence to give a second incumbrancer priority, must be such as to enable one party to commit a fraud or to bring another into grievous difficulties.—[Lord Lyndhurst: If there is not notice duly given, a man would be enabled to commit a fraud. If the first party gave notice, the second would be on his guard, and the mischief now arising would be prevented.]—But mere negligence is not tantamount to actual mischief. All the generality of expression in *Ryall* v. *Rowles*, referred to by Lord Lyndhurst, in *Loveridge* v. *Cooper*, is not sufficient to carry the doctrine in that case to such an extent. The subsequent incumbrancer, in order to set aside the priority of date, and obtain for himself a priority of equity, must do more than give notice; he must get in the legal estate, *Stanhope* v. *Verney* (2 Eden, 81; Co. Litt. 290; Butler's note, 249). That doctrine was distinctly laid down in *Brace* v. *The Duchess of Marlborough* (2 P. Wms. 491), where it is said, "If **[467]** a third mortgagee buys

in the first mortgage, though it be pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgage; and this the Lord Chief Justice Hale called a plank gained by the third mortgagee, or *tabula in naufragio.*" In *Willoughby* v. *Willoughby* (1 T. R. 768), Lord Hardwicke refers to the doctrine of Lord Cowper in *Wilker* v. *Bodington* (2 Vern. 599), where it was held that where a man is a purchaser for a valuable consideration without notice, he shall not be annoyed in equity, not only where he has a prior legal estate, but where he has a better right to call for that legal estate than his adversary; and adopting that doctrine, he says, that " the legal estate must be so standing out, as that the puisne incumbrancer has not acquired the better or preferable right to call for that legal estate." It is clear that he cannot acquire such right by mere notice to the holders of the legal estate that he is an incumbrancer. This rule was fully adopted by Lord Eldon, in *Maundrell* v. *Maundrell* (10 Ves. 264), where he said, " With respect to mortgagees and incumbrancers, if they do not get in the term in some sense, either by taking an assignment or making the trustee a party to the instrument, or taking possession of the deed creating the term, that term cannot be used to protect them." Nothing of that sort was done here, and the only priority between the parties is, that of the date of their incumbrances. In *Frere* v. *Moore* (8 Price, 475) the plaintiff became the mortgagee of a prebend, the legal estate in such prebend being in a trustee, and in the mortgage the trustee covenanted to stand possessed, subject [468] to a prior mortgage, for securing to the plaintiff payment of the sum there stated, and subject thereto to the use of such persons as the mortgagor should appoint. The mortgagor afterwards appointed the trustee to stand possessed for other persons. The second mortgagee had notice of the first mortgage. None of the mortgagees got in the legal estate. It was held, that as they had all equal equities, the incumbrances were available only according to the priorities of their several dates, and that the covenant as to the first mortgagee to stand possessed could not be held equivalent to an assignment, or to a getting in of the legal estate, which, however, either of the mortgagees might have done, and thus obtained a priority. In this state the law remained till the decision of the case of *Cooper* v. *Fynmore* (3 Russ. 60), by which the matter was for the first time definitively settled. Now that case expressly decided that mere neglect of notice was not sufficient to postpone a prior incumbrancer, but that to produce that effect, there must be such laches as would amount to fraud.—[Lord Lyndhurst: The cases of *Dearle* v. *Hall* [3 Russ. 1] and *Cooper* v. *Fynmore* are certainly at variance with each other, for the inquiry as to prior incumbrances was made in both of those cases; one of them, therefore, must be taken as overruling the other.]—Not precisely so, for in *Dearle* v. *Hall* Sir T. Plumer will be found throughout relying upon the delay in the two first incumbrancers to give notice to the trustees as having occasioned a great practical mischief to Hall, who had used every possible means to acquire a full knowledge of the property and the title to it (Id. 15); that case therefore, in substance, supports the doctrine now contended for. No such objection arises here, and the delay of the Respondent has [469] been as great, and as likely to produce mischief, as that of which the Appellants are accused. There are four modes by which the assignee of an interest of this kind can completely protect himself; first, by getting in the legal estate for himself; secondly, by procuring an express declaration of the trustee that he holds as trustee for the assignee; thirdly, by making the trustee a party to the deed of assignment; and fourthly, by getting possession of the deed itself, and so defeating the purchaser at law or getting an advantage from him of which equity will not then deprive the assignee.—[Lord Lyndhurst: Suppose the party signs a bond, and the assignee procures it to be delivered; will he, from holding the bond, be entitled to priority?]—He will.—[Lord Lyndhurst: And is not a notice the same thing in effect?]—It is not; *Wilker* v. *Bodington* (2 Vern. 599). There must be something beyond the mere custody of the deeds to give a subsequent incumbrancer an advantage over one prior in date. In *Stanhope* v. *Lord Verney* (2 Eden, 81; Co. Litt. 290 b. (note 249) sect. xv.), that rule was acted on. Lord Chancellor Northington there said, " I am of opinion that I cannot, consistently with the rules and maxims of this Court, or without taking lands *ex commercio*, relieve the plaintiffs, for no man can purchase lands but by advice of counsel, and if you cannot safely purchase with the legal

estate, counsel cannot advise you, and you cannot purchase at all." He therefore held, that not the custody of deeds alone, but the custody of deeds creating a term, accompanied by a declaration of the trust of it in favour of a second incumbrancer, without notice of the prior mortgage, gave him an advantage over the prior incumbrancer, [470] of which a court of equity would not deprive him. There he required the two circumstances to be united in one person in order to give this advantage. In the case of an equitable interest in land, the date of the security decides the question of priority, except there be fraud in the transaction, *Beckett* v. *Cordley* (1 Bro. Ch. Cas. 353). This decision of Lord Thurlow has been repeatedly mentioned with great respect by Lord Eldon (*ex parte* Cawthorne, 1 Glyn and J. 243; *Evans* v. *Bicknell*, Ves. 192; and *Martinez* v. *Cooper*, 2 Russ. 214). All the cases, therefore, show that to defeat the priority of date in equitable incumbrances, there must on the one side be fraud or on the other a possession of the legal estate. To act upon a different rule, and to allow, on the mere ground of notice, a superiority to a subsequent equitable incumbrancer, where the law would not give him any superiority of legal rights, would be to destroy the settled practice of the courts, and to introduce a new course of proceeding, in contradiction to all the authorities. There is no pretence for charging fraud here as against the Appellants, nor is there any ground for saying that the Respondent obtained possession of the legal estate, and so entitled himself to a priority over a more early incumbrancer.

Mr. Pemberton and Mr. Cockerell for the Respondent:—It is unnecessary to go into any consideration of the cases previous to those of *Dearle* v. *Hall* [3 Russ. 1], and *Loveridge* v. *Cooper* [3 Russ. 30], for in them the law was fully considered and settled. The principles adopted in those cases must be acted upon in the present. It is not denied that the general rule in equity is, that he who is first in time is first in equity. The argument on the other side proceeds altogether on the pre-[471]-sumption, that there is an analogy between real estate and a chose in action. That argument is completely destroyed by the authority of *Ryall* v. *Rowles* [1 Ves. Sen. 348; 1 Atk. 165]. A chose in action cannot pass by assignment, which gives no right *in rem* till, by notice to the trustees, the validity of that assignment is perfected, or till delivery has been made. Taking that to be the rule, who had the first perfect title in this case? The Respondent; for it was he that first gave notice to the trustee. The rule as to priority is, in fact, therefore in his favour. There is no ground of merit on which one party is preferred to another; he does that which is necessary to perfect his own title, and to prevent any fraud towards those who may come after him. The Respondent is said to have been guilty of laches. That accusation more properly applies to the Appellants, who did not give any notice to the trustees till after it had been given by the Respondent; and the latter gave it as soon as it was found that there was any person in whose hands the money could be attached. The Respondent here has not only the authority of Sir T. Plumer, in *Dearle* v. *Hall*, and *Loveridge* v. *Cooper*, and that of Lord Lyndhurst, who confirmed the decision in those cases, but that of the Court of Exchequer, in *Hulton* v. *Sandys* (1 Younge, 602). In that case an annuity was secured by a charge on certain stocks standing in the name of trustees, and on an assignment of the dividends of the stock, but the grantee omitted to give notice to the trustees; the grantee of an annuity subsequently created was in consequence preferred to him. Nothing was said in that case of anything except the want of notice, it being distinctly held, that notice to the trustees was [472] necessary to perfect the title of the assignee of a chose in action. That case alone, therefore, is decisive of the question.—[Lord Lyndhurst: In the case in the Exchequer this point was merely mentioned; it was not argued.]—It was merely mentioned, and the parties at once acquiesced in it, which is a strong confirmation of the opinion of the profession as to its correctness. The rule clearly is, that they who first give notice are first in point of time, and, therefore, have priority in equity. There have been several recent cases in which the doctrine in *Dearle* v. *Hall* [3 Russ. 1] and *Loveridge* v. *Cooper* [3 Russ. 30] has been recognised. In *Williams* v. *Thorpe* (2 Sim. 257) it was held that the assignment of a policy of insurance on a life would not take it out of the order and disposition of the assignor, if no notice of the assignment was given to the insurers; and in *Ex parte* Colvill (Mont. 110) it was decided that an assignment of a policy without notice to the office would not prevent the operation of the clause of reputed ownership; and it has been held that the payment

of the annual premium by the agent of the assignee, who in the course of conversation with one of the clerks in the office told him that the policy had been assigned, did not amount to notice. It is clear, therefore, not merely that notice is required, but that the notice should be distinct and unequivocal. Again, in *Greening* v. *Beckford* (5 Sim. 195), A. was entitled to a reversionary interest in a fund in court, and assigned it first to B. and afterwards to C. An order was obtained by C. and entered at the Accountant-general's Office, directing that the fund should not be transferred without notice to him, and it was held that this gave him a priority over B., who had not taken similar precautions. The principle, therefore, on which the [473] courts have hitherto acted is clear, and this case has been decided in the court below upon that principle. There is no question as to comparative negligence; the party who omits to give notice, omits to complete his title; when he gives notice, he makes his title complete, and the person whose title is first complete, is the person to be considered as the prior incumbrancer. This is, and always has been, the acknowledged doctrine of courts of equity, and their decisions have always proceeded on this principle. Unless this appeal is dismissed, the regular course of decisions will be quite altered, and a new rule, dangerous in itself and inconvenient to all parties, will be introduced.

Mr. Treslove, in reply:—The argument on the other side is put on the single point, that to perfect the assignment of a chose in action notice is necessary. But that is not warranted by any direct authority. The case of *Ryall* v. *Rowles* [1 Ves. Sen. 348; 1 Atk. 165] does not go to that extent, and large as may be the expressions of some of the Judges there, or of Sir T. Plumer, in *Dearle* v. *Hall* [3 Russ. 1], and *Loveridge* v. *Cooper* [3 Russ. 30], they do not establish such a doctrine. *Ryall* v. *Rowles* can only properly be applied to a case of bankruptcy. What the Respondent has done here may give him a better title, as against an incumbrancer subsequent to himself, but can give him no priority as against an incumbrance of an earlier date. That was the view which even the Master of the Rolls took of the present case when it was before him. He said (1 Myl. and K. 306), "A better equity is, where a second incumbrancer, without notice, takes a protection against a subsequent incumbrancer, which the prior incumbrancer has neglected to take: thus a declaration of [474] trust of an outstanding term, accompanied by delivery of the deeds creating and continuing the term, gives a better equity than a mere declaration of trust to a prior incumbrancer." That shows that if giving notice is like taking possession, it is a taking of possession against a subsequent, not a prior incumbrancer. The judgment of the Master of the Rolls in this case was, therefore, founded on the analogy between an assignment of an interest like this and an assignment of real property; yet the argument on the other side proceeds altogether on the denial of such an analogy. The doctrine now contended for, that a title under an equitable assignment cannot be perfect without notice, was not that of Sir T. Jekyll, of Lord Hardwicke, or of Lord Eldon, and ought not to be now, for the first time, introduced into the law by the decision of this House.

Lord Lyndhurst inquired if the decree of the Court below was enrolled.

The solicitor for the Appellants answered that it was not.

The cases of *Barton* v. *Bateman* (2 Bro. P. C. 275), and *Conyngham* v. *Conyngham* (Ambl. 91. S. C. Dick. 145), were referred to, in both of which it was said that no appeal would lie to the Lords till the decree had been enrolled.*

Lord Lyndhurst (Chancellor):—We will pronounce judgment when the decree has been enrolled.

Lord Lyndhurst, in moving for judgment, said:—This is a case which was argued some time since, and [475] on which your Lordships had pretty well made up your minds at the time of the argument. It appeared, however, that the decree of the Court below had not been enrolled, and judgment was therefore postponed. The parties have since enrolled the decree, and the cause is now in such a situation that your Lordships may proceed to give judgment upon it.

* But see *Moore* v. *Blake*, 4 Dow. 239, where after argument before Lords Eldon and Redesdale, "it appeared that the decree below had not been made up, and the judgment was delayed till the defect should be rectified."

The question in the cause was one of the right of priority, as between two incumbrancers, namely, whether the subsequent incumbrancer in equity, having given notice to the trustees, was entitled to priority over a former equitable incumbrancer. That question seems to me to have been settled, after much deliberate discussion, in two cases: in the case of *Dearle* v. *Hall* [3 Russ. 1], and in the case of *Loveridge* v. *Cooper* [3 Russ. 30]. These cases were very learnedly and carefully argued before Sir Thomas Plumer, as Master of the Rolls. The Master of the Rolls, after taking time to consider them, pronounced, in each, a very elaborate judgment, in which he most distinctly recognised the principle, that a party who first gives notice to the trustees of an incumbrance created in his favour over the trust property, is entitled to a priority in equity. Without adverting to the particular facts of those cases, the reason on which his Honor adopted that principle as the rule for his decision seems to have been, that if a contrary doctrine was allowed to prevail, it would enable a *cestui que trust* to commit a fraud, by enabling him to assign his interest, first to one, and then to a second incumbrancer, and perhaps, indeed, to a great many more; and these later incumbrancers would have no opportunity of ascertaining, by any communication with the trustees, whether or not there had been a prior assignment of **[476]** the interest, on the security of which they were relying for provision for their claims.

Another principle, acted upon by the Master of the Rolls, was, that a party, till he gave notice to the trustees, had not done everything that was necessary to complete his title. I fully agree with that principle. In a case of this sort it is necessary that a party claiming advantage from a title, should do everything that is requisite to complete that title before he sets up a claim in respect of it. The Master of the Rolls was also of opinion, that the trustees themselves were entitled to notice on their own account; and, that till notice was given to the trustees, they did not, in fact, become trustees for the assignee. It was upon these distinct grounds that he laid it down as a general principle, that in the case of an equitable assignment the party, who was the earlier incumbrancer in point of date, was not entitled to priority if he did not give notice; but such priority was justly to be conceded to a party giving notice to the trustees, although such party was, according to the date of the assignment, only a second incumbrancer.

These cases afterwards came before me when I had the honour of presiding in the Court of Chancery, and they were again argued with great ability and great attention to the subject. I took time to consider the judgment, and after mature deliberation felt satisfied that the decision of the Master of the Rolls in each case was a correct judgment, and that it was my duty to affirm the judgment in each. We come, then, to the present case, and in my opinion the principle on which the decisions in those cases proceeded applies directly to the present. Here are two incumbrancers of an equitable interest. The latter **[477]** gave notice to the trustees, the former neglected to do so till long afterwards. This case came before the late Master of the Rolls (Sir John Leach). His Honor referred to and considered the decisions I have just noticed, and being of opinion that they were correct and that he was bound by their authority, he pronounced his own judgment in conformity with them, and gave to the second incumbrancer with notice a priority over the first incumbrancer without notice. Under these circumstances, therefore, I think your Lordships will be of opinion that that decision so pronounced upon these principles was correct, and I therefore move that the judgment in this case be affirmed; and considering that the point now subjected to appeal has already been decided more than once, after deliberate argument in the Court below, I think that your Lordships will also be of opinion that this judgment ought to be affirmed with costs.

Lord Brougham: I agree with my noble and learned friend as to this case. This case was decided in the Court below, upon the principle of the two former cases in the Rolls, and the discussion here has brought under the view of your Lordships the judgments in *Dearle* v. *Hall* [3 Russ. 1] and *Loveridge* v. *Cooper* [3 Russ. 30]. With the decisions in those cases I perfectly agree, and it is not only my opinion that this case ought to be decided by them, because the principle laid down in those to which I have referred strictly applies to this case, and because there is nothing in the facts of the present case to prevent the application of that principle, but also because I am of opinion, that if those cases of *Dearle* v. *Hall* and *Loveridge* v. *Cooper* were now

before your Lord-[478]-ships by appeal, they ought to be declared to have been well decided, and ought to be affirmed. It seems to me that the true principle which ought to govern courts of equity was taken in those cases, according not only to the analogy of established decisions, but according to the rules which have been formally and distinctly laid down, and which make those cases not cases of the first impression, but cases which have proceeded upon well-defined and well-settled rules of equity. I entirely agree that this judgment of the Master of the Rolls should be affirmed, and that there was no such reasonable ground for appeal here as to entitle the Appellant to escape without paying the costs.

Decree affirmed, and appeal dismissed with costs.

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[479]

APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

The Right Hon. the Earl of BANDON,—*Appellant;* HENRY BECHER, Esq.,—*Respondent.*

[Mews' Dig. vii. 361, 363; ix. 309. S.C. 9 Bli. N.S. 532. See *Shedden* v. *Patrick*, 1854, 1 Macq. 594; and *Ellis* v. *M'Henry*, 1871, L.R. 6 C.P. p. 239.]

Though the Court of Chancery cannot review or correct a decree of the Court of Exchequer, yet where such decree has been obtained collusively and fraudulently, a party whose interests are affected by it, may raise, in the Court of Chancery, either as actor or defender, a question as to its validity.

Where sales of estates had fraudulently taken place under decrees of the Court of Exchequer in Ireland, obtained by collusion between the tenant for life, the mortgagee, the person in whose favour a charge had been created, and the purchaser, and where the interests of the tenant in remainder had not been protected in such suits, the Court of Chancery in Ireland, on his coming into possession, granted him relief on a bill filed to redeem. That decree was affirmed by the Lords.

The fraudulent sales had been made by the first tenant for life; his son died in his lifetime: the tenancy for life continued to exist for above 35 years after these fraudulent sales. On the tenant in remainder becoming entitled, he filed a bill to redeem. HELD by the Court below, and affirmed by the Lords, that he was not barred by the lapse of time.

Henry Becher, formerly of Creagh, in the county of Cork, Esq., being seised in fee of certain lands in that county, executed a mortgage, dated 14th October 1737, whereby he granted and released unto Samuel Townsend, his heirs and assigns, all those the lands of Killeenleagh, Lassanaroe, Cappamore and Cahergall, [480] situate in the barony of West Carberry and county of Cork; subject to redemption on payment of the sum of £1000, with interest.

Henry Becher being entitled to the equity of redemption of these mortgaged premises, and being seised in fee of several other lands, etc., died in 1738, leaving John Becher (Respondent's great grandfather) his eldest son and heir-at-law, who thereupon entered into possession of the said hereditaments, subject, as to said lands of Lassanaroe, amongst others, to the said mortgage for £1000. Previous to John Becher's marriage with Miss Frances Hedges, by certain indentures of lease and release of 26th and 27th March 1740, the release made between himself of the first part, Richard Hedges and said Frances Hedges of the second part, the Honourable Charles Annesley and Samuel Townsend of the third part, and Richard Tonson and Richard Eyre of the fourth part, John Becher, in consideration of his intended marriage and of £5600, the marriage portion, conveyed unto Annesley and Townsend, and their heirs, certain lands in the county of Cork, among which were some known by the names of Ardentenant, Balteenoughtra, Ballyourane, Barnitonicane, Caherolickenny, Mauldenny, Derrynalamane, Dunkelly, Keelbronoge, Lassanaroe, Rathcool, Ratourah, Letterscanlan, etc., upon trust

as to part of said lands, to the use of John Becher, until the marriage, then upon other trusts for limited purposes, then to the use of John Becher for life, and then to trustees, to preserve contingent remainders. A jointure of £500 a-year was secured to Frances Hedges, and a term of ninety-nine years was vested in trustees, and, subject thereto, the lands were conveyed to the use of the first and other sons of the said John Becher by said Frances Hedges successively in tail male. In [481] default of issue, the ultimate remainder in fee was to revert to John Becher. The term of ninety-nine years was declared to be vested in the trustees, to raise by sale or mortgage £5000 for younger children, in such shares as John Becher should appoint.

The marriage between the said John Becher and Frances Hedges took place, and the issue thereof were two sons and two daughters, viz. Richard Becher, the eldest son, and who was grandfather of Respondent; Michael Becher, the second son; Jane Becher, afterwards the wife of Daniel O'Donovan; and Elizabeth Becher, afterwards the wife of William Evans.

By a settlement on the marriage of Daniel O'Donovan and Jane Becher, dated on the 2d of April 1763, John Becher, pursuant to the power in the settlement of 27th March 1740, appointed £2000, part of the £5000, to Jane Becher, to bear interest from 2d April 1763, at £5 per cent. An assignment thereof was made to trustees, upon trust to pay the interest to O'Donovan for his life, and after his death to pay over the principal for the younger children of the marriage, in such shares and at such times as Daniel O'Donovan should appoint. It was further declared that the principal sum should not be raised out of the real estates of John Becher during his life.

Richard Becher, seised of an estate in tail male, expectant on the death of his father, attained 21 in 1768; and his father having occasion to borrow £2300, applied to Richard Wright for the purpose, and having obtained from him a loan to that amount, the father and son, on the 18th January 1768, joined in a mortgage in fee to Richard Wright for £2300. The mortgage extended over the lands comprised in the settlement of 27th March 1740. There was also a covenant by John and Richard Becher to suffer [482] a recovery to the use of Richard Wright, these securities being subject to redemption on payment of principal and interest. The recovery was to enure, after the payment of the mortgage-money, to such uses as John and Richard Becher should by deed appoint; and in default of, and until such appointment, to the uses of the settlement of 26th and 27th March 1740. A recovery, as of Easter Term 1768, was suffered accordingly. On the 17th September 1768, a deed, declaring further uses of the recovery, was executed, and the uses were declared to be to John Becher for life, to Richard Becher for life, to trustees to preserve, etc., with a power in Richard Becher to jointure, and then to the first and other sons of the said Richard Becher successively in tail male. There was a proviso that any mortgage or judgment obtained previous to the execution of the deed was not to be affected thereby.

On the 9th September 1769, a settlement was made on the marriage of Richard Becher with Letitia Hungerford, by which John and Richard Becher conveyed to trustees the lands comprised in the settlement of 1740, and in the deeds of 18th January and 17th September 1768, to hold to the use of John Becher for life, to Richard Becher for life, to trustees to preserve, etc., and (subject to a jointure of £300 per annum for Letitia Hungerford, and also to a term of 500 years for a provision of £5000 for younger children) to the first and other sons of the said Richard Becher successively in tail male; and in default of such issue to John and Richard Becher, according to their respective estates therein at the time of executing said deed. The deed of 9th September 1769 revoked the uses of the deed of 17th September 1768. The issue of the marriage of Richard Becher with Letitia Hungerford were John Becher, Respondent's father, the eldest son; Henry Becher and Frances Becher, younger children. The [483] two latter became entitled to £5000 as their portion under the marriage settlement of their parents.

John Becher, Respondent's great grandfather, married, 2dly, Barbara Townsend; and, 3dly, Barbara Hungerford; and on the 28th October 1769 made his will, by which he appointed, under the powers of the settlement of 27th March 1740, £2000, part of £3000 (remainder of £5000) to his daughter Elizabeth, and £1000 to his second son, Michael Becher. John Becher died on 19th February 1778, leaving

his widow, his first and second sons, and his two daughters surviving. His will was proved by the Respondent's grandfather.

Michael Becher died in November 1778, having, by his will dated 7th April 1778, bequeathed unto his brother, Richard Becher, his share of the sum of £5000, and appointed him executor.

Daniel O'Donovan died in 1778, and by his will, dated 22d December 1777, appointed the £2000 to his younger children, equally to be divided between them share and share alike.

Richard Becher (Respondent's grandfather) having survived his wife Letitia, married Mary Alleyn, and by deed, dated 25th August 1779, after reciting the settlement of the 27th March 1740, and the will of Michael Becher, Richard Becher, for the considerations therein mentioned, did grant and make over unto Dean French and Richard Boyle Townsend, the trustees, the said sum of £1000, upon trust that they should raise the same and pay it over to the sons or daughters of him the said Richard Becher and Mary Alleyn. Two sons and seven daughters were the issue of this marriage.

The £1000 so due on the foot of the deed of mortgage of the 14th of October 1737, became, and is now, **[484]** vested in the Respondent's uncle, Henry Becher, and is a subsisting incumbrance, upon which the Respondent continues to pay interest. The lands of Lassanaroe, included in this mortgage, were sold to James Bernard for payment of a subsequent charge, as if this incumbrance did not exist.

The £1000 appointed by John Becher the elder for his son Michael, is a subsisting charge upon the estates, and is vested in the surviving trustee named in said settlement of 25th August 1779, and the Respondent pays interest for the same.

Henry Becher and Frances Becher, now Hungerford, who were born previously to 1777, and were the only younger children of Richard Becher and Letitia his wife, became, under the provisions of the settlement of 9th September 1769, entitled to the £5000 in equal shares. They are now living.

Elizabeth Becher intermarried with William Evans, of Kilkeran, in the county of Cork, esquire, on 2d September 1777.

After the decease of John Becher the elder, and upon the commencement of the term of 99 years, William Evans and Elizabeth his wife, exhibited their bill on the equity side of the Exchequer in Ireland, on 9th February 1779, against Richard Becher, and against his sons John and Henry, both then minors, (but omitting their sister Frances, though born some years before,) and against the surviving trustees of the respective terms of 99 years and 500 years for raising the portions of the younger children of Richard Becher and Letitia his wife, and also against Richard and John Townsend, the trustees named in the deeds of 17th September 1768, and 9th September 1769; and the bill (amongst other things) set forth the settlement of March 1740, and the limitations of said term of 99 years, and the trusts thereof; **[485]** and that the marriage took effect, and that there was issue thereof Richard Becher, Respondent's grandfather, Michael, Jean and Elizabeth; and also stating the settlement of the 9th September 1769 on the marriage of said Richard Becher with Letitia Hungerford, and the said trust-term thereby created for securing the £5000 as a provision for the younger children of the marriage; and that there was issue of that marriage John Becher and Henry Becher; and the bill prayed that Richard Becher might be decreed to pay the £2000 (part of the £5000 to be raised under the settlement of 1740, and referred to in the will of John Becher made in October 1769), with interest at £5 per cent., until the death of John Becher the elder, and also with legal interest from the death of the said John Becher to William Evans and Elizabeth his wife, at a short day, or, in default thereof, that the said premises, being those comprised in the said respective deeds of 27th March 1740, 18th January 1768, and 9th September 1769, or a competent part thereof, might be set up and sold for the remainder of the trust-term of 99 years, for the payment of plaintiffs' demand, and that a receiver might be appointed.

Richard Becher, on 3d February 1780, answered the said bill.

The defendants, the trustees of the two terms, also filed answers to said bill; and Richard Becher, on 9th November 1781, filed a further answer in the cause; and John Becher and Henry Becher, (Respondent's father and uncle), being then infants, on 21st March 1782 (by John Macartney, esq., the Deputy Remembrancer of

the Court of Exchequer,) filed their answers to said bill, and thereby stated they were total strangers to the charges and allegations therein mentioned.

[486] Issue having been joined in this cause, witnesses were examined on the part of the plaintiffs only; and the cause having been set down to be heard, it was, on 1st June 1782, ordered that it should be referred to the Remembrancer to state an account of what was due to the plaintiffs for principal and interest under the deed of settlement of 27th March 1740, and the will of John Becher, calculating the interest at the rate of £5 per cent. per annum, to the time of the death of the said John Becher, and at the rate of £6 per cent. per annum from thence to the day of pronouncing the decree. The Chief Remembrancer, or his deputy, having proceeded to take the account, by his report, dated 8th November 1782, found that the plaintiffs had filed their charge, but that no discharge was filed thereto, nor was there any attendance on behalf of any of the defendants; and that there was due to the plaintiffs for principal and interest up to 19th June 1782, £2566 6s. 5d. The cause having been set down for further directions, was heard on 16th November 1782; when it was ordered, that the officer of the Court of Exchequer should then, in open court, tot up the interest on the said principal sum of £2000 from the said 19th June (being the time interest was computed to in said report) up to the 15th November then next instant, being the time of confirming the said report; and the same having been calculated, the whole was found to amount to £2615 5s. 8d. And it was further ordered, that Richard Becher, the defendant in the cause, should pay unto the plaintiffs, within six calendar months from 16th November 1782, the said last-mentioned sum, with interest from the date of the last decree until paid, together with costs; or, in default thereof, that the Chief Remembrancer should sell by public cant, to the highest and fairest bidder, a competent [487] part of the lands and premises comprised in the trust-term of 99 years; and that out of the money arising by such sale he was to pay unto the plaintiffs their principal, interest and costs; and the remainder, if any, he was to pay over to the defendant Richard Becher, upon his making out a good title to such person as should be declared the purchaser of such lands and premises.

The decree was duly enrolled, and was signed by Stawell Webb, since deceased, as attorney for the plaintiffs; by Robert Reeves, as attorney for the defendants John Becher, Henry Becher, and the trustees; and by Benjamin Swayne, as attorney for Robert Hedges; but no attorney or person signed the same on behalf of the defendant Richard Becher.

On the 9th of June 1781 another bill was exhibited on the equity side of the Court of Exchequer, in the name of Richard Wright, the mortgagee, against Richard Becher, Respondent's grandfather, and Barbara his wife, and against John Becher, his eldest son, the father of Respondent, then a minor, and Henry Becher, the second son of the said Richard Becher, also a minor, and against two of the trustees; and the bill was afterwards amended. It stated the mortgage-deed of 18th January 1768, for securing £2300; an endorsement thereon, dated 25th March 1768, acknowledging the receipt by John Becher the elder of an additional sum of £700 from Wright; the settlement of the 9th September 1769, and the limitations thereby made as to estates so settled; and after further stating that the principal sum of £2300, and the said £700, with considerable arrears of interest, were due, it prayed that the officer of the Court should tot up what should appear to be due to Wright for principal, [488] interest and costs, and that the defendants in the cause might be decreed to pay the same to the plaintiff, by a short day, to be appointed by the said Court, and in default thereof, that the defendants Richard Becher and John Becher, and all other persons claiming under the said John Becher deceased, and under the said defendant Richard Becher, or either of them, might be foreclosed, and that the mortgaged premises might be sold.

Richard Becher answered the bill for himself and for his infant son John Becher, on the 9th November 1781; but all the other defendants, including Henry Becher, the infant brother of John Becher, were struck out as parties, and were not named parties in the title of the decree; and the cause having been set down for hearing, it was, on the 21st February 1782, heard, and referred to the Chief Remembrancer to state an account of what was due to Wright for principal, interest, and costs. This decree cannot be found among the records of the Court of Exchequer.

The Chief Remembrancer made his report, finding £3583 2s. 7½d. to be due,

and this report was confirmed: and Richard Becher and John, his son, were ordered, within six months from the 8th of May 1782, to pay the same with costs, or, in default of payment, the Chief Remembrancer was ordered to sell by public cant, to the highest bidder, the several lands and premises comprised in the deeds of 27th March 1740 and 9th September 1769 mentioned, or a competent part thereof; and that out of the money arising from such sale, he was, in the first place, to pay the plaintiff his principal, interest and costs, and the remainder, if any, he was to pay over unto the defendants, or unto such of them as should appear entitled thereto, upon their making out a good title to such person as should become the purchaser of the said [489] land and premises. This decree was signed on behalf of the said plaintiff by Thomas Barter, as his attorney, and on behalf of the said Richard Becher and John Becher by John Denis, as their attorney.

John O'Donovan, Jane O'Donovan, and Helen O'Donovan, minors, by Jane O'Donovan, their mother and next friend, on the 12th March 1785, likewise exhibited their bill in the Exchequer against Richard Becher (Respondent's grandfather), and against John Becher (Respondent's father) and Henry Becher, who were both minors, and against the trustees, and after stating the deed of the 27th March 1740 and the indenture of 2d April 1763, made upon the marriage of the said Daniel O'Donovan with Jane Becher, and the will of O'Donovan, and also the deed of 9th September 1769, prayed that Richard Becher might pay the £2000, with interest thereon, or, in default thereof, that the lands comprised in the said trust-term might be sold for the remainder of the term of ninety-nine years, and that the plaintiffs should be paid their demand out of the produce of such sale.

Answers were put in by all the defendants, except Richard Becher, as to whom the bill was ordered to be taken as confessed, and it was decreed that the plaintiffs were entitled to £2000, with interest; and a reference, to take an account of the sum due, was directed.

The Deputy Remembrancer made his report, stating that no person had attended him on behalf of the defendants; that he found £2480 18s. 2d. to be due, and a similar decree was then made in this as in the other causes. Stowell Webb signed this decree as attorney for the plaintiffs.

Four separate sales were effected under the decrees in the said three causes.

[490] At the first sale, on the 17th of May 1783, Thomas Brown, John O'Malley and John Terry Morgan were the bidders for the several sums of £5000, £5500 and £6450, as the purchase money of the thirteen denominations of land formerly mentioned; Morgan was declared the purchaser. On the 20th of May 1783, being only three days after this sale, a consent was entered into, in the cause of *Wright* v. *Becher*, as follows, viz.: "By consent of the parties, plaintiff and defendants, in this cause, testified by their attornies signing hereof, as also of John Terry Morgan, esq., the purchaser on the last sale in this cause, it is hereby agreed that the said sale be and is hereby set aside, and that the said lands and premises shall be again advertised, and set up by the officer for sale on Monday the 2d day of June next; and that this consent may be received and made the order of this court. Dated this 20th day of May 1783. (Signed) Thomas Barter, attorney for the plaintiff: John Dennis, attorney for the defendants; John Terry Morgan."

This consent was made a rule of Court, by order dated 2d June 1783, and under this rule of Court of 2d June 1783, the second sale was had.

At this second sale, which took place on the day of the date of the order (viz. 2d June 1783), the same lands sold to Morgan at the first sale were again put up, together with two other denominations.

The sale was kept open for a long time, and on 20th June 1783, John Terry Morgan made a bidding of £7000; and on 3d July 1783 he was declared purchaser; the persons bidding against him for some of the lands being William Honnor, John Milward, and John Dennis. John Becher, the Respondent's father, died on the 21st February 1820, leaving Richard Becher, the Respondent's grandfather, still [491] living, and tenant for life of the estates to which the Respondent was entitled in tail male under the settlement of 1769. The Respondent was also entitled to the equity of redemption of the mortgaged estates. Richard Becher, the Respondent's grandfather, died on the 8th of February 1825.

The Respondent filed his bill in the Court of Chancery on the 1st of May 1828

against the Appellant and others, stating all the circumstances already set forth, and alleging that Richard Becher (Respondent's grandfather) was a person of very extravagant habits, and was often in pecuniary difficulties; that James Bernard, at the time of the Exchequer decrees, was a banker, having great command of money; that a close intimacy existed between Richard Becher and James Bernard; that James Bernard well knew Richard Becher's pecuniary difficulties and his property; and that James Bernard, by sales improperly conducted, under these decrees got possession of thirteen denominations of the lands thus ordered to be sold.

There were allegations in the Respondent's bill that some or all of these parties were mere instruments in the hands of the persons then affecting to prosecute the suits, and to compel the sale of the estates; that the tenant for life joined in these proceedings, and fraudulently assisted in a sale in which the interests of those in remainder were totally disregarded, and that the whole proceeding was therefore tainted with fraud and could not be supported. Many circumstances were stated as showing that James Bernard was a party to this fraud on the rights of the remainder-man; such, for instance, as that there were several sales, at different times, of various portions of the property, the sales being set aside by consents entered into by the parties themselves; that there were no real bidders at these sales, [492] but only the attornies or the clerks of the attornies employed for the parties or for James Bernard; that the sales were excessive, being sales of property far greater in amount than would have been required to satisfy the judgments in the suits in which the sales were directed; that promissory notes were ordered to be taken in lieu of money, by the consent of the solicitors; that these consents were permitted by the Court, though the tenant in tail was an infant; that the £7000, the produce of the second sale, was applied by fraudulent consents to the benefit of the tenant for life alone. It was also alleged, that after the second sale, in June 1783, there was a surplus of £1800 beyond the charges; that the lands sold to James Bernard were conveyed by the tenant for life to him in fee, but that the tenant in tail was no party to the conveyance; that there was a further sale of lands for £1800, and a conveyance to James Bernard in fee of the said lands; that the tenant for life and mortgagee were the only parties thereto, and that James Bernard entered into possession of all the lands, but did not pay the £1800, nor any rent or interest, and had possession delivered to him by consent. On the 13th February 1784, James Bernard, on the marriage of his son, Francis Bernard, afterwards created Earl of Bandon, settled the lands thus purchased on his son in strict settlement; but James Bernard did not rest satisfied with his title to the estates thus acquired; and on the 14th May 1785, another consent was entered into to set aside the last sale and have another. It was further alleged, that only two months before the last consent, Webb filed O'Donovan's bill to exhaust the £1800 purchase money in the hands of James Bernard; that Honner appeared as attorney for the purchaser when the matter was brought before the Court; that this sale was also set aside, but costs, by consent, were [493] not given to the infant. On the 11th June 1785, the third sale of part of the same lands in *Wright* v. *Becher* took place, when the bidders thereat were Fitzgerald, Ormsby, and Webb, the last of whom was declared purchaser for £4192 18s., and proof was given of an alleged concert between Webb and James Bernard, and the amount for which the property was pretended to be sold, was exactly the amount of the debt alleged to be due to Evans and his wife; that some of the conveyances were of the fee, though only terms for years were sold; and that in one case the conveyance was only executed by the pretended plaintiff in the suit, and not even by the tenant for life, and certainly not by the tenant in tail or by any one on his behalf.

The bill prayed that the several decrees of the Court of Exchequer might be declared to have been fraudulently obtained; that the several sales had pursuant thereto, and the conveyances made to James Bernard in 1783, if in existence, might also be declared fraudulent, but might stand as securities for the sums paid by James Bernard, or Francis Earl of Bandon, in discharge of incumbrances; that an account might be taken of the sums paid by them on foot of the mortgage, and in satisfaction of the trusts of the term of 99 years; and that an account might be taken of the rents, and any surplus payment of the sums due at foot of the various securities be paid to the Respondent; that Respondent might be at liberty to redeem the mortgaged premises upon payment of the said money; and that, upon payment there-

of, said Earl of Bandon might be decreed to deliver up the premises to Respondent, with the deeds relating thereto; that if the lands could not be restored to Respondent by reason of the deed of 13th February 1784, then that Respon-[494]-dent might be compensated out of the assets of James Bernard; and that a receiver might be appointed.

Answers were put in, and the cause came to a hearing, when a reference was ordered to the Master to report the sums paid by James Bernard on account of incumbrances; the Appellant to have credit for such sums, with interest, as were unliquidated at the death of the tenant for life; and James Bernard was declared bound to keep down the interest on the charges, as Richard Becher, the tenant for life, would have been. Reference was also made to the Master as to whether the profits of the lands were sufficient to keep down the interest on said incumbrances in the lifetime of Richard Becher; and, if not sufficient, to report the balance of the interest due. The Respondent was declared entitled in fee tail, with the immediate reversion in fee-simple, to the lands comprised in the settlement of 1784, subject only to the sums paid by James Bernard; and in case the rents and profits of the whole of the said lands should be inadequate, the Master was directed to inquire as to what proportion the lands of Letterscanlan and Ratourah ought to contribute. The Respondent was decreed entitled to the full value of lands bound by the settlement, to be paid out of the assets of said James Bernard, and a reference was directed to take an account of the personal estate of James Bernard. Directions were given as to the application of the rents, and as to other matters, and certain issues were directed, and costs and further directions were reserved. There was a petition by the Appellant for re-hearing, alleging length of time as a bar to the claim of the Respondent, and that no relief ought to have been granted against the assets of James Bernard, or of Francis, Earl of [495] Bandon. The cause was reheard, and the original decree affirmed.

Mr. Tinney and Mr. Pemberton for the Appellant:—This decree cannot be supported. In the first place, the suit is in substance a bill for a rehearing by the Court of Chancery of a case already decided in the Court of Exchequer. Such a proceeding cannot be allowed, under whatever form it may come into a Court. The party, now a plaintiff in the Court of Chancery, is the tenant in tail of an estate which, while in the possession of a preceding tenant in tail, through whom he claims, was the subject of a suit in the Court of Exchequer and of a decree made by that Court. In that suit the former tenant in tail and a mortgagee were parties. The decree made in that suit must be binding on the present tenant in tail. The case of *Giffard* v. *Hort* (1 Sch. and Lef. 386) shows that a decree against a tenant for life or a tenant in tail will bind him in remainder; for treating such decree as one so binding on him, the House of Lords gave the remainder-man the right to file a supplemental bill, in order to enable him to appeal against it. If he has this advantage, he must take the corresponding disability, and be held bound, where he does not appeal. He has not done so here, but in another Court; and with a view to impeach the whole proceedings in the former suit he has filed the present bill. Such a course cannot be permitted him. The next answer to the bill is, that even if the plaintiff has a right in this way to impeach the former proceedings, he can only do it on the ground of fraud. Now undervalue would be a ground of fraud. But it is not pretended that these estates were purchased at an under-value; on the contrary, [496] all the evidence goes to show that full value was given for them, and the Lord Chancellor himself, in his judgment in the Court below, admits that the parties engaged in these transactions were not guilty of any moral fraud, but he says that they set up a series of sham sales. Even if that is so, the blame is with the seller, under whom the Respondent claims, and not with the purchaser, now represented by the Appellant. The purchaser therefore cannot be made answerable: *Lloyd* v. *Johnes* (9 Ves. 37). Again, this is in substance a suit for damages. Who is the party injured? Not the Respondent, but his father, John Becher. Yet he never attempted to sue for damages or to set aside the transaction. But even if damages are to be paid, none can be assessed, for full value was given for the estates. Besides, a court of equity cannot give damages, nor, in a case like the present, can it decree the reconveyance of the estate. Even therefore if the Respondent had established any title to set aside the proceedings in the Court of Exchequer, he could gain nothing by so doing. But he has no right to set them aside. The sales

cannot be impeached but on the ground of fraud, and fraud is not proved here; nothing short of fraud will be sufficient to affect a purchaser under a decree. In *Bennett* v. *Hamill* (2 Sch. and Lef. 566) it was held that a purchaser under a decree shall not be affected by error in the decree, as for example, in its not having given a day to an infant defendant to show cause, or in decreeing a sale of lands to satisfy judgment debts without an account of the personal estate. In like manner Lord Thurlow decided, in *Wall* v. *Bushby* (1 Bro. C.C. 484), that infants are bound by a decree taken by consent, though there has been no reference to the Master to inquire whether it was for [497] their benefit. Then too the lapse of time is alone sufficient in this case to be a bar to the Respondent's right to a decree. In *Burke* v. *Crosbie* (1 Ball and Beat. 489), it was held that a conveyance to a *bonâ fide* purchaser, under a decree against a feme covert for a sale of part of her separate estate, cannot, after an acquiescence of twenty-two years, be set aside, notwithstanding the purchase-money may have been misapplied. Length of time was there distinctly declared to be a bar to an equitable title. Nor would the Court set aside a sale under a decree though the surplus of the purchase-money was directed to be paid to the tenant for life. *Lightbourne* v. *Swift* (2 Ball and Beat. 207); and that case also decided that a minor is bound by a decree (Id. 213); *Cholmeley* v. *Clinton* (4 Bli. 1) distinctly established that adverse possession of an equity of redemption for 20 years, is a bar to any other claim of the equity of redemption, producing the same effect as abatement, intrusion, and disseisin, with respect to the legal estate. The doctrine now contended for, that a remainder-man is bound by the act of a tenant for life through whom he claims, was referred to by Lord Plunkett, with the observation that he found it laid down broadly enough in the text books, but that he could not find the grounds of it distinctly stated. Yet the cases of *Cuthbert* v. *Creasy* (4 Bli. 135), *Pim* v. *Goodwin* (Id. 133), and *Foster* v. *Blake* (Id. 140; 4 Dow, 230. nom. *Moore* v. *Blake*) are sufficient authorities on this point, and the judgment of Lord Manners in the last of these cases has always been considered to be good law. In *Whalley* v. *Whalley*, the distinction which will be attempted to be relied on in this case, as to the continuance of the [498] tenancy for life until 1825, and the consequent absence of right in the remainder-man to interfere, was considered, and was held not to be an answer to the lapse of time. There it was held that the cause of action, within the meaning of the Statute of Limitations arises when a party has a right to apply to a Court of Equity, and in that case, which, it should be recollected, was a case of fraud, it was held that the time of limitation began to run from the time when the fraud was discovered, whether in the life of the ancestor or upon the descent. That rule must be applied here, and then the Respondent will be barred by lapse of time. There is no authority whatever to justify the claim of this remainder-man after so great a lapse of time. Even therefore, if any of the other grounds of objection should be deemed insufficient, and it is submitted that all of them are valid, this alone justifies the Appellant in praying that the judgment of the Court below may be reversed.

Mr. Bickersteth and Mr. Jacob for the Respondents:—All the proceedings in the Court of Exchequer were wrong. There was no protection afforded to the interests of the infants; as against them the proceedings were fraudulent, and a court of equity, when it discovers fraud against infants, will relieve them from the consequences. The sale was directed without any restriction as to what was to be sold; if more was sold than was necessary, the surplus was to go into the pocket of the tenant for life. That is treated on the other side as a sort of equitable conversion not sufficient to vitiate the transaction, and *Lightburne* v. *Swift* (2 Ball and B. 207) is cited; but in that case all the necessary parties were before the Court, and that circumstance [499] was a main ingredient in the decision. The relations existing here between all the parties concerned in the sale, and the manner in which the lands not sold were treated, clearly prove that the whole transaction was collusive and fraudulent. There was nothing real or *bonâ fide* in it: the parties deceived the Court by pretended consents, under colour of which they sacrificed the interests of the tenants in remainder. Then when the first sale was set aside and another was resorted to, the order for the second sale was made without any direction as to the payment of the costs of the first. Again, therefore, the interests of the tenant in remainder were sacrificed, and Mr. Bernard, who pretended to have parted with the estate, acted in the case, and consented that the sale should be set aside and the proceedings under it vacated. It is

not disputed that the subsequent proceedings were fictitious; the opinion of the other side as to the anterior proceedings is pretty well shown by their having recourse afterwards to others not now denied to be fictitious. It is clear, under all the circumstances of this case, that the sales in 1783 were collusive and fraudulent; that they were without any real competition among the buyers, and without protection to the interests of the infant tenant in tail. Even the ordinary clause that he should have a day to show cause when he came of age was omitted from the decree. Under these sales the only interest that James Bernard could gain was an assignment of a mortgage and of the life interest of Richard Becher, and he acquired no rights as against John Becher the tenant in tail, or against the remainder-man. The only persons protected in the Court of Exchequer were those who were capable of acting for themselves, namely, the mortgagee, the owner of the charge paid off, and the tenant for life. Their interest passed to the purchaser, but [500] no other did so. The Court was deluded, by the contrivances of these parties, into making decrees and orders which are completely irregular. It is asserted that full value was given for these estates. There is no evidence of that; all that the Court can now know is, that proper means were not taken to procure the full value for the estates. As to the objection with respect to the mode of awarding compensation, the bill in this case seeks to recover the lands. Bernard, who had wrongfully obtained these lands, gave them to his own family, but his wrongful act could confer no right on the donees. The Respondents are not bound to show that they suffered an actual loss from the sale, that must be presumed, as the sale was not an equitable conversion, but a collusive and fraudulent proceeding. But an objection of form is made to this suit. It is said that these were judgments of the Court of Exchequer, and that there was consequently no power in the Court of Chancery to set them aside. That position cannot be maintained with respect to judgments obtained, as these were, by fraud.—[Lord Brougham: You cannot, under ordinary circumstances, go to the Chancery to set aside a decree of the Exchequer for irregularity or error, but the decree being set up in Chancery, you have a right, on the ground of fraud, to call on the Court to disregard that decree.]—That is the ground on which the Respondent puts the present case. The Irish Chancery reports show many cases in which decrees of sales have been set aside as fraudulent; sometimes in the Courts in which such decrees were made, and sometimes in other Courts. In *Kennedy* v. *Daly* (1 Sch. and Lef. 355-379), there was a sale in the Exchequer, and a suit was subsequently instituted in Chancery; that was a case of fraud upon the rights of [501] an infant. Lord Redesdale gave relief against the sale, and commented strongly on the fraudulent nature of the proceeding. In *Giffard* v. *Hort* (1 Sch. and Lef. 386), which was a case of a similar kind, Lord Redesdale acted on the same principle, and declared that he should hold that the plaintiff was entitled to be put in the same situation he would have been in if the fraud had not been practised. In *Gore* v. *Stackpoole* (1 Dow, 18), there was a sale of mortgaged estates for the payment of the mortgage and of judgment debts. The sale was effected under a decree fraudulently obtained in 1733, in the Court of Exchequer in Ireland, by collusion between the tenant for life and others, to the prejudice of those in remainder. This sale was questioned in the Irish Court of Chancery in 1796 by the tenant in tail, three months after his title accrued. There Lord Clare, in 1801, dismissed the bill, but that decision was afterwards brought under consideration in the House of Lords, and the sale was, in 1813, set aside by the Lords as to part sold to a person cognizant of the fraud: and Lord Redesdale expressed strong doubts whether the same course would not have been pursued with respect to the other part, if the case had come before their Lordships, as to that other part, though it had been sold to a person not actually cognizant of the fraud, but who might have discovered it by inspecting the proceedings, on the face of which it was apparent. In *Mullins* v. *Townsend* (2 Dow and Clark, 130; 5 Bli. N.S. 567), and *Colclough* v. *Bolger* (4 Dow, 54; 3 Bli. 181), the principle of setting aside a fraudulent sale was acted on. In the last of these cases the Court set aside a sale without going into the question of fraud, and this House decided that it was rightly done, on the ground that [502] it was incumbent on a purchaser to see that the decree under which he purchased was substantially complied with. That was not done here, and on that ground alone the first sale could not have been supported. It was bad also on the ground on which the parties themselves deemed it prudent to set it aside.

Now as to the question of compensation. The principle of courts of equity is to

give relief by a specific restitution of the property; but if that is impossible, then the party injured is entitled to the value of the property at the time he ought to have come into possession of it. If the Court of Chancery is called on to give a man the value of stock, of all things the most fluctuating, the order is to replace the quantity of stock improperly sold; and the stock must be replaced without reference to the difference in price. *Wilson* v. *Moore*, which occurred some months ago in the Court of Chancery (since reported, 1 Myl. and K. 127 and 337), proceeded on that rule, and trustees having improperly applied trust stock to their own purposes, were afterwards ordered, at the suit of the legatees, to restore it, and it was replaced, not at the value it bore at the time of the conversion, but at a very considerable advance. Then as to the answer set up on the alleged delay. The rule as to the lapse of time is not denied, but the question here is as to the applicability of that rule. The first point to be considered is, whether there was fraud in the transaction, and if so, then when that fraud was discovered; the next point is, when the adverse possession commenced, and when the right to sue accrued. The existing right to the possession of the land could alone give the Respondent the right to sue. Courts of equity will not entertain a bill for the mere declaration of a right, nor unless something is to be done upon that declaration. **[503]** On that ground alone, the Respondent is excused for not proceeding at an earlier period. Then as to the adverse possession. If a mortgagee enters into possession as mortgagee during the life of the tenant for life, and remains in possession for twenty years, the tenant in remainder is barred, for such a possession is adverse; but if the mortgagee purchases the interest of the tenant for life, or takes under him, the mortgagee is in possession in two characters, and his possession is not adverse, but is consistent with the interest of him in remainder. In *Corbett* v. *Baker* (3 Anstr. 755), the husband and wife were in possession of an estate in right of the wife, they mortgaged by fine, and then conveyed the equity of redemption by lease and release to the mortgagee. He remained in possession as complete owner for more than twenty years during the life of the husband, who was tenant by courtesy. After the husband's death it was held that the heir of the wife was not barred of his equity of redemption by lapse of time. *Ravald* v. *Russel* (1 Younge, 9), in the Exchequer, is to the same effect. In the last of these cases, *Harris* v. *Hollinson* (1 Sim. and St. 471), *Cholmeley* v. *Clinton* (2 Jac. and W. 191; 4 Bli. 1), and *Corbett* v. *Baker*, were cited and considered; and Lord Chief Baron Alexander, admitting that adverse possession would be a bar, declared that the question whether the possession was or was not adverse, must depend on the character in which the possession was held. Tried by that rule, there was no adverse possession in the present case, when the mortgagee was in under the tenant for life, for Lord Chief Baron Alexander distinctly stated that the character of the tenant for life is not adverse to him in remainder. *Whalley* v. *Whalley* (3 Bli. 2) is no authority in the present case, for that **[504]** was an application by a party to set aside deeds which he himself had executed. It was clear that in such a case the limitation of time began from the moment that the fraud was discovered. But *Bennett* v. *Colley* (5 Sim. 181; 2 Myl. and K. 225) is a direct authority. There, upon the expiration of the tenancy for life, the first remainder-man was allowed to claim compensation for a loss he had suffered through the neglect of the tenant for life, though more than twenty years had elapsed. In the present case the discovery of the fraud would have given the remainder-man no right to proceed during the existence of the tenancy for life. The utmost that he could have done under any circumstances, would have been to file a bill to perpetuate testimony. But even if he could have been allowed to do that, which would have been of comparatively little use, since the documentary evidence was sufficient for any purpose he might require, he could not have applied to the Court for relief while the tenancy for life continued. As soon as it terminated he proceeded. There has not, therefore, been any acquiescence on the part of the Respondent, and he is entitled to have the judgment given in his favour, affirmed with costs.

Mr. Tinney in reply:—In all the cases where a transaction taking place a considerable time back has been set aside, there is not one in which the main ingredient was not a want of value given by the purchaser. There is no such ingredient in the present case. The Respondent here had no right to apply to the Court of Chancery to set aside transactions which had taken place many years ago in the Court of Exchequer. The Court of Chancery is no court of appeal to decide on judgments

previously given in the Court of Exchequer. Both are courts of co-ordinate [505] jurisdiction. The distinction on which the proceeding has been attempted to be justified does not apply. The Respondent, in fact, appealed to the Court of Chancery to set aside the judgment of the Court of Exchequer, a court of co-ordinate jurisdiction in equity. Now it is admitted on the other side that this cannot be done. On that admission the judgment of the Court below must be reversed. The ground on which these sales are impeached is one of fraud, but there is no evidence whatever to impute fraud to Mr. Bernard. The fact that, under the recommendation of his professional advisers, he agreed to the sale being set aside proves nothing. If they thought that there was any defect of form that might render the title doubtful for a moment, they were right in having the defect remedied while all the parties were alive. Their doing so at so early a period is rather a proof of good faith than otherwise. But supposing that those who now represent Mr. Bernard should be compelled to give what is called compensation, in what manner is that compensation to be ascertained? The difficulty of settling that point is an answer to this suit. It is said that if the property is not restored, the value must be given, and that that value must be calculated at the time when the remainder-man would, but for these transactions, have been entitled to enter into possession. But will equity, because this land has been passed away to a stranger, who has altered and improved the character of the property, now call on his representatives to pay the present, the improved value of the land? It is impossible to suppose that a court of equity will do anything of the kind. *Wilson* v. *Moore* (1 Myl. and Keene, 127) is not in point, for that was a case arising out of the stipulations made on a marriage, and fraudulently endeavoured to be evaded. In such [506] cases the Courts have always strictly enforced the stipulation (*Jones* v. *Martin*, 6 Bro. P.C. 437 ; *Logan* v. *Wienholt*, *ante*, vol. i. p. 611). Here marriage was not the consideration, and no fraud is proved. But there is another difficulty: suppose that there existed a ground for compensation, to whom is it to be given? The Respondent is not the personal representative of his father, but is a sort of purchaser under the provisions of the statute *De donis* from the original creator of the estate tail. Now, pecuniary damages must always go to the personal representative. Not to act on that rule would create numberless difficulties. Suppose the Respondent should die before the money passed into his pocket, could the remainder-man in tail under the settlement of 1740 come into Court, and by a supplemental bill claim this money? He certainly could not; nor can the present Respondent claim it as remainder-man, after the expiration of his father's title. Now, as to the lapse of time. The Respondent is barred by lapse of time. The general principle in *Cholmeley* v. *Clinton* and the other cases is, that from the moment a party is enabled to have relief in equity, his acquiescence runs against him. —[Lord Brougham: That is, provided that the possession of the other party is inconsistent with his rights; in other words, that it is an adverse possession.]—Not an adverse possession in the sense in which that term is ordinarily used in a court of law. —[Lord Brougham: A possession not referable to anything which is consistent with his title; he could not be said to slumber over his rights, if his utmost activity could do nothing for him.]—Suppose that definition of adverse possession to be adopted in this case. Is the possession consistent with his title? Wright was the mortgagee of the whole estate included in the settlement of 1790. Evans was an incum-[507]-brancer on it. Wright obtained a decree for a foreclosure, which then went on to direct that, the equities of Evans being destroyed, the whole estate should be sold, in order to clear off incumbrances. Was not the whole title affected by this proceeding? The possession by any one person of any particular lot is inconsistent with a mortgage which runs over the whole. From the moment, therefore, that a purchaser of a part existed, and was let into possession on his purchase, there was a possession inconsistent with that of the remainder-man, and the time of limitation began to run. Bernard here did not purchase Richard Becher's life estate under Richard Becher, but under a decree adverse to Richard Becher. Bernard, therefore, does not claim under Becher, but against him. His possession, consequently, was adverse to the tenant for life, and to those in remainder, from the moment that it vested in Bernard. The point now under discussion was argued when *Foster* v. *Blake* was the second time before the Court, and the observations of the learned Judge who decided that case are important, as showing what was his opinion as to the course that courts of equity ought to adopt with regard to the

provisions of the Statute of Limitations in cases of bills for redeeming filed by those in remainder. He said (2 Ball and B. 575), "The only question now remaining, is how far the Statute of Limitations is to be applied to a redemption bill. It appears not a little extraordinary that a court of equity should adopt the analogy and the exceptions of the statute, and yet reject the provisions as to the period from which the time is calculated to commence, so as to bar the redemption bill. The mortgagor in equity is considered as the owner of this estate, the mortgagee a mere incumbrancer; the limitation of a bill to redeem is borrowed from the statute, and no [508] satisfactory reason can be assigned for rejecting the most important provision of the act, namely, the period from which the adverse possession shall begin to run as against a remainder-man." The observations of the Lord Chancellor in *Bennett* v. *Colley* (2 Myl. and K. 225-233), show that the Respondent in this case is barred. His Lordship, after referring to the many cases that had been cited, declared that they did not apply, because in that case "the quantum of damages could not be ascertained till the tenant for life died, because till then it was impossible to know what would be the residue unexpended of the lease, and the present proceeding could not have been instituted." No such excuse for the delay exists in the present case. The Respondent had a clear and well-defined remedy, which he might have put in force at an earlier period. His laches in not doing so must now debar him from succeeding in this suit. It is a matter of every-day practice, that when a mortgagee takes possession, the time begins to run against the remainder-man, as he has the same right to redeem as the tenant for life. *Ravald* v. *Russell* (Younge, 9) was identical with the case of *Corbet* v. *Barker* (1 Anstr. 138. S.C. judgment reversed, 3 Anstr. 755); and there the possession of the mortgagee was perfectly consistent with the possession of the husband, who was tenant by the courtesy, and the heir of the wife could not interfere. These two cases, therefore, furnish no authority in support of the Respondent's claim, for the possession here was adverse. In *Colclough* v. *Stevens* (1 Bli. 121), the heir had been abroad, and therefore the statute did not apply; and in *Gore* v. *Stackpoole* (1 Dow, 18), the tenant for life was himself the real though not the avowed purchaser of the fee, so that of course [509] the Statute of Limitations could not run against the heir during his life, for that would have been to render his wrongful act good as against the tenant in remainder.

Lord Brougham:—This case has been very fully and ably argued, and the point involved is one of considerable importance. When a decree is pronounced by a Judge of the long experience of the noble and learned Lord who decided this case, and after ample discussion and great pains taken by him, and when his judgment is fortified by a statement of reasons ample and satisfactory (at least in all except with respect to one particular), it becomes an anxious matter for any one to advise your Lordships to overrule his decision. The probabilities are all in favour of the soundness of his judgment; it is, however, the duty of the professional members of your Lordships' House to advise your Lordships to the best of their abilities, on all cases which may be brought here by appeal for your decision. I shall, therefore, apply myself to the consideration with that view; but though there are one or two matters on which I shall not be satisfied till I have had time to consider them, there are others on which I shall now throw out a few observations that will, perhaps, dispose of them at once. The first ground of objection assigned appears to be one of form, but in fact it is one of substance, for it goes to the jurisdiction. It is said that the whole of these proceedings spring from a decree of the Court of Exchequer in Ireland, and that that decree being pronounced by a Court of competent jurisdiction, upon parties legally before it, cannot now be questioned in another Court of co-ordinate jurisdiction; but, if brought into dispute at all, should be brought into dispute in the Court where it was [510] originally pronounced. I agree generally to the proposition, but I must add to it this one qualification, that you may at all times, in a Court of competent jurisdiction,—competent as to the subject-matter of the suit itself,—where you appear as an actor, object to a decree made in another Court, upon which decree your adversary relies; and you may, either as actor or defender, object to the validity of that decree, provided it was pronounced through fraud, contrivance, or covin of any description, or not in a real suit; or if pronounced in a real and substantial suit, between parties who were really not in contest with each other. That it is undeniably true that the

Court of Chancery has no right to review a decree of the Court of Exchequer; that nothing but a Court of Appeal can give redress if such decree is erroneous, is clear, and indeed nothing can be more true than such a proposition; but it is equally true, that if the decree has been obtained by fraud it shall avail nothing for or against the parties affected by it, to the prosecution of a claim, or to the defence of a right. These two propositions are undeniably true; they are recognised in practice, they are independent of each other, and they stand well together. That was the rule stated as deduced from all the authorities in a case which, having been decided in the Court of Arches, was subsequently the subject of discussion in another Court. The question was, whether the judgment of the Court of Arches was conclusive and binding on all other Courts, not Courts where that judgment was before them on appeal. Mr. Solicitor-general Wedderburn, in his excellent argument in that case, thus summed up the effect of all the authorities*:—"A sentence is a [511] judicial determination of a cause agitated between real parties, upon which a real interest has been settled; – in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit; there is no Judge, but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question." On the whole, I am of opinion that this case falls within the rule there stated, and which I quote from Mr. Wedderburn's statement because of the aptness of the expressions. It is not an irregularity, it is not an error which is here complained of, but it is that the whole proceeding is collusive and fraudulent; that it cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up. That then brings me to the body of the argument. There are only two grounds on which it is necessary to take time to consider; the first is, in what manner the compensation ought to be awarded; and, secondly, what is the effect and import of the length of time which has been suffered to elapse. I chiefly require time to consider these points, because on them, and on them alone, is the judgment of the noble and learned Lord in the Court below at all deficient in fulness. I ought however to add, that on the point of the lapse of time I am much in favour of the judgment of the Court below.

Lord Brougham:—My Lords, I stated my views of this case very fully when it was previously before [512] your Lordships, I mean in the course of the argument; so that, after what I then threw out, I shall not feel it necessary to enter into any lengthened observations at present. There were two points on which the case depended. On one of them I expressed my opinion at the time, I had no doubt about it; if it had been well founded it would have gone to the jurisdiction of this Court. As to the other, which in itself embraced two points, I wished to take time to consider, in order to see what had been the grounds of my noble and learned friend Lord Plunket's opinion, for I could not see the reasons for that opinion in the report of the judgment furnished to me. I have since had a communication with my noble and learned friend, and I find that he took, when the cause was in his Court, a view of the subject similar to that which I took here; that he considered the points separately, and had come to the same conclusion upon them. I do not mean to say that this a case free from doubt; but my doubts upon it are not so strong as to incline me to advise your Lordships to reverse the judgment of the Court below, for a Court of Appeal ought never to reverse the judgment of an inferior Court unless quite confident that the judgment given in the Court below is wrong. I shall therefore move that this judgment be affirmed; but, as it is a case not entirely free from doubt, I shall move that it be affirmed without costs.

Affirmed accordingly.

* The Duchess of Kingston's case, 20 Howell's State Trials, 478-9. See also *Gore* v. *Stackpoole*, 1 Dow, 18, which was a case of a bill filed in the Irish Court of Chancery by a remainder-man claiming to redeem, the estates having been sold under decrees of the Court of Exchequer; and see Lord Eldon's observations, p. 33.

[513] In the matter of the ISLINGTON MARKET BILL.

[Mews' Dig. ix. 763, 766, 770; 12 M. and W. 20 *n.* Considered in *Manchester (Corporation of)* v. *Peverley*, 1876, 22 Ch. D. 295 *n.*; and *Goldsmid* v. *Great Eastern Ry. Co.*, 1883-84, 25 Ch. D. 512; 9 A. C. 945. Applied in *Midleton (Lord)* v. *Power*, 1886, 19 L. R. Ir. 1.]

Where a corporation had held a market by prescription, and the Crown afterwards granted to the corporation a charter with these words, "quod nullum mercatum infra septem leucas in circuitû burgi praedicti per nos vel haeredes nostros alieno concedatur:" Held, that such prohibition, if it could be construed to extend beyond that which is attached by the common law to the grant of a market, was void. Held also, that the establishment of a new market, to be holden at the same times within the common law distance of the old market, was *primâ facie* injurious to the latter, and therefore void; the convenience of the public would not, under such circumstances, justify the grant of a new market.

And where the first charter purported to be granted "de assensu praelatorum, comitum, etc. in instanti Parliamento convocato," a new charter granted to hold a market within the prescribed distance would be void, and would be repealable by *scire facias*. The words stated would have the effect of giving the first charter the authority of an Act of Parliament.

Such a charter could only be repealed by Act of Parliament.

If the market created by the first charter had not sufficient space for the accommodation of the public, and also, if part of the space originally allotted to it was employed or suffered by the grantee to be employed for other purposes, without his providing as convenient a place for the public to buy and sell in elsewhere within the limits of his grant, such circumstances would furnish a good defence to an action brought by him against any person for selling out of the market; they might also furnish ground for a *scire facias* to repeal the charter.

Quaere, whether such circumstances would not render the [514] grantee liable to an indictment for a misdemeanour? If they would, an action would also lie against him for his default.

But while such grant remained unrepealed, no other market could be granted within the limited distance.

If by the terms of the grant the market was to be held in a fixed place defined and known by metes and bounds, should those limits not be sufficient, and the owner of the market have no power to enlarge them, a new market might be granted to such an extent as to supply the deficiency, but no more.

A bill had been introduced into Parliament for the purpose of establishing a cattle-market at Islington. The corporation of the city of London presented a petition to the House of Lords, praying to be heard by counsel against the Bill. The prayer of the petition was granted, and the Bill was ordered to be argued by one counsel on each side.

Mr. Harrison appeared at the bar as counsel for the corporation against the Bill.

Mr. Serjeant Merewether was heard in support of it.

At the close of the arguments the following questions were proposed to the Judges:

A charter was granted by King Edward III. to the corporation of the borough of A., with these words, (inter alia,) "quod nullum mercatum infra septem leucas in circuitû burgi praedicti per nos vel haeredes nostros alieno concedatur." The corporation hath continued to hold, as it before hath been holden, by prescription, a market in Blackacre, and to take the profits thereof. A charter is now granted to B. by [515] the Crown, of a market to be holden in Whiteacre, within less than seven miles distance from Blackacre.

1. Is this second grant contrary to the first, and may it be repealed by *sci. fa.* as contrary thereto?

2. The same question, Whiteacre being less than seven miles distant from the borough of A.?

3. In either of the said cases, can it be pleaded or in any way taken into con-

sideration that the benefit of the public required a new market to be holden other than markets holden by the corporation of A., and within less than seven miles from those markets, or from the said borough?

Mr. Justice Park, on behalf of himself and the other Judges, delivered the following answer:

I have to acquaint your Lordships, that my learned brethren and myself, in considering the questions propounded to us by your Lordships, assume that it is proposed to ask the first and second questions with reference to holding the new market at the same times with the old.

The Judges are agreed, that, if this clause adds any prohibition other than that which is attached by the common law to the grant of a market, it is void; for there is no consideration for such restriction, nor any additional benefit conferred upon the subject. That is, it is a prohibition imposed in respect of an old right, without a new consideration.

The establishment of a new market, to be holden at the same times within the common law distance of an old market, *primâ facie* is injurious to the old market, and therefore void.

The Judges are also of opinion, that the circumstances mentioned in the third question, viz. that the benefit of the public required a new market to be [516] holden other than markets already holden by the first grantee, would not of itself warrant the grant of such new market.

In a subsequent debate on the Bill, the further opinion of the Judges was desired, and their Lordships having again attended the House, the following questions were put to them:

A charter was granted by King Edward III. to the corporation of the borough of A., with these words, (inter alia,) "quod nullum mercatum infra septem leucas in circuitû burgi praedicti per nos vel haeredes nostros alieno concedatur." And this grant purports to be made "de assensu praelatorum, comitum, baronum, ac totius communitatis regni in instanti Parliamento apud Westmonasterium convocato." And the charter begins, "Rex Archiepiscopis, etc. salutem." The corporation hath continued to hold as it before had been holden, by prescription, a market in Blackacre, in the borough of A., and to take the profits thereof. A charter is now granted to B. by the Crown of a market to be holden in Whiteacre, within less than seven miles distance from Blackacre.

1. Would the second charter as above mentioned, for holding a market within seven miles from the market at Blackacre, be illegal, and could it be repealed by *scire facias?*

2. Same question, within seven leagues from the borough of A.?

3. The Judges having informed the House, that in their opinion the circumstance of the benefit of the public requiring a new market would not of itself warrant the grant of a new market, their opinion is further required, whether the advantage of the public, coupled with the fact that the space of the prior [517] market is not sufficient for the buyers and sellers, could not be pleaded, or in any way taken into consideration, to warrant or support the grant of a new market within the limits of the common law?

4. Or whether the advantage of the public, coupled with the facts that the space of the prior market is not sufficient for the buyers and sellers, and that part of the ancient site of the market has been employed or permitted to be employed by the owners of the market, could not be pleaded, or in any way taken into consideration, to warrant or support the grant of a new market within the limits of the common law?

5. Or whether, supposing the prior market to be granted in a fixed place, the advantage of the public, coupled with the facts that the place of the prior market is not sufficient for the buyers and sellers, and that part of the ancient site and place of the market has been employed or permitted to be employed by the owners of the market for other purposes than those of the market, could not be pleaded, or in any way taken into consideration, to warrant or support the grant of a new market within the limits of the common law?

Mr. Justice Littledale, having conferred with the rest of the Judges present, delivered their unanimous opinion on the two first questions in the affirmative, but desired time to consider of the remaining three questions.

On a subsequent day, Mr. Justice Littledale delivered the unanimous opinions of the Judges present, upon these three questions, in the following terms:

When three of the Judges, Mr. Baron Parke, Lord Commissioner Bosanquet and myself, attended your [518] Lordships' House on the 14th of July, your Lordships were pleased to ask the Judges then present, whether the words of the charter of King Edward III. were such as to give it the effect of an Act of Parliament? and to which question, the Judges answered in the affirmative. That being so, it would appear that all the other questions which now await the opinion of the Judges are at an end, because if there be a prohibition by Act of Parliament from holding a market within seven miles of the borough of A., the king would have no right to grant a market to be held within seven miles under any circumstances whatsoever; but an application must be made to Parliament to repeal that Act which has embraced and confirmed the charter.

The third and fourth questions proposed by your Lordships, which are the two first of those on which the Judges requested time for consideration, may be conveniently answered together. These questions evidently apply to the grant of a market, not to be held in a certain spot defined or known by metes and bounds, but generally in the vill or district of Blackacre. There is no doubt but that the grantee of such a market may hold it anywhere within that vill or district, or in more places than one, and may change the place in which it is held; and an obligation is cast upon him by his acceptance of the grant, to provide convenient accommodation for all who are ready to buy and sell in the public market. If he does not do so, or if, after having once appropriated a particular site for the use of the public as a market-place, he afterwards employs or permits it, or part of it, to be employed for other purposes without providing as convenient a place for the public to buy and sell in elsewhere, within the limits [519] of his grant, the consequence would be first, that there would be a good defence to an action brought by the grantee of the franchise against any person for selling out of the market to the prejudice of his right, provided such person had been prevented from selling in the market by the want of convenient room. This point was decided in the case of *Prince* v. *Lewis* (5 Barn. and Cres. 363), and confirmed by that of *Mosely* v. *Walker* (7 Barn. and Cres. 40). A second consequence would be, that this breach of a public duty on the part of the grantee of the franchise might, unless those inconveniences were removed, and a sufficient space restored for the accommodation of the public, operate as a forfeiture, and furnish a ground for a *scire facias* to repeal the patent by which the market was granted. And thirdly, we are not prepared to say that such misconduct of the grantee would not render him liable to an indictment for a misdemeanour, in like manner as the grantee of a ferry is punishable for a default in providing proper boats and ferrymen, though we are not aware of any instance in which such a proceeding against the owner of a market has been adopted; and if an indictment would lie against him for his default, an action would also lie at the suit of any private individual who should have received any special injury thereby.

But these are the only consequences of the breach of duty committed by the grantee of the franchise; for we are of opinion that whilst the grant remains unrepealed, the default of providing proper accommodation for the public cannot operate in point of law as a ground for granting a new charter to another to hold a market within the common law distance, which shall really be injurious to the existing market. But [520] after the former grant has been duly repealed, a new charter may of course be granted to any one.

The fifth and last question proposed by your Lordships contains one circumstance which makes a very material difference in the consideration of the supposed case. This question relates to a market held by the terms of the grant in a fixed place, that is, as we understand it, in a place defined or known by metes and bounds, and containing a precise quantity of land. We are of opinion, that if those limits are not sufficient for the accommodation of buyers and sellers at the market, and the owner of the market has no power to enlarge the limits, that circumstance, coupled with the fact that it would be for the advantage of the public that a new market should be erected, would be a sufficient ground for the Crown to take such steps as would according to law have the effect of erecting a new market, to such an extent as would remedy the inconvenience, without affecting the rights of the owners of the old market; and for

that purpose a writ of *ad quod damnum* might issue, and upon the inquisition returned on that writ, that the erection of a new market would not be to the damage of the owners or other persons, the Crown might grant such a new market as would not be to the damage of others. We do not say that a writ of *ad quod damnum* is absolutely necessary; but if the Crown were to grant a new charter without a writ of *ad quod damnum*, and it should appear that the interests of other persons were prejudiced, the Crown would be supposed to be deceived, and the grant might be repealed on a *scire facias*. *Vide* note in Fitz. Nat. Brev. 226; and according to the authority in 2 Inst. 406, "if one hath a market either by prescription or by letters patent of the king, and another obtains a market to the nusans of the [521] former market, he shall not tarry till he have avoided the letters patent of the latter market by course of law, but he may have an assize of nusans;" and the same authority adds, "there be words in the grant of a market, *ita quod non sit ad nocumentum alterius mercati*." But in whatever form any proceedings are taken for the new market, we are of opinion that the new market can only be legally granted to such an extent as to provide for what may be called the surplus accommodation of the public beyond what the market of Blackacre can afford, and that the market of Blackacre is not to be affected by the new market: for instance, if the public require twenty acres of accommodation, and Blackacre could only afford ten acres, the new market could not be granted for the whole twenty acres, but only for the additional ten acres, so as, upon the whole, the twenty should be capable of being used by the public; and we think that if the proceeding by *ad quod damnum* should be adopted, the inquisition would probably be adapted to such a state of things.

For if a new market were granted for twenty acres, that would be to the damage of the old market, and might have the effect of totally ruining it, when there was no default in the owners of that market, but the necessity of the new market arose from the increase of population. This view of the case however is entirely new. We at least know of no instance where the question has arisen, for in general markets belong to districts, and then they may be changed or enlarged as the owners please. And as this point never has been argued by counsel, and as the opinion of three Judges only is asked, when the original questions were submitted to nine Judges, we do not feel so confident in this opinion as if we had come to the same conclusion after hearing counsel and conferring with the whole [522] of the nine Judges to whom the questions were originally put.

Your Lordships will observe that it may by possibility happen that the limits of a district within which a market is to be held (though such market may not be confined to a certain place therein) may yet be so narrow, and the residue of the district not appropriated to the purpose of a market so occupied, that the grantee cannot possibly perform his duty by providing such accommodation as the increased exigencies of the public may require. Such a case would, we apprehend, be governed by the principle laid down in our answer to the fifth and last question, and the Crown would have a power to grant such new market as would be required for that portion of the public which could not be accommodated within the limits of the former grant.

Lord Brougham.—I am sure that your Lordships are much indebted to the Judges for the very learned answers they have given to your Lordships' questions. The opinion they have given is undoubtedly a qualified one, but then it is clear that we can run no risk from acting on it thus qualified. Your Lordships only put the question whether the charter intended to be granted was inconsistent with the old grant. Your Lordships put the feigned case of a new and an old charter. But the Judges have stated that in such a case as we have stated, namely, with such words in the charter, it is to be taken as equal to an Act of Parliament. Now an Act of Parliament, as we know, can touch anything, and that which has been created by one may be taken away by another. The answer, therefore, does not decide the fate of the Bill. The fact that the Islington Market Bill may be incon-[523]-sistent with existing rights, is not decisive of the question whether you ought to pass that Bill, for that must be the case with all local Acts and with all Bills for the dissolution of marriage. Yet it is clear, that, with respect to these, Parliament has an undoubted power to pass them. All, therefore, that you have obtained from the Judges, so far as relates to your guidance in the present case, is the expression of an opinion that but by a new Act of Parliament old rights cannot be interfered with. But that may be the best

foundation for asking for the new remedy. The question of compensation may be affected by this opinion of the Judges, but nothing more; but your Lordships cannot grant this compensation, and the other House of Parliament has dealt with the Bill already. You may suggest an amendment, and the other House may tack a clause of compensation to the Bill.

The Earl of Devon quite agreed with what had just fallen from the noble and learned Lord.

The opinions of the Judges were ordered to be entered on the Journals (see the Lords' Journals for 1835, pp. 285, 583, 584).

The Bill afterwards passed both Houses and received the Royal assent.

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[525] APPEAL

From the Court of Session.

JOHN MACTAGGART, jun., and Others,—*Appellants;* WILLIAM WATSON,—*Respondent.*

[Mews' Dig. xi. 1262, S.C., 10 Bli. N.S. 618. Commented in *Guardians of Mansfield Union* v. *Wright*, 1882, 9 Q. B. D., 685, 686, and *Durham* (Mayor of) v. *Fowler*, 1889, 22, 2 B.D., 405, *Mayor of Kingston-upon-Hull* v. *Harding* (1892), 2 Q. B. 508.]

Watson undertook by bond jointly and severally with the trustee of a bankrupt estate in Scotland to answer to the extent of £1000 that the trustee should faithfully discharge his office, account for his management of the estate, etc. The creditors of the bankrupt, according to the bankrupt law in Scotland, chose commissioners to act for them, and to superintend the proceedings of the trustee. The trustee having managed the estate for thirteen years without censure, was, in the fourteenth year, found to have, by various contrivances amounting to fraud, abstracted from the bankrupt estate a large sum, and his accounts were deficient to the amount of £1008. The bond being put in suit against Watson, the co-obligor and surety, he pleaded that the commissioners, by neglect and connivance, had caused and permitted the trustee's default, or, knowing it, had concealed it from him, but of this imputation he did not give any proof, and it was denied by the commissioners: Held, by the Lords, reversing the judgment of the Court below, that [526] the surety was not discharged from his obligation by the alleged neglect of the commissioners in not detecting the fraud and malversation of the trustee.

The estates of the Gorbals' cotton-spinning and manufacturing company, and of Alexander M'Kerlie as a partner thereof, having been sequestrated under the Bankrupt Act, (54 Geo. 3, c. 137,) in the month of September 1815, Mr. William Jeffrey was elected and confirmed trustee on the sequestrated estates on the 10th of October next following, and the Respondent became cautioner or surety for his fidelity in office, and for a faithful account of his intromissions, to the extent of £1000. The bond granted by them on that occasion, after reciting the sequestration, etc., proceeded thus:—"Therefore I, the said William Jeffrey, as principal, without limitation, and I the said William Watson, as cautioner, surety, and full obligant, with and for the said William Jeffrey, to the foresaid extent of £1000 sterling, hereby bind and oblige ourselves jointly and severally, renouncing the benefit of discussion, and our heirs, executors and successors whomsoever, that I, the said William Jeffrey, shall and will manage the said estate in all respects conform to the statute under which the sequestration was awarded, and that I shall and will hold just count and reckoning, and make payment to the said creditors according to their several claims ranked upon the said sequestrated estate, or the trustees or trustee that may be afterwards named by the creditors to succeed me, for my whole management,

receipts and intromissions as trustee foresaid, with the property of the said estates, or any part thereof, of whatever kind or denomination, and wherever situated, which may come into my hands as trustee foresaid, and that from [527] time to time, when required," etc. Commissioners were soon afterwards elected by the creditors, according to the requisitions of the said Act, to superintend the trustee's administration of the sequestrated estates, from which he soon realized a considerable sum, and a dividend of 2s. in the pound on the proved debts was declared by order of the commissioners, and paid before the statutory period. A further dividend of 6d. in the pound was declared in May 1820, when the trustee presented a report of his management and intromissions with the estate to the commissioners, who examined the same and found it to be correct. He again, in May 1826, presented to them a report accompanied with a statement of his whole accounts up to that period. The commissioners examined this statement, and found upon the face of it a balance of £67 11s. 11d. in favour of the trustee, which was caused by the disbursements made by him, with the sanction of the creditors, in resisting, in a long course of litigation, various claims made on the bankrupt estate by Mr. John Mactaggart of London (see *Mactaggart* v. *Jeffrey*, 4 Shaw and W. 361). With the exception of the property involved in that litigation, the estate was, at this period, considered as wound up and recovered; and there was no call for an audit of the accounts again until January 1829, when the new commissioners then elected, on the resignation of the former commissioners, called upon the trustee to exhibit a state of the funds. Upon the investigation which was then made into the accounts, Mr. Jeffrey was found to owe to the estate £1008 12s. 2d. On that discovery he resigned the office of trustee, and Mr. James Kerr having been elected in his place, after several ineffectual applications to him, and to [528] his cautioner, the Respondent, for a settlement of the said deficiency, raised an action against them for payment of the £1000, the amount of the bond. One James William Robertson was also a defendant to the action, in respect of the share which it was alleged that he had taken in the management of the bankrupt estate, as a partner of Jeffrey. The summons concluded to the effect, "First, that the said W. Jeffrey and J. W. Robertson should be decerned, conjunctly and severally, to hold just count and reckoning with the pursuer, as trustee foresaid, for the whole of their joint and individual actings and management, in regard to the said sequestrated estates, and for that purpose to exhibit a full and accurate state of their accounts, and of their whole joint and individual intromissions with the said estates, with the vouchers for the same, whereby the balance due by them, or either of them, to the pursuer, may appear, and be ascertained; and they should be decerned to make payment, conjunctly and severally, of such sum as shall appear, upon a proper accounting, to be the true balance remaining due by them, or either of them, on account of the said sequestrated estates, etc. Secondly, that the said W. Watson, as cautioner aforesaid for the said W. Jeffrey, and also as full obligant along with him, in terms of the foresaid bond, should be decerned, conjunctly and severally, with the said W. Jeffrey and J. W. Robertson, or with the said W. Jeffrey, to make payment to the pursuer, as trustee foresaid, of the sum of £1000 sterling, being part of the balance admitted to be due by the said W. Jeffrey on account of the said sequestrated estates, and to which extent the said W. Watson is liable, under his bond of caution before mentioned, together with the legal interest of the said sum of £1000, from the date of citation to follow hereon," etc.

[529] The Respondent, in his defence to the action, alleged that he was not a creditor upon the estate, and had no opportunity of knowing anything regarding the transactions of the trustee, or the proceedings under the sequestration. He trusted that the creditors and their commissioners would do their duty in maintaining that check over the trustee's proceedings which, by the statute, they were empowered and required to do. That in the summons no explanation was given as to the cause of the extraordinary arrear into which the trustee was allowed to run, or of the delay on the part of the creditors and their commissioners in calling him to account for so very long a period, and until he himself had become bankrupt. That the whole of the alleged defalcation proceeded from the commissioners and creditors having entirely violated and disregarded the course of management and procedure, which it was incumbent on them to follow, with reference to the trustee's intro-

missions. That it appeared from a minute of the meeting of the commissioners in May 1826, that the trustee laid before that meeting the Glasgow Bank receipt for £3400, being the money then in the bank belonging to the estate, and they approved of its transmission from the Royal to the Glasgow Bank, which was done with their knowledge and approbation at the time the transference was made. The Respondent insisted that that operation was unwarranted and illegal, as by the 43d section of the Bankrupt Act, the trustee is bound to lodge all the money he receives in the Royal Bank, Bank of Scotland, or Bank of the British Linen Company, unless he has been directed by four-fifths in number and value of a general meeting of the creditors to lodge it in some other bank, which did not appear to have been done in this case; and he had reason to believe that the [530] money was lodged and the receipt dated only a few days before, and that, had the commissioners performed the duty imperatively enjoined on them by the said section of the Act, they would have found that, for a long period previous to the date of the receipt, the money had not been in any bank at all. They had utterly failed to observe the course prescribed by the enactment. They had previously allowed the sequestration to go to sleep for about six years without anything being done, and without ever taking the precaution pointed out by the statute of comparing the sums lodged and drawn by the trustee in his bank account, with the sums received and disbursed by him; and they never at any subsequent period made any examination or inquiry whatever with regard to the intromissions of the trustee, or to the depositation in bank of the funds in his hands. That the commissioners and creditors also neglected to attend to the requirement of the 37th section of the statute, by which the trustee is bound, once in every three months, to make up a state and estimate of the estate, and the commissioners are bound to subscribe every such state in the *sederunt* book. The various periods also pointed out by the statute for auditing the accounts with a view to after dividends, were allowed to pass without anything being done to investigate the situation of the bankrupt estate. On all these grounds the Respondent claimed to be discharged from his cautionary obligation.

After the action had for some time proceeded, an arrangement was entered into between Mr. Kerr, as trustee on the estate, with consent of the commissioners and creditors, and the Appellants, by which, on certain considerations, there were made over to the Appellants the whole assets of the sequestrated estate, and, amongst others, the right of claim form-[531]-ing the subject of this action. By an interlocutor, dated May 1832, the Appellants, who are the representatives of the said John Mactaggart of London, deceased, were sisted as pursuers in the action in place of James Kerr and as his assignees.

By an interlocutor, dated 12th November 1833, the Lord Ordinary, having considered the closed record and whole process in respect to William Watson, sustained his defences, and accordingly decerned, finding him entitled to his expenses, etc.; and his Lordship added the following note explanatory of his judgment: "The Lord Ordinary thinks, that in various respects, but in particular in respect to the money falling to be in bank, there was a gross failure by the commissioners to observe the regulations of the statute provided to control the trustee; and the Lord Ordinary further thinks, that in all probability this neglect of duty was the cause of the embezzlement which produced the loss. The trustee, Jeffrey, did not snatch the money and run off. Even at the end, he seems to have taken the use of it, in the hope of replacing it before it was missed, a hope encouraged in him by the want of any examination of his accounts with the banks, and indeed of keeping or exhibiting any accounts with the banks at all."

A reclaiming note was presented by the Appellants to the Lords of the Second Division, by whom the following interlocutor was pronounced: "24th January 1834. The Lords having considered this note, with the other proceedings, and heard counsel thereon, adhere to the interlocutor complained of."

The appeal was against these interlocutors.

Mr. Pemberton and Mr. Keay for the Appellants:—

The Court below altogether overlooked, or did not [532] give sufficient weight to the fact, that the Respondent was himself surety that those very things should have been done which he alleges were not done, and he was not therefore entitled to complain of the omission or neglect of them. The bond in its express terms contains

two several obligations; the first is, "That I, the said William Jeffrey, shall and will manage the said estate in all respects conform to the statute under which the sequestration was awarded." The second obligation, which is distinct from and additional to the first, is, "And that I shall and will hold just count and reckoning, and make payment, etc. for my whole management, receipts and intromissions, as trustee foresaid." Besides the main obligation to make payment of any pecuniary balance which Jeffrey might owe to the estate, here is a most distinct and unequivocal obligation on the Respondent, binding him to guarantee that Jeffrey should do all those things in discharge of his office which the statute requires to be done. The security gained by this obligation can never be held to be superseded by the appointment of commissioners, or by the manner in which they may have discharged their duty. If that duty is rightly performed, the creditors have both the statutory checks in full operation; if one of those checks fail them, by a negligence on the part of the commissioners, that affords no reason why the other should become entirely inoperative. It is utterly to mistake the whole intendment of the statute to assume that the diligence of the commissioners is to be the measure of the cautioner's liability, and that their negligence must form his discharge. The commissioners are gratuitous officers, and therefore to a large extent irresponsible, because it would require something nearly approximating to actual fraud to subject [533] them to pecuniary liability. It is out of the question therefore to expect from these any close or laborious superintendence of the trustee's proceedings. It is equally unreasonable to expect any efficient superintendence from the general body of creditors, who are generally scattered over the country, and not in a situation to attend to the management of the trustee. It is different with the cautioner; he has it in his power always to be accurately informed of the proceedings of the trustee; he is entitled to have the minutes of procedure and the accounts of the estate laid open to him. If information is withheld from him by the trustee, he is entitled to compel it by application to the commissioners and creditors, and if they do not put an end to the irregularity complained of, he then may demand to be freed from his bond. The cautioner therefore has ample control over the conduct of the trustee. *Hamilton* v. *Calder* (Dic. of Deci. 2091), *Wallace* v. *Landers* (Id. 2096), *Eadie* v. *How* (7 Shaw and D. 356).

Even were there any foundation for the argument of the Respondent in the Court below, it would be altogether inapplicable, in so far at least as regards the sum of £700 which was feloniously abstracted from the bank by the trustee. For reimbursement of that sum to the estate the Respondent must be held liable, in any view whatever of this case. That sum was abstracted in this way: In May 1829, the funds of the estate, amounting to £3125, were lying deposited in bank; £2425 in the Glasgow Bank, and £700 in the bank of the British Linen Company. Jeffrey was required to transfer the whole sum into one account with the Royal Bank of Scotland. He did transfer the £2425 from the Glasgow to the Royal Bank accordingly. But the £700 in the bank of the British [534] Linen Company he took out, and appropriated it to his own purposes; whilst, to conceal the fraud, he played off the ingenious manoeuvre of drawing from the Royal Bank, and re-lodging the next day £700 of the money there deposited, so as to get a separate deposit receipt for this sum of £700 to be exhibited to the commissioners, as if it were the proceeds of the money in the British Linen Company Bank regularly transferred. Were the principles on which the Respondent founds his argument indisputable, they are altogether inapplicable to this case, in which an act is committed by the trustee which no precaution could prevent and no ingenuity anticipate. No man could possibly suspect that Jeffrey was acting the part of a thief; no one could have prevented the theft from being perpetrated.

Sir John Campbell and Mr. M'Neill for the Respondent:—

The sequestration lasted for 14 years, during which the commissioners affected to audit the trustee's accounts four different times, in 1816, in 1818, in 1820, and in 1826. But during the whole of that period the commissioners did not put in operation the check provided by the statute, in the examination of the bank account and comparison of its entries. The trustee was allowed and encouraged from the commencement to intermeddle with the funds of the estate, to an unlimited extent, as if they had been his own, and that in a manner apparent and discoverable on the

very face of the bank accounts, and such as ought instantly to have been put a stop to by the commissioners: and that system, after advancing from year to year in an increasing ratio, ended at last in the direct fraud to which the Appellants impute the ultimate defalcation. **[535]** According to the account of the Appellants themselves, there were various stages at which the whole funds of the estate were secured, and at which, if the trustee had then been removed for his intermediate misconduct, as he should have been, no loss would have accrued to the estate.

In undertaking an obligation as cautioner for the trustee's discharge of his official duty to the creditors in terms of the Bankrupt Act, the Respondent was entitled to rely on the provisions of that statute being fairly and substantially observed in those matters in which a control was provided on the part of the creditors over the proceedings and management of the trustee. But the total omission and violation of those provisions on the part of the creditors and their delegates, the commissioners, was such a change of the Respondent's situation and of the contract into which he entered, that he was no longer bound as cautioner. If the commissioners omitted entirely, during the 14 years that the sequestration lasted, to make any examination under the statute of the trustee's bank account, that was an entire departure from the understood terms of their statutory engagement with the Respondent. On the other hand, if they examined that account, and did not put a stop to the gross malversations and irregularities apparent on the face of it, they then sanctioned a course of management on the part of the trustee essentially different from that for which the Respondent became bound, and in either view the Respondent is discharged. The mode of dealing with the trustee, by requiring merely at the distance of several years, or receiving as satisfactory the production of deposit accounts of recent dates, without any examination of the intermediate entries, was such a departure from the duty of the commis-**[536]**-sioners, as to liberate the Respondent. The trustee's accounts having been audited from time to time, dividends struck and accepted, and sums of commission allowed to him, without any complaint against him for 14 years, the Respondent was entitled to believe that he was proceeding in all respects regularly, and to the satisfaction of the creditors, and cannot now be made liable for the deficiencies of a trustee, who is found to have been openly violating his duty in a course of misapplication of the funds without control or challenge.

In the course of the argument the following cases were cited, besides others which are noticed in the judgment: *Mactavish* v. *Scott* (4 Wils. and S. 410), *Duncan* v. *Porterfield* (5 Shaw and D. 111), *Mein* v. *Hardie* (8 Shaw and D. 346), and *Dalziel* v. *Menzies* (9 Shaw and D. 434).

Lord Brougham:—The bond is not given to any individual as obligee, but it is an obligation to the extent of £1000 by the trustee and his cautioner jointly, and in which both are obligors. As the condition is that W. Jeffrey shall faithfully and regularly discharge his office of trustee, and as the creditors afterwards chose three commissioners to act for them, and in a manner to represent them in their dealings with the trustee, and to some extent to control, or at least to superintend his proceedings, we may allow it to be held that these creditors, and the commissioners appointed by them, and acting on their parts, are the obligees, and that their acts, as for example, in releasing the principal obligor, Jeffrey, would discharge Watson, his surety; that any connivance at Jeffrey's misconduct, and any act otherwise injurious to the rights and equity of the surety, and done behind his **[537]** back, would release him, as much as if the bond had been given to them, instead of being left indefinite as to the person of the obligee. We are thus making suppositions the most favourable to the Respondent, for we are not only assuming the creditors to be represented and bound by the commissioners, but we are allowing the Respondent to be a surety only, whereas he is a principal, being a joint and several obligor.

It appears that the trustee, by a series of irregular proceedings, and by various contrivances amounting to fraud, in respect to the sequestrated estate, was found in arrear in his accounts to the amount of £1008 12s. 2d.; and the trustee who succeeded him put the bond in suit against the Respondent, who defended himself by accusing the commissioners of great neglect in their superintendence of Jeffrey, of conniving at his misconduct, and of generally failing to discharge their duties, under the Bankrupt Act, towards the creditors, as also their duties towards himself in his capacity of Jeffrey's surety. But all, or almost all, these charges are denied by

the late trustee who first raised this action, and by the Appellants, his assignees, and also by the commissioners. They deny all knowledge or suspicion of Jeffrey's frauds, which were, indeed, for the most part, so cunningly devised as to escape even a close scrutiny; they deny all laches or negligence in the discharge of their own office; they only admit that their meetings were not held as often or as regularly as the Scotch Bankrupt Act directs; and they also admit that a sum lodged in the Royal Bank by Jeffrey, as the Act requires, was with their privity and consent transferred to a Glasgow bank, of which one of themselves, a large creditor of the bankrupt, was a partner, but [538] which was perfectly solvent, and by which no loss whatever has accrued to the estate (see *White* v. *Baugh*, ante, 44, 60 and 61).

Upon this latter fact, thus admitted in the pleadings, I have to observe that it was most irregular in the commissioners to allow the transfer of the fund from one of the three banks expressly named in the statute without the consent of their constituents, the creditors, and they are the more to be blamed that one of themselves, or his banking-house, was to profit by the operation. Had any loss occurred by the proceeding, not only would the surety have been discharged from all liability in respect of it, but the commissioners would have been accountable for the whole amount of it to the creditors at large; but no loss having accrued on that score, and Jeffrey having done no act of malversation or even of neglect, up to the date of that transaction, I am clearly of opinion that the Respondent is not, at least by the transfer, discharged from his obligation in respect of Jeffrey as regards his subsequent dealings.

The Court below having assoilzied the Respondent in respect of the neglect and irregular conduct of the commissioners, which their Lordships held to operate the surety's discharge, the appeal is brought from that decree, and we are now to see upon what grounds it rests; and first of all, I have to remark that in this, as in so many of the Scotch cases, we find extremely little attention paid to the facts, hardly any care being taken to ascertain what these are, by examining which of the statements on either side is admitted, and which denied, or not admitted by the other. The matters of fact are thus too often passed over as of little moment, in order to get at the matter of law, on which all the pains both of the bar and the bench are be-[539]-stowed; but on the facts everything must depend, and it is to be noted in this case that the facts are assumed,—assumed, too, all one way and against the Appellants, in the face of their positive denial and in the absence of proof. The Court below took for granted that the commissioners acted with gross negligence in the performance of their duty (though this is denied), and assumed that out of their negligence arose the malversations of Jeffrey, or the opportunities of committing them—opportunities which, but for the laches of the commissioners, he could not have had; and yet not only is this charge of negligence denied, but upon all the circumstances, as they appear in the case, I really do not think, even morally speaking, and to say nothing of legal evidence, that the fact is so, as assumed by the Court. But another thing, if possible still more important, has been equally overlooked, the frame of the bond itself, the whole ground of the action. The obligation is, that "W. Jeffrey shall manage the estate in all respects conform to the statute under which the sequestration was awarded," as well as that he "shall hold just count and reckoning, and make payment to the creditors according to their several claims:" count and reckoning for what? "for my whole management, receipts and intromissions, as trustee, with the whole estate."

Now the main reliance of the Respondent, and in which view the Court below fully shared, is upon the supposed fact of the commissioners having been careless in calling on Jeffrey to render accounts, and in other respects to perform his duty under the statute. They say that it was the office of the commissioners to see that he did properly discharge his duty; that the cautioner relied on their performing that office, and that their non-performance creates a case which he [540] never contemplated, and to which his suretyship cannot apply. Was it of no moment to observe that the performance of the statutory duties by Jeffrey was one of the very things for which the obligation bound his surety? Assuredly it is no argument against my being answerable for a man's not doing a certain thing that the party to whom I gave this obligation did not see that he did the thing. I had myself undertaken for his doing it, and it is no discharge of my voluntary obligation that the other party,

the obligee, did not see to his proceedings. The statute and the bond have the very same object of giving the creditors a double security against malversation of the trustee—the superintendence of the commissioners and the obligation of the surety. The argument of the Respondent here, and by which he swayed the Court below, at once cuts off one of these securities, and leaves the creditors only protected by the other. The duty incumbent on the commissioners, as a pledge to them, continues: but that security they had without the bond, and I do not see how the bond can avail them at all, or why it was to be taken if this argument prevails.

The defective state of the facts in this case to support the Respondent's defences, renders it unnecessary for me to enter upon many of the legal questions raised on little or no foundation, and discussed with no profit, because with no application to the case at bar; I may, however, observe that very dangerous doctrines on suretyship obligations appear to be suggested in some of the cases in Scotland—cases which have never been brought by appeal to your Lordships. The language of the learned Judges is calculated perhaps to convey, as reported in the books, a meaning far stronger than their Lordships intended. They are really made to **[541]** speak more of the obligee's duties than of the obligor's covenants—of the duties towards the surety, which a person indemnified and guaranteed is bound to perform, rather than of the obligation which that surety has incurred towards him; a closer watch is thus kept over the conduct of the party who has taken an indemnity, than over the liability of him who has given it. Now that the obligee may by his conduct release a surety in certain cases, no one can doubt. The holder of a bill of exchange giving time to the acceptor, discharges the indorser from his suretyship liability, even at law, and so in any other guarantee by simple contract; and in equity, the obligee in a specialty may do so, by giving indulgence or otherwise injuring the recourse of the surety or co-obligor; and all this upon the ground that the surety has a right to stand in the place of the creditor, holder, obligee, or other party indemnified, and must not have his rights or equities voluntarily cut down by the acts of that party. But while at law the surety in a bond is not at all discharged, even by a long neglect of the obligee to demand payment or account from the principal,—nay, when the latter has become insolvent during the time thus suffered to elapse, as was decided in the *Trent Navigation Company* v. *Hardy* (10 East, 34), the courts of equity have never, to my knowledge, given a discharge to the surety merely on the ground of the creditor, the obligee, not having called on the debtor so early as he ought, or not having given early notice of his failure or non-payment to the surety. The case of Law, one of Mr. William Tierney's sureties in Calcutta, against the East India Company, at the Rolls, in 1799, gave rise to much discussion on the law of **[542]** principal and surety, and to an elaborate judgment by Lord Alvanley (4 Ves. 824). But there were other circumstances very different from such laches to govern that judgment, and especially the payment of a supposed balance to the representatives of the principal debtor by the East India Company's servants, which was justly held to be an acknowledgment, to the benefit whereof the surety was well entitled. It is, however, undeniable that the courts of equity will look narrowly to every thing in the conduct of the obligee which has a direct tendency to wrong the surety and injure his rights and equities, and will, as Lord Loughborough said in *Rees* v. *Berrington* (2 Ves. jun. 540), lay hold of such errors to release him. The error, however, in the present case arises in supposing that any want of care on the commissioners' side, in making the trustee do that which the surety had covenanted that he should do, was like a postponement of the surety's equities, or diminution of his rights at law.

However, we need not discuss such questions in this case, nor deal with the English decision in *Mountague* v. *Tidcombe* (2 Vern. 518), which was that of a positive and express covenant given to the surety by the obligee. Neither are we called upon to dispute the doctrine of the Court below, laid down here, and in *Mein* v. *Hardy*, that where any one gives security for the conduct of another, in a certain office which brings him in contact with persons also in the office, he has a right to expect that these persons will, in all things affecting the surety, conduct themselves according to law and discharge their duties. All this may be generally true, and yet it cannot avail to discharge a surety who has expressly bound himself for a per-**[543]**-son's doing certain things, unless it can be shown that the party taking the security has, by his conduct, either prevented the things from being done, or connived at their omis-

sion, or enabled the person to do what he ought not to have done, or leave undone what he ought to have done, and that but for such conduct the omission or commission would not have happened. The present is not such a case; the facts are not here to govern any such conclusion, and therefore I am of opinion that the surety, Mr. Watson, was not discharged.

I have, therefore, to move your Lordships that the interlocutors appealed from be reversed, and that you remit the cause to the Court below, with instructions to decree in terms of the second conclusion of the summons: that is, the conclusion relating to Mr. Watson, the only party here before your Lordships.

Ordered accordingly by their Lordships, that the said interlocutors (of the 12th of November 1833, and of the 24th and 25th of January 1834), so far as complained of, be reversed; and that the cause be remitted back to the Court of Session, with instructions to decree against the Respondent, William Watson, in the terms of the second conclusion of the libelled summons, and to do further in the case as will be consistent with this judgment.

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[544]

APPEAL

From the Court of Session.

JACOB YATES,—*Appellant;* ALEXANDER THOMSON and Others,—*Respondents.*

[Mews' Dig. vi. 635, 1503, 1504; viii. 271; xv. 1434. See *Enohin* v. *Wylie*, 10 H.L.C. 1.]

J. Y., born in Scotland but domiciled in England, bought a Scotch estate, paid part of the price, and for the remainder—which was declared to be a lien on the estate—he gave a bond, payable within a given time, if all pre-existing incumbrances affecting the estate should be then discharged. The vendor assigned the bond and real lien to the bank of L., who gave J. Y. notice thereof. J. Y., finding that the incumbrances were not discharged at the expiration of the time for payment of the bond, deposited the principal and interest in the bank of Scotland, and informed the assignees that the money was so consigned, but should be paid to them on producing discharges from the incumbrances. The assignees produced some discharges, and received a proportion of the deposit. The balance remained in the bank, on receipts taken in J. Y.'s name, up to the time of his death.

J. Y. before his death executed in England several instruments in writing. In a will respecting his Scotch estate, he declared his will to be, that the said receipts of deposit should become the property of certain trustees of that estate, and be indorsed to them by his executors in a will of his English property, the money to remain in deposit until the titles of the estate should be cleared, and then to become the property of the vendors' representatives on payment of the bond. He then made a will respecting his English property, appointing executors, and afterwards cancelled it. He subsequently executed a trust-deed, disposing of his Scotch estate, and therein declared that he had, in a separate will respecting his English property, directed his trustees and executors to endorse the said [545] receipts to the trustees of his Scotch estate. He afterwards made a will disposing of his English property, and thereby gave his goods and chattels, wherever situated, to his nephew, and appointed him sole executor and residuary legatee. He obtained probate of the will, and claimed thereunder the bank deposit, in a suit instituted in Scotland between him and other claimants.

Held, first, that the Scotch court had a right to look to the first will for discovering the testator's intentions respecting the deposited money; secondly, that, without looking to that will, the trust-deed contained a sufficient declaration of J. Y.'s intention to appropriate the money to his trustees for payment of his bond.

Following up the principle that the *lex loci domicilii* governs the distribution of personal estate, the Scotch and all foreign courts are bound, in the interpretation of a testator's written declarations of intention touching his personal estate, situated within the foreign jurisdiction, to adopt the principles of construction applicable to such instruments by the law of the testator's domicile, and that law, being matter of fact, is to be inquired after like other facts; but they are not bound to adopt foreign rules of evidence, every court having its own technical rules of procedure.

Mr. James Yates, a native of Glasgow, left Scotland when very young, became a merchant in London, and died on the 26th of August 1829 at his estate of Woodville, near Salcombe, in Devonshire, at the age of 74, having been resident in England for the preceding 60 years. He had been married, but at his death, left neither widow nor child. In the year 1815 he purchased from Colonel Alexander Macdonald, of Lynedale, the lands and island of Shuna, one of the Hebrides in Scotland, for £10,500. The lands being burdened with debt, Mr. Yates paid only £5000 of the price; the remainder (£5500) was declared, in the conveyance to him, to be a *lien* on [546] the lands, and he at the same time granted a personal bond for that amount, payable at Candlemas 1819, with interest to be paid half-yearly up to that time; but it was declared in the bond, that all the incumbrances affecting the lands were to be fully discharged before payment of that balance. This bond was assigned in July 1817 by Colonel Macdonald to a Mr. Campbell, of London, together with the real *lien* created over Shuna, and the bond and *lien* were again in the same year assigned by Campbell and Colonel Macdonald to the Leith Banking Company. This assignment was notified to Mr. Yates, with an application for payment; he, finding on inquiry, early in 1819, that the incumbrances affecting Shuna were not then cleared off, declined to pay, but deposited on the 2d of February in that year the sum of £5649 2s. 5d., (being the whole principal and interest then due on the bond,) in the bank of Scotland, in the name of Samuel Rose, esq., commissioner of excise in Edinburgh. Mr. Rose's name was used for mere convenience, on account of the remoteness of Mr. Yates's residence.

Mr. Yates's object in making this lodgment will best appear from the following extracts from a letter, which Mr. Pearson, his law agent in Edinburgh, wrote to Mr. Kerr, agent for the Leith Bank: "Agreeably to what I stated to you I wrote to Mr. Rose, and communicated to him your wish that the money should be paid into your bank. I have not yet seen or heard from Mr. Rose in answer; but, in pursuance of the arrangement with that gentleman, the amount of Mr. Yates's bond, with interest, was paid into the Bank of Scotland yesterday before three o'clock, etc. The estate of Shuna appears to have been overloaded with debt; and it is quite evi-[547]-dent, both from the nature of the thing and from the express terms of the bargain, that there must be legal evidence of the extinction of the debt produced previous to payment of the bond. If the evidence alluded to be ready to be produced, I am ready on half an hour's notice to pay the money; and I do hope this will be immediately done. All I presume which can be asked of Mr. Yates is, payment of the contents of his bond and interest up to yesterday, and which I was ready to pay. Matters not being ready to close the transaction, Mr. Yates had no alternative but to consign the money, and which has been accordingly done. Any loss arising from interest, subsequent to yesterday, surely cannot attach to Mr. Yates, and therefore your recourse will be against Colonel Macdonald. The bond is quite explicit, in the point that all incumbrances must be cleared before payment; and, in so far as this is not done, Mr. Yates is entitled to retain from the price. He has, however, not the most distant wish to do so; but if he is obliged for safety's sake to do it, he cannot consent to keep the money and to pay five per cent., consequently it must be consigned. I am perfectly willing, however, to pay any sum to account on a proper discharge, and on a sum sufficient to pay all apparent incumbrances and expenses being allowed to remain deposited in the bank."

On the 12th of March 1819, Mr. Yates authorized Mr. Rose to advance £4000 of the deposit, towards further payment of the purchase-money, to the Leith Banking Company, who satisfied him that so much of the incumbrances in Shuna were cleared off. The balance then left in the Bank of Scotland was £1649 2s. 5d., which con-

tinued so deposited until August 1826, when Mr. Rose, unwilling to continue [548] longer in such a protracted trust, with the consent of Mr. Yates gave up the receipt granted to him by the bank when the deposit was made; and Mr. Yates took in his own name two receipts, one for the said balance of £1649 2s. 5d., and another for £387 12s. 6d., the interest then due on the same, and the money continued vested with that bank on those receipts up to the time of his death. These are the sums in dispute between the parties to this appeal.

In the years 1828 and 1829, Mr. Yates executed several instruments in writing: by the first of these, which is dated the 15th of April 1828, and which he described as "the last will of me, James Yates, of Salcombe, etc., as it respects the island of Shuna," he appointed as executors or trustees of that will, Alexander Thomson, banker in Greenock, Thomas Waller, wine-merchant in London, and Henry Strong, maltster of Salcombe, "to whom I give and devise my said island of Shuna, with all its appendages, in trust to assign and convey the same, as soon after my decease as can conveniently be, and in the proper legal mode required by the Scotch law, to the Lord Provost and principal magistrates of the city of Glasgow (my native place) for the time being, and to their successors for ever, in trust to them and their said successors, for the uses and purposes hereinafter mentioned." The trust was, that "the said magistrates and their successors, upon receiving the rents and profits of the same, which I now reckon worth £500 a year, and which may be very considerably improved, shall divide the same in the following manner, after deducting all the charges of management and collection that may have been reasonably incurred." He then directed the distribution of the rents; viz. one-[549]-fifth for the use of the city of Glasgow, in public buildings or other useful and charitable purposes; two-fifths for the University of Glasgow; one-fifth for Anderson's Institute; and one-fifth for the public Infirmary. He then recommended the mode of management of the island, and added:—"As the island of Shuna appeared from the public records to be greatly encumbered when I bought it in 1815, and the title-deeds were, in consequence, very defective, a moiety of the purchase-money was retained till these defects were purged, and there still remains a balance of £1500, with interest, amounting together to about £2000, deposited in my name, in the Royal * Bank of Scotland, for which I possess the bank's notes or receipts. My will is, that, after my decease, these notes or receipts shall become the property of, and be indorsed or transferred by my executors, in another will respecting my property in England, to my said trustees, the magistracy of Glasgow; but that the money should remain where it now is, till the defects in the title-deeds, as abovementioned, are cured, or till the said trustees are fully satisfied with respect to the same, and till an entry is made with Lord Breadalbane, the superior of Shuna, to whom a yearly feu-duty of £8 is payable of a new vassal, after the death of M'Lean, the existing one, according to a stipulation made by me with Colonel Macdonald, my predecessor in Shuna. These done, the sum in deposit will become the property of his successors or assigns (for he is deceased), and must accordingly be transferred or given up to them, on discharging an heritable bond by me to the Colonel, for the unpaid part of the original price."

By another "last will of me, James Yates," dated the [550] 1st of May 1828, and purporting, like the former, to have been signed and sealed in the presence of three witnesses, he left certain legacies and annuities to relations and others; and bequeathed to the Appellant all his chattels and effects, of whatever nature, together with the life-rent of all his lands and houses, excepting Shuna, and gave him also the power of disposal of certain heritable property at Camlachie, near Glasgow, worth, as he believed, £5000. He appointed as executors of this will the said Mr. Waller and Mr. Strong, "whom I have also named as executors and trustees in a separate will, which disposes of Shuna, and of a deposit of money which lies in deposit in the Royal Bank of Scotland, and is to remain there, till certain defects in the title are cured."

As a Scotch deed, intended to dispose of the island of Shuna, the first-mentioned will was ineffectual. It did not contain those dispositive words which by the law of Scotland are necessary in conveying real property; accordingly, Mr. Yates, after sending a copy of it to Mr. Thomson, one of the trustees, and his particular friend

* This was a mistake: it was the Bank of Scotland.

in Scotland, was informed of its defective nature, and he obtained from him a form for preparing a valid trust-conveyance of the island. On the 1st of April 1829, he executed a trust-conveyance in that form, by which he gave and disponed to the said Messrs. Thomson, Waller and Strong, as trustees, the lands and island of Shuna, for purposes similar to those set forth in the first-mentioned will. This conveyance contained also a statement regarding the money deposited in bank, in these terms:— "As the island of Shuna appeared from the public records to be greatly encumbered when I bought it from Colonel Macdonald, £5500 of the price was retained by me, and lodged in the Royal Bank of Scotland, till the **[551]** estate was cleared of these defects in the titles. Of this sum there still remains, in the same depository, of principal and interest, about £2000. Beside clearing the incumbrances, Colonel Macdonald is under obligation to me to enter, at his expense, a new vassal with the superior, Lord Breadalbane, a new one instead of M'Lean the old one, who is still alive. This will cost Macdonald's creditors or successors a year's rent of Shuna. But the titles, that is, the incumbrances cleared, and the entry with the superior made, the notes or receipts I hold of the Royal Bank, with the interest due upon them, will become the property of Colonel Macdonald's creditors, or successors or assigns, and must be given up on delivery or discharge of my heritable bond for the balance of the price of Shuna. One of these bank notes or receipts is for £1649 2s. 5d., and the other for £387 12s. 6d., being the interest which had accrued at the time of settling with the bank in 1826. Now, if this transaction should not be closed before my death, I have, in a separate will, which respects my property in England, directed my trustees or executors in that will to assign or indorse the notes or receipts of the Royal Bank to my said trustees, the Lord Mayor and Bailies, to be kept by them in the same depository where they now are, till the above defects are cured, and till the entry stipulated to be made with the superior is implemented; or if the latter is called for before the titles are purged, it may, with no impropriety, be taken from the sum in deposit."

About the time of executing this deed, Mr. Yates cancelled his will of the 1st of May 1828, by drawing his pen through it, and writing at the bottom of it, "Cancelled by another will, J. Y." And on the 17th of April 1829, he made a new will, containing several **[552]** bequests and legacies to his relations, servants, etc., and referring to the above trust-deed in these terms: "It may be proper to observe that, by a will made by me in this present month and year, I have disposed of the island of Shuna, in Argyllshire in Scotland." And the will concludes thus: "As to my goods and chattels, wherever situated, I give and bequeath them to the said Jacob Yates, his heirs and assigns, requesting, but not enforcing his observance of some private instructions which accompany, but are not to be considered as any part of this; hereby appointing him and his aforesaid, my sole executor and residuary legatee. It may be well to mention, that I include in this bequest my stock of cattle and other effects in Shuna, which are considerable."

This will was signed, sealed, and declared as the last will of the testator, in presence of three witnesses, who subscribed the same. Probate of it was afterwards granted to the Appellant out of the Prerogative Court of Canterbury, and he obtained confirmation of it in Scotland, and by virtue thereof claimed the deposit in the Bank of Scotland. The trustees of Shuna also claimed this deposit under the trust disposition, and as appropriated by the deceased for the purpose of discharging the incumbrances on the island. The Leith Banking Company also claimed the deposit, and had taken proceedings by arrestment.

In these circumstances, the Bank of Scotland raised an action of multiplepoinding, stating in their summons that they were possessed of the said two principal sums of £1649 2s. 5d. and £387 12s. 6d., deposited with them by the deceased, James Yates; that these sums were claimed by Jacob Yates, the Appellant, as executor of the said James Yates, and also by the Lord Provost and Bailies of Glasgow, as **[553]** trustees, and by other parties; that they (the Bank of Scotland) were ready to pay the said sums with interest to such claimants as could show best right thereto, but as they were liable only in a single payment, it was necessary that the several claimants should be convened in process, that they may dispute their differences; therefore, etc., the said claimants, and all other persons pretending a right to the said sums, should produce the grounds of their respective claims.

Condescendences and claims were made in this action by the Appellant, by the two sets of trustees in the trust disposition, by the Leith Banking Company, and by the representatives of a Captain Lockhart, an alleged creditor of the deceased James Yates. The Lord Ordinary, by an interlocutor dated the 17th of January 1832, decerned in favour of the trustees of Shuna. Against this interlocutor the Appellant reclaimed to the Lords of the Second Division, and their Lordships, on the 24th of May 1832, pronounced this interlocutor: They "adhere to the Lord Ordinary's interlocutor; find the trustees of the late James Yates entitled to the fund *in medio*, and the interest that has accrued thereon, and decern, with this explanation, that the said trustees shall apply the fund *in medio*, and interest thereon, in payment of the heritable debt over the island of Shuna, held by the Leith Banking Company, upon their clearing the incumbrances on the property, and performing any other stipulations that may be incumbent on them; and remit to the Lord Ordinary to hear parties thereon, and also as to the question whether the expenses of the confirmation obtained at the instance of the claimant, Jacob Yates, as executor of the deceased James Yates, and claimed by him, should be [554] paid out of the fund *in medio;* and to hear parties thereon, and do therein as he shall see cause" (see report, 10 Shaw, D. and B. 565).

These two interlocutors were the subjects of the appeal.

Dr. Lushington and Mr. Kenyon Parker for the Appellant:—

The question at issue relates to the disposal of about £2000 remaining in the Bank of Scotland, and formerly belonging to Mr Yates, the testator. The Appellant claims this sum under the testator's last will, dated 17th April 1829; the Shuna trustees claim it either as bequeathed to them by the deceased, or as appropriated and destined by him for redeeming the incumbrance on that estate; the Leith Bank claimed the sum, either as appropriated for payment of the debt due to them under the bond and security assigned to them by Colonel Macdonald, or as attached by an arrestment, which they had used. Captain Lockhart's representatives also appeared in the multiplepoinding, claiming merely as ordinary creditors of the deceased; but these are not parties to the appeal. The trustees of Shuna and the Leith Bank are Respondents in the same interest.

In considering the question raised, two points require attention: 1st, What would be the rights of the parties under the general terms and effect of the deeds and wills, independent of any special bequest or direction regarding the money deposited in Bank? 2dly, Whether any such special bequest or direction subsisted at the testator's death, or formed part of the settlement of his succession, as to supersede the general rule of law on the subject? On the first point of this inquiry there is no difficulty: for, on the one [555] hand, it is clear that the testator's last will of the 17th April 1829, bequeathing to the Appellant his "goods and chattels wherever situated," and appointing him his sole executor and residuary legatee, followed by administration in England and confirmation in Scotland, is sufficient to vest in the Appellant all the testator's funds and money, whether in England or Scotland, and in particular the sum deposited in a bank upon an ordinary receipt: the testator being domiciled in England, where also his will was made, it must be construed by the law of England. On the other hand, it is equally clear, that, by disponing to trustees the lands and island of Shuna, burdened with a debt which was declared to be a heritable lien or real charge on the lands, the testator gave to them the lands *cum suo onere*—with every incumbrance of a real nature attaching to them. The Appellant, as executor, could never be called on to pay out of the moveable funds a debt which had been made heritable over these lands, in the person of the testator himself. Stair, b. 3, tit. 5, sect. 17, and tit. 8, sect. 65; Erskine, b. 3, tit. 8, sect. 52, and tit. 9, sect. 48; *Clayton* v. *Lowthian* (2 Wils. and Shaw, 40). No proposition can be clearer than that an heir, or *mortis causâ* disponee in Scotland, succeeding to an encumbered estate, must take it with all its burdens.

The next inquiry is, whether any such special bequest or direction subsisted at the testator's death as to supersede the general rule of law on the subject. There are two ways in which it may be contended that the money deposited was set aside for the relief of the Shuna trustees: first, that the testator by destination or the expression of a testamentary intention, devoted this money for that purpose; or, secondly, [556] that the money was appropriated for payment of the Shuna debt, not merely by the

ultimate intention of the testator, but by some previous agreement with third parties, creating a vested interest in this deposit. But these two grounds are distinct and independent of each other. The question of testamentary disposal is different from an agreement *inter vivos*; the two views ought not to be mixed up together, but ought to be separately examined; and if it appears on such an examination that neither of them singly is well founded, it will not be possible to support the interlocutors appealed from, by endeavouring to blend them together. If there was neither a clear appropriation of this fund as *inter vivos*, nor a clear destination of it *mortis causâ*, it would be impossible to make a third ground for depriving the Appellant of his rights, out of these two inadequate and defective views.

With respect to the first question, whether in the testamentary deeds there is an effectual destination of the deposit in favour of the Shuna trustees, to the exclusion of the executor and residuary legatee, supposing that at one time Mr. Yates harboured the intention of giving this money for the benefit of the trustees, and that such intention had been effectually expressed, it cannot be doubted that it was competent for him to alter that intention. It is equally clear, on the other hand, that if he ever had any such intention, it was *de facto* recalled by him, and that the result of his last will is to leave this part of his succession to rest upon the ordinary principles of law, and to devolve on the Appellant as part of the personal estate. The will of 15th April 1828, which destined the fund, was wholly superseded by subsequent deeds. That will contained a devise of the [557] island of Shuna, but as that devise was found to be insufficient, by the law of Scotland, to carry heritable property, a new deed was framed by the testator, and by that deed the whole provisions of the first will were virtually cancelled. It is impossible to look at the will of 15th April 1828, and the trust disposition of 1st April 1829, without being satisfied that none of the provisions of the first are to be considered as subsisting, except in so far as they are repeated in the second, and that, where any of the provisions have in the second deed been altered or modified in form or substance, the terms of the second deed are to be taken as the rule.

The deed of 1st May 1828 requires no comment, because it was actually cancelled by the testator, and was marked "cancelled by another will," which could be no other than the will of 17th April 1829, in favour of the Appellant, leaving him the testator's whole goods and chattels, and appointing him sole executor and residuary legatee. This and the trust disposition of the 1st of April 1829 are the only subsisting deeds. The latter was mainly intended as a conveyance of the island of Shuna, and as a description of the purposes to which it was to be applied. The subject of the deposited money is introduced incidentally, "As the island of Shuna appeared from the public records," etc. (see the extract, *ante*, p. 550). Upon well considering this passage, no one can say that it contains a substantive or direct bequest of the deposited money, or that the disposal of it was intended to be regulated by that deed; it is mentioned merely by relation to another will, the terms of which can alone be considered the testator's ultimate declaration of his intention upon [558] the subject; reference to the separate will cannot be considered of itself as determining the testator's final intentions, if that will is either differently expressed or has been recalled, and if the testator's last will of all contains no such provision.

It is clear that the testator in that passage refers to the will of 1st May, 1828, which is the only previous will respecting his property in England, and which, in all probability, was subsisting when the trust disposition of the 1st of April was executed. On the 17th of April 1829 the testator executed another will, containing the ultimate declaration of his intentions as to his English property, and as to his personal funds generally. It was then most probably that the will of the 1st of May 1828 was cancelled. In so far as regards the last will (of 17th April 1829), it is all in favour of the Appellant's pleas; it gives him the whole goods and chattels of the testator, wherever situated, appoints him sole executor and residuary legatee, and subjects him to payment of certain bequests, but it contains no provisions as to the deposited money. It does not, as pointed at in the trust disposition (of the 1st of April 1829), direct the executor to assign or indorse the notes or receipts of the bank to the trustees, nor does it qualify the general bequest in the Appellant's favour, by any condition or exception on the subject. It is submitted, therefore, that under the last will the Appellant takes all the testator's moveable property, including the fund in dispute, subject only to the legacies therein mentioned, and free from any obliga-

tion to indorse or assign the receipts. The Respondents cannot claim this part of the succession under the will of 15th April 1828, because that was entirely superseded by the trust disposition of 1st April 1829. They cannot [559] claim it under the will of 1st May 1828, because that was actually cancelled. They cannot claim it under the trust disposition of 1st of April 1829, because that merely refers to a separate will, which is cancelled, and the directions therein given to the executors are consequently revoked, and the executors themselves are superseded; and they cannot claim it under the last will of 17th April 1829, because by that will all former settlements of the testator's goods and chattels and of all his moveable property are virtually recalled, and they are bequeathed to the Appellant without restriction or exception.

The next question is, whether there was any previous arrangement or agreement *inter vivos* as to the appropriation of this money for the redemption of the debt and *lien* over Shuna. There could be no agreement of that sort between the testator and the Shuna trustees, because their interest in the succession was altogether *mortis causâ*, and of a revocable nature. There were no other parties, except the Leith Bank, with whom any agreement of appropriation could effectually be made, and the whole case shows that there never was, as between the testator and the Leith Bank, a concluded agreement for appropriating this fund. Mr. Yates at first deposited the money in bank, in the hope that it would lead to an immediate discharge of the incumbrances on Shuna, or would stop the currency of legal interest upon the debt. But the Leith Bank never closed with that proposition, and never recognised the deposit as affecting them, or made for their behoof. If they were to have the same general claim as before, for principal and interest of the assigned bond and lien, and were not bound on their part to recognise the deposit, there could not be any obligation as against Mr. Yates, and [560] the deposit must be looked on as an *ex parte* operation; and that such was truly the state of the case, is manifest from the steps taken by the Leith Bank in the action and diligence raised by them after Mr. Yates's death. The mode also in which the testator himself dealt with this money, demonstrates that it was not considered as definitely appropriated under any binding agreement with the Leith Bank: the money had been deposited in 1819, in the name of Mr. Rose, in *trust for*, and *to be under the direction of Mr. Yates*, and, from beginning to end of the transaction, the Leith Bank directors were never parties to the deposit. The risk was with Mr. Yates: if the Bank of Scotland holding the money had failed, he alone must have suffered the loss. As a consequence of the same view, the claim of the Leith Bank was in no way restricted to the fund deposited. Supposing that Mr. Yates had become insolvent before his death, the Leith Bank could not set up such vested interest in the money deposited as would have enabled them to compete preferably with his general creditors; or, supposing that any claims had arisen to the Bank of Scotland against Mr. Yates, it is obvious that they would have been entitled to retain the money deposited with them after the receipts were taken in his own name, in payment or security of their claims. Again, supposing that the creditor on the bond and real lien had not been a banking company, but an individual, it is clear that the debt in his person so secured over Shuna would have been heritable, and would descend on the heir, and not on the executor of the debtor. Supposing, finally, that the Leith Bank were to be considered as entitled to preference on the fund *in medio*, in virtue of their arrestment, the Appellant would be entitled to receive an assignation of their [561] debt and security, and to keep it up and enforce it as a real charge or burden on the estate of Shuna, in the hands of the trustees and all others.

Apprehending that the Respondents would rely on the judgment moved by Lord Gifford, in the case of *Earl of Minto* v. *Elliott* (1 Wils. and S. 678), the learned counsel cited it, and distinguished it from this case; and in support of their own argument on the construction of the will, they referred to the cases of *Hog* v. *Lashley* (6 Bro. P.C. 577), *Stanley* v. *Bernes* (3 Haggard, 373), *Anstruther* v. *Chalmers* (2 Sim. 1).

The Lord Advocate (Mr. Murray), and Mr. James Parker, for the Respondents:—

The points for consideration are, first, What was the intention of the testator? Secondly, How far has he succeeded in the legal execution of his intention? On the first question there can be no doubt. The whole of the testator's conduct, in every circumstance connected with the disputed fund, clearly shows that it never, at any moment, was his intention to bestow that fund on the Appellant; but that, on the

contrary, it was his settled determination throughout, that it should be employed in the disincumbrance of his property of Shuna. The letter which his agent, Mr. Pearson, addressed to Mr. Kerr, who represented the Leith Bank, is a document of much importance: and bearing date the very day after the stipulated term of payment, it proves that the postponement of payment took place in spite of Mr. Yates, and not in furtherance directly or indirectly of any object or intention of his. This letter is further of importance, as proving that the consignation of the deposit was with the full cognizance of the Leith Bank, then representing Mr. **[562]** Macdonald in the character of creditor, and under express notice, that, as the fault of non-payment lay with them, Mr. Yates was thenceforth to be liable in no more than bank interest. The money, as it lay in the bank, was to be dealt with as the money of the creditor, to remain deposited only until the creditor, by fulfilling his obligations, should put himself in condition to uplift it. From this letter it appears, that the Leith Bank had for some time previous been in communication with Mr. Pearson, who thus writes, "Agreeably to what I stated to you, I wrote to Mr. Rose, and communicated to him your wish," etc. (see the letter, *ante*, p. 546).

The Leith Bank at last obtained a discharge of a portion of the incumbrances on the estate of Shuna, and availing themselves of Mr. Pearson's readiness to pay any sum to account on a proper discharge, they applied for and obtained £4000 of the deposited fund, which was the amount of the incumbrances then extinguished, and they could then have obtained the whole deposit had they been in a condition to produce discharges of the whole incumbrances.

It is impossible to peruse the will of the 15th April 1828, without being satisfied that it was the testator's intention to vest the island in his trustees, free from every burden. It was not his interest in the island, subject to the reserved burden of a considerable portion of its price, but the whole and entire property of the island that was meant to be conveyed, and a perfect freedom from incumbrances was implied in the very purposes of the trust. Any doubt on this head is completely removed by referring to the special clause, respecting the consigned money: "As the island of Shuna," etc. (see the clause, *ante*, p. 549). The second testamentary **[563]** deed, executed by Mr. Yates on the 1st of May 1828, distinctly following up the intent of the first, conveyed his whole remaining estate to two of the three individuals whom he had already appointed trustees under the first deed. In so far, therefore, as these two deeds are to be read separately, it is plain that it is under the first, and not under the second, that the testator disposed of Shuna and of the deposit of money now in dispute. As however the two deeds have relation to each other, and between them embody a universal conveyance of the whole estate belonging to the testator, they may properly be read together, as constituting but one settlement. But it is clear, whether they are read together or separately, that the deposited money is dealt with as a special bequest in favour of the Respondents, and not intended to form part of the residuary estate under the second deed. The words of the residuary bequest are, "I give and bequeath all my chattels and effects of whatever nature to Jacob Yates," etc., "together with the liferent of all my lands and houses in the above parishes and other places, except the island of Shuna, in Argyllshire, which I have otherwise disposed of," etc. The present question, therefore, could never have arisen if there had been no other deeds beyond the two that have now been noticed.

The question then comes to be, whether Mr. Yates having once unquestionably conferred upon the Respondents a right to the deposited money, and having in direct terms excluded the residuary legatee from all right to that fund, did afterwards change his mind as to the disposal of this portion of his property? It is an undoubted fact in the case, that Mr. Yates never cancelled or revoked his first will, (of the 15th of April 1828). In consequence of some hints **[564]** dropped in a correspondence between him and Mr. Thomson, one of his intended trustees, he entertained doubts how far that deed might be technically sufficient by the law of Scotland to carry heritage situate there. He in fact never considered the deposited fund as forming any part of his own estate. He looked upon it as money set apart for Colonel Macdonald, from whom he had purchased Shuna, and for the Leith Banking Company which had come in his place. In a letter of the 28th May 1827, he says, "There is £1500, with several years' interest, lying in my name, in the Bank of Scotland, till certain defects in the title deeds of Shuna are removed. The Leith Bank have an assignment

of the sum, and it is odd that though only three per cent. is allowed on the deposit, they seem to be careless about the business," etc. Again, on the 23d of January 1828, he writes "There is likely to be litigation between the trustees of Colonel Macdonald and the Leith Bank, with respect to the part of the purchase-money which is deposited with the Bank of Scotland," etc.

But the new deeds which Mr. Yates executed, require no external aid from presumptive circumstances to show that they were no ways intended either to cut down the interests conferred upon the Respondents, or to enlarge the only interest which the original deeds had conferred on the Appellant. In the deed of the 1st of April 1829 is this passage: "As the island of Shuna appeared," etc. (see the extract, *ante*, p. 550). The only other deed which he executed, was the will of 17th of April 1829. Can it be pretended that within this short interval of 16 days between the two deeds, Mr. Yates changed his mind, upon a matter which had **[565]** been the favourite scheme of his life? There is not a vestige of evidence that he did. One most important feature in this deed, as in all the other deeds, is, that it contains no express words of revocation, applicable to any of the former deeds, and therefore, in so far as it is not absolutely irreconcileable with these deeds, it must be construed in conformity with them. But not only does it not contain any words of express revocation, but it contains words of positive recognition; thus it says, "It may be proper to observe, that by a will made by me in this present month and year, I have disposed of the island of Shuna, in Argyllshire, Scotland." The only clause from first to last of all the four deeds which affords the Appellant the slightest pretence for maintaining his present claim, is the following, which is contained in the last deed, "As to my goods and chattels, wherever situated, I give and bequeath them to the said Jacob Yates, his heirs and assigns, requesting," etc. (see this passage, *ante*, p. 552). Is this general bequest of residue to destroy the special destination of a specific fund which had already been fixed by another deed, executed but a few days before, and expressly referred to and recognised in the very deed which bequeaths the residue? Revocation is never to be presumed, except where the deeds are such that they cannot possibly stand together, which most assuredly is not the case here. But the words of residuary bequest do not stand alone; they are immediately followed up by this explanatory clause: "It may be well to mention, that I include in this bequest, my stock of cattle and other effects in Shuna, which are considerable," etc. (see the extract, *ante*, ibid).

The Respondents submit, in the first place, that the **[566]** fund belongs to them by express and positive bequest, under those words in the deed of 15th April 1828:— "My will is, that after my decease these notes or receipts shall become the property of my trustees, the magistracy of Glasgow." That bequest stands unrevoked. The trust disposition of 1st April 1829, indeed, again touches on the same matter, but there is nothing incompatible in the two deeds to prevent their standing together; if the second should be thought to labour under any ambiguity, the first may be made use of to explain it. The deed of 17th April 1829, on which the Appellant more immediately founds, contains nothing which could by possibility detract from the previous special bequest. Throwing aside the deed of 1st April 1829, and taking the deeds of 15th April 1828 and of 17th April 1829, as the only subsisting settlements, the Respondents submit that there is nothing in the general residuary bequest contained in the latter, which can in any respect destroy the specific disposal of the deposited fund contained in the former. A bequest of residue necessarily implies, that it can only come into operation after all special bequests shall have received their full effect.

The Respondents have in the next place to submit, that even though there should be held to be no direct bequest of the deposited money in their favour, there is such a plain appropriation and destination of it for their benefit, in the setting of it apart for the discharge and extinction of the unpaid balance of the price of Shuna, as completely to take it out of the residuary portion of the estate, and to entitle the Respondents to insist that it shall be applied to the special end for which the testator had thus destined it. Had there been no testamentary deeds whatever, and had the question arisen between the heir and **[567]** executor of Mr. Yates dying intestate, the Respondents would still contend that the very peculiar destination which exists as to this deposited money, would have entitled the heir-at-law to have insisted upon its being applied in extinction of the price of Shuna. Stair, B. 3. tit. 1. sect. 4:

Traquair v. *Blushiels* (Morr. 3591 and 11337), *Aikman* v. *Heirs, etc. of Boyd* (Id. 11347), *Earl of Minto* v. *Elliott* (1 Wils. and S. 678), *Waugh* v. *Jamieson* (Morr. 5453): Ersk. B. 3, tit. 8, sect. 17 and 18.

But the Appellant may object that these authorities proceed upon the footing that the price, in payment of which the executor was subjected, had not been constituted, by reservation or otherwise, a real burden on the land; and that wherever a real burden has been created, it is the heir, and not the executor, who is left to clear off that burden. It is quite true, that in the ordinary case, where the price is converted into a real burden at the instance and for the ends of the purchaser, the objection would be well founded, because it is by his own act and will that the liability is converted from a personal obligation into a real right. But in this case the postponed payment of the price was not rendered necessary from any fault of Mr. Yates's; it arose from the incapacity of the seller to give an unincumbered title. Mr. Yates's anxiety and wish was to pay the price and be quit of his money, but the seller was not equally ready. From the moment that the fund has been actually placed in deposit, or consigned in bank, and set apart from the debtor's other estate, with a view to such payment and extinction, the fund becomes heritable *destinatione;* the executor, if the original debtor dies whilst the money remains in this situation, is not entitled to [568] demand it as a portion of the testator's assets, but on the contrary, the heir who would have benefited by the payment, if the creditor's refusal or incapacity to receive payment had not rendered consignation unavoidable, is entitled to insist that he shall not be deprived of this benefit through the act of the creditor, but that the deposited fund shall be applied to the purposes for which, from the moment of its deposit, it had been destined; viz., the payment and extinction of that heritable debt which would otherwise fall a burden upon him as heir. The consignation of the deposit in this case was in all other respects equivalent to payment.

If such, therefore, would have been the Appellant's predicament in a competition with the heir-at-law, upon the mere abstract principle of destination, without any aid from the express declaration of the testator's intention contained in his testamentary deeds, how, under the infinitely more favourable circumstances which support the Respondent's case, can he maintain his claim to the deposited money which here forms the fund? The destination of that fund appears, not merely from the indicated purpose of paying off the balance of price due to those in the right of Colonel Macdonald; not merely from the actual tender of payment, which is proved to have been made at the stipulated term of Candlemas 1819; not merely from the consignation of the money on the creditors' failure to accept of this tender; not merely from the subsequent payment to account out of the deposited fund, which the same creditor afterwards accepted of and discharged; but from the total separation which, for upwards of ten years, was made between the deposited money and the deceased's other estate; from the cessation to pay interest upon [569] the debt to the creditor during the whole of this period of deposit; from the express notice given to the creditor, that he must be content with such interest as the bank in deposit might give; from the tacit acquiescence of the creditor in the notification thus given; and, above all, from the reiterated, express declarations of purpose contained in the first, as in the last, of the deceased's testamentary deeds; that this fund was "to be kept by his trustees, in the same depository where it now is, till the defects in the title of Shuna are cured:" and that upon that event, and upon all encumbrances being cleared, then,—so far from being handed over to the Appellant, either as residuary legatee or as executor,—the deposited money and "the notes or receipts I hold of the Royal Bank, with the interest due upon them, will become the property of Colonel Macdonald's creditors or assigns, and must be given up, on delivery or discharge of my heritable bond for the balance of the price of Shuna."

Lord Brougham, in the course of the arguments for the Appellant, made the following observations:—In England we should have some difficulty in admitting the wills in evidence,—I do not know how the practice is in Scotland,—how could any Court before which this question should have arisen have access to those two instruments? By the laws of evidence in England, where the personalty is in question, you cannot produce the will itself for any purpose of a civil action, and prove the testator's handwriting by the attesting witnesses; that could not be given in evidence: it could not get to the Court; the only evidence is the probate, unless on

certain issues, such as a question of sanity, for instance, or a collateral question; but for no testa-**[570]**-mentary purpose, as I apprehend, could the will itself be produced. I do not say that is the Scotch law of evidence. But it does not follow that the case is to be decided by English law; it may be that the Scotch Courts, acting as Scotch Courts with respect to Scotch property, must decide by the Scotch law. These are feelers by which they are to arrive at their point, though the general principle would be that the English law is to prevail.

[Dr. Lushington.—I submit that the will of a person domiciled in England, made according to the law of England, governs the distribution of the testator's personal estate all over the world: *Anstruther* v. *Chalmers* (2 Sim. 1).]

Lord Brougham.—The law of England must be looked to for the *lex domicilii*, for the construction as well as the effect of a will, and Sir John Leach's decision in *Anstruther* v. *Chalmers* would be a grave authority to show it was so; but, as this was a Scotch estate, it might be a question, under the law of Scotland, whether, in construing an English-made instrument, though the party was a domiciled Englishman, upon a personal matter you were not to look to the rules of the law of Scotland. I feel some difficulty as to that question; the law of Scotland knows nothing of ordinary executory devises; they have one chapter that comes near them—the doctrine of list deliveries on general failure of issue; but the subtleties of our law of executory devises they know nothing of it; it is one of the nicest points in the English law, upon the effect of all those 64 cases often mentioned in Lord Thurlow's **[571]** time; and I asked Mr. Preston a few days ago how many more he could show me, and he said 140. A domiciled Englishman in England making an English will, according to your present contention, the Scotch Courts must construe that English will according to the English law; but supposing he limits a chattel personal, say some bank stock made personal chattel by Act of Parliament, upon a general failure of issue, that is to say, to A. B., and, according to the English law, I will say with remainder to C. D.,—the Scotch would say, "whom failing;"—and if C. D. should die without issue, or without children, then over to E. F., the English law would then raise this question, must it be to C. D. dying without issue generally, or must the bequest, in order to vest, be given over to E. F., if C. D. dies without having issue living at the time of his death: and then you go into all the general learning, to show whether it is a general or a special failure of issue; in the one case an executory devise would be good, in the other bad.

I am inclined to think, in the first place, if you read these words, without going out of the four corners of this paper and without looking into the cancelled will, it contains a sufficient indication and a declaration that will do: "Now, if this transaction should not be closed before my death, I have, in a separate will, which respects my property in England, directed my trustees or executors in that will" what they shall do. Supposing it had been so, that would raise a question whether you had a right to travel out of this instrument, and to look at the unproved or cancelled will. But it is no such thing; the deed says, "to assign or indorse the notes or receipts of the Royal Bank to my said trustees." (His Lordship having read the passage as in p. 551, *ante*, proceeded to observe.) They will contend, **[572]** on the other side, that this is a sufficient *testamenti dictio* without travelling out of this deed into the cancelled will; and that they do not require the cancelled words. In cases with respect to property in England, it has been held, that reciting and referring to a thing as done is sufficient, though it was never done. If a man says, "I have, in the first part of my will, given such an estate to A.," A. shall have that estate, though the gift is not contained in the first part of the will.

[Dr. Lushington.—But the persons appointed to do the act are the executors mentioned in that instrument, and can your Lordship doubt, that if the testator cancelled that very thing which appoints them, it all falls to the ground?]

Lord Brougham.—I will tell you my idea of that. If by a valid subsisting will admitted to probate, a man gives £1000 to A. B., whom he has appointed his executor in his former will, and if he, the next day after he has executed that instrument, cancels the will by which he appointed A. B. his executor, no man can doubt that, under the subsisting will, A. B. would take the £1000. Suppose A. B. is not mentioned, but the testator says, "I hereby give the person whom I have appointed my executor in my will, made on such a day, £1000," and next day he revokes or cancels that

will. May you look into such a will for the purpose of seeing who the person is? For that raises the question to which we must come in this case, and it is a very important one; and it never has been decided yet, either in this country or in Scotland, that if the law of the country where the testator lives and dies (his *lex domicilii*) is to regulate the disposition of his personal property under the will, that **[573]** law is also to regulate the construction of the will, which is one difficulty. That point has never been decided, and I have very great doubt about it, namely, whether the Judges in Scotland must not only take the English law as their guide in the construction of the will, and in working out what was the intention of the testator, but whether they must also take the technical rules of the English law as to evidence in getting to the case in the Scotch Court: that is what you have got to combat; and I have great doubts about it. I must say, though I incline to the opinion of the Judges of the Court below, still I am very far from thinking it so very clear a case, because the points are raised for the first time, viz. first, whether the English rule of construction is to be applied; and, secondly, whether the English rule of evidence is to be applied? Both those questions are distinctly raised and we must decide them; we cannot travel to a decision here without deciding those questions, and yet the Judges below never seem to have said a word about them. Could the appropriation not have been effected by the testator himself in his lifetime?

[Dr. Lushington.—I mean to establish before your Lordships, on the authority of the case of *Lord Minto* v. *Elliott*, that it could not; for, in order to make a valid appropriation during the party's lifetime, there must be an interest created in some third party.—He read extracts from the judgments of Lord Giffard, in the case just cited, and of Chief Baron Alexander, in *Gaskell* v. *Gaskell* (2 You. and J. 502. 510).]

Lord Brougham.—The reason why they talk of a testamentary deed in Scotland is this: By a testament **[574]** in Scotland you cannot convey a real estate or touch it at all; it must be by deed *inter vivos*, but then there is in Scotland the seal; there is no difference between simple contract and bond debts, consequently they do not talk of a deed as we do. By a deed, they mean an instrument under seal; a will does not require a seal, a deed does.

His Lordship further said in the course of the arguments for the Respondents: I take the case to consist of two branches, the one is the question of evidence of English instruments, and the Scotch Courts dealing with them in two ways; the other is the appropriation. Perhaps you, my Lord Advocate, do not mean to deny, nor does, I suppose, Dr. Lushington on his part mean to deny, that his case might stand on the second ground, that of appropriation, whichever way the first is disposed of? You have two points whichever way we decide: the first point is the one I wish particularly to call my Lord Advocate's attention to, and that is,—you have to show, though I think you may assume, that the law of domicile is to govern the decision—then two questions arise in applying that principle; are you to take the construction which the English law would put upon the instrument, or are you to come at the construction by the Scotch law principle? That is the first question, and upon that question I am inclined to think that it is the English law that is to govern. The second is a different question, whether or not the English or the Scotch law of evidence is to regulate the admission or rejection of certain evidence in this case. We are putting the two points on the true ground, whether the one law or the other is to be the governing rule. Again, supposing it is decided that the Scotch law **[575]** is to govern, you are to satisfy me that by the Scotch law, regard being had to the confirmation and the proceedings there, you have a right to avail yourselves of them. Then comes the question of appropriation kept apart from the other two. That seems to me to be the scheme of the argument. It is not merely a technical matter, but a very substantial matter, for it is whether it is the man's last will or not; the question raised on admitting a paper to probate is, whether it is testamentary or not? He may have one will which is a testamentary paper and not revoked by the last will, but he may also have a paper which ceased to be his will, because he has made his last will. A man may have two wills, but he cannot have two last wills. How you can ever make this out to be a subsisting will, my Lord Advocate, I cannot say. This, I take upon me to say, would never be admitted to probate in England—I mean the former will of April 1828.

The question is, whether an English rule of evidence is to be applied, or a

Scotch rule of evidence. By the law of England, if a man makes a will written all with his own hand, and bequeaths £1000 to one and £1000 to another, and the residue to a third, and signs it with his own hand, and it is in every respect in the form of a will according to the English law as it at present stands,—in short, suppose he makes such a will as would be admitted to probate, suppose it to have been proved as his last will at Doctors Commons; then suppose any person gets possession of that will (which ought to have been regularly filed at Doctors Commons) by spoliation or by negligence of the officer in bringing it down, which he may be compelled to do by a subpœna *duces tecum*,—suppose you bring down that original will and produce it at York, at *nisi prius*, and even prove it was out of Doctors Commons and [576] in the custody of the proper officer; what you would think of that in Scotland would be, that it would be the most perfect proof of the instrument, yet by the rules of evidence in England, it cannot be received at *nisi prius*, and the party would be nonsuited, or have a verdict passed against him if he did not choose to be nonsuited, if he had not another instrument, and if he only produced the original will. By our rules of evidence he must produce the probate, which is a sentence of a Court of competent jurisdiction declaring that to be the will; that is the probate without the will, but with a copy of the will, so that that is a case in which a copy is evidence and not the original. It is the sentence of a Court, and proves itself under the seal of the Court. Now, if that be so in the case of a will which has had probate, how much more is it the case where you produce a will which never has had probate, consequently a Court and Jury here, or a Court of Equity, never could look at that instrument, it is the probate alone that lets it in *quasi* will. They might see it for other purposes, as in a question of forgery, or they might see it if it were referred to in another instrument, or in a question of sanity. Now that is the law here; and this being the case of a domiciled Englishman, is the law here to be the governing rule as to the admissibility of evidence in Scotland, where the action is brought?

I will state to you my only difficulty and see whether you can help me over it, because I agree with you, generally speaking, that the *lex loci domicilii* is not applicable to the course of procedure; that the Court is to proceed by its own course of procedure, the law of the Court being the course of the Court, and consequently I am inclined to think that the admission of evidence being rather matter of procedure than a substantial matter of law, it is to be governed by the law [577] of the country where the Court sits. But then in all questions of jurisprudence it is easy to say how things are here and there, when there is a very great difference between the points; but when you come to the confines, and when the one province runs into the other, then arises the difficulty and then we get *inter apices juris*. Here is a case which partakes of the nature of the law of evidence and also of the substance of the weightier matter of law. I will put the case I have already hinted at; suppose the English law were to change, as it is now in the course of changing, and that no will of personalty could henceforth be valid unless it was attested by two witnesses. Now observe, an Englishman domiciled in England makes his will touching Scotch property; *mobilia sequuntur personam*, and therefore the *lex loci* of England prevails. You go into a Court of Scotland and tender the will, in order to get, by the rules of the English law, possession of the fund; the Scotch Court says, "willingly you shall have it; whoever would get it in England shall get it here, whether it would be the same person our law would give it to or no, because the English law is to govern, but," says the Court, "let us look at the will." The will is produced, it has only one witness or no witness at all, then the Court says, "this is no will, it would not in England be held to pass the property to any human being. The law has said, that in order to pass property, to extend after a man's death the right that he has to his chattels during his lifetime, which is not a natural right but entirely conventional, he must have complied with the formality of two witnesses attesting it." Now, my Lord Advocate, how would you deal with that matter? Would it be by the English or the Scotch law? because if it be by the Scotch law there is a great difficulty, which is neither more nor less than [578] this, that Englishmen would acquire personal property by the English law, though that property was only attached by a will executed without complying with the formality of that law; that is the difficulty.

The Counsel for the Respondents proceeded, and with a view of showing that their Lordships, sitting as a Court of Appeal on Scotch law, might look to the will without reference to probate, and for the general purposes of their argument, they cited Ersk. B. 2, tit. 3, sect. 14, *In re Ewin* (1 Cromp. and J. 151), *Attorney-general* v. *Dimond* (Id. 356), *Earl Minto* v. *Elliott* (1 Wils. and S. 678).

Dr. Lushington, in his reply, was arguing that their Lordships could not look to the instrument as a testamentary act—

Lord Brougham.—I admit that no probate could be had of any but the second will, in England. It does not, however, follow that the Scotch Court may not look at both instruments; at that which has not probate, as well as at that which has. That Court will give faith to what has been sanctioned by a Court of competent jurisdiction, but it does not follow that, upon a matter in which no Court has exercised any judgment, the Scotch Court would reject that matter because it was not proved in an English Court, if it is not contrary to the rules of evidence, and to the practice of the Scotch Court, to receive it. It is going too far to suppose the Scotch Court would say, "if this instrument had been offered to an English Court it would not be admitted, and we therefore reject it." Do you think, my Lord Advocate, you can for your argument throw overboard the first will of 1828? Could you rely safely on the passage in the deed of **[579]** the 1st of April 1829? "Now, if this transaction should not be closed before my death, I have in a separate will which respects my property in England, directed my trustees or executors in that will, to assign or indorse the notes or receipts of the Royal Bank to my said trustees, the lord mayor and bailies, to be kept by them in the same depository where they now are till the above defects are cured." Would that sustain your argument without the first will? This is a subsisting trust deed, a conveyance *inter vivos*, operative at this moment. I mean your argument respecting the appropriation; does it require no other aid, and can it stand without the first will of 1828, as well as without the cancelled will? [The Lord Advocate.—Certainly; I apprehend it is quite sufficient, if a person declares "I deposit this money," meaning it should be paid for a certain debt.] Lord Brougham.—Suppose now, Dr. Lushington, there had been a will, not proved in Scotland, but a will which by the law of Scotland, for want of two witnesses (a will of personalty), could not be admitted to probate there, and suppose probate had been sought of that will here, would probate be refused here for want of two witnesses?

Dr. Lushington.—Decidedly; the case of *Stanley* v. *Bernes* (3 Hagg. 373) is one in point.

Lord Brougham, after the arguments were closed, said:—My Lords, another reason,—besides the importance of the matter,—for which I wish to postpone the further consideration of this question, is, that though the subject is of great importance, and some parts of it are not without difficulty—though undeniably the **[580]** decision, if pronounced, will be for the first time pronounced in this House upon those points—though undeniably also the decision upon the same points in the Court below has been pronounced for the first time in any Court of England or of Scotland—though, therefore, these points are matters of first impression, yet in this case I desiderate that which is a great help to any Court of Review dealing with the judgment of a Court below, brought before it by appeal—I desiderate the reasons of the learned Judges who pronounced the decision in the Court below. I find four learned Judges have given their opinions, but not one of them has given one tittle of reason for his opinion. The question that arises here, and which brings the laws of the two countries into conflict, is this first and general question: Shall the Scotch practice or the English practice respecting the law of evidence, as well as the Scotch principle or the English principle in respect of the construction of the instrument, prevail as the governing rule in this case? That is the first and general question, and for solution of that question one should look to the opinions of learned Judges and for their reasons, to know the view which they take of so important a matter. But that is not the only question: there is another and much more material one; and that is one upon which above all things it is material to know the views of the Scotch Judges.—Granting that the Scotch law is to prevail in construing the instrument, and the Scotch practice also in admitting or rejecting evidence, what is the Scotch practice, and what is the Scotch law; the Scotch law

respecting construction of instruments, and the Scotch practice respecting the admission or rejection of evidence? I desiderate the authority, the authentic and consequently the [581] most valuable statement which can be had as to what is the Scotch law and practice, but particularly the Scotch practice as to admitting or rejecting evidence. I desiderate that the more, because one wishes to know how these things are dealt with in the Scotch Courts, and to see exactly what the difference is, and upon the highest authority, between the Scotch and the English Courts in the administration of the important law of evidence. Unfortunately we are left without any light from that quarter, from which above all others I should wish to receive it, and that is an additional reason for wishing your Lordships to postpone the further consideration of this case.

Lord Brougham.—My Lords, the question which I considered it right to give reasons upon in this case, relates rather to the first than to the second part of the subject as taken in the order of the argument at the bar—to the manner in which the instruments, executed in England by a domiciled Englishman, are to be construed and dealt with in respect of evidence by a Scotch Court, in so far as these instruments relate to the distribution of personal property, situated within the territory of Scotland, rather than to the question of valid or effectual appropriation.

James Yates, merchant in London, and residing always in England, had purchased the island of Shuna, one of the Hebrides, at the price of £10,500, of which £5500 was, by agreement, left as a burden upon the estate. The transaction took place in 1815, and at Candlemas 1819 the remaining part of the price was to be paid, the parties having no doubt of the seller being able before that time to clear off the incumbrances affecting the estate. Meanwhile an heritable bond was granted for the £5500, and was [582] duly recorded, so as to constitute an effectual lien on the estate by the laws of Scotland. At the stipulated period, (the 2d February 1819,) payment of the bond was tendered, but the seller was still unable to give a clear title, and Mr. Yates accordingly consigned the money with the Bank of Scotland. Before this period the rights of the vendor had been transferred to the Leith Banking Company, to whom accordingly Mr. Yates's agents gave notice of the consignment, in order that their client might be relieved from any claim of interest after the consignment was notified. The Bank Company acted upon this notice; for Mr. Yates having intimated to them that they might draw out a sum of the deposit equal to the debts upon the estate which they should pay off and produce discharges for, they actually paid off £4000, or at least produced discharges to that amount, and received so much of the fund out of the Bank of Scotland, leaving only £1649 2s. 5d. the balance still deposited, and now in dispute, together with the sum of £387 2s. 6d. interest. The deposit had originally been made in the name of Mr. Rose, as a kind of trustee or stakeholder for all parties, but in August 1826 it was, at Mr. Rose's desire, transferred to Mr. Yates's own name. The whole course of the transaction, as I have stated it from the facts admitted on all hands, plainly shows Mr. Yates's desire from the beginning to finish the affair, to pay the price, and to receive the titles of the estate, and his intention of keeping this business apart from his general concerns; nor can anything be more contrary to probability than the supposition that he should allow it to be mixed up with the arrangement of his affairs, and to influence the testamentary disposition of his property.

With this strong probability arising from the con-[583]-duct of the parties, and from the course of the transaction generally, we come to consider that which forms the whole question in the cause,—whether an appropriation of the fund deposited with the Bank of Scotland was effectually made by Mr. Yates? And first let us see how far the trust disposition of the 1st of April 1829 will carry us, without any regard to the will of April 1828. The island of Shuna seems to be the subject of that deed; the maker having probably discovered since April 1828, that the devise of real property situated in Scotland, which he had in the will of that date endeavoured to make, by executing it so as to pass lands in England, was wholly ineffectual for his purpose. He appears, however, to have deemed that will sufficient for executing his intention respecting his personalty as connected with the island, as indeed it was while unrevoked, and accordingly it is said that he rather refers to it as having declared those intentions, than repeats his declaration. I cannot, however, either con-

sider the passage of the trust deed to which I am alluding as a mere reference to the will; nor can I think, even if it were, that this circumstance would destroy its force; if it were a mere reference, nothing is more certain than that by words of recital, you may validly bequeath or devise, and that saying you have done so, if you say it distinctly, is as valid a gift as if there was a reference or recital in the passage. But granting that the subsequent cancelling of the will to which reference is made, would have the effect of cancelling also this reference, the last words of the passage appear substantive and not relative to the will. "Now, if this transaction should not be closed before my death," etc. (His Lordship read the whole clause as in p. 551, *ante*), "and till the entry stipulated to be made with the superior is [584] implemented; or *if the latter is called for before the titles are purged, it may with no impropriety be taken from the sum in deposit.*" These words, "or if the latter," etc. do not in form relate to the will previously made, but contain a direction, or a declaration of an intention, nowhere to be found in the will, and they are therefore an addition to the declaration there contained.

But let us consider the last will, which was admitted to probate. It is dated the 17th April 1829, sixteen days after the date of the trust disposition; and it clearly refers to the English property only. He considered that in the trust deed he had disposed fully of his Scotch property; and the will is addressed to the English property. This circumstance and the express reference to the provision of the deed in the will, appear to me sufficient to render them both parts of one conveyance; for he says in the will, "It may be proper to observe, that by a will made in this present month and year I have disposed of the island of Shuna, in Argyllshire;" and he also mentions his "stock of cattle and other effects in Shuna" as part of the residue. Now supposing this last will to have the effect, which it undoubtedly has, generally speaking, of revoking the first will, it seems to me by no means so clear that it revokes whatever part of that first will is, by reference to it in the trust deed, republished and imported into that trust deed; for the sounder view of the matter seems to be, that the trust deed and the will of 1829 being taken as one, the will of 1829 only revokes so much of the will of 1828 as is not imported into or referred to by the deed. Indeed, if the trust disposition and last will be regarded as one conveyance, the last will no more revokes the part of the trust disposition referring to the generally revoked will of 1828, than if the reference had been [585] contained in the last will, that of 1829. This consideration goes far to satisfy me that the revocation operated by the last will, after the date of the trust disposition, renders the passage in the trust disposition, which refers to the will of 1828, substantive and not relative, and prevents the general revocation subsequently effected from having any force to destroy the import of that passage as a valid declaration of the testator's intention. It might even be argued that you would, upon this ground, have a right in our Courts, and, according to our strict practice, to look at the revoked will by means of the reference, first in the trust deed to that will, and next in the last will to the trust deed. But this needs not now be considered.

Although, therefore, I am of opinion that there is no necessity for admitting the first will in order to dispose of this case and to support the decree of the Court below, yet the importance of the question connected with its admission in evidence is sufficient to require that I should state in what light I should view it. It is on all hands admitted that the whole distribution of Mr. Yates's personal estate must be governed by the law of England, where he had his domicile through life, and at the time of his decease, and at the dates of all the instruments executed by him. Had he died intestate, the English statute of distributions, and not the Scotch law of succession in moveables, would have regulated the whole course of the administration. His written declarations must, therefore, be taken with respect to the English law. I think it follows from hence, that those declarations of intention touching that property must be construed as we should construe them here by our principles of legal interpretation. Great embarrassment may, no doubt, arise from calling upon a Scotch Court to apply the [586] principles of English law to such questions, many of those principles being among the most nice and difficult known in our jurisprudence. The Court of Session may, for example, be required to decide whether an executory devise is void as being too remote, and to apply, for the purpose of ascertaining that question, the criterion of the gift passing or not passing what

would be an estate in realty, although in the language of the Scotch law there is no such expression as executory devise, and within the knowledge of Scotch lawyers no such thing as an executory estate tail. Nevertheless, this is a difficulty which must of necessity be grappled with, because in no other way can the English law be applied to personal property situated locally within the jurisdiction of the Scottish forum, and the rule which requires the law of the domicile to govern succession to such property could in no other way be applied and followed out. Nor am I aware that any distinction in this respect has ever been taken between testamentary succession, and succession *ab intestato*, or that it has been held either here or in Scotland that the Court's right to regard the foreign law was excluded wherever a foreign instrument had been executed. It is therefore my opinion that in this, as in other cases of the like description, the Scotch Court must inquire of the foreign law as a matter of fact, and examine such evidence as will show how in England such instruments would be dealt with as to construction. I give this as my opinion upon principle, for I am not aware of the question ever having received judicial determination in either country.

But here I think the importing of the foreign code (sometimes incorrectly called the *comitas*) must stop: what evidence the Courts of another country would receive, and what reject, is a question into which [587] I cannot at all see the necessity of the Courts of any one country entering. Those principles which regulate the admission of evidence are the rules by which the Courts of every country guide themselves in all their inquiries. The truth with respect to men's actions, which form the subject-matter of their inquiry, is to be ascertained according to a certain definite course of proceeding, and certain rules have established that in pursuing this investigation some things shall be heard from witnesses, others not listened to; some instruments shall be inspected by the judge, others kept from his eye. This must evidently be the same course, and governed by the same rules, whatever be the subject-matter of investigation; nor can it make any difference whether the facts, concerning which the discussion arises, happened at home or abroad; whether they related to a foreigner domiciled abroad, or a native living and dying at home. As well might it be contended that another mode of trial should be adopted as that another law of evidence should be admitted in such cases. Who would argue that in a question like the present the Court of Session should try the point of fact by a jury according to the English procedure, or should follow the course of our dispositions or interrogatories in courts of equity, because the testator was a domiciled Englishman, and because those methods of trial would be applied to his case were the question raised here? The answer is, that the question arises in the Court of Session, and must be dealt with by the rules which regulate inquiry there. Now the law of evidence is among the chief of these rules; nor let it be said that there is any inconsistency in applying the English rules of construction and the Scotch ones of evidence to the same matter, in in-[588]-vestigating facts by one law and intention by another. The difference is manifest between the two inquiries; for a person's meaning can only be gathered from assuming that he intended to use words in the sense affixed to them by the law of the country he belonged to at the time of framing his instrument. Accordingly, where the question is what a person intended by an instrument relating to the conveyance of real estate situated in a foreign country, and where the *lex loci rei sitæ* must govern, we decide upon his meaning by that law, and not by the law of the country where the deed was executed, because we consider him to have had that foreign law in his contemplation.

The will of April 1828 has not been admitted to probate here; it has not even been offered for proof, so that there is no sentence of any Court of competent jurisdiction upon it either way. But in England it would never be received in evidence nor seen by any Court; neither would it have been seen if it had been proved ever so formally. Our law holds the probate as the only evidence of a will of personalty, or of the appointment of executors; in short, of any disposition which a testator may make, unless it regards his real estate. Can it be said that the Scotch Court is bound by this rule of evidence, which, though founded upon views of convenience, and for anything I know well devised, is yet one which must be allowed to be exceedingly technical, and which would exclude from the view of the Court a subsequent will, clearly revoking the one admitted to probate. The English Courts would never

look at this will, although proof might be tendered that it had come to the knowledge of the party on the eve of the trial. A delay might be granted to enable him to obtain a revocation of the [589] probate of the former will. It is absurd to contend, that the Court of Session shall admit all this technicality of procedure into its course of judicature as often as a question arises upon the succession of a person domiciled in England.

Again, there are certain rules just as strict, and many of them not less technical, governing the admission of parol evidence with us. Can it be contended, that, as often as an English succession comes in question before the Scotch Court, witnesses are to be admitted or rejected upon the practice of the English Courts; nay, that examination and cross-examination are to proceed upon those rules of our practice, supposing them to be (as they may possibly be) quite different from the Scotch rules? This would be manifestly a source of such inconvenience as no Court ever could get over. Among other embarrassments equally inextricable there would be this: that a host of English lawyers must always be in attendance on the Scotch Courts, ready to give evidence, at a moment's notice, of what the English rules of practice are touching the reception or refusal of testimony, and the manner of obtaining it; for those questions which, by the supposition, are questions of mere fact in the Scotch Courts, must arise unexpectedly during each trial, and must be disposed of on the spot in order that the trial may proceed.

The case which I should however put, as quite decisive of this matter, comes nearer than any other to the one at bar, and it may, with equal advantage to the elucidation of the argument, be put as arising both in an English and in a Scotch Court. By our English rules of evidence no instrument proves itself, unless it be thirty years old, or is an office copy authorized by law to be given by the proper officer, [590] or is the London Gazette, or is by some special Act made evidence, or is an original record of a Court under its seal, or an exemplification under seal, which is *quasi* a record. By the Scotch law all instruments prepared and witnessed according to the provisions of the Act of 1681 are probative writs, and may be given in evidence without any proof. Now suppose a will of personalty or any other instrument relating to personal property, attested by two witnesses and executed in England according to the provisions of the Scotch Act, is tendered in evidence before the Court of Session; it surely never will be contended that the learned Judges, on being satisfied that the question relates to English personal succession, ought straightway to examine what is the English law of evidence, and to require the attendance of one or other of the subscribing witnesses, where the instrument is admissible by the Scotch law as probative. Of this I can have no doubt. But suppose the question to arise in England, and that a deed is executed in Scotland according to the Act of 1681 by one domiciled here, would any Court here receive it as proving itself, being only a year old, without calling the attesting witnesses? It would have a strange effect to hear the circumstance of there being two subscribing witnesses to the instrument, which makes it prove itself in the Parliament House of Edinburgh, urged in Westminster Hall as the ground of its admission without any parol testimony. The Court would inevitably answer, "two witnesses—then, because there are witnesses, it cannot be admitted, but they must, one or other of them, be called to prove it." The very thing that makes the instrument prove itself in Scotland, makes it in England necessary to be proved by witnesses. I have, therefore, no doubt [591] whatever that the rules of evidence form no part of the foreign law, according to which you are to proceed in disposing of English questions arising in Scotch Courts.

It by no means follows, that where a sentence of a foreign Court is offered in evidence in Court—the probate, for example, of an English will, it should not be admitted; nor do I think it should be denied its natural and legitimate force. But that it must, like all other instruments, be received upon such proof as is required by the rules of evidence, followed by the Court before which it is tendered, I hold to be quite clear; it will follow, that though a probate striking out part of a will would be received, and the Court of Session would have no right to notice the part struck out—for this would be reversing or at least disregarding the very sentence of the court of probate, yet the non-probate of a person's will would not prevent the Court from receiving and regarding that will if its own rules of evidence did not shut it out. So, too, it is unnecessary here to decide what would be the course in the Scotch Courts in

the case of an English will of personalty attested by one witness, after an Act should have passed requiring two. I think, that though it might be admissible in evidence by the rules of evidence which would then govern, yet no effect could be given to its disposition, because of the rules of English law requiring two witnesses, that being a requisition not of form, in order to make the paper evidence, but of substance, in order to protect testators on their dying beds.

Upon these principles I am of opinion that the Court of Session had a right to receive and to look at the first will, with a view to examine the testator's intention regarding this fund *in medio*. Upon the [592] effect of that first will it is unnecessary to dwell further. The trust disposition seems to me a sufficient declaration of intention to appropriate. But the will leaves that intention free from all doubt. No doubt, if that will was wholly revoked by the subsequent one of April 1829, there would be an end of such a declaration in Scotland as well as in this country. But I have stated why I think the trust deed, and even the connexion between that and the last will, cannot be regarded as revoking any intention respecting the fund and the island expressed in the earlier will, and why *quoad* that intention it cannot be held revoked. The whole course of the transaction and the whole circumstances of the parties confirm this view of the case. I therefore move your Lordships that the judgment of the Court below be affirmed, but without costs.

Ordered accordingly, "that the appeal be dismissed, and the interlocutors complained of affirmed, without costs."

[593]

APPEAL

From the Court of Chancery.

STEPHEN TURNER and MARY FOURNIER, Executor and Executrix of J. L. FOURNIER, deceased,—*Appellants;* WILLIAM HENRY DICKENSON, Assignee of EMMA DICKENSON,—*Respondent.*

[Mews' Dig. ix. 1408, 1457; S.C. 9 Bli. N.S. 282, *sub nom. Fournier* v. *Paine.*]

A. became possessed of a tract of open waste ground called the Lydes. He built houses upon it, and gave the row of houses thus built the name of Somerset-place. There were gardens behind these houses, and a lawn in front, and roads and footpaths connecting them with the roads of the neighbourhood. A., to carry on the building speculation in which he was engaged, borrowed money at different times from B., and occasionally made up accounts of advances and payments, and struck balances, for which he gave different securities. In the year 1808, he gave as a security for the repayment of the money then due, an agreement, whereby he charged certain houses at that time unfinished, "and likewise all and every other the messuages or dwelling-houses, lands, hereditaments, and fee-farm ground rents, also situate and lying in Somerset-place aforesaid, adjoining the said unfinished messuages or dwelling-houses," with the payment of the sum then found due to B.: and he thereby agreed to execute to B. "a good and sufficient mortgage of all and every his said messuages or dwelling-houses, lands, hereditaments, and fee-farm or ground rents." In 1810, A. collected the water from springs on the Lydes into a reservoir, which he formed on the lawn, and he agreed with certain other persons to supply their houses with water on receiving a compensation "in the nature of a rent issuing out of their [594] premises for ever after, and recoverable in the usual manner by distress and entry." In 1813 another settlement took place between him and B., and A. entered into another agreement with B., in the same terms as the former, for securing payment of the sum then found due to B. The title-deeds of the Lydes were then left by A. in the hands of B.'s solicitor. After all this had been done, a house called the Ivy House was built upon a strip of land at the south-western extremity of the

space which had been called the Lydes, and outside the carriage-road which ran round the lawn to the houses. Held, that the reservoir and the Ivy House were by force of the terms in A.'s agreement chargeable with the payment of the debt to B.

Where there is a statement of a fact in the case presented by the Appellant to this House as the subject of appeal, the Respondent, if he objects to such statement, should apply to have it struck out. If he omits to do so, such fact will be afterwards taken as uncontradicted.

Under two several conveyances made in the years 1784 and 1786, Thomas Paine was, previously to the month of November 1805, entitled to a piece of ground in the parish of Walcot in the county of Somerset, on which he intended to build certain dwelling-houses. This ground was called the Lydes, or the Great Lydes. The houses were afterwards erected, and formed a crescent called Somerset-place. The spot called the Lydes was, when Paine first became the purchaser of it in 1784 and 1786, an open space of ground, inclosing in its area the ground on which the houses afterwards called Somerset-place were built, a lawn in front thereof, gardens and coach-road behind, and a house, called indifferently Protection House or Ivy House, at the extreme end of the lawn. From the year 1805 to 1813 inclusive, Emma Dickenson, at different intervals, advanced money to Paine for the purposes of the buildings he was then erecting, and **[595]** from time to time settlements of accounts were made between them, and balances were struck, and securities given. On the 2d November 1805, the sum of £200 being due to Emma Dickenson, Paine gave his bond, conditioned in the penal sum of £400, to secure its repayment with five per cent. interest. On the 2d November 1807, another settlement of accounts took place, when £835 8s. 3d. were found to be due, and Paine then executed an agreement to "charge or subject the two messuages or dwelling-houses lately erected and built, but not finished, and also the two messuages or dwelling-houses adjoining, now erecting and building, with their appurtenances, and respectively situate and lying in the parish of Walcot, in the county of Somerset, and near the city of Bath, with the payment of the said sum."

The two messuages or dwelling-houses described as being lately erected but not finished, and the two messuages or dwelling-houses described as adjoining those erections and buildings, with their appurtenances, were afterwards known by the numbers 17, 18, 19 and 20, in Somerset-place. On the 24th of June 1808, another account was made out, and a balance of £2225 2s. was found to be due to Emma Dickenson, and Paine further charged the premises with the payment of that sum, and lawful interest for the same. A further settlement of accounts took place on the 14th of September in that year, when Paine was found indebted in the sum of £2425, and signed a memorandum in writing, at the foot of the account, whereby he acknowledged the account to be correct, and charged the before-mentioned premises, "and likewise all and every other the messuages or dwelling-houses, lands, hereditaments and fee-farm ground-rents, also situate and lying in Somerset-place afore-**[596]**-said, adjoining the said before unfinished messuages or dwelling-houses, with the payment to the said Emma Dickenson, her heirs, executors, administrators and assigns, of the sum of £2425 0s. 0d., and he thereby agreed to make and execute unto the said Emma Dickenson a good and sufficient mortgage of all and every his said messuages or dwelling-houses, lands, hereditaments and fee-farm or ground-rents."

Previously to September 1808, Paine had collected the water from the upper part of the Lydes, and brought the same into a reservoir at the lower end of the lawn, and laid out the lawn for an ornament to the buildings called Somerset-place.

On the 28th of June 1810, an agreement was entered into between Paine of the one part, and William Broom and James Chapman, builders, of the other part, whereby, after reciting that Paine was possessed of the piece of land called the Lydes, and that there were springs of water thereon, and that Broom and Chapman were possessed of a piece of land adjoining the land belonging to Paine, and that they intended to build houses thereon (they were afterwards built and called Cavendish-place), Paine agreed to supply such houses with water, and to erect for that purpose cisterns, and to connect the same with the reservoir by means of a main pipe. The consideration for this agreement was to be the payment of a rent in respect of each

house, and it was stipulated that the sum or sums of money to be paid for the supply of water to each house should be considered in the nature of a rent issuing out of the same premises for ever thereafter, and recoverable in the usual manner by distress and entry on the same premises; and it was thereby agreed and declared, that if the said intended reservoir should, by or in consequence of the failure of the springs, or [597] in consequence of any other unavoidable means except the neglect or default of Broom and Chapman, cease to afford any water for the purposes thereinbefore mentioned, then all the annual rents should cease and be no longer payable. A similar agreement was made between the same parties for the supply of water to a pile of buildings called Cavendish-crescent.

On the 14th September 1813, a further account was settled between the parties, when Paine was found indebted in the sum of £7768 6s. 4d., and an agreement of that date was duly executed, whereby Paine "charged the four messuages or dwelling-houses lately built by him, with their respective appurtenances, in a certain place or site of buildings called Somerset-place in the said parish of Walcot, and likewise all and every other the messuages or dwelling-houses, lands, tenements and fee-farm or ground-rents, also situate and lying in Somerset-place, adjoining the aforesaid four newly erected messuages or dwelling-houses, with the payment to the said Emma Dickenson, her heirs, executors, administrators and assigns, of the said sum of £7768 6s. 4d.; and the said Thomas Paine thereby promised and agreed to execute to the said Emma Dickenson a good and sufficient mortgage of all and every his said messuages, dwelling-houses, lands, hereditaments and fee-farm or ground-rents situate and lying in Somerset-place, including therein the four newly erected messuages or dwelling-houses, subject to the several charges and mortgage incumbrances thereon, as soon as such mortgage could be prepared and tendered to him for execution." The title-deeds by which Paine held the Lydes, from and after the 10th of March 1813, remained in the possession of one John Slade, who was the solicitor of Mrs. Emma Dickenson. The house called the Protection or Ivy House, was afterwards [598] built on part of the land called the Lydes It was separated from the lawn in front of the houses in Somerset-place, by a dwarf wall and by the coach-road going up to the houses, but it had the appearance of a sort of entrance lodge to the larger buildings.

By an indenture of the 31st of August 1815, between Paine of the one part, and John Lewis Fournier since deceased, of the other part; after reciting that Fournier had at several times lent to Paine certain sums of money, making in the whole £700, and had engaged to lend him the further sum of £300, but that all the interest in respect of the £700 had been paid or secured up to the day of the date of the indenture now in recital; and also reciting, that Fournier had not as yet received any securities whatever for the monies so advanced, and therefore had applied to Paine for that purpose, who had proposed to give him his bond for the £700, and to enter into the covenant thereinafter mentioned for granting and executing to Fournier a mortgage in fee or for a term of years of a messuage or tenement which Paine was then building upon a certain plot of ground situate and being near Somerset House, in the parish of Walcot, with the rights, members and appurtenances, and to assign to Fournier, by way of mortgage or by way of further or collateral security, the beneficial interest of him, Paine, in the agreements of the 28th and 29th days of June 1810, which it was agreed should, with the indenture now in recital, in the meantime be deposited in the hands of Fournier; and also reciting that Paine, in part performance, had by his bond bearing even date with the indenture now in recital, become bound unto Fournier, his executors, etc. in the penal sum of £1400, with a condition thereunder written for making the same void on payment by Paine, his heirs, etc. to [599] Fournier, his executors, etc. of the sum of £700, with lawful interest for the same, on the 1st day of March then next ensuing: it was witnessed that in performance of the proposal, and in consideration of the £700 so advanced, and of £300 intended to be advanced to Paine by Fournier, Paine did thereby for himself, his heirs, etc. covenant and agree with Fournier, his heirs, etc., that Paine, his heirs, etc., should, on the 1st of March 1816, execute a good mortgage, for the purpose of securing the said sum of £700, with lawful interest for the same, to be calculated from the day of the date of the indenture now in recital, together with £300 intended to be advanced, with lawful interest thereon,

with all the other monies which, at the time of the execution of such mortgage, should have been advanced by Fournier to Paine, together with lawful interest upon such last-mentioned monies; and that Paine did thereby further covenant that Paine, his heirs, etc. would, by such mortgage, convey, release, assign, or otherwise assure to Fournier, his heirs, etc., all that plot, piece, or parcel of ground situate, lying, and being near or opposite Somerset House, in the occupation of Paine, and the messuage or tenement then building and intended to be built thereon (afterwards built and called Protection or Ivy House), with their and every of their rights, members, and appurtenances, and also the water rents reserved in and by the agreements or contracts thereinbefore severally referred to, together with the said contracts, and all deeds, muniments of title, and papers, relating to the said premises respectively. The agreements of the 28th and 29th of June 1810 were, before the 31st of August 1815, deposited by Paine in the hands of Fournier.

Fournier, in Trinity Term 1820, filed his bill in **[600]** the Court of Chancery against Paine and Emma Dickenson, stating the indenture of the 31st of August 1815, and that after the execution thereof Fournier advanced to Paine the sum of £330 6s. 11d., making the total sum due to Fournier £1033 6s. 11d. principal money, with interest thereon, and praying amongst other things that an account might be taken of what was due to Fournier for principal and interest, upon the security of the premises, and that Paine might be decreed to pay to Fournier what should appear to be due upon such account, together with his costs, or in default thereof that Paine, and all persons claiming under him, might be compelled to convey and assign to Fournier the house situate near Somerset House, and the water rents, and all his and their right and interest therein respectively, and to deliver to Fournier all deeds and writings relating to the premises, and every part thereof, not already in Fournier's possession, or that the said mortgaged premises might be sold under the direction of the Court, and that the money arising thereby might be applied towards satisfaction of what should be found due to Fournier as aforesaid.

Answers having been put in, by an order made by the Vice-Chancellor in the cause, bearing date the 4th of August 1821, it was ordered that it should be referred to Mr. Dowdeswell, one of the Masters, to appoint a proper person to be receiver of the rent of the house and premises called Protection or Ivy House, and also of the water rents in the pleadings mentioned, with the usual directions: And it was ordered, that the Master should inquire and state to the Court the extent and priority of the securities held by Fournier and Emma Dickenson, and in order thereto the parties were to produce before him, upon oath, all **[601]** deeds, papers, and writings relating thereto, and were to be examined upon interrogatories as the Master should direct.

On the death of J. L. Fournier the Appellants became entitled as executor and executrix of his will, and Emma Dickenson assigned her interest in the premises to the Respondent. The suit was continued in the names of these new parties.

The Master made his report, dated the 20th of July 1824, and, after stating the several facts, he certified that the securities of Emma Dickenson, under and by virtue of the several agreements of the 2d November 1805, the 2d November 1807, the 24th June 1808, and 14th September 1813, and by the deposit of the title-deeds of the lands and premises formerly called Lydes or Great Lydes, extended over the whole of the premises, and comprised the lawn on which the reservoir was formed, and whence the houses in Cavendish-place and Cavendish-crescent were supplied with water, and also the House called the House of Protection or Ivy House; and he certified that, by virtue of the indenture of the 31st of August 1815, and by the deposit of the several indentures of the 28th and 29th of June 1810, the security of Fournier extended over the water rents reserved by the several indentures of the 28th and 29th of June 1810; and also the plot, piece, or parcel of ground, described in the indenture of the 31st of August 1815, situate near or opposite Somerset House in the occupation of Paine, and the messuage or tenement then intended to be built thereon, and which had since been built, and had been called the House of Protection or Ivy House, but subject as to such piece or parcel of ground, and messuage or tenement, to the prior security which **[602]** Emma Dickenson acquired by the means thereinbefore mentioned.

The Appellants took two exceptions to the report; first, that the Master ought not to have found that the securities of Emma Dickenson extended over the whole of the premises in the report in that behalf mentioned, and comprised the lawn on which the reservoir therein mentioned is formed, and whence the houses in Cavendish-place and Cavendish-crescent are supplied with water, and also the house called the House of Protection or Ivy House; secondly, that the said Master ought not to have found that the security of Fournier, upon the House of Protection or Ivy House, was subject to the prior security which Emma Dickenson acquired by the means thereinbefore mentioned. On the 11th of March 1826 the Vice-Chancellor allowed the exceptions. The Respondent then appealed to Lord Lyndhurst, then Lord Chancellor; which appeal was heard on the 19th of November 1828, when his Lordship overruled the exceptions.

The cause came on to be heard before his Lordship on the 19th of May 1829, when the Appellants declining to redeem the Respondent on the footing of the Master's report, as confirmed by the order made on appeal, it was ordered that the suit should be dismissed with costs, to be paid by the plaintiffs.

The Appellants presented their petition of appeal from this order of dismissal, which last-mentioned appeal came to be heard before Lord Chancellor Brougham on the 10th of August 1832, when the Appellants asserted that they were willing to redeem the Respondent on the footing of the Master's report, so confirmed as aforesaid; and thereupon, by the decree of his Lordship, the decree of the 19th of May [603] 1829, dismissing the suit, was reversed, and it was ordered that it should be referred to the Master, to whom the cause was referred, to take an account of what was due to the Respondent as representative of Emma Dickenson, for principal and interest on the security which Emma Dickenson acquired, as in the report mentioned, and to tax the costs of the Respondent; and upon the Appellants paying to the Respondent what should be reported due for such principal, interest, and costs, within six months after the Master should have made his report, it was ordered that the Respondent should re-assign the premises comprised in his securities, etc. to the Appellants; but in default of the Appellants paying to the Respondent what should be reported due as aforesaid, the Appellants' bill was to stand dismissed out of Court, with costs to be taxed by the Master; but in case the Appellants should redeem the Respondent, it was ordered that the Master should take an account of what was due to them for principal and interest on their mortgage, and tax their costs of suit, and compute interest on what they should have so paid to the Respondent, and upon his paying to them what should be reported due to them for principal, interest, and costs, together with what they should have paid to him, with interest thereon as aforesaid, within three months after the Master should have made his report, it was ordered that they should reconvey the mortgaged premises, free and clear from all incumbrances, etc.; but in default of the Respondent paying to the Appellants what should be reported due to them as aforesaid, he was thenceforth to stand absolutely foreclosed as to the mortgaged premises.

The Appellants appealed from the order of the 19th of November 1828, and from the decree of the 10th [604] of August 1832, except so far as the latter reversed the decree of the 19th of May 1829.

Mr. Knight and Mr. Lynch for the Appellants:—It is impossible to say, that the words of the agreements made with Mrs. Dickenson convey to her a mortgage of the whole of the premises. The four houses, especially mentioned by their numbers in the first agreement, are situated at one end of the property. It is a forced construction to say, that the mortgage includes all the Somerset-place property. The reservoir and Ivy House are clearly not included in the grant. [Lord Lyndhurst, Lord Chancellor.—What is it constitutes a square? Is it a row of houses.] *Primâ facie* it is. [Lord Lyndhurst.—On the contrary, does not the word square *primâ facie* include the whole area surrounded by the houses, as well as the houses themselves? Lord Brougham.—Suppose there was a lease with these words, "All my freehold premises called Grosvenor-square," might it mean the houses, or the enclosed square, or the houses *plus* the square?] That is hardly the case here, which more nearly resembles a lease conveying the houses numbered 1, 2, 3 and 4, in Grosvenor-square, and the land and ground rents adjoining. It would be difficult

to say, that a piece of pleasure ground divided by a pavement and a carriage-road from the houses, would pass under such a conveyance. Paine here continued entitled to the exclusive possession of the Ivy House and reservoir, which would make a difference between this case and the supposed case of Grosvenor-square, for the right of walking in the pleasure ground there is reserved to the inhabitants, who might cut down any obstruction to the enjoyment of that right. There was evidence taken in this case before the Master, which [605] is important as ascertaining the probable meaning of the parties. The Bath chairmen stated, that if hired to go to Somerset-place they should not stop at the Ivy House, but go on to the row of buildings properly so called. The evidence is all in favour of the Appellants, so are the probabilities of the case; for it is not likely that if Paine had deemed the whole of the land to be already mortgaged, he would have laid out any additional sum of money in erecting the reservoir and the Ivy House upon it. Then, as to the rule of construction. In construing conveyances, bonds, and other instruments, the Courts correct certain words, however general, when the context of the whole document requires such correction. The context here does require such correction of particular expressions, and the evidence shows the nature and extent of the required correction. The fact of the alleged deposit of the deeds with Emma Dickenson in 1813, is denied by the Appellants. It is wholly inconsistent with the language of the trust. The Appellants therefore say, that no equitable mortgage was created in her. [Lord Brougham.—That deposit is stated as a fact in the case, presented to us by the Appellant as the subject of appeal. If you objected to the statement, you should have applied to have it struck out of the Appellants' case. That is always the course in this House; else we might be proceeding on matters which were not in evidence.] But even supposing Mrs. Dickenson to be an equitable mortgagee by deposit of deeds, her title, contradicted as it is by a written instrument, will not be favoured by the Court. That doctrine was distinctly laid down in *Ex parte Coombes* (17 Ves. 369; 1 Rose, 261), and has been acted upon ever since. There was no adverse possession here, for Slade, in [606] whose possession the deeds were left, was the solicitor not only of Mrs. Dickenson but of Mr. Payne. There is no evidence beyond the fact that the deeds were in his hands, certainly none that he held them as solicitor for Mrs. Dickenson and adversely to Mr. Payne. On the other hand, the deposit of the contracts and the indenture made between Payne and him in August 1815, gave him a prior security over the reservoir and the Ivy House, those portions of Payne's property, under the description of the ground and building lying near to and opposite Somerset House and the water rents, being distinctly mentioned therein.

Mr. Pemberton and Mr. Simkinson for the Respondent:—There was clearly an equitable mortgage effected by the deposit of these deeds, and it is too late for the Appellants now to dispute that question. Then do the agreements under which that mortgage was made include the Ivy House and the reservoir? They do; for the terms used give as specific a description of the property as was then capable of being applied to it. The doctrine in the case cited may be admitted, but the equitable mortgage here is distinguishable from the one made in that case, for here it was made in conformity to and under the provisions of a written agreement. The terms employed in the agreement are such as to cover property of every description "situate and lying in Somerset-place," and the words "Somerset-place" include the whole of that property which had formerly been known by the name of the Lydes. Those words cannot be restricted to the row of houses, but must be taken to refer to the lawn, garden-ground, reservoir, and Ivy House, all of which formed part of the land taken by Payne, and constituted a portion of the new district called Somerset-[607]-place. To give a different construction would be to suppose that Mrs. Dickenson had continued to make advances on property which she must have known to be insufficient to secure her repayment. The four dwelling-houses would not have offered sufficient security, and therefore all the property designated by one general name was charged with the payment.

Lord Brougham.—My Lords, I have no doubt that the construction put by the Master upon these instruments when he made his report was right. The question we have to decide is, whether the words used in them are large enough to convey the Ivy House and the reservoir. The burden of proving that they are not large

enough for this purpose lies on the person who would exclude those places from their operation. Is there any intention to except them apparent on the facts of these instruments? I think that there is none. The terms used are as large as they well can be. [His Lordship read them.] Somerset-place in these instruments seems to me to include the whole of the area formerly called the Lydes. Let us try the question by a familiar instance. Somerset House in London supplies one. The expression Somerset House, used with reference to the place known by that name in London, is used to designate the great square or pile of building in the Strand; but it most certainly also includes the open space there in the centre of which the statue is situated. If any of your Lordships should be asked where the Treasurer of the Navy lived, you would probably answer, "in Somerset House;" you would in that answer intend to include the whole site of the buildings. Yet it would be said, according to this argument, that the meaning of the answer must be confined to the house alone, [608] for that otherwise it would not be properly described. Now it seems to me that the mortgagor here used the words in both senses, "all and every other my houses, lands, hereditaments, and fee-farm or ground-rents adjoining to the said unfinished messuages." The question then is, does the land in question lie in Somerset-place, and is it adjoining to those messuages? On referring to the description and comparing it with the plan, it does appear to lie in Somerset-place, and it does adjoin the unfinished premises. But then it is said that it is unlikely that a house of the description of the Ivy House, and at this distance from the rest of the buildings, and forming part of property of this peculiar kind, should pass under these general words without a particular specific description. The answer is, that in 1808 all these buildings and the reservoir did not exist, and no one who had then the property could dream of such a thing as the reservoir or the Ivy House being built. The building of that house was not then even in contemplation, and that was the sufficient reason why it and the reservoir were not specifically mentioned. But unless the mortgagor had excepted any buildings he might afterwards erect, these words would be sufficient to carry the house and the reservoir whenever they might be erected. It is said that he would not be likely to lay out any money if he thought there was a mortgage already existing on what he was about to build. But that is not so, for, having the equity of redemption, he would be benefited by the amount of the increased value of the property, and would be the more able to pay off the mortgage. If the road had been a frequented road, and a measured boundary had at that time existed so as to cut off the narrow slip of ground on which the Ivy House is built, [609] that house and the reservoir might have been excluded; but all we know is, that there was then an open space of waste ground, and that there was nothing to form a natural boundary separating any one part of that space from any other part of it. Why then was he to exempt the strip of ground from the operation of the deed? If the road now in existence had been then made, and the wall at present separating the Ivy House from the road had been then built, I should say that that might be sufficient to found the argument now employed; but at the time that this agreement was made, nothing whatever existed as a natural boundary, and there was nothing to distinguish the watercourse or the strip of ground on which the Ivy House has since been built from the rest. I really have no doubt whatever that the language used in the agreements was meant to charge the whole of the property in the Somerset-place, and that the burden of proof is on the other side, to show the exemption of these portions of it from that charge. There is no exception, nor any intention of exception manifested, and I therefore think that the Master came to a right conclusion, and that the judgment of the Court below should be affirmed. But under all the circumstances of the case, as I think that there is some hardship in it, I should recommend your Lordships to affirm it without costs.

Lord Lyndhurst (Lord Chancellor) concurred.

Judgment affirmed accordingly.

[610] APPEAL

FROM THE COURT OF SESSION.

JOHN SWAN, JOHN CARRUTHERS, JOHN POOL, and JAMES MARTIN,—*Appellants;* ALEXANDER BLAIR, Treasurer of the Governor and Company of the Bank of Scotland,—*Respondent.*

[Mews' Dig. iv. 150, 224; xiii. 1919, *sub nom. Swan* v. *Bank of Scotland*, S.C. 10 Bli. N.S. 627.]

W. M. and others bound themselves by bond, jointly and severally, to pay to the Bank of Scotland such sums as should be drawn out by W. M., or be due from him, on a cash credit opened by the bank, in his name; and the certificate of the bank accountant was to be held sufficient to ascertain the balance due, and to warrant execution of law for such balance (not exceeding £5000) against the obligors. W. M. drew on the bank by orders, written on unstamped paper, payable to bearer; and though these drafts purported to be issued in the town where the bank was situated, they were in fact drawn and issued at a place more than ten miles distant, and were also post-dated, and the bank agent knew that they were wrong dated in point of place and time. W. M., having become insolvent, was found to owe to the bank on the cash credit account upwards of £4000, as certified by the bank accountant, and for that debt the bank put the bond in suit against his co-obligors.

HELD by the Lords (reversing the decree of the Court of Session), that no obligation arose on the bond to pay any balance alleged to be due on drafts so drawn and issued, contrary to the provisions of the Stamp Act, 55 Geo. 3, c. 184, s. 13, which, in addition to penalties on the parties offending, declares, moreover, that a banker shall not be allowed any money paid on such drafts in account against the drawer or his representatives.

The Appellants were co-obligors with one William Martin in a bond, for securing to the Bank of Scotland **[611]** repayment of monies advanced to W. Martin by the bank, or its agents. W. Martin became insolvent in 1831, and the Respondent on behalf of the bank took proceedings on the bond, and gave against the Appellants a charge for payment of upwards of £4300, alleged to be due to the bank in respect of the said advances of money, together with a penalty of £2000 mentioned in the bond. The Appellants presented to the Court of Session a bill of suspension of the charge, and the appeal is against interlocutors pronounced in that action. (The case is reported 13 Shaw, Dunlop, and Bell, 403.) The facts, as collected from the pleadings, were these:—Mr. William Martin, writer in Lockerbie, which is upwards of ten miles distant from Dumfries, besides practising as a writer, carried on from the year 1819 to 1831 a considerable business as a discounter of bills, but not having sufficient capital of his own to maintain this trade, he obtained accommodation from the Bank of Scotland at their office in Dumfries, by giving them bonds of caution for cash credit. The first of these bonds was granted in the year 1819 for £600, and the Appellant Swan was one of the obligors. W. Martin afterwards requiring a further credit, a new bond was granted in September 1825, in which all the Appellants and other persons, since deceased, became co-obligors with W. Martin. This bond was in the common form of cash-credit bonds, and, as far as it is material to set it forth, was in the following terms: "We [obligors' names and descriptions] in consideration of a credit of £10,000 sterling, given by the directors of the Bank of Scotland to us, on cash-account, in name of me, W. Martin, with the said bank, at the office thereof in Dumfries, etc., do hereby bind and oblige ourselves, conjunctly and severally, etc., to pay to the said bank, and to **[612]** their treasurer for their behoof, etc., all such sums, not exceeding £10,000 sterling, as shall be drawn out from the said bank by me, W. Martin, or as may be contained, due, paid, payable or claimable on any drafts, orders, bills, promissory notes, receipts, guarantees, letters, obligations and documents whatever, drawn, accepted, granted, indorsed, or any how signed by me the said William Martin, or on my procuration, or liable on me by any

legal construction, and whether discounted or paid to me the said William Martin, or to any other party, or retired by the said bank, or otherwise taken or holden by or for the said governor and company, all thereby *ipso facto* to be due hereon, and chargeable to the said cash account, and of all such sums hereon, to make payment aforesaid, whenever required, with legal interest, etc., together also with £2000 sterling of liquidate penalty in case of failzie, etc.; and any account or certificate signed by the principal accountant of the said governor and company, or by their agent and accountant for the office where the said cash account may be kept, shall be sufficient to ascertain, specify, and constitute the sums or balances such as aforesaid, to be due hereon in principal, and thereon legal interest aforesaid, and shall warrant hereon all executorials of law against us conjunctly and severally, for such sums or balances in principal, and thereon legal interest aforesaid, and for the said liquidate penalty: Providing hereby that the said governor and company, and their aforesaid, shall not hereby nor by any execution or process whatever to follow hereon, have more from us (the co-obligors) than £5000 sterling, and thereon legal interest, from the date of demand, etc., but these presents, without limitation, shall be available and effectual against me the said W. Martin."

[613] This bond contained no reference to the bond given in 1819, which latter however continued to be in force and to be operated upon, but the accounts were kept distinct. The bonds and cash credits were arranged, on behalf of the bank, by Mr. Barker, their agent in the branch at Dumfries, who, as the Appellants alleged, was well acquainted with the way in which Martin transacted his discounting business, which was this: The bank furnished Martin with unstamped printed checks or orders, all bearing "Dumfries" as the place of issue, and having blank spaces for the sums and dates; Martin filled up, and issued at Lockerbie, these blank drafts in the course of his business, and so continued his operations on the bank account from the date of the bond in 1825 until his bankruptcy in 1831. He did not carry on business in Dumfries. In the bond he was designated "Writer in Lockerbie;" and the annual accounts furnished by the bank during the currency of the bond were titled, "State of cash account in name of William Martin, writer, Lockerbie, with the Bank of Scotland, in books thereof at Dumfries." The checks or orders were used by him in discounting at Lockerbie, for his own profit, bills, which were made payable at the Bank of Scotland's office in Dumfries, charging, besides a commission, a higher rate of discount than was charged to him by the bank. The bills so discounted were generally transmitted from Lockerbie, in letters and parcels addressed to Mr. Barker,* the bank agent at **[614]** Dumfries, who discounted such of them as he considered good, and accounted to Martin for their proceeds, returning to him such bills as he refused to discount. Martin frequently discounted other bills, which did not pass into Barker's hands, and having, besides the discounting of bills, a variety of miscellaneous transactions in the line of his business, he used the bank drafts for these general purposes, sometimes sending them by a messenger from Lockerbie to Dumfries, and getting back the cash from Barker; and he often gave such drafts to third parties for value, who afterwards drew the amount from the bank at Dumfries. Although all these drafts bore the printed word, "Dumfries," purporting to be issued

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* Specimens of letters and drafts:

"John Barker, Esq. Lockerbie, 29 July 1826.

I enclose in mixed notes the sum of	£721	0	0
Draft by Mr. William Mitchell	10	0	0
	731	0	0
Amount of bills, see Bill Book	1041	10	6
	£1772	10	6

I also enclose a draft on my account for £1000 sterling, cash for which you will send me by the bearer. I remain, etc.

"Copy.—Draft enclosed.

Dumfries, 31 July 1826.

"To the agent of the Bank of Scotland, Dumfries. Pay the bearer £1000 sterling, and charge to account of,

"£1000 sterling. (signed) *Wm. Martin.*"

there, they were in fact issued at Lockerbie, and many of them were dated one or more days subsequent to the day on which they were actually issued or delivered by Martin. This post-dating of the drafts was alleged by the Appellants to arise from the circumstance of their not being expected to be presented to the bank until some time after they had been delivered at Lockerbie, on account of the distance. Most of the drafts were made simply payable to the "bearer," but some of them, given to third parties for value, were made payable to particular individuals, named in the drafts.

The accounts of these transactions between Martin and the bank agent at Dumfries were settled and [615] doquetted annually, and the vouchers delivered up; as thus, "Dumfries, 6th April 1830. This account settled, vouchers exchanged, and the balance of £2687 4s. 4d. brought to the debit of new account at 1st ultimo. Signed William Martin." So also the account ending the 28th February 1831 was settled on the 13th of April following, and the vouchers mutually exchanged, leaving then a balance of £3266 14s. 4d. to the debit of the account.

Martin became bankrupt in July 1831, and Mr. Barker was appointed trustee on his sequestrated estate. The whole balance due by him to the bank, as ascertained by the certificate of their agent and accountant for the branch at Dumfries, dated August 1832, was £4709 18s. 3d., including £590 17s. alleged to be due on foot of the account opened in 1819; and for the whole sum the bank was admitted to rank on the sequestrated estate. For this sum and for the penalty in the bond, the Respondent on behalf of the bank issued a charge, as before mentioned, against the Appellants. They resisted the claim, alleging in their reasons for the bill of suspension, *first*, that they were not, as obligors in the bond of 1825, in any way liable for the balance alleged to be due on the separate bond of 1819, and that the Appellant Swan, who alone was obligor in that bond, was released by the delay and negligence of the bank in respect to that account: *secondly*, that they were not concluded from disputing the claim by reason of the settlement of accounts with Martin, or ranking of the debt on his sequestrated estate, as these transactions took place without notice to them; *thirdly*, and chiefly, that the whole transactions out of which the claim arose, were in violation of the 13th section of the Stamp Act, 55 Geo. 3, c. 184. "And for the more effectually preventing of frauds and evasions of the duties hereby granted on the bills of exchange, drafts, [616] or orders for the payment of money, under colour of the exemption in favour of drafts or orders upon bankers, or persons acting as bankers, contained in the schedule hereunto annexed,* be it further enacted, that if any person or persons shall, after the 31st day of August 1815, make and issue, or cause to be made and issued, any bill, draft, or order for the payment of money to the bearer on demand, upon any banker or bankers, or any person or persons acting as a banker or bankers, which shall be dated on any day subsequent to the day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not in every respect fall within the said exemption, unless the same shall be duly stamped as a bill of exchange, according to this Act,—the person or persons so offending shall, for every such bill, draft, or order, forfeit the sum of £100. And if any person or persons shall knowingly receive or take any such bill, draft, or order, in payment of, or as a security for the sum therein mentioned, he, she, or they shall, for every such bill, draft, or order, forfeit the sum of £20. And if any banker or bankers, or any person or persons acting as a banker, upon whom any such bill, draft, or order shall be drawn, shall pay, or cause or permit to be paid, the sum of money therein expressed, or any part thereof, knowing the same to be post-dated, or know-[617]-ing that the place where it was issued is not truly specified and set forth therein, or knowing that the same does not, in any other respect, fall within the said exemption, then the banker

* The exemption referred is in the first part of the schedule to the Act under the head "Bills," and is as follows: "All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes."

or bankers, or person or persons so offending, shall, for every such bill, draft, or order, forfeit the sum of £100; and, moreover, shall not be allowed the money so paid, or any part thereof, in account against the person or persons by or for whom such bill, draft, or order shall be drawn, or his, her, or their executors or administrators, or his, or her, or their assignees or creditors, in case of bankruptcy or insolvency, or any other person or persons claiming under him, her, or them."

The bank, in their answer to the bill of suspension, submitted that as they were admitted to rank on the sequestrated estate for the whole debt charged for, the suspenders must be held to have acknowledged that debt, and to be barred by acquiescence from insisting in the suspension; that the balance of £590 8s. being ascertained by a regular voucher, they did not lose their right thereto by delay or negligence; that the whole balance charged for being legally constituted, not only by accounts certified by the bank's agent and accountant, according to the provision in the bond, but also by accounts finally settled and doquetted by the parties, the allegations of the suspenders respecting the draft, being in violation of the stamp laws, were irrelevant; that the operations of Martin with the bank were conducted lawfully on the part of the bank; that they did not know that Martin post-dated or issued at Lockerbie any of the checks; that the drafts and other vouchers having been mutually given up at each annual settlement of the accounts, it must be presumed that a great many of them were lost or destroyed, and the allegations of the suspenders were [618] thus quite incapable of being proved. But even supposing it necessary for the bank to found upon drafts or other vouchers which had been given up as useless, and might have been legally destroyed, there would be no room for holding that the drafts were issued in violation of the Stamp Act, or that the money paid upon them could not be recovered; for that as Lockerbie was admitted to be only 13 miles from Dumfries, Martin's drafts, even if issued at Lockerbie, were within the protection of the Act 9 Geo. 4, c. 49, s. 15, enacting "That from and after the passing of this Act, all drafts or orders for payment of any sum of money to the bearer on demand, and drawn in any part of Great Britain upon any banker or bankers who shall reside or transact the business of a banker within 15 miles of the place where such drafts or orders shall be issued, shall be, and the same are hereby exempted from any stamp-duty imposed by an Act or Acts in force immediately before the passing of this Act, any thing in such Act or Acts to the contrary notwithstanding, provided the place where such drafts or orders shall be issued shall be specified therein, and provided the same shall bear a date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes."

The case having been reported by the Lord Ordinary to the Lords of the Second Division of the Court of Session, their Lordships of that division, after hearing the case twice argued, pronounced this interlocutor: "5th February 1835.—The Lords etc., in respect that the present charge proceeds only on the bond of credit dated in 1825, sustain the reasons of suspension as to that portion of the debt charged for, which had been contracted under the previous bond of credit dated in [619] 1819: suspend the letters *simpliciter* to that extent, and decern, without prejudice to any competent action to be brought by the chargers for recovery of the balance due under that previous bond, as effeirs; *quoad ultra*, as to the debt contracted under the second bond above alluded to, and in respect of the accounts doquetted and balances certified by the proper parties, repel the reasons of suspension, and find the letters orderly proceeded, and decern: find the charger entitled to the expenses of process, but subject to modification; allow the account to be given in, and when lodged, remit to the auditor to tax and report."

The Respondent lodged an account of expenses, and after it had been taxed, the Lords of the Second Division pronounced the following interlocutor: "27th February 1835.—The Lords having advised this amount, with the report of the auditor, approve thereof, and modify the account to the sum of £117 14s. 8d., and decern for payment of that sum to the chargers, with dues of extract."

The appeal was against these interlocutors.

Sir William Follett and Mr. Stuart for the Appellants:—The Court of Session sustained the Appellants' first reason of suspension under which they objected to the bank's charge, so far as it embraced a balance claimed under the bond of 1819:

but repelled the objections to the whole charge on the ground of its being void under the Stamp Acts. This latter part of the interlocutor is founded on a misconstruction of the bond, in virtue of which the charge is given. One leading argument for the Respondent, to which the Court of Session inclined, was, that the Appellants were not to be viewed in this discussion as sureties for **[620]** Martin, they being co-obligants, and bound "conjunctly and severally" with him for the whole debt. That was an erroneous construction of the bond, with reference both to its terms and to the judicial views taken of similar instruments by the Courts. The bond is an ordinary bond of caution for a cash account, so framed as to make all parties thereto co-obligants to the bank, and giving the bank a joint and several claim against the sureties, without first resorting to the principal, but not otherwise affecting their general rights. Even if the purport of the bond had not been fully revealed upon the face of it, still it would have been competent for the Appellants to explain the real nature of the obligation by extraneous proofs, *Smollett* v. *Bell* (Morr. 12354), *Hume* v. *Youngson* (8 Shaw and Dunlop, 295); and so in a late case in this House, it was held that a person bound as full debtor for another in a bond for a cash account was a surety, and entitled to all the equities as such: *Mackenzie* v. *Macartney*, 23d September 1831 (now reported, 5 Wils. and S. 504). In the bond there is no authority, either express or implied, empowering Martin to waive or renounce any legal defence which might be competent to the Appellants as cautioners in the obligation; yet the Court below has, by implication, found such a stipulation in the bond, and decided the case upon that view, assuming a general authority in Martin to act for the cautioners in regard to the claim of the Bank. According to the view on which the case was decided, Martin, by settling and doquetting the accounts and recognising the claim, discharged not only the objection of illegality founded on the Stamp Acts, but all other objections which might previously have been competent against the claim.

[621] The judgment of the Court below is also founded on a misconstruction of the Stamp Acts. Some of the Judges of the Court of Session seemed to be of opinion that these Acts were to be construed strictly, and that their provisions ought not to be extended to cases not falling directly within their enactments. The Appellants do not dispute this rule of construction, to a certain extent; they even admit that Acts of Parliament imposing duties are to be so construed as not to make any instruments liable to them unless manifestly within the intention of the legislature. But this rule is not applicable to the present case, in which the question is not whether the drafts did or did not require stamps, it being undeniable that they did; but the Stamp Acts must be construed so as to give full effect to their provisions, and any interpretation leading to an evasion of them ought to be rejected. Here their provisions have been directly violated, by a tacit arrangement between a third party and the bank, both contraveners of the statutes. The bank had for years been enabled, with impunity, to conduct the banking business of a large district, extending far beyond the distance referred to in the exception in the schedule to the Stamp Act, and had transactions to the extent of some hundred thousand pounds, in manifest evasion of the Act. The provisions of an enactment intended for a public purpose cannot be waived by any private arrangement, even in a question between the parties to that arrangement: *pactis privatorum publico juri derogari nequit*. The case as determined by the Court of Session exhibits this anomalous result, that the bank and Martin have, by a private arrangement in violation of the Stamp Act, not only wiped away the effects of their own illegal acts, but have rendered those acts binding on third parties, and **[622]** excluded them from maintaining the objection on the statute. The reason which seemed chiefly to prevail with the Court below was, that the claim of the bank was not made upon the illegal drafts but upon the doquetted accounts, which were said to be sufficient evidence to support the claim, and which required no stamp.

The doquetting of the accounts, being the private acts of Martin and of the bank, is not obligatory upon the Appellants. As furnishing a claim against Martin, the doquetted accounts may or may not be sufficient; but the Appellants are in a very different situation, and they repudiate the doquet, as being *res inter alios acta*. This view of the case casts the Respondents back upon the original account, which they cannot prove except by the original drafts, which are subject to the Appellants' objection. The settled accounts, which are alleged to

constitute an acknowledgment of the debt, do not remove the illegality in the original contraction of a debt. The acknowledgment of a debt merely prevents the operation of the Statutes of Limitation; the original evidence of the obligation remains unaffected; any defect in it cannot be cured by the bare acknowledgment of a debt; an acknowledgment will not make that good which was bad originally: *Castleman* v. *Ray* (2 Bos. and P. 383).

As the settled accounts specially refer to the drafts, that reference subjects the drafts to inquiry, and then arises the objection on the Stamp Acts. Where the written instrument cannot be read in evidence, it frequently happens that other evidence may be resorted to; but that evidence must have no reference to the rejected instrument, or at least must be sufficient [623] without calling it in aid. The reference made in the doquetted accounts to the drafts, renders it competent to the Appellants to demand an inquiry as to the nature of the drafts, which confessedly form the elements of the bank's claim; even if the doquetted accounts were to be regarded as *prima facie* proofs of a legal debt, still it would be competent for the Appellants to disprove the debt by showing that the original consideration was illegal.

With respect to the Respondents' plea of the protection of the Act 9 Geo. 4, c. 49, s. 15, the effect of that was merely to extend the distance for the operation of the exemption from 10 to 15 miles. That provision does not repeal or affect in any way the express enactments in the prior Stamp Act as to the necessity of the draft bearing the true place of drawing—being dated on the day on which it was issued, and being alone made payable to the bearer on demand. It is the want of these requisites, and the violation of these standing provisions, which form the grounds of the Appellants' objections; and these objections are in no way altered by the general provision of the statute referred to.

The Attorney-General (Sir J. Campbell), and Dr. Lushington for the Respondents:—With the exception of the objection founded on the stamp laws, there is no other ground for maintaining that the principal interlocutor appealed from is erroneous, so far as it is favourable to the Respondents. The bond expressly declares that an account or certificate, signed either by the bank's principal accountant, or by the agent and accountant for the office where the cash account is kept, shall be sufficient to ascertain and constitute the balance against the co-[624]-obligors. As the balance now charged for is thus ascertained, there is no room for objecting to the regularity of the charge. The Appellants have not attempted to show that any part of the debt, for which the interlocutor finds them liable, was not truly advanced to Martin on the faith of the bond. On the contrary, in the reasons of suspension the Appellants state that the whole balance charged for is composed of money paid by the Respondents, or their agent, on drafts, which the Appellants allege to be in violation of the stamp laws. If therefore the objection founded on the stamp laws be shown to be untenable, no other ground remains upon which the Appellants can demand an alteration of the interlocutor.

Under the circumstances of this case, it is impossible to maintain that any part of the debt charged for is liable to objection under the stamp laws. By the Act 9 Geo. 4, c. 49, s. 15, the exemption previously conferred upon orders drawn on bankers residing within 10 miles of the place of issue, was extended to orders upon bankers residing within 15 miles. Even supposing all the other obstacles in the way of the Appellants to be got over, they would find the utmost difficulty in showing that any part of the balance now charged for arises from operations anterior to that statute. If, as the fact is, Lockerbie is within 15 miles of Dumfries, it follows that ever since the passing of this Act it has been quite lawful to pay at Dumfries unstamped drafts issued at Lockerbie.

But the conclusive answer to all the allegations of the Appellant is, that the Respondents have no occasion to found upon the drafts at all. Independently of the certified account, which sets forth only the sums truly advanced by the Respondents, the charge is fully supported by the annual doquets under the hand of [625] Martin himself, or of his authorised agent. Supposing that the question had arisen between the Respondents and Martin, it would have been in vain for him, in the face of his own doquets, to have founded on the allegations now brought forward by the Appellants. When the account was settled by the doquet, dated 13th April 1831, the drafts and other vouchers previously granted by Martin were given up, the

balance due by him being sufficiently vouched by the doquet affixed to the account. The drafts in question not being founded on by the Respondents, and not being necessary as vouchers to support the charge, the Court was not called upon to look at them at all. As to the drafts themselves, it was not alleged by the Appellants that they laboured under any such *ex-facie* objection, as, if they had been founded on in judgment, would have rendered it necessary for the Court to reject them. There being no room for setting aside the doquet, on the ground that the balance struck was not warranted by the real pecuniary transactions between the parties, there could be no occasion for the Court interfering: *Barnes* v. *Hedley* (1 Campb. 157 and 180. S. C. 2 Taunt. 184). Although the original transaction in that case was tainted with usury, the Court felt themselves bound to give effect to a subsequent obligation to pay the principal sum actually advanced, with interest. Supposing the Appellants entitled to assume the character of sureties only, there is no ground for making any distinction between them and the principal debtor. It is not even alleged that the doquets were collusively arranged between the Respondents and Martin, or that he was disabled from granting them. Under such circumstances the Appellants are bound by the doquets. **[626]** The annual settlement of the account being a matter of ordinary practice in all the Scotch banks, there was no occasion to call upon the Appellants to be present. It ought to be particularly observed that by the bond charged upon, the cash account is appointed "to be kept in the name of me the said W. Martin, and the co-obligants bind themselves for all such sums not exceeding £5000 as shall be drawn out from the said bank by me the said W. Martin, or as may be contained, due, paid, payable, or claimable on any drafts," etc. (see the bond, *ante*, p. 611). There is no other individual than Martin entitled to operate upon the cash account. The Appellants consented to be bound by his operations, and therefore he bound them by his annual doquets, equally as by any other operation under the cash account.

Another and a sufficient answer to any objection, as to the debt due under the bond, is afforded by the fact that the Respondents have been duly ranked on the sequestrated estate of Martin for the sum for which the charge has been proceeded on by the interlocutor. In the Scotch case of *Dickson* v. *Barbour* (6 Shaw and D. 856), it was held that cautioners for a composition under a sequestration are not entitled to dispute the validity of debts ranked on the estate. The Respondents are at a loss to discover upon what principle, while the decree of ranking remains unchallenged, the Appellants, as the cautioners of Martin, can competently maintain that the debt for which the Respondents have been so ranked is not truly due.

Sir William Follett, in his reply, admitted the extensive influence which a reversal of the decree of the **[627]** Court of Session might exercise on the banking system of cash credit hitherto pursued in Scotland, but contended that the obligations of the Stamp Act were imperative as to the bank, and decisive of the illegality of the drafts issued by Martin, upon which the whole question turned.

Besides the cases already mentioned, and others which are commented on in the judgment, reference was made in the arguments on both sides to *Scott* v. *Gillmore* (3 Taunt. 226; but see *Spencer* v. *Smith*, 3 Camp. 9), *Preston* v. *Jackson* (2 Stark. 237), *Waters* v. *Brogden* (1 You. and J. 457), and to the cases cited by Mr. Coventry in his book on the Stamp Acts, pp. 78 and 79, and by Mr. Chitty on Stamp Laws, p. 47.

Lord Brougham said he would take time to consider the case before he recommended a decision, and he would then deliver his opinion in writing, for the satisfaction of both parties, who, in common with the moneyed and mercantile interests of Scotland, seemed to look to the determination of this appeal as a precedent of considerable importance to that country.

Lord Brougham this day (July 6) read his written judgment, as follows:—My Lords, the Scottish Banks, both public and private, have, for more than a century past, been in the practice of granting accommodation to their customers by way of cash credits. It consists in the opening of an account to a certain limited amount with a customer, on his finding good security for any balance which may at any time of settlement be found due. Upon this credit he operates by drafts on the bank, and these are honoured up to the specified **[628]** amount of credit during the whole period of the party's occasion for this accommodation. Interest is charged on the sums actually drawn, and thus the party only pays for what he actually uses, while he

runs no risk of keeping money by him beyond the occasions of the day; and the bank runs little or no risk, because, besides the surety's liability, it has constant means of knowing the nature of the customer's dealings, and of inferring thence the state of his circumstances.

These credits are used, not only by traders, but by persons in any other occupation or profession, requiring supplies of money to a moderate amount, as cattle dealers, agents, and writers, and sometimes even by private individuals living on their means. W. Martin obtained a credit of this description with the Bank of Scotland in June 1819, and gave a bond for securing £600, in which he was joined by Mr. Swan, one of the Appellants, and others, formally and nominally as principal co-obligors, but in reality as his sureties. In September 1825 this credit was extended to £10,000, and the Appellants joined in a second bond, whereby they became liable in the same manner with W. Martin, but to the extent of £5000, for all such money as should be drawn out from the said bank, or its agency office, at Dumfries, or as may be respectively owing, due, paid, payable, or claimable on any drafts, orders, bills, notes, receipts, guarantees, letters, obligations, or documents whatever, drawn, accepted, granted, indorsed, or any how signed by W. Martin, or on his procuration, or liable on him by any legal construction, and chargeable to the said account. And it was further stipulated by the bank in this bond, that any "account or certificate, signed by their principal accountant, or by their agent at Dumfries, should **[629]** be sufficient to ascertain, specify, and constitute the sums or balances to be due on principal and interest, and should warrant all execution of law against the obligors jointly and severally for such sums and balance" (see extracts from the bond, *ante*, p. 611).

W. Martin continued to operate on this credit until he became insolvent, and was sequestered in 1831, when a balance of £1378 0s. 11d. principal, and £326 10s. 2d. interest, appeared due upon the account. The sureties or cautioners were sued upon the bond, and it was stated by them that the manner of drawing had been chiefly in two ways: W. Martin had sometimes sent letters from Lockerbie, where he resided, to the bank agent at Dumfries, directing him to send him money to a specified amount by the bearer; and sometimes he had discounted bills and entered into other transactions with various persons at Lockerbie, and given them drafts on the bank or bank agent. In order to save the stamp duty, it is alleged that he made them payable to bearer on demand; but as Lockerbie is said to be beyond the distance of the ten miles specified by the Stamp Act, he dated the drafts or checks at Dumfries, and generally post-dated them, as if drawn the day when the holders might present them for payment at the bank office. Doquets and balances certified by both the accountant and agent were regularly made and produced, and the cause was reported upon cases by the Lord Ordinary to the Lords of the Second Division, who directed a hearing in presence, and then decided that the suit being brought only on the second bond (that of 1825), the Respondents could not recover on the bond of 1819 in this action, but their Lordships decreed in their favour upon the former instrument.

Nothing here turns upon the form of the action, **[630]** which was a suspension of a charge given by the bank on the bond. The matters before stated as to the transactions were averred, and the facts alleged by the parties being in many, indeed in most particulars denied on either side, nothing is to be taken for concluded or ascertained by the process, but the Respondents were sufficiently confident in their grounds of law to let the case be determined upon the fact of admitting, for argument's sake, the allegations of the Appellants; and as it was on this assumption that the Court decided, so it is upon this that the appeal is brought, and that your Lordships are called upon to determine the case.

It is to be regretted that some steps had not been taken to ascertain the facts, the more especially as the matter of law was, in the estimation of the Court below, sufficiently difficult to require cases and a hearing in presence. It does not seem that any difficulty could have attended this settlement of the facts, for nothing material was in dispute, except the fact of the drafts having been such as the Appellants contend they were, viz. payable at Dumfries, and drawn at Lockerbie, of their having been issued to parties whom W. Martin was paying money to, of Lockerbie being above the legal distance, and of the bank's agent being aware of all this; the facts probably being denied, only for form's sake, and which probably

would have been admitted, or at least easily substantiated, if contested. What part of the balance was made up of money obtained on the drafts, and what part on letters sent for money to be transmitted from Dumfries by W. Martin's messenger, might probably have been ascertained with equal ease; and these are the only facts in the case. The consequence of settling these things would have been, that should the point of law be decided against the Respondents, the cause **[631]** would have been at an end. Whereas, if your Lordships reverse this decision, a new litigation will be necessary in case the chargers deny the suspenders' allegations. However, we have to deal with the case as it is now before us, and I regret to find that I cannot come to the conclusion at which the learned Judges below have arrived. On the contrary, I really hold it to be, without any reasonable doubt, clear, that upon the facts which the case for the Respondents assumes to be those of the cause, the bank could not recover upon this bond.

The whole question arises out of and turns upon the Stamp Act (55 Geo. 3, c. 184, s. 13), and we may at once lay out of view all that portion of the alleged balance or debt which arose from letters or orders, such as those set forth in the cases, namely, directions given at Lockerbie in writing to the bank agent to send W. Martin sums of money; I do not consider that these are drafts or orders for the payment of money at all. They are directions to send money to the party who either has it in the bank or takes it on credit from the bank; they are not negotiable instruments at all, and they are not issued, therefore they do not come within the description of instruments requiring a stamp, and they do not fall in any way within the provisions of the 13th section of the Act. But we are to consider the point argued and decided below, whether upon a balance arising out of sums paid by the bank to the bearers of unstamped cheques, issued at Lockerbie, beyond the privileged distance, the agent who honoured those cheques being cognizant of the distance and of the place of issue, the co-obligors or sureties in William Martin's bond of 1825 were liable to make good William Martin's deficiency, in other words, to pay the debt found due and arising out of **[632]** such dealing. Now it must first of all be observed, that it seems mainly, though not exclusively, to be the ground upon which the Respondents rest their case, and the Court below their judgment, that the bondsmen had bound themselves by the certificate of the accountants or agents of the bank, and that whatever balance those persons should certify due was to be regarded as the true balance for which the bondsmen were liable to the bank. This argument seems to admit that, but for such a special provision between the parties, the want of a stamp would be fatal, but certainly something has been said of a more general nature respecting the difference between enactments for protecting the revenue and other statutory provisions.

We shall therefore begin by considering the question in its more general shape, and then inquire if the special obligation just adverted to makes any difference in the present case. First, there seems to be no reason at all to doubt, that if, for the purpose of protecting the revenue, anything is forbidden to be done under a penalty, this does not necessarily make void the thing done, or prevent a right of action from arising out of it. Thus, if dealing in tobacco without a licence, as in *Johnson* v. *Hudson* (11 East, 180), is prohibited under a penalty; this will not prevent the person who so deals from maintaining an action for goods sold and delivered in such dealing, although the unlicensed dealer will be liable to the statutory penalty. But how would it have been if the legislature had provided, that besides the penalty, all dealing of the forbidden kind should be absolutely void? It is clear that in this case no action could arise from such void dealing, not because the law forbad the transaction for revenue pur-**[633]**-poses, but because it deprived the transaction of all legal force and effect by making it void, and even if it had only been forbidden, with or without a penalty, provided the prohibition was for other than revenue purposes, no action could arise. Where there was no provision avoiding the transaction, but a prohibition framed to protect the buyer, an action was held not to lie, where that prohibition was broken: *Law* v. *Hodson* (11 East, 300). So it was held that no action was maintainable for printers' work, where the Act requiring the printer's name to be given had not been complied with, not following a direction being held equivalent to disobeying a prohibition: *Bensley* v. *Bignold* (5 Barn. and Ald. 335). But a provision making void the transaction is quite as clear a ground of nullity, and quite as strong to

defeat all legal remedy as any such prohibition. Be it so, that the provision is to protect the revenue, still if it operates not by penalty nor yet by mere prohibition, but declaring void what is prohibited, surely this is as immediate and direct a defeasance of all legal remedy as can be conceived. It is not, as in *Law* v. *Hodson*, a consequence drawn by argument from the statutory enactment, but it is the very enactment itself; it stands in the place of penalty; it is in truth the penalty denounced. The wrong-doer, the person breaking the law, forfeits £100 and forfeits also the validity of his contract. He incurs two penalties, the fine and the nullity.

Now what does the Stamp Act provide? With reference to the present case the 13th section is precise. [His Lordship read the section, and called particular attention to the latter part of it, which he conceived to be a clear declaration of nullity or avoidance]; for [con-**[634]**-tinued his Lordship] it goes on to provide, that "moreover," that is, over and above forfeiting the penalty, "the banker or other person shall not be allowed the money so paid, or any part thereof, in account against the person or persons by or from whom such bill, draft or order shall be drawn, or his, her or their executors or administrators, or his, her, or their assigns or creditors, in case of bankruptcy or insolvency, or any other person or persons claiming under her, him or them." To say that a party shall not be allowed in account any money paid in a particular account, is equivalent to saying that the party shall have no claim against the payer or person on whose account or for whose behoof the money was paid, or, in other words, that no credit shall arise to the party, and, which is the same thing, no debt should be incurred towards him by the other person. The statute has, therefore, in terms, said that no debt shall arise from dealings contrary to the stamp provisions, and, in all but express terms, that whatever is done shall be void *quoad* creating a demand or claim by the party paying against the party receiving. This is anything, then, rather than a mere penalty protecting the fiscal regulation, or a mere prohibition with a view to such protection. It is a further and an additional protection given to the stamp revenue, declaring that payments upon unstamped instruments, made by parties knowing that the instruments do not come within the exemption, shall not be valid to the effect of charging the payee with a debt to the party paying.

Secondly, now what is the ground of the bank's action, of the charge given against William Martin's co-obligors or sureties? It is the debt alleged to be due from him to the bank in respect of his drafts upon the bank agent, honoured by him at Dumfries. But **[635]** if no debt is due, if the wrong-doer is forbidden from having claims against his customer in account, there is no liability incurred by the co-obligors, or indeed by W. Martin himself. That is, indeed, the immediate and direct consequence of the statutory provision. It is as if the statute had made void the bond to secure the balance from time to time due; for if there is nothing due, there is no balance—the obligation to make that nothing good itself amounts to nothing. The operation of banking is this: We speak of deposits by customers, and of their keeping money at bankers, but, both in fact and in contemplation of law, they give their money or securities for money to the banker, who becomes their debtor and is bound to repay it on demand. The operation of a cash credit is the reverse, the customer becomes the debtor to the bank by so much as the bank advances on his drafts, and the surety becomes bound to pay that debt if the customer fails. Then if the statute says no debts shall arise or become due upon money drawn out by the customer or paid by the bankers in a particular way, it also says that no bondsmen shall be liable on such a security given. It is as if the cash credit stood, and the bond for securing the balances stood, but nothing had been done under the credit, and so no balance had arisen or could arise which the bondsmen could have to make good.

But the peculiar form of the bond in this case is relied upon. It is said that whatever the accountant or agent should certify as the balance, is to be taken as that balance. How can this alter the case? They are to ascertain the quantum. The quantum of what? Of balance or debt due to the bank. But the Act of Parliament has said that there can, out of transactions of this kind, arise no debt whatever. Then **[636]** there is no balance of a debt for the certifier to ascertain. The words, taken even most literally, will not bear out the contention of the Respondents. "Any account or certificate, signed as provided, shall be sufficient to ascertain, specify, and constitute—" What? not how much the obligors shall be bound to make good or pay,

but "the sums and balances, such as aforesaid, to be due hereon in principal and interest, and shall warrant all executorials of law for such sums or balances." Now what are balances such as aforesaid? They are plainly balances in the transactions aforesaid, the drawing money out and paying it in; in a word, the balance of debt due from William Martin to the bank; and how are they further described? As "to be due hereon in principal and interest." This plainly means, due on this bond, by reason of the claims arising to the bank for money advanced on William Martin's cash credit, so that the obligation is to pay the debt and balance arising and due. If there is no debt, no claim, there is no obligation. The statute has taken away the debt, and the obligation vanishes with it. It is quite impossible to avoid regarding what it is that constitutes the obligation in the instrument, and what is the main purpose of it? It is that the obligors are bound to pay any debt incurred by William Martin to the bank on his cash credit. Now if there could be no debt, there must be an end of the obligation to pay.

Nothing can be more plain than that if such decisions as the present could be supported, the 13 sect. of the statute becomes at once a dead letter, as far as the nullity goes; for parties would only have to frame their securities like this bond, and then the unstamped cheques would constitute a balance available to the one party and payable by the other; for then it would **[637]** always be contended, and with success, that the party was not suing for money paid by unstamped drafts; that would be admitted to be impossible by virtue of the 13th section; but he would be represented as suing on the balance declared by the account, and the parties would thus be concluded, and the Court precluded from going into the fraudulent and illegal dealing which had rendered the whole transaction void, by prohibiting any claim or debt from arising out of it. All drafts, whether within ten or beyond a hundred miles, whether payable to bearer or not, whether on demand, at sight, or at six or eighteen months' date, would become valid, because a single bond executed would make the party drawing and receiving liable; without even paying for a bond stamp; a written memorandum agreeing to pay and with an agreement stamp, and that only affixed to it when it was to be put in suit, would suffice to legalize the whole transaction. As far as efficiency in law and equity is concerned, the statutory protection to the revenue of the nullity declared would be gone, and the penalty alone would remain. A recent case in the Court of Exchequer, *Owen* v. *Denton* (1 Cro., Mee. and R. 711), was relied on in the argument for the Respondent. But it is in no respect repugnant to the opinion which I have been giving. There a settling of accounts had taken place upon a selling of malt by an illegal measure. The Court admitted explicitly that such a sale could not either be enforced by action, or set off in defence against a claim, but they held that the settlement was equivalent to payment, and could not thus be set off. It is quite unnecessary to say whether this was or not a correct view of the law, and whether it let in or not **[638]** a plain evasion of the revenue; at all events it does in no way conflict with the grounds of the present case, which stands wholly separate and apart.

I am, therefore, of opinion, and would move your Lordships, that the decree appealed from must be reversed, and that the case must be remitted with a declaration to this effect, "That no obligation arises upon the bond dated 28th September 1825, to pay any balance alleged to be due to the bank on W. Martin's drafts, so far as such drafts were drawn and issued beyond the statutory distance, or wrong dated in point of time or place, and were known by the agent of the bank to be drawn beyond such distance, or to be wrong dated in point of place, or to be wrong dated in point of time; and so far the Court of Session is directed to suspend the charge, and to find expenses due according to the result of the inquiry touching the manner in which the balance is constituted; and with this finding and direction, it is ordered that the cause be remitted back to the said Court to do therein as shall be just and consistent with this judgment."

The interlocutors were accordingly reversed so far as they were complained of, and the cause was remitted to the Court of Session, with a declaration in the above terms.

[639]

APPEAL

FROM THE COURT OF SESSION.

Sir WILLIAM BAILLIE, Bart., and Others,—*Appellants;* The EDINBURGH OIL GAS LIGHT COMPANY,—*Respondents.*

[Mews' Dig. i. 560, 649, 705; iii. 1401, 1402, 1870.]

By Act of Parliament, authorising a joint-stock company to raise £80,000 in shares of £25 each, the directors were empowered to make such calls for money on the subscribers to the undertaking as they should from time to time find necessary for the purpose of carrying on the same, but no such call should exceed £10 per cent., and one month at least should intervene between the calls. The directors brought an action against one of the subscribers for the amount of two calls made on his shares, on the same day, and that subscriber brought a counter action against the directors for the value of his shares as at a certain period, on the ground that they had, without his consent, engaged in speculations foreign to the company's undertaking, and at last abandoned that undertaking and united themselves with another company. Both actions were referred to an arbitrator under an order of Court; and he found, *first*, that the directors were entitled to decree for *the amount of the two calls*, with interest; *secondly*, that the subscriber was entitled to decree for a certain sum as the ascertained price of his shares, which sum, under deduction of what was awarded for the calls, he was *entitled to recover* from the company *on surrendering or transferring his shares* to them, or to any person they might direct; and he further found that the directors were entitled to reservation of any claim they might have against the subscriber for calls made subsequent to their action, and that the subscriber was entitled to reservation of his defences against such claims.

Held by the House of Lords that the award was bad, inas-[640]-much as the first finding for the amount of two calls made in one day was contrary to the Act of Incorporation, which required the distance of a month at least between two calls, and the second finding was not final and conclusive, but held the subscriber entitled to recover the sum awarded to him upon condition only of transferring his shares.

Semble, the third finding, reserving subsequent claims of one party and defences of the other thereto, was not bad (though unnecessary), inasmuch as a reference of "all questions between the parties," by the practice in Scotland, is confined to the questions in the particular actions referred.

There are here two appeals at the instance of the same Appellants and Respondents (see the report, 10 Shaw, D. and B. 723). The interlocutors complained of were pronounced partly in an action raised by the Respondents against Mr. Clyne, solicitor in the supreme Courts in Scotland, for payment of the sum of £260 with interest, being the amount of two instalments alleged to be payable on fifty-two shares of the capital stock of "The Edinburgh Oil Gas Light Company," held by him. That company was incorporated in the year 1824, by an Act 5 Geo. 4, c. 76, intituled "An Act for the better lighting the City and Suburbs of Edinburgh with Oil Gas:" by the 12th section of which, the company was authorised to raise £80,000 in 3200 shares of £25 each share. By the 52d section it was enacted, "That the committee of management shall have full power and authority, from time to time, at any of their meetings aforesaid, to make such call or calls for money from the several subscribers to and proprietors of the said undertaking in order *to defray the expenses of or of carrying on the same, as they shall from time to time find wanting and necessary for* [641] *these purposes*, until the sums subscribed are fully paid; but no *such call shall exceed the sum of* £10 *per centum*, for or in respect of every share in the said undertaking, and so that *no such calls be made but at the distance of one calendar month at least from each other*, and so that fourteen days' previous notice at least shall be given of every such call, etc." And it was provided by the 71st section, "That nothing in

this Act shall extend or be construed to extend to authorise, nor shall it be lawful for the said company to manufacture or produce gas or inflammable air, or the products obtained in the process of making gas or inflammable air, from pit coal, cannel coal, or coal of any other species."

On the 12th of December 1825, the committee of management made two calls on the proprietors, each being for £2 10s. per share, payable respectively on the 10th January and 13th February 1826. These were the fifth and sixth calls, and the sums thus demanded on Mr. Clyne by these two calls, in respect of his shares, amounted to £260. On his refusing to pay that sum the directors of the company brought an action against him in January 1827. Defences were given in for Mr. Clyne, in the month of November of the same year, to this effect:—That the calls in question were not made for the necessary purposes authorised by the Act of incorporation; that had the managers of the company confined their operations to what was authorised by that Act, no call would have been necessary after June 1825, as was stated at the annual meeting then held; and that if speculations had been gone into, and measures adopted which were not authorised by the Act, the expense of all such proceedings should be defrayed by those with whom they originated, but could not [642] be charged against such members of the company as did not concur in them. It was in conclusion averred, that the calls now made had been occasioned solely by objects and pursuits not authorised by the Act, and which had no concern with the original object and proper business of the company.

While this action was depending the company resolved to abandon the manufacture of oil gas, and an offer having been made by the Edinburgh Coal Gas Company for purchasing their works and pipes, an agreement was entered into in March 1828, whereby the whole property belonging to the Oil Gas Company, except the sums due for calls on the proprietors and accounts due by customers, was sold to the Coal Gas Company for 1000 shares of the latter company's stock, to be distributed among the proprietors of the Oil Gas Company, in proportion to the shares of the stock of that company, held by them respectively at the time of the agreement.

Subsequently to these transactions, Mr. Clyne raised a counter action for damages against the Respondents, alleging that by various proceedings taken by them as directors of the company, and which he particularly stated in his summons, they had violated the said Act of Parliament, and also the original conditions upon which he became a shareholder of the company's stock; and that having so acted, and having sold the property of the company without his consent, they were bound to repay unto him all that he had paid for his shares in deposits, premiums, and calls or instalments (of which he had paid four) with interest. The summons concluded for payment of £1183 10s. 5¼d.

To this action the Respondents gave in defences to this effect:—That Mr. Clyne was barred by acqui-[643]-escence from questioning the proceedings, on which he libelled, as grounds of action against them: That under the circumstances in which the affairs of the company were placed at the time of their agreement with the Coal Gas Company, they were legally entitled to dissolve the Oil Gas Company, to dispose of their property, and to divide the proceeds rateably among the proprietors; and these measures having been effected in the way most beneficial for the shareholders at large, it afforded no relevant ground of action against the Respondents, that they were not consented to by an individual proprietor of stock: and that Mr. Clyne sustained no loss from the proceedings in question, but, on the contrary, had been greatly benefited thereby, and therefore his claim of repetition and damages was altogether unfounded.

This action was ordered by the Lord Ordinary to be remitted to the former action, but not conjoined with it; and some of the interlocutors complained of in the appeals were pronounced in them on the 30th of November 1830, and the 24th of May and 1st of June 1831. In pursuance of his Lordship's interlocutor of the last date, the following issues were proposed to be tried by a jury.—Issue in the cause in which the Edinburgh Oil Gaslight Company are Pursuers; and David Clyne, solicitor in the Supreme Courts, is Defender.—"It being admitted that by an Act of Parliament, 5 Geo. 4, c. 76, a company was established in Edinburgh, under the name of the Edinburgh Oil Gaslight Company, for the purpose of manufacturing gas from oil and other substances:

"It being also admitted that the defender was proprietor of fifty-two shares of the stock of the said company, during the months of January and February 1826:—

[644] "Whether the defender is indebted and resting-owing to the pursuers in the sum of £130 sterling, or any part thereof, with interest thereon from the 10th day of January 1826, and the sum of £130 sterling, or any part thereof, with interest thereon from the 13th day of February 1826, as the instalments or instalment on the shares of the said company, held by the defender as aforesaid?"

The issue in Mr. Clyne's action, after admitting in like manner the formation of the company under the said Act, and stating that Mr. Clyne was an original partner of the company, and as such held twelve shares of the stock, on which he paid instalments, and that, between the 17th of January and the 21st of April 1824, he purchased forty additional shares of the stock, on which he paid certain instalments and premiums, concluded thus:—

"Whether, between the 19th day of January 1824, and the 15th day of May 1828, the defenders wrongfully violated the provisions of the aforesaid statute, and thereby became indebted to and are resting-owing to the pursuer in the sum of £1183 10s. 5¼d., or any part thereof, with interest thereon, as the value of the shares of stock held by the pursuer, as aforesaid? or, whether the pursuer homologated or acquiesced in all or any of the said actings of the defenders?"

When these issues came on for trial, on the 19th of December 1831, the counsel for the parties, on the suggestion of the presiding judge, agreed to refer both causes, and subscribed accordingly a minute of reference in these terms:—"The parties agree to refer the two actions to Mr. John Boyd Greenshields, with full powers to determine all questions between the parties, and to determine the question of expenses, and they request the Court to interpone their authority to this minute of judicial reference." "Failing Mr. **[645]** Greenshields, the parties agree to refer to any referee to be named by the Lord President."

Mr. Clyne, in the course of the same day, protested against the reference, alleging that he was not aware of the terms of it, and was taken by surprise. And he gave notice of motion, and moved the Court accordingly to discharge the reference, stating, as an additional reason, that Mr. Greenshields declined to accept it, which was the fact. But the Lord President, and the Lords of the First Division, before whom the motion was heard, by two interlocutors, dated respectively the 19th and 22d of December 1831, admitted the reference, and, by virtue of the power given in the said minute to the Lord President, named Mr. Duncan M'Niell, advocate, judicial referee, in place of Mr. Greenshields.

Mr. M'Niell accepted the reference, and after several meetings, at which he was attended by Mr. Clyne and the agent of the Respondents, he delivered his award on the 25th of May 1832, thus:—"*Primo*, I find that, in the action at the instance of the Edinburgh Oil Gaslight Company against Mr. Clyne, the pursuers are entitled to decreet for £130 sterling, with legal interest thereof, from the 10th of January 1826, and for the further sum of £130 sterling, with the legal interest thereof, from the 13th of February 1826, being the two calls or instalments concluded for in the summons, at the instance of the said company, against Mr. Clyne, and amounting, the said two calls or instalments, with interest, to £289 16s. 10¾d. at Whitsunday 1828. *Secundo*, I find that, in the action at the instance of Mr. Clyne against the Edinburgh Oil Gaslight Company, he is entitled to decree for £780 sterling, with the legal interest thereof from the term of Whitsunday 1828; but that the said com-**[646]**-pany is entitled to deduct therefrom the aforesaid sum of £289 16s. 10¾d., found due to them as at Whitsunday 1828, leaving a balance due by the said company to Mr. Clyne, at Whitsunday 1828, of £490 3s. 1¼d., which sum, with the legal interest thereof from Whitsunday 1828 till paid, Mr. Clyne is entitled to recover from the said company, upon his surrendering the 52 shares of the Edinburgh Oil Gaslight Company stock held by him, or transferring the same in favour of the said company, or of any person or persons they may direct, for their behoof. *Tertio*, I find that the Edinburgh Oil Gaslight Company are entitled to reservation of any claim they may have against Mr. Clyne for any calls or instalments subsequent to 13th of February 1826, paid by other partners of the company, but not by Mr. Clyne, and that Mr. Clyne is entitled to have his defences against any such claim reserved, and that the said company are not entitled to withhold or delay payment, in the meantime, of the said balance of £490 3s. 1¼d.,

and interest, or any part thereof, on account of any such alleged claim for subsequent instalments. *Quarto*, I find that neither party is entitled to expenses against the other party, but that both parties are conjunctly and severally liable to the clerk to the reference for his expenses and trouble."

Mr. Clyne again disclaimed the reference, and took several objections to the award, in a letter written to the arbitrator, a copy of which he sent to the agent for the Respondents. He also moved the Court to sustain his objections, and set the award aside. The Respondents, at the same time, moved to confirm it. And the Court, by two interlocutors, dated respectively the 21st and 28th of June 1832, ordered the award to be printed, and also the issues in the cause; **[647]** and printed copies to be put into the boxes of the Lords of the First Division; and, after hearing counsel on the said motions, approved of the award, and interponed the authority of the Court thereto, and decerned against the parties for implement thereof to each other.

Mr. Clyne died in November 1833, leaving a trust disposition, in which the Appellants were appointed trustees and executors, who, being accordingly sisted in his place in the actions, appealed from the above recited interlocutors of the Lord Ordinary, dated 30th November 1830, 24th May and 1st June 1831, the interlocutor of the Lord President, dated 19th December 1831, the foresaid interlocutor of the Lord President, and of the Lords of the First Division of the Court, dated 22d December 1831, and the interlocutors of the Lords of the First Division of the Court, dated the 21st and the 28th June 1832, as erroneous and contrary to law and equity.

The Appellants' counsel had just opened their case at the bar of the House, the 14th of May 1835, when, on the suggestion of the Lords then present, the appeals were withdrawn, upon terms consented to by the counsel of the parties, and embodied in an order of the House; that order was afterwards rescinded upon petition of the Appellants' agents, stating, that he had not considered the import of the terms of the compromise when the counsel consented to it, and the appeals were reheard on the 6th of July following.

The Attorney-General and Mr. Tinney for the Appellants:—It is evident, from the summons and defences, that the questions raised in both the actions were questions of law, and not such as could competently form the subject of a jury trial. That was the **[648]** opinion of the Respondents themselves, as appeared from their application to the Lord Ordinary to remit the actions to his ordinary roll; and the judge who presided, expressed his opinion after the cases had been opened, that they were not fit for a jury trial. The interlocutors, therefore, remitting the actions to a jury were clearly wrong.

Mr Clyne had the same objection to the judicial reference that he had to the trial by a jury; but having brought his witnesses and prepared his cases at great expense, he preferred on the day of trial to have the issues at once disposed of, because he knew that he could afterwards discuss the law before the Court. He protested against the reference as soon as he understood the true nature of the minute signed by his counsel, and, on the first opportunity, he moved the Court to rescind it. In principle, every reference of a judicial nature between litigants, being a voluntary contract to depart from the ordinary course of procedure, may be disclaimed and abandoned so long as the rights of the parties remain entire. Thus, where a judicial reference had been made to the oath of a party, which is one of the most solemn agreements of this description, it has been held that it may be departed from: *Chalmers* v. *Jackson* (18 February 1813, Fac. Coll.), *Bennie* v. *Mack* (10 Shaw, D. and B. 255). Mr Clyne's conduct throughout showed that he did not acquiesce in the reference; he was obliged to attend the referee by orders of the Court served on him, and he did attend from respect to the Court and to the referee, whom, notwithstanding, he considered as a commissioner merely to collect the facts and report, subject to the review of the Court. The whole proceedings, therefore, in remitting first to **[649]** the jury court, then to a referee, in opposition to Mr. Clyne's protest, was irregular, and was an attempt to force him into a compulsory reference, and thereby defeat his just claims, and render nugatory the law, which ruled the questions in dispute between the parties. The only question brought before the Court in both actions, was a question of law, proper to be disposed of by the Court.

The merits of the original action, as appearing on the record, did not form the

ground of the last interlocutor of the Court below, any decision on the merits having been held to be superseded by the reference and award, to which the authority of the Court was without investigation interponed; but the award as well as the reference was void, and did not form a competent ground of decision; and the findings contained in it are as illegal as they are unjust, inasmuch as the two calls which the arbitrator sustained, being made on the same day, are contrary to the 52d section of the Act 5 Geo. 4, c. 76, which requires a month at least to intervene between two calls. The arbitrator, by his first finding, awarding their whole demand to the Respondents, and repelling the defences of Mr. Clyne, found by implication that the Respondents were entitled to dissolve the company without the authority of Parliament, by virtue of which it existed; to alienate its property, and Mr. Clyne's interest in it, and at the same time to bring actions, as a supposed existing company, for calls, said to be authorised by the statute, although the calls were not made in terms of the statute, and the expenses which the calls were meant to cover were shown to have been incurred by undertakings and proceedings not warranted by the statute. This finding, which was contrary to the evidence, and unsupported by legal principle, affords [650] a striking contrast to the second and third findings, by which the claim made by Mr. Clyne in his action against the company was disposed of. Mr. Clyne in his summons concluded for payment of £1183 10s. 5¼d., money paid by him on the faith of the original articles of association and of the statute, the claim being made on the ground that the company was bound to refund to him the loss he sustained by their abandoning the original, and amalgamating with a new and different company. But the referee, in place of awarding the sums disbursed by Mr. Clyne, reduced his claim to £780, and, by deducting the amount of the calls pursued for by the company, reduced it still further to £490 3s. 1d. Instead of giving an immediate decree for that sum, a condition was introduced into the award, for which neither the summons nor the record gave any warrant, viz. that Mr. Clyne should be entitled to recover this reduced sum, only "upon his surrendering the 52 shares held by him, or transferring the same in favour of the company." This was a conditional finding, and Mr. Clyne, unless he complied with the terms of it, was denied all redress. The arbitrator had no right to go out of the reference, and introduce conditions which might avoid the award. The Courts have often set aside awards for faults of that sort. *Carruthers* v. *Hall* (9 Shaw and D. 66); *Johnson* v. *Cheape* (5 Dow, 255); Erskine, B. 4, tit. 3, s. 33; Caldwell on Arbitrations, 104; Parker on Arbitrations, 203.

The third finding of the award is also in terms and principle altogether unwarranted, as finding the company entitled to reservation of any claim they may have against Mr. Clyne for calls and instalments, subsequent to February 1826; such a reservation was [651] prejudicial to Mr. Clyne, as implying a recognition of what is reserved. No reservation could have been asked, had the actions been decided by the Court, or by the jury; and the only object of the reference was, to dispose of the whole matter in dispute between the parties and prevent future litigation. The award does not give any effect to the conclusions of the action at Mr. Clyne's instance, as it finds only that he is "*entitled to recover*" a certain sum, and even that title to *recover*, by another action of course, is burdened with conditions of *surrendering* his shares, or of *transferring* them in favour of the company, or of *any persons* they may direct, and of a *reservation* of *any* claim the Respondents may have for *any* calls *subsequent* to those embraced in the action. The award on the whole is partial and unjust, is not final, and above all is contrary to law, and ought therefore to be set aside. *Corneforth* v. *Geer* (2 Vern. 705); Caldwell on Arbitrations, 63.

Dr. Lushington and Mr. Bruce for the Respondents:—Mr. Clyne was liable under the statute, and *ex contractu* as a partner of the company, to pay the instalments concluded for, and the Appellants as his representatives are bound to fulfil his engagements. It is vain for them to object that Mr. Clyne was not a party to the order of reference, when they cannot deny that the minute of reference was signed by his counsel, in his presence, and it appears by the terms of it that the cases were referred to a "judicial referee," and not to a commissioner. If the submission had been by deed, expressed in the terms of this minute, could Mr. Clyne at his pleasure depart from its [652] binding force, and convert the referee into a commissioner to report on facts?

The whole proceedings in the case show, that the parties were well aware that the

matters at issue between them were submitted to the final decision of the referee, and on that footing all the pleadings on the part of Mr. Clyne, whether by himself or his counsel, were conducted.

Another objection of the Appellants is, that the award is not conclusive in the second and third findings. To that objection, there are sufficient answers: in the first place, the action at the instance of the Respondents, concluded for payment of those instalments only which had fallen due prior to February 1826; for those which have become payable subsequent to that period, no action has yet been brought, and as only the claims included in the mutual actions then pending were referred, it was incompetent for the arbitrator to decide any question not embraced in these actions. But even if it could be shown that the claim for subsequent instalments was included in the judicial minute, and therefore that the award was not conclusive as it did not dispose of them, that circumstance could form no objection to the award, which is valid so far as it decided points truly embraced by the reference: *M'Lellan* v. *M'Leod* (4 Wils. and Shaw, 158); Erskine, B. 4, tit. 3, s. 35. But the chief objection to the award is, that it was *ultra vires*, in other words, that the referee exceeded his powers in ordering Mr. Clyne to surrender his shares even conditionally, inasmuch as the action contained no conclusion to that effect. In referring to the summons in Mr. Clyne's action, your Lordships will find **[653]** it to be grounded in the Respondents' liability to refund to him all the sums paid by him in respect of his shares. With regard to the agreement with the Coal Gas Company, which is one of the grounds of that action, the Respondents, on behalf of the company, were not only justified, but bound to suspend the manufacture of oil gas when they discovered that it was disadvantageous and unprofitable to the shareholders. They were also justified in accepting the offer of the Coal Gas Company, but the powers of the company given by statute were not disposed of, and the company still exists as the Appellants know, for they have raised an action against the Respondents in their corporate capacity. But if it were possible to dispute the legal right of the company in the circumstances in which they were placed, to abandon the undertaking for which the company was incorporated, and to dispose of their property in the manner they did, still the Appellants, in order to succeed in their claim against the company, must, at all events, prove that they have suffered damage in consequence of the proceedings complained of. Was not that a proper jury question, depending on the evidence adduced by the parties? The Lord Ordinary, when he sent the case to the jury court, was of opinion that the question was proper to be decided by a jury, and it was in that view that the arbitrator made his award on Mr. Clyne's claim.

Mr. Clyne having acquiesced in the proceedings of the Respondents, on which he libelled as grounds of action against them, his representatives are barred from challenging these proceedings; and at all events, as they sustained no loss from the proceedings complained of, they are not entitled to claim repetition to any greater extent than the fair value of the shares **[654]** of stock held by Mr. Clyne, at the date of the agreement with the Coal Gas Company. The Respondents having neither infringed the provisions of the statute whereby the company was incorporated, nor deviated from any subsisting contract, are not liable to the Appellants beyond that value, as found by the judicial referee.

The parties having entered into a judicial reference, by which they agreed to refer the two actions to the decision of a referee, who pronounced the award to which the authority of the Court was duly affixed, the Appellants are bound to put in force that award. A judicial reference is a contract, by which parties agree to submit the subject-matter of a depending action to the amicable decision of an arbitrator, and oblige themselves to acquiesce in his decision. The agreement is entered into under the authority of the Court, on a joint minute presented by the parties, praying their Lordships to admit the reference, and to interpone their authority thereto. On considering this minute, the Court pronounces an interlocutor, remitting the case to the referee named, whose judgment is final, and is not subject to review in any Court except in an action of reduction on the grounds of corruption or fraud, or that the arbitrator exceeded his power: Ersk. B. 4, tit. 3, s. 35.

The arguments for the Respondents on the validity of the award are noticed in the judgment.

When the arguments at the bar were closed—

Lord Brougham said, I have no doubt upon two points raised for your Lordships' consideration in these appeals: first, with respect to the two calls, whether in regard to the amount being twenty per cent. instead of ten, or the calls being two at the same time, [655] instead of two at the distance of one calendar month at least between them; that point, it is said, was not included in the issue; and if it be said that the issue did not leave that point to be decided by a jury, I do not see what was sent to be tried, except that very point. Nevertheless, I think if it be something less or more than was necessary, it is, in point of fact, the same amount that was left to the jury by the issue; and therefore the objection seems, in another stage of the proceedings, in substance to come to the same thing; namely, that the Lord Ordinary, instead of sending an issue of fact and of law, which is the objection, should send no issue to be tried at all, when facts enough were admitted to raise a point of law, which, I think, the Court ought to have taken and decided, whether these calls were or were not contrary to the fifty-second section of the Act of incorporation of the company.

The other point, on which I have no doubt in certain respects, is, that the award is not final, and that it does not direct anything specific or positive to be done, but merely that upon one party doing something, something is also to be done by the other party; if Mr. Clyne chooses to give up his shares, and divest himself of that property, the company shall pay him so much. It is in vain to argue that this direction was the same as a direction to a party to do so and so, upon another party producing letters of administration; or that it is like the case of a party who is directed to do so and so upon a discharge being executed to him. It is in vain to say, as has been ingeniously put in the argument at the bar, that it is the same as directing a cautioner to do so and so upon the assignment to him of the principal obligor's interest. It is in vain to say that any of the [656] three cases so put is at all the same as, or at all like to the one in question in this award. There was no necessary connexion between the arrangement which the arbitrator was in the course of directing, and Mr. Clyne's divesting himself of his property in ceasing to be a shareholder. The award did not direct him to give up the shares; it only said if he chooses to get out of the situation of shareholder, he can divest himself of the joint-stock property, and assign over, or give up, the shares to the company, and the company shall do so and so. That is a perfectly different matter, and ought to be made the subject of a specific direction binding Mr. Clyne obligatorily, not binding the company, in the event of Mr. Clyne executing the directions of this award, whatever they might be.

I have no doubt whatever upon that objection to the award, but there are two other matters which I wish to take time to consider, especially as raising another objection of a more specific nature, from which it appears still clearer that the award was not final, namely, the objection which applies to the calls, that the reservation is bad. Now if this was a general submission of the cause and all matters in difference, or, what comes to the same thing, a submission of all matters in the cause, with a power to the arbitrator to whom that reference was made to dispose of all questions between the parties—if that be not in Scotland, it would certainly be with us, a general reference of all matters in dispute between the parties, as well out of the cause as in the cause pending. But I am not quite clear that the form of the direction, perhaps from the wording of it, makes it a final proceeding; for it is reserving all questions touching shares and calls, which calls have been made during the intervals between the actions brought [657] and the date of the reference. But it is said that is not the course, and, in fact, that there could be no such reference by the practice in Scotland. I shall inquire as to that practice; for if so, this other consequence follows, which indeed is not repudiated, but expressly stated to be Scotch law; that, if the word "other" had been inserted for the express purpose of showing that all other matters, as well as those pending in this suit, were referred to arbitration, the use of the distinct word, "other," would still only amount to a reference of the subject-matters in dispute in the cause. I apprehend the word "other," by the Scotch language, means all other questions than those in the cause, or it means nothing. I should be surprised to find the practice to be otherwise, as it would be giving a technical sense in opposition to the obvious meaning of the word in common sense; I shall therefore take the opportunity of satisfying myself upon this, which is a point of importance in practice.

The only other point that remains to be considered is, as to the effect of the arbi-

tration, whether it extends to these other suits brought for subsequent calls; and it is the only other question that arises (if I should be of opinion against the Appellants on the former) upon the construction of the award, and, consequently, upon the import and effect of the third finding of the arbitrator, I mean the question of the reservation of claims and defences as to subsequent calls. There is upon the face of the award a point of law, namely, the application of the construction of the fifty-second section. If I come to an opinion against the Appellants on those views, both upon the meaning of the reference, which prevents the effect of the third finding, and upon the passage importing a [658] legal question out of the summons into the award, and there dealing with it as a point of law arising upon the construction of the fifty-second section, there is an end of the case; but if I am with them upon the second point, and against them on the first, if they can raise the question about the summons, then the only further question will be—I being of opinion the second call is bad at all events—whether or not the first call is good. That raises the question which has been argued. It is not said the company may not have two calls on the same day, but that they are not allowed to have more than ten per cent.; that raises this question, whether if a call of ten per cent. has been paid on the 10th of January, and another upon the 15th of February, it is not an evasion of the clause for raising money, in which the company was tied down closely?

Lord Brougham (July 17).—My Lords, in this case I stated, at considerable length, when the arguments had closed, the views which I took of the two most material parts of it, and I stated the reasons why it appeared to me to be impossible to agree entirely with the judgment which had been pronounced below upon the former part of the case, affirming in all respects the award of the arbitrator. It appeared to me that the award was not final, in respect of the second finding, which did not give a positive direction to Mr. Clyne to surrender his shares, but only a conditional order, which imported that if he thought fit he might surrender them, upon receiving from the company the compensation stated. But a question also arose, whether the third finding was not equally defective in point of conclusiveness, as it reserved to one of the [659] parties all right of action with respect to the other calls, which had not become due at the time the submission to arbitration was entered into. This question depended upon whether or not we construed the words of the reference, as importing a submission to arbitration of all matters in dispute between the parties, or only a submission to arbitration of the matters in dispute in the action already brought, and which was then referred. The words of the reference were, "The parties agree to refer the two actions to, etc., with full power to determine all questions between the parties," etc.; and it appeared to me that this was a reference of all matters in dispute; it undoubtedly would have been so with us in our Courts here, being our, and perhaps the most ordinary, mode of making a general reference to arbitration. If we refer all matters in dispute in a cause, that, of course, is only a submission to arbitration of the cause itself, and nothing more than is in dispute in that cause; but if we refer—which is usual when a general reference is intended—"this cause, and all matters in difference between the parties," or, "this cause, and all questions between the parties"; these words import a general reference.

I find, however, upon further consideration and examination of the authorities, and, above all, on a very instructive communication which I have had with some of the learned judges in the Court in Scotland, that there is something peculiarly technical and strict in what is called "a judicial reference," in Scotland. It is stated to be an act of the Court—not to take the cause out of the Court; the Court is understood still to retain its control over it, but the mode of inquiry and the manner of trial alone is changed by the reference, and the *forum* of the arbitrator is, in [660] this restricted sense, and subject to the control of the Court, substituted for inquiry by the Court itself. I will not stop to inquire how far this view finds resemblance or analogy in our references under the statute of William 3 (9 and 10 Will. 3, c. 15), making the submission a rule of Court; but, at all events, this is certain, that the course of proceeding in Scotland is so strict, and its incidents are so construed, as to make these words of reference, or words of reference similar to those used here, bear a construction materially different from what they would have with us, so that referring "the cause and all questions," or even "the cause and all *other* questions," but certainly referring "the cause and *all* questions between the parties" to arbitra-

tion, only imports, in Scotland, that the generality of all questions is to be construed according to the special matters immediately preceding, and that "all questions" in such a reference must be taken to mean "all questions in dispute between the parties in the cause referred"; that is to say, it is a reference only of all matters in dispute in that cause. This construction of the terms of the reference, therefore, removes all questions which may arise as to the conclusiveness of the award in this latter branch—the third finding; but it leaves the want of conclusiveness in the second branch or finding exactly where it was, and that is sufficient to prevent the interlocutors of the Court below from standing, which interlocutors confirmed the award generally.

With respect to the first branch of the award, that touching the two calls and interest on them, and in which the award was made against Mr. Clyne, I stated, after the argument, my opinion that one, at [661] least, of those calls was not exigible, inasmuch as the fifty-second section of the Act 5 Geo. 4, c. 76, requires that a month or more shall intervene between the making of any two calls; and those calls, even though the payments under them were to be made at an interval of more than a month, were nevertheless contrary to the Act, as both were made on the same day and were for more than 10 per cent. I formerly stated at greater length, the reasons why this was not a compliance with, but an evasion of the provisions of the Act, and an evasion of it in one of its most important particulars—that of a right to make calls on the shareholders for payments to the company. But the first of these calls does not appear to me to fall within the same objection; and therefore I am of opinion that one of those calls was duly made, inasmuch as it is not denied that above one calendar month had elapsed from the last preceding call. The result of this will therefore be, that the finding of the arbitrator in the action by the company against Mr. Clyne, may be reduced by one half, and that instead of £289 12s. 10½d., only £144 16s. 5¼d. will be payable by Mr. Clyne's executors to the company, including principal and interest. It is upon an error in law that I hold this part of the award to be erroneous, and the error in law, though it does not appear in express terms upon the face of the award, yet appears by the award, taken together with that to which the award refers, and which by that reference must be taken to be imported into it; consequently there is here just as much error in law as if that error in law had appeared upon the face of the award. The result of the argument with respect to the inconclusiveness of the award, of course, is, that the interlocutor must be set aside requiring the payment from the company [662] to Mr. Clyne of £780, from which the company also was allowed to deduct that which was found due by Mr. Clyne to the company under the first head, and in the first action. As there will now be no payment to be made by the company to Mr. Clyne, or his representatives, of course there is no occasion for mentioning the deduction.

But I have to make one observation, which appears to me to be of importance, because it tends to prevent these proceedings from being carried on further than the stage which they will reach on the reversal and remit, which I shall recommend to your Lordships. What the arbitrator intended to direct is very clear, though he failed in accomplishing his object, by a defect not only in form, but in substance of his directions. If he had directed—which in all probability he meant to do—that Mr. Clyne should surrender his shares, and that the company should make him compensation, then the whole direction would have been right. I have looked into the facts of the case, and as far as I understand them, I am of opinion that such would have been so far a right award, and that had it been so made, the Court would have been right in confirming it. When this matter goes back to the Court below, the probability is, that the party against whom the award was made will not choose to refer at all; but whether by reference and an award, or by the Court itself dealing with it, a similar judgment is, in my opinion, likely to be arrived at. As at present advised, I think that judgment, if it is come to, will be unimpeachable, and any different judgment will be wrong. If, therefore, the result of the present reversal and remit will be, that the same conclusion will be arrived at which I have already stated my belief to have been the intention of the arbitrator and of the [663] Court below to have come to, that conclusion ought, I think, to stand; and if it should be brought here by appeal, the party so appealing will, very probably, not only have the decision here against him, but will also have to pay the full costs of that proceeding.

The best course for your Lordships now will be, to alter the interlocutors complained of in the manner which I have already described, the consequence of which will be, that the award will be set aside, and the Court below will be left to proceed with the causes as they shall see fit; the Appellants being directed to pay the sum of £144 16s. 5½d., as I have already stated, as one call, with interest.

It was ordered accordingly, "That the interlocutors complained of in the said appeal (the first) be, and the same are hereby reversed; and it is found and declared that in terms of the 52d section of the Act (5 Geo. 4, c. 76), it was not competent to the company, thereby incorporated, to make two calls for money from the subscribers to, and proprietors of, the said undertaking at one and the same time; and that it was by the said Act enacted, that no such calls should be made but at the distance of one calendar month, at least, from each other. And it is further declared, that instead of making two calls for £130 each, upon the shares held by the said David Clyne on the 12th day of December 1825, it was not competent to the said company to make more than one of such calls at one time. And it is therefore further ordered, that the said cause be remitted back to the First Division of the Court of Session in Scotland, with instructions to the said Court to set aside the award of Mr. Duncan M'Niell, mentioned in the said appeal, in terms of this judgment, finding, and declaration; and to find the [664] Appellants liable in payment to the Respondents of the first instalment or call on the said shares, with interest since the same became due, and to proceed further therein as may be just and consistent with this judgment."

And in the second appeal it was ordered, "That the interlocutors complained of in the said appeal be, and the same are hereby reversed; and it is further ordered, that the said cause be remitted back to the First Division of the Court of Session in Scotland, with instructions to the said Court to set aside the award of Mr. Duncan M'Niell mentioned in the said appeal, and to proceed further therein as may be just and consistent with this judgment" (47 Journ. 304).

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[665]

APPEAL

FROM THE COURT OF CHANCERY.

JAMES ACKERS (an Infant, by N. C. MILNE, his Guardian),—*Appellant:*

SOPHIA PHIPPS,* Widow,—*Respondent.*

[Mews' Dig. xiv. 1524; xv. 1441, 1769; S.C. 9 Bli. N.S. 430. And see *Phipps* v. *Ackers*, 3 Cl. and F. 702; 9 Cl. and F. 583; and S.C. in Ch., 5 Sim. 44; 1 L.J. Ch. 96. Cp. *In re Townsend's Estate* 1886, 34 Ch.D. 357.]

A testator devised all his freehold, copyhold, and leasehold messuages, lands, tenements, rents, and hereditaments, and all other his real and personal estate, whatsoever and wheresoever, not before disposed of, to trustees, with power to sell and absolutely dispose of, or to exchange or let, all or any part or parts of his said estate, upon trust, as to a certain part, to convey and assure that part to his godson, G. H. A., when and so soon as his godson should attain 21; and also to pay to G. H. A. £7000 upon his attaining 21. But in case G. H. A. should die without issue before attaining 21, then the said part of the real estate, together with the £7000, was to sink into and become part of the residue, and to go according to the disposition thereof, thereafter in the will expressed. As to the rest, residue, and remainder of his personal estate, he directed it to accumulate at compound interest until J. C. A. should attain 24 years, then upon trust to convey, assign, etc. unto J. C. A. (upon his giving such security, and executing such deeds for the payment of annuities before bequeathed to other persons, as should be to the satisfaction of the trustees) all the legal estate and interest of and in all the freehold, lease-

* The appeal had abated before the hearing by the death of this Respondent, and was revived by an order of the House in her executors and devisees.

hold, and copyhold lands, tenements, rents, and hereditaments, and all other the testator's [666] real and personal estate, whatsoever and wheresoever, not thereinbefore devised and bequeathed. HELD, that this gift to J. C. A. displaced the heir at law as to the residuary gift of real and personal estate; that J. C. A. took a vested interest in the intermediate rents and profits, and that the words respecting his executing deeds and assurances did not constitute a condition precedent.

James Ackers, by his will, dated the 13th of April 1822, after directing his debts and funeral and testamentary expenses to be paid out of his personal estate, gave and bequeathed to his wife, Anne Ackers, for her life, his capital messuage or dwelling-house, with the out-buildings, gardens, land, and appurtenances thereto belonging, situate at Lark-hill, within Salford, in the county of Lancaster, which he held, together with other land, by lease from the Earl of Derby; and also the use of his household and other goods, furniture, plate, etc., which should be found in his said dwelling-house at the time of his decease; and in case of the death of his said wife before his interest in the premises should expire, then he directed that the said dwelling-house, land, and premises, and the household goods and chattels, should revert to his executors, and be applicable to the purposes of his will, thereinafter set forth, concerning his personal estate. The testator then gave several pecuniary legacies, which he directed to be paid, some within one year, and others within three months after his decease; and he gave and devised all his freehold and copyhold messuages, lands, tenements, rents, and hereditaments, and moieties, parts and shares of messuages, lands, tenements, rents, and hereditaments, whatsoever and wheresoever, situated, standing, lying, arising, and being in the United Kingdom of Great Britain and Ireland; [667] and also all and every his leasehold messuages, lands, tenements, rents, and hereditaments respectively, and all other his real and personal estate and effects, whatsoever and wheresoever, not thereinbefore disposed of, unto Edward Hobson and Benjamin Williams, their heirs and assigns, for ever, or for such other estate or estates as he had therein respectively, upon trust, as to his said lands, hereditaments, and real estates, that they, his said trustees, should keep and continue the same in good repair, and set, let, and manage the same for the utmost benefit and advantage; and upon further trust and direction, that it should be lawful for them, at any time or times after his decease, to sell all or any parts of his real estate (except the messuage and premises devised to his wife, during her interest therein, and also the land, hereditaments, and premises thereinafter devised to his godson, George Holland Ackers), and to convey the fee-simple thereof to any person or persons whomsoever, either in parcels for building upon, or otherwise improving the same, at such yearly, chief, or other rents, as they his trustees should think fit; and that when any of the said premises should be sold, the rents to be reserved upon such sales should be vested in the trustees upon the trusts in his will expressed, concerning his real estate. And he empowered his trustees to exchange any of his said lands and hereditaments for other lands, and to make partition of any lands of which he was joint proprietor, and he directed that the lands to be taken in exchange or divided should become vested in his trustees upon the trusts of his will, and that the monies to arise from the sale or sales of his estates should be added to his personal estate; and as to his personal estate, money in the public funds, money out at interest, and securities for money, rents, arrears [668] of rent, goods, chattels, and effects of what nature or kind soever, not thereinbefore specially bequeathed, he gave and bequeathed the same to his said trustees, their executors, administrators, and assigns, upon trust, in the first place, to pay thereout to his said wife an annuity of £3000 for her life, etc.

The will then proceeded thus, "And as to, for, and concerning all my messuages, lands, and premises, situate, lying, and being in Wheelock, in the county of Chester, purchased by me from Mr. Hillidge and Mr. Lockett, they my said trustees, and the survivor of them, and the heir of such survivor, shall stand seised and be possessed thereof, in trust, and to the intent and purposes, to assign, convey, and assure the same unto my godson, George Holland Ackers, eldest son of my nephew, George Ackers, *when and so soon as he*, my said godson, shall attain his age of 21 years; and also do and shall pay unto my said godson, George Holland Ackers, the sum of

£7000 at *and upon his attaining* his said age of 21 years. But in case my said godson, George Holland Ackers, *shall depart this life before he attains the said age of 21 years, without leaving issue* of his body lawfully to be begotten, then, and in such case, the said messuages, land, and premises, in Wheelock aforesaid, hereinbefore given and devised to him, together with the said sum of £7000, shall sink into and become part of the residue of my real and personal estate, and go according to the disposition thereof, hereinafter expressed and contained."

The will continued: "And as to the rest, residue, and remainder of my personal estate, not by this my will specifically disposed of, upon trust, that they my said trustees, and the survivor of them, his executors and administrators, do and shall, after payment thereout of all my just debts, funeral, and testamentary [669] charges, and all annuities and yearly sums of money, and legacies given by this my will, together with all such sum and sums of money as may be necessary for the management and repairs of my real and personal estate, invest the overplus in the Parliamentary stocks or public funds of Great Britain, or at interest upon government securities in England, to be altered and varied as they, my said trustees or trustee, shall think proper, and that the resulting income and produce thereof may be accumulated by way of compound interest, until James Coops, son of Ann Coops (some time ago residing in Salford), and which said James Coops was born on or about the 4th day of August in the year 1811, shall arrive at and attain the age of 24 years; then upon trust, that they, my said trustees and the survivor of them, and the heirs, executors, and administrators of such survivor, shall convey, assign, transfer, pay, and make over, by proper and effectual conveyances, transfers, payments, and assurances in the law, unto the said James Coops, upon his giving such security, and executing such deeds and assurances, to the satisfaction of the said trustees or trustee for the time being, or as their or his counsel shall advise, for the regular payment of the said several annuities hereinbefore bequeathed, all the legal estate and interest of and in all my said freehold, copyhold, and leasehold messuages, lands, tenements, rents, and hereditaments, and moieties, parts, and shares of messuages, lands, tenements, rents, and hereditaments, situate, standing, lying, arising, and being in the United Kingdoms of Great Britain and Ireland, and all other my real and personal estate and effects, whatsoever and wheresoever, not hereinbefore given, devised, and bequeathed."

The testator then directed that his trustees should [670] place James Coops at school, and give him an education at one of the universities, and pay for his maintenance and education such sum or sums out of the income of the testator's personal estate as they should think necessary, not exceeding £800 a year, until he should attain the age of 21 years; and after attaining that age, then that the trustees should increase the allowance from £800 to an amount not exceeding £1500 a year, until he attained the age of 24 years; and the testator further directed, that the said James Coops should from and after the testator's decease take and use the surname of "Ackers" only, in addition to his Christian name. The will then proceeded: "But in case the said James Coops shall depart this life before he attains the said age of 24 years, without leaving issue lawfully begotten, then upon trust, that they, my said trustees, and the survivor of them, etc., do and shall, in like manner, assign, transfer, pay, and make over, by proper conveyances, payments, and assurances (subject nevertheless to the payment of the said annuities and yearly sums of money hereinbefore bequeathed, and also to the life estate of my said wife, in my house and premises at Lark-hill,) unto such son of the body of my said nephew, George Ackers, lawfully to be begotten and hereafter to be born (exclusive of my said godson, George Holland Ackers, and his heirs), when he shall attain the age of 24 years, all that and those my real and personal estate, of what nature or kind soever; and in default of such son, in trust for the third, fourth, fifth, sixth, and all and every other son and sons of the body of my said nephew, George Ackers, lawfully issuing and hereafter to be born, successively and in remainder one after another, as they and every of them shall be in priority of birth, etc., such son and his heirs lawfully begotten, nevertheless, only to take [671] when he shall have attained the age of 24 years, etc.; and in default of such issue, in trust for all and every the daughter and daughters, and their heirs, of my said nephew, George Ackers, equally to be divided among them, etc., nevertheless, only to take when she or they shall have

attained the age of 21 years; and in case my said nephew, George Ackers, shall depart this life without leaving such son or sons, daughter or daughters, hereafter to be born, or that he, she, or they shall have respectively departed this life, if a son, under 24 years, and if a daughter, under 21 years of age, then upon trust for my said godson, George Holland Ackers, when and so soon as he shall have attained his age of 24 years." Then followed a proviso, that in case there should be no such son or daughter of the testator's said nephew, thereafter to be born, or that G. H. Ackers should die before attaining the age of 24 years without issue, lawfully to be begotten, the trustees should divide the whole of the testator's real and personal estate not before disposed of into three equal parts, each part to be divided equally among the children who should be then living of the testator's late uncle and aunts, T. Singleton, Elizabeth Halsall, and Ann Bayley, respectively. And the testator appointed the said Edward Hobson and Benjamin Williams executors of his will.

The testator afterwards made a codicil to his will, which, however, did not affect the devise of the real estate; and he died, without otherwise revoking or altering his will, on the 23d of May 1824, leaving Sophia Phipps (the Respondent) his heiress-at-law, and the said James Coops and George Holland Ackers, both infants under the age of 21 years, him surviving. Ann Ackers, the testator's wife, died in his lifetime. **[672]** The only child of his said uncle, Thomas Singleton, living at the testator's death, was George Singleton. The only children then living of the testator's aunt, Elizabeth Halsall, were John Halsall, and Ellen, the wife of Richard Mayor, and the only child of the testator's aunt, Ann Bayley, living at his death, was Ann Cottom, widow, who died in August 1824, leaving Robert Cottom, her eldest son, and heir-at-law, who obtained letters of administration of her estate and effects. Edward Hobson having by deed renounced and disclaimed the will, Benjamin Williams alone duly proved the same in October 1824.

Sophia Phipps (the Respondent) filed her bill in Chancery in October 1831 against the said Benjamin Williams, James Coops, then calling himself James Ackers (the Appellant), George Holland Ackers, George Singleton, John Halsall, Richard Mayor and Ellen his wife, and Robert Cottom, stating the facts above stated; and, among other things, that the testator was, at the respective times of making his will, and of his death, seised in fee of various lands in the townships of Manchester and Salford, and of Chorlton-row, jointly with Holland Ackers, deceased, in undivided moieties, as tenants in common; that these lands had been bought by them for the purpose of being sold again in parcels for building upon, and that contracts had been entered into by the testator both before and after the date of his will for the sale of these parcels, in consideration of certain rent-charges in fee issuing and payable out of the respective plots. And the bill further stated, that B. Williams, upon the death of the testator, took upon himself the execution of the trusts reposed in him by virtue of the will, and entered into possession and receipt of the rents and profits of the lands devised by the will, upon **[673]** trust to convey the same to James Coops when he should attain 24; and that the rents received by B. Williams, in respect of the premises at Wheelock, and the rents received by him on account of the other estates before mentioned, amount respectively to several thousand pounds. The bill prayed that it might be declared that the plaintiff was entitled to the rents and profits of the lands, etc. situate at Wheelock, from the death of the testator, until such time as the defendant, George Holland Ackers, should attain 21 years of age; and that it might likewise be declared that she was entitled to the rents and profits of the freehold lands and hereditaments in the will mentioned to be devised to the Appellant, until such time as he should attain 24 years of age. And for an account, etc.

The Appellant and George Holland Ackers appeared separately to the bill by their respective guardians, and put in demurrers thereto for want of equity. These demurrers came on to be argued before the Vice-Chancellor, and his Honor, by two several orders, dated the 19th of December 1831, overruled the demurrer of this Appellant, and allowed the demurrer of George Holland Ackers (see the case reported under the name of *Phipps* v. *Williams*, 5 Sim. 44).

This was an appeal against the order overruling the demurrer of James Ackers.

Sir C. Wetherall, for the Appellant:—The question is, whether the intermediate rents and profits are to go according to the trusts of the will, and accumulate for

the benefit of the infant, or to pass to the heir-at-law? This question must be answered in the affirmative. The general rule of law is, that in a devise **[674]** like the present, which is an immediate devise, liable to be divested, the right vests at once, and the intermediate rents are taken: *Borastone's case* (3 Rep. 19); *Doe* v. *Moore* (14 East, 601); *Doe* v. *Nowell* (5 Dow, 202; 1 Maule and Selw. 327); *Farmer* v. *Francis* (2 Bing. 151; 2 Sim. and Stu. 505); *Chambers* v. *Brailsford* (18 Ves. 368); *Stanley* v. *Stanley* (16 Ves. 491). If the testator has not directly devised them, he has done so by necessary implication. In the first part of the will, the testator speaks of "the capital messuage or dwelling-house, garden, land, and premises, and the household goods and chattels, and every part thereof respectively;" and this description of his property runs throughout the will, a circumstance of considerable importance to be attended to in its construction. In the devise to the trustees, the word "rents" is particularly introduced. [Lord Brougham.—The word "rents" is there made applicable to leasehold as well as freehold.] The trust created in that part of the will is most general in its nature, and it is clear, that every possible property was intended to be accumulated for the benefit of this young man. The trustees have the power to sell every acre of the real estate and turn it into personalty; and what is done with the personal estate, must be taken as giving the standard of construction for the whole will. In the devise to the trustees to pay the annuity to the testator's widow, rents are put upon the same footing as the other personal property. In the devise for the benefit of George Holland Ackers, the Wheelock estates and the sum of £7000, are in like manner treated as personalty, both being directed to sink into the residue should George Holland Ackers die before 21, and without lawful **[675]** issue; and then follows the general provision as to the residue not bequeathed or disposed of. This provision shows, that it was the desire of the testator, that every possible part of the property should be capable of being made available for the increase of the accumulating fund. The annuity of £3000 to the testator's widow, is to come from the aggregate fund formed of the real and personal property, and "rents" are expressly spoken of as part of the fund to form that property. The very large allowance made to this young man at the University, is itself a test of what the testator intended, namely, that after providing for the annuities and legacies given by the will, this young man should succeed him in the possession of the property. Throughout the will, instead of keeping separate the real and personal property, they are constantly mixed together. There is nothing whatever from which it can be inferred, that the testator desired to give the benefit of this property to a third person, till the time at which the Appellant should obtain 24 years of age. It may be said, that the contrary is not apparent, and that the rule of law is, that an heir-at-law cannot be disinherited without direct words expressly and for that purpose. The words here are sufficiently express, for power is given to the trustees to do that which it is impossible they can do, if the claims of the heir-at-law are to be preserved. The trustees may sell the estate itself and convert it into personalty; and if they did so, it is clear that the produce of the sale would go to form part of the accumulating fund. The creation of this power is equal to a devise to the trustees of the intermediate rents and profits of the estate, for it gives them an absolute power over the capital of the estate **[676]** itself. In *Gibson* v. *Lord Montfort* (1 Ves. 485; Ambler, 93) there was a devise of real, leasehold, copyhold, and personal estate to trustees, their executors, etc., first for payment of annuities, etc., upon a deficiency of the personalty; and "as concerning all the rest, residue, etc.," in trust for the children of the testator's daughter, but if she die without issue then to B. and C., and the intermediate profits were held to pass by this devise; and it was further held, that trustees have a fee when the purposes of the trust cannot be answered otherwise. That case must govern the present. In that case, Lord Hardwicke considered and commented on the case of *Stephens* v. *Stephens* (Cas. temp. Talb. 228). In the latter case, the judges whose opinions were taken, concluded their certificate as to the point now in question, by stating, "As to the profits of the estate received since the death of the grandson, or to be received until it shall vest in any one person by force of the said executory devise, or shall go over to the remainder-man: we conceive that they belong to Sir Thomas Stephens, by virtue of the residuary devise in the will, as an interest in the testator's estate, not before bequeathed or disposed of." That case is as strong as any that can be put, for it is the case of an executory devise which

may never be executed, but even in such a case it appears, that the intermediate accumulation of rents will go under the residuary devise. *Glanvill* v. *Glanvill* (2 Mer. 38), is another authority to the same effect. There the testator, after making a provision for the maintenance of his children, gave "all the rest, residue, and remainder of his real and personal estate" to his son, T. W. G., "to be a vested interest on his [677] attaining the age of 21," and "if he shall happen to die before 21," then to a daughter, E. G., with remainders over. The Master of the Rolls (Sir W. Grant) held, that the rents and profits were to accumulate until T. W. G. attained the age of 21, or died under that age. In that case, there was no special clause of accumulation, but the whole matter was put upon the general rule as laid down in *Stephens* v. *Stephens*, and *Gibson* v. *Lord Montfort*. The same general rule was adopted in *Genery* v. *Fitzgerald* (1 Jac. 468). Lord Eldon there stated most distinctly the rule on which the construction of devises of real and personal estate must proceed. He said, "When a testator mixes up real and personal estate in the same clause, the question must be, whether he does not show an intention that the same rule shall operate on both? He does not by his will create any trust, but makes a legal devise and bequest of the whole together; then is not the weight of authority in favour of the proposition, that when real and personal estate are given in this way, the intermediate profits of both must go together? I think it is." The only difficulty felt by the Vice-Chancellor in the present case was, in consequence of that part of the devise, by which on the property being conveyed to the infant, upon his attaining the age of 24, he is required to do certain things stated in the will. It was contended, that these things must be considered as conditions precedent to his right to enjoy the estate. In the report of the case in the Court below, *Phipps* v. *Williams* (5 Sim. 44), the Vice-Chancellor appears to have said, "The mere attainment of the age, is not the only thing by which the testator marks the time at which it shall be determined whether the estate shall vest or finally [678] become not liable to be divested, but there is a preliminary act to be done, without the doing of which James Ackers never would be entitled to call for the conveyance of the legal estate: for the testator has in express terms directed, that the conveyance shall be made on his giving such security, and executing such deeds as should be satisfactory to the trustees, for the purpose of securing the regular payment of the annuities. This is, in my opinion, clearly a condition precedent, and till that be performed, James Ackers will take no interest, and my opinion therefore is, inasmuch as there is no trust for the account of the rents, that the rents and profits of the residue of the real estate belong to the heir in the meantime. The consequence therefore is, that the demurrer of George Holland Ackers must be allowed, and the demurrer of James Ackers overruled." This case is properly divided into branches, the first relates to the estate James Ackers is to take at 24; the second, what is the effect of the general context of the will by way of raising an express gift? and it is clear that the judgment of the Vice-Chancellor was throughout directed only to the first of these two questions, and it is submitted, that for the reasons already stated, his Honor's judgment cannot be supported as to that point. Then as to the second point, it is clear on the face of this will, that the testator intended to leave all to this young man, and if the intention of the testator is to be, as it ought to be, taken as a guide in the construction of this will, the judgment of the Vice-Chancellor must be reversed, and the Appellant declared entitled to these rents and profits.

Mr. Tinney and Mr. West, for the Respondent:—As to the intention of the testator; if his intention was, what it is now contended to have been, the [679] only answer that can be made is, *quod voluit non dixit*. This appeal must be decided as one falling within the ordinary rule applicable to such cases. Where is the evidence of favourable intention on the part of the testator towards the Appellant? In every part of the will the testator has taken care to guard against making any acknowledgment of him. Then, as to the trusts, there is no trust declared as to the rents except for the repairs which the testator afterwards directs to be made out of the funds of the personal estate. [Lord Brougham:—Can you say that the heir is not disinherited when he is left at the mercy of the trustees, who have the power of converting the estate out and out?] The power here does not amount to a direction to convert the estate, and is not therefore a disinheriting of the heir-at-law. The accumulating clause entirely relates to the personal estate, and there is

not one word in that clause affecting the real estate. In *Gibson* v. *Lord Montfort*, the testator himself had answered the question by the very form in which he manifested his intention in the will. Here there is no such express manifestation of the testator's will; and it is clear therefore that the intervening rents will not go with the real estate. The position adopted by Lord Eldon in *Genery* v. *Fitzgerald* (1 Jac. 468) is not controverted. If the testator mixes up real and personal estates and makes a general devise of the residue, there is no doubt that both will go together. But that is not the case here, for he has in several parts of his will carefully distinguished between the two estates. *Genery* v. *Fitzgerald* is therefore, so far as it goes, an authority for the Respondent. In that case it was expressly declared, that if a testator gives a future estate to com-[680]-mence at a future period, the intermediate profits will not be carried, for he does not by his will create the trust. In like manner, when rightly considered, *Stephens* v. *Stephens* (Cas. temp. Talb. 228) is an authority in favour of the Respondent. In this will there is no residuary clause independent of this contingency, and, as there is no other clause in the will having the effect of disinheriting the heir-at-law, the ordinary rule of law must take place. Then the case of *Gibson* v. *Lord Montfort* is peculiar, containing, as it does, an exposition of the law different from any other case. But, first, it may be observed, that, in that case, there is a general mixture of rest, residue, and remainder, no such words being found in this case. To follow out the argument, an annuity, which is a portion of the real estate, as well as of the profits of the real estate, will go in remainder over. There is in *Gibson* v. *Lord Montfort* a distinct and clear ground on which the bequest of the residue must necessarily be taken to mean the residue of both real and personal estate. It is not so here. That case, however, is often carried farther than was intended by the judge who decided it; and the restriction which he puts upon the matter, by reference to what was the intention of the parties, is often overlooked. The case of *Glanvill* v. *Glanvill* (2 Mer. 38) was not thoroughly argued, and the cases cited were inapplicable; the two first cases out of the three there cited relating only to realty, and the last turning entirely on the limitations in strict settlement. *Gibson* v. *Lord Montfort* is there cited as *Rogers* v. *Gibson*, under which name it is reported in Ambler (Ambler, 93). *Glanvill* v. *Glanvill* is to be supported on the ground that the gift there was a gift to the heir-at-[681]-law on his attaining 21, and that that means that he is not to take till he attains 21. Now, apply that to the present case. Suppose James Ackers had died before he attained 24, where would the intermediate rents have gone? The other side must contend that they would have gone first into the general residue and next in remainder, and, if so, he must take a contingent not a vested remainder. If this residuary clause can carry the intermediate rents of James Ackers' estate, what can prevent it from carrying the intermediate rents of George Holland Ackers' estate? Yet even the other side will not pretend that it has any such effect, for that would show that James Ackers would take the rents of a vested estate, and would leave George Holland Ackers totally unprovided for. That is a consequence too monstrous to be adopted. It is said that this interest was a vested interest in James Ackers, and that so the intermediate rents passed to him. That argument is not supported by authorities. From the first to the last, all the cases cited, with the exception of *Stanley* v. *Stanley* (16 Ves. 491), are cases of direct devises. In that case there is nothing to support the proposition contended for by the Appellant, except an observation of Sir W. Grant, then Master of the Rolls, who said that "the event on which the estate was given over would not determine the event on which it was vested:" but he held that the estate itself continued in the trustees till the party who was entitled to the vested estate for life attained 21. Leaving therefore *Stanley* v. *Stanley* as an indisputable authority, a case like the present, where there is merely a direction to convey, will not fall within its principle. There is no analogy be-[682]-tween the devises to G. H. Ackers and to the Appellant, for the estate of G. H. Ackers is a vested estate; but it cannot be said that the interest of the Appellant is vested when he is not allowed to take at 21, but is compelled to wait till 24, and then is not to have the estate except on performing certain conditions; on the refusal to perform which the trustees would continue to hold the estate till the object of making those conditions had been attained. It is clear that where a testator directs an act to be done before a party becomes entitled to an estate, unless that act is done the title of the party required to do it cannot have accrued. The

Appellant here had no vested but only a contingent interest, and the intermediate rents and profits could not go to him in respect of such an interest. This point was elaborately argued in the case of *Duffield* v. *Duffield* (3 Bligh, N.S. 260. 1 Dow and Clark, 268 and 395), and the opinions of the judges taken and the case fully considered. In delivering the reasons of the judges, Lord Chief Justice Best said (1 Dow and Clark, 310; 3 Bligh, N.S. 330), "Until these estates become vested the estates themselves, and the rents and profits derived from them, pass to the heir-at-law of the testator as estates not disposed of by the will." That was the rule laid down, and to what estates did that rule apply? The sentence immediately preceding that which has just been quoted sufficiently answers the question: "The testator's freehold estates do not vest until some son of the testator's daughter shall attain the age of 21 years, and take the name of Elwes." The performance of that condition was considered alone to give a vested title to the estate, which till that condition was performed remained contingent. It may be [683] admitted that if the thing to be performed was directed to be performed by the trustees, it could not be said to be a condition precedent to the vesting of the estate, for then the trustees might for ever keep the party out of the estate by refusing to do the thing required; but that is not the case here, for the act of the party himself is that which determines the vesting of the estate, and there can be no hardship on him in preventing the estate from vesting until he does what the testator has required. If this is a condition precedent, then the estate is only a contingent estate, and the intermediate rents will not pass till the condition is performed. There was no conversion here out and out; and *Ackroyd* v. *Smithson* (1 Brown, Chan. Cas. 503) shows that where that is the case, the legacies are not vested interests, but that, so far as they are constituted of personal estate, will go to the next of kin, and so far as they are constituted of real estate will pass to the heir-at-law. In that case, as in *Digby* v. *Legard* (3 P. Wms. 22 n), a direction for the sale of the lands for payment of debts and legacies was held not to be a conversion out and out, and the residuary legatees in those cases having died, the Court held that the share coming out of the estate to such legatees was a resulting trust for the benefit of the heir-at-law. In *Doe* v. *Nowell* (1 Maule and Selw. 327; S.C. nom. *Randoll* v. *Doe*, 5 Dow, 202) it was decided that the word "if" was not in that will a contingent, but merely a descriptive word; but there it applied merely to the happening of an event, not to the doing of an act; and in all the cases the distinction is taken between a condition requiring a thing to be done and one requiring a time to arrive. In the former case the thing must be done before the estate vests: *Roun-*[684]*-del* v. *Currer* (2 Bro. C. C. 67), *Johnson* v. *Castle* (cited Winch, 116). There "a man had devised his term to his youngest son if he lived to the age of 25 years and did pay to his eldest brother so much money, and agreed no estate passed till the age of 25 years and payment of the money; and the reason was, that a devise executory may depend on a precedent condition." The same doctrine, after great consideration, was laid down in *Acherley* v. *Vernon* (Willes, 153), where a rent-charge was devised to a person, payable half yearly, on condition that she should release all right and claim on the estate of the donor of the annuity. It was there declared that the release was a condition precedent, but that, even if it had been a condition subsequent, it ought to have been performed in a reasonable time; and the sister not having performed it in her lifetime, her husband was not allowed, after her death, to sue for the arrears of the annuity. *Doe* v. *Lea* (3 Term Rep. 41) may be referred to as a case on the other side; but that is distinguishable, because there the only thing contended to be a condition was the arrival of a certain period of time, which has always been distinguished from a case where an act was to be done. In the case of *Duffield* v. *Duffield* (1 Dow and Clark, 268), where the devise was to the son of the testator's daughter on his attaining 21 and changing his name to Elwes, this House held that no son of such daughter would be entitled to the freehold estates until the happening of both events, and that until that time the rents and profits belonged to the testator's heir-at-law. That case is the last great decision recognising the distinction between the happening of a period of time mentioned in a will, and the doing of an act required by [685] such will to be done; and that case most completely established the doctrine, that where an act is to be done it must be done before the estate can vest. In this case, too, there is this important fact, that the testator has expressly

provided a maintenance for James Ackers till he shall reach the age of 24, and that maintenance of £3000 a year completely excludes the possibility of the testator intending that he should be entitled in the meantime to the intervening rents and profits. The case of *Gibson* v. *Montfort* is inconsistent with the subsequent case of *Bullock* v. *Stones* (2 Ves. 521), and the authority of the latter must be preferred. In every respect, therefore, the decree was correct, and ought to be affirmed.

Sir Charles Wetherall in reply.—The will clearly shows that the testator constituted the real and personal estate into one indivisible fund, for the use of the particular individuals who were to take in succession. The doctrine in *Genery* v. *Fitzgerald* (1 Jac. 468), applies in such a case. That the real and personal estate were thus mixed together in one fund, is amply shown by the directions to the trustees as to the sale of the estate, and by the provision, that, should George Holland Ackers die before 21, the estate devised to him should "sink into and form part of the residuary estate." If the estate is sold—and the trustees have the power to sell the whole of it, the money arising therefrom, or from the leasing, or from the exchange, is to go to form part of the residuary fund. There is no condition precedent here to prevent the Appellant from having a beneficial enjoyment of this estate. That part of the will is a direction, not a condition.

[686] Lord Brougham.—I think that the intention of the testator here was, to give the residue to J. Coops Ackers, but the question is, whether that intention is stated with sufficient clearness to enable the Court to carry it into execution? I am by no means satisfied with the judgment of the Court below, but I shall look into the cases before I decide upon it. A question similar to the present was raised in *Amphlett* v. *Park*, and Sir John Leach there doubted the authority of *Durour* v. *Motteux* (1 Ves. 320), and intimated that, if it came before him in the House of Lords, he would examine into that decision. The ruling in *Amphlett* v. *Park* was submitted to. I wish it had come before me in the Court of Chancery on appeal, for then, in order to settle the question, I should have obtained the assistance of Lord Lyndhurst, the Master of the Rolls, and the Vice-Chancellor.

Judgment postponed.

Lord Brougham (Aug. 31).—James Ackers, being seised of real, leasehold and personal estates, made his last will, in which among other things, and after other devises and bequests, he devised certain leasehold premises and personal chattels to his wife for her life, directing that the interest therein unexpired at his decease, together with the personal chattels, should revert to and become vested in his executors, to be applicable to the purposes of the will, afterwards set forth, as to his personal estate; and he then gave and devised, by the most ample words, all his real and personal estate, whatsoever and wheresoever situated, to trustees (whom he also appointed executors and guardians of James Coops Ackers, the Appellant,) and their heirs and assigns for ever, "upon trust as to the real estate, to **[687]** keep it in repair, and to make sale, and absolutely dispose of, or let on reserved rents, or exchange for other lands, or partly for other lands and partly money, all or any part or parts of the said real estate," except a small parcel, the subject of the other appeal, and except the part devised to his wife for life, during his or her life; and the money got or rents reserved on such sale, lease or exchange was to fall into his personal estate. He then declares the trust as to the estate of Wheelock (the subject of the other appeal) to be, to J. C. Ackers, when he shall attain 21, together with £7000, but in case of his decease before 21 without issue, both the one and the other are to become part of the real and personal estate, and to go according to the "disposition" (in the singular) after made; and as to the residue of the personal estate, not specifically disposed of, the trusts are, to repair the real as well as personal, meaning of course the leasehold, and to invest the surplus, and to accumulate it by way of compound interest, for James Coops Ackers (who appears to have been his natural son), "until he arrives at 24." In passing, I must say, that if anything turns on this, there is a great doubt whether G. H. Ackers took under the devise a vested or a contingent interest; if he had taken a vested interest, that would have made an end of the question, but then there are these words, "to pay over when he shall attain that age," and taking the two dispositions together, I have no doubt whatever, nor had his Honor, that that is a contingent devise. "Then upon trust to convey, assign and transfer, by proper and effectual conveyances and assurances, to James Coops Ackers,

upon his giving such securities " (as if it were a condition precedent, which I do not think it is), " upon his giving such securities, and executing such deeds and [688] assurances, to the satisfaction of the said parties or trustees for the time being, as their or his counsel shall advise, for the regular payment of the several annuities hereinbefore bequeathed, all the legal estate and interest of and in all my said freehold, copyhold and leasehold messuages, lands, tenements, rents and hereditaments, moieties, parts and shares of messuages, lands, tenements, rents and hereditaments, situate, standing, arising, lying and being in the United Kingdom of Great Britain and Ireland, and all other my real and personal estate and effects, whatsoever and wheresoever, not hereinbefore given, devised and bequeathed." Then after that parenthesis, on which every thing turns, " subject nevertheless to the life-estate of my said wife in my said capital messuage or dwelling-house, garden, land and premises, and the household goods and chattels thereto appertaining and belonging." Now this was not much, if at all, commented upon below, but it does appear to me to be not an immaterial feature here. You see, he first accumulates the personal rents, the profits of the personal estate, they are to accumulate with compound interest until James Coops Ackers attains 24, but he does not say, and then to be given to James Coops Ackers, but he before shows how the accumulations that he has just directed shall be disposed of, by giving them to James Coops Ackers (which is clearly his object), and he goes entirely off from that to the general residue of the real, as well as of the personal estate, and it is only under the general gift of the residue of the real and personal estate that he gives any directions whatever as to what is to be done as to the accumulations which he had immediately before directed to be made, a circumstance which is very material in my view of it, as to the blending of the two funds. The question decided in the Court [689] below, and now brought by appeal before your Lordships, is, whether or not this devise gives the intermediate rents and profits growing due, and of which perception has been had by the trustees previous to the period of majority—whether the devise gives them to James Coops Ackers, the Appellant? His Honor the Vice-Chancellor has decided that these rents go to the heir-at-law, as undevised; that it was a resulting trust for the heir-at-law, and that the gift to James Coops Ackers was contingent and not vested. I have already said, considering this to be clear that it was a contingent and not a vested interest in G. H. Ackers, that that raises the question whether it was meant to vest the intermediate rents and profits in James Coops Ackers. Upon the general principles which are to rule this case, there is no doubt: they are recognised in all the cases, and not disputed in any, even where the particular circumstances are understood to preclude their application; nor do I understand them to be here brought into controversy except, perhaps, in one part of the argument, upon the other appeal; indeed they are so clear, that they require no defence. The heir-at-law takes, through no intention of the testator, but paramount the will, and independent of it, or as it has been sometimes expressed, and not very correctly, against the will. This is indeed quite plain, it is only saying he takes as heir and not as purchaser. But from this it follows that he has no occasion at all for arguments upon construction, or to ascertain intentions in his favour. The arguments belong to the party who would displace him, and, by means of the intention expressed, defeat his claim; nor can he be so displaced and defeated, except by direct words or plain intention—an expression which I prefer to necessary intention. There must [690] appear to be such an intention to exclude him, as to leave no reasonable doubt in the Court that it existed in the mind of the testator, and it will manifestly not be sufficient, that, from the general circumstances and situation of the party, or even from the general aspect of the instrument, we may have no moral doubt of how the framer of it could have answered the question had he been asked to declare his meaning, for this would let in every case of plain omission by mistake, and of gift by inept words, or in contravention of the rules of law. The words used in the will must be sufficient according to their legal sense, and within the rules of law to indicate the intention—there it is chiefly that the authorities aid, and indeed control us—for there have been authorities in this as in many other branches of the law respecting devises and bequests, which have given a certain weight to certain provisions; that is to say, the Courts have held these provisions as so strong to indicate intention, that a rule of construction with regard to them may be said to have been adopted, and when we find such provisions, we are

not at liberty to say the intention did not exist, unless the other parts of the instrument are sufficient to rebut the inference.

Now it is impossible for me to look at the cases decided both at law and in equity without feeling that great force has been given to general bequests of all the residue, real and personal. The Court of Common Pleas, while it possessed such lawyers as Mr. Justice Wilson and Mr. Justice Heath, held such a gift to be strong enough to pass real estate, though accompanied with limitations utterly inapplicable to any but personal estate, *Doe* v. *Chapman* (1 H. Bl. 223); and the **[691]** same was afterwards held in *Smith* v. *Coffin* (2 H. Bl. 444); a doctrine extended many years afterwards in *Morgan* v. *Surnam* (1 Taunt. 289), (when Sir James Mansfield was in that Court,) to comprehend estates not in the contemplation of the testator. But this principle is general and will not carry us a great way. The view taken of a mixed residuary gift in *Gibson* v. *Montfort*, is of great importance. I have seen it commented upon by some very able text writers, as if Lord Hardwicke had there considered that a residuary gift of real estate by way of executory devise, and to a person not *in esse*, or to a person *in esse*, but to take only at a future time, carried the rents and profits of the estate during the intermediate time. That is certainly not the ground of the decision, which proceeds upon the whole circumstances of the case, on the devise being to the trustees in fee, and on the gift being the residue of all the estates, real and personal. But in one part of his elaborate judgment (1 Ves. 490), he says, "It is pretty hard to say, that in any case where one devises all the rest and residue of his real estate"—now, mark that—"of his real estate, the heir should be enabled to claim anything out of it; for how can he claim or take these intermediate profits? He must claim them as part of the real estate undisposed of, not by any particular trust." It is clear he must claim them as heir, and therefore, *ex hypothesi*, all the real estate undisposed of, being in the residue given to A. B., the heir cannot claim them. Lord Hardwicke afterwards dwells on the residuary devise of all estate personal as well as real. Let us, however, in passing, remark, although this is quite unnecessary in disposing of the present question, that it does seem **[692]** difficult to understand a residuary devise, even when confined to real estate, in any other than this general and absolute sense. For what can it mean, but to give away from the heir whatever had not before been given away from him? In some of the cases discussion has arisen as to the words "not before given," or "not otherwise disposed of;" but these are implied in "rest, residue and remainder;" and besides, those words are here, for it is in that way the residue is given; the word "residue" is not here, but I think it stronger for not being here, for I think you find in all the cases it is said that "all other estate not otherwise disposed of," is clearly stronger than all residue. Then, suppose I give my estate of Blackacre to A., and then give to B. my other real estate not already or otherwise disposed of, "to be taken by him at 21," or "when he arrives at 21," surely this includes not merely the *corpus* of my estate at Whiteacre, but the intermediate rents of it, because they are parts of the real estate not otherwise disposed of. This clearly appears to have been Lord Hardwicke's opinion, and I know of no case in which it has been overruled, though it is said to be inconsistent with *Bullock* v. *Stones* (2 Ves. 521), of which I shall presently speak.

But *Gibson* v. *Montfort* is certainly of peculiar authority. There is hardly any one of the same eminent person's judgments more laboured, and he felt strongly the difficulties of construing the will, for he begins by saying that it looked as if the testator had been minded to raise all the questions touching executory devises in trust which he could raise on such an instrument. The part, too, which occupies by far the greatest portion of the judgment is the one here **[693]** in question. Lord Hardwicke, at great length, shows that the trustees took a fee in the estates devised; and he then refers fully to the case of *Stephens* v. *Stephens*, and to the concurring opinion of the courts of law and equity, of himself sitting in the Court of King's Bench (for he was one of the judges who decided it), and of Lord Talbot and Lord King, that an executory devise of all the rest and residue of an estate, real and personal, takes in the intermediate profits of the real estates so devised upon contingency. He then states, that the only difference between *Stephens* v. *Stephens* and the case then before him was, that the devisee was *in esse*, which he agrees made it stronger. In the present case, too, the devisee was *in esse*. But he still holds that case of

Stephens v. *Stephens* sufficient to decide the one in hand, though he adds, that it did not rest there, for the blending of real and personal estates in the same residuary clause, the surplus of the personal being on all hands admitted to pass, is a strong argument against a resulting trust to the heir-at-law, and that Lord King laid great strength on that circumstance in *Rogers* v. *Rogers* (3 P. Wms. 193). He further relies on the disposal of the annuities, as furnishing new indications of the intention to exclude the heir. Some persons have been disposed to think that *Rogers* v. *Rogers* is the same case as *Stephens* v. *Stephens*, but it is not the same, and it does not appear to me to be the least like it, *Stephens* v. *Stephens* being a much stronger case than *Rogers* v. *Rogers*, and being one of the most celebrated cases in the Court of Chancery or Court of King's Bench. Lord Hardwicke also relies on the [694] disposal of the annuities as furnishing a new indication of the intention to exclude the heir. These, which were to be paid out of the real estate in case the personal estate proved deficient, were ordered to fall into the residue as the lives fell in. I have preferred a reference to the important cases of *Stephens* v. *Stephens* and *Rogers* v. *Rogers*, in the words, and with the remarks of such a commentator as Lord Hardwicke, rather than going at once to the books where those cases are reported. But taking them into view, and especially considering the decision of Lord Hardwicke in *Gibson* v. *Montfort*, I remain without any doubt at all upon the case at your Lordships' bar. But *Stephens* v. *Stephens* requires an observation further. The folio edition of Forrester's Cases temp. Lord Talbot, was published before 1750 (it was published in 1741), when *Gibson* v. *Montfort* was decided, and yet it is observable and remarkable that Lord Hardwicke there speaks of Lord Talbot's opinion as known to him only by rumour; he says, "I have *heard* that Lord Talbot approves of that case." But Lord Camden, in a case which I cannot recollect the name of, says, that Forrester's Reports are only written by Forrester down to page 228. It is a very odd circumstance that *Stephens* v. *Stephens* begins in page 228; so that that may account for Lord Hardwicke not taking the statement of Lord Talbot's approval on that authority. Lord Talbot (according to the Report in page 228) expressed his satisfaction with the certificate of the King's Bench, and said, he hoped it would, for the future, be a leading case in the determination of all questions of this kind. The main point, no doubt, in the case sent, and in the certificate returned, was, notwithstanding this, a [695] question then held not to be sufficiently decided. In *Taylor* v. *Biddal* (2 Mod. 289) it is said, "if the intent be that the devisee shall take *in praesenti*, and there is no incapacity in him to do it, he shall not take *in futuro* by an executory devise." The devise there was to A. B. until her son should be of age, then to him in fee; he died within age, and yet it was held that a fee vested in him presently. In *Stephens* v. *Stephens* (Cas. temp. Talb. 228), an executory devise of an estate of inheritance to a person unborn, when he shall attain the age of 21 years, was held to be good, and the intermediate rents and profits were there declared to belong to Sir Thomas Stephens, by virtue of the residuary clause in the will, as an interest in the testator's estate not before bequeathed or disposed of. The first part of that decision was expressly founded on *Taylor* v. *Biddal*. But *Bullock* v. *Stones* (2 Ves. 521) is cited as inconsistent with *Gibson* v. *Montfort*. I do not think there is any discrepancy between them whatever; indeed it is impossible there should be. Lord Hardwicke had decided the one only a few years before, and no person who had decided that case could have omitted the consideration of it in every other case coming before him on the same subject, as long as he lived. He appears to have laboured at it as much as any other case he ever decided. I shall first remark upon it, that some of the circumstances are wanting in *Bullock* v. *Stones* which occur in *Gibson* v. *Montfort*, and which occur here; next, reliance was there placed in the argument at the bar upon the relation in which the devisee, the unborn son of John Stones, the file-cutter, stood to his father. Thirdly, the judgment only gives the file-cutter (who was heir-at-law) the [696] rents and profits until the son comes *in esse*, and then gives them to the son; at least this is the plain meaning of the judgment, though it is very inaccurately given, Lord Hardwicke being made to say, "I am of opinion that this intermediate interest or benefit arising to the heir-at-law, as to the profits of this estate, will determine upon his having a son, for that son's education is to come out of them;" and he adds, "the son whom testator has instituted as heir," (using an expression in the civil law,) "shall have the benefit of these rents and profits from the time of his birth." Now

this is his studious and firm opinion. but he goes on to add, " at least so far as his education and maintenance are concerned." What the surplus will be does not appear—probably nothing. This is rather an *ex cathedrâ* deciding, as to the intermediate rents and profits paying the maintenance and education, which is not disposing of that question.

The utmost then that can be said, as to the surplus untouched by the special direction respecting maintenance and education, is, that the judgment avoids disposing of it. But that which totally distinguishes the file-cutter's case from *Gibson* v. *Montfort*, and from the present case, is, that it is not the case of a general residue at all, it is only a gift of the " real and personal estate at Ashgate." By this must be intended the real estate at Ashgate and the personal estate there, or the personalty connected with the realty, and it looks as if it had been leasehold. Now no one maintains that a devise to A. when born, or when he attains 21, of the estate at Blackacre, will convey the intermediate rents. That is a known and admitted distinction between a devise of real and a gift of personal estate, to vest in possession or at a **[697]** future time. *Genery* v. *Fitzgerald* (1 Jac. 468) was decided by Lord Eldon, upon an appeal from the Rolls, and he was so clear upon the point that he stopped the Respondent. *Bullock* v. *Stones* was cited by the present Vice-Chancellor, who argued it for the Appellant, as was *Gibson* v. *Montfort*. His Lordship, therefore, had the whole before him; and, after admitting the distinction between real and personal gifts in the same terms, and to the same purpose to which I have just adverted, he says, " When a testator mixes up real and personal estate in the same clause, the question must be, whether he does not show an intention that the same rule shall operate on both;" that is, as to the intention to be gathered from the blending or the mixing; but I say, the residuary nature of the gift is, that which, in the judgment of Lord Hardwicke in *Gibson* v. *Montfort*, is the strongest reason for adopting such a conclusion. It must be further remarked, that this was a direct gift to the devisee, and not a fee limited first to trustees. Now Lord Hardwicke must have deemed that an important feature in *Gibson* v. *Montfort*, for a great part of his argument is employed in demonstrating that the trustees took a fee, and accordingly reliance was placed on the difference between the two cases by the Vice-Chancellor arguing on the Appellant's behalf in *Genery* v. *Fitzgerald*. Nevertheless, Lord Eldon was quite clear that the blending of realty and personalty in one clause was sufficient, and affirmed the judgment of the Master of the Rolls without hearing the other side, although the fee previously given to trustees, of which Lord Hardwicke thought so much in the former did not exist in that case.

[698] The case before us has all the circumstances which occurred in *Gibson* v. *Montfort*, except that of the annuities directed to fall in, and it has other circumstances fully as strong as that was which did not occur in the former case. It is also distinguished by the circumstance admitted by Lord Hardwicke to have some weight, of the gift being to a person *in esse*. There is here, therefore, a devise to trustees in fee, not proved by implication, or made out by reasoning, but made in the most apt and express terms to convey a fee; and there is the power of sale, and exchange of all or any part of the real estate; the price to fall into the residue, and go from the heir—go from the heir, because the testator has given the residue. Now it is said that that is only a power given to the trustees and executors to dispose of by way of sale or exchange in such a way as to improve the real estate. Then what is the meaning of the word " whole? " if it had been " the sale of part," or " to make sale of part," that would have been intelligible; that would mean only such as would go to the improvement of the whole real estate, and that would not be a power of conversion out and out (as is the language of the Court on the subject) of the real estate; and then it might be argued as it was argued at the bar, that if it had been a conversion out and out under this clause, the Court of Chancery would have restrained them by injunction for a breach of trust. But what is the meaning of saying to improve the estate, not by the sale of part, but the whole? There is a power to sell the whole real estate; that is to annihilate the real estate, to convert it out and out into personalty. I do not understand how that can be restricted. It looks like a contemplation of selling if a good price could be got **[699]** for it, which I take it this manufacturer thought would be a good way of improving his real estate, and that the best mode of doing it would be

to convert it into personalty. There is a clause respecting the repairs of the leasehold out of the general fund. There is the accumulation of the personalty and compound interest directed, and before any direction is added as to who shall take this, there comes the general gift of the real and personal estate not otherwise given, so that though no direction is given as to accumulating the income of the real estate, yet the accumulation of the personal income is only given under the same clause which gives the residue of the real estate. The word "disposition" is used in the singular, indicating clearly that it was all one provision or gift, real as well as personal.

There remains, then, no doubt whatever that this case is at least as strong as *Gibson* v. *Montfort;* perhaps stronger; that it is stronger than *Genery* v. *Fitzgerald;* that it does not at all come within the principle of *Bullock* v. *Stones*, and that, therefore, we are justified in deciding that the circumstances indicate plainly an intention to displace the heir-at-law with respect to the intermediate rents and profits.

I do not at all consider the doctrine as recognised in *Stephens* v. *Stephens*, *Gibson* v. *Montfort*, and *Genery* v. *Fitzgerald*, as an arbitrary one, or proceeding on technical grounds. The main circumstance of the residuary gift of real and personal naturally and in itself indicates, and strongly too, an intention that both should follow the same course, and be dealt with in the same way. But I am also of opinion, that the gift of a real residue, without blending it with a personal residue, would of itself have the same effect upon another ground, namely, the [700] meaning of residue; still more, if as here the words, "not otherwise disposed of," are found in the gift: for this shows that the devisee, under such a gift, is to take all the real estate, not otherwise given; and this must exclude the heir who cannot as such take under any gift. Such, too, is Lord Hardwicke's opinion in *Gibson* v. *Montfort*, although he does not decide the case upon this ground alone. As for *Wright* v. *Horn* (8 Mod. 221), which is sometimes referred to in cases of this kind, and which, as well as *Goodright* v. *Opie* (Id. 123), is relied on in the argument at the bar in *Gibson* v. *Montfort*, it clearly has no application, for it related entirely to a lapsed devise of land which is now admitted not to pass under such residuary gift. The residuary gift is that which the present case has in common with the three others I have cited. But the other circumstances of the case (I mean the other provisions of the will) are strong to indicate the same intention of excluding the heir-at-law.

I observe that reliance was placed below upon the parenthetical words, "upon his giving such security, etc." And his Honor is represented to have treated these as in the nature of a condition precedent. To be sure, if it were so, that would make a great difference in the argument, but I can on no account allow that there is anything like a condition precedent, or, indeed, a condition subsequent either, to be found in these words; but it is a direction and provision wholly nugatory and useless, inasmuch as the law would have required the performance of the same thing wholly unconnected with the devisee taking under the gifts, or his manner of taking. The common direction to give a receipt might as well be called a condition precedent.

[701] I am, therefore, of opinion, that in this case the gift to James Coops Ackers, though it was not vested, yet was a gift that displaces the heir, for the reasons which I have given, in respect chiefly to the residuary gift of real and personal estate, but in respect also, as strengthening that inference, to the intention of displacing the heir-at-law in favour of the devisee, and which intention, I think, is clearly made out from the other circumstances of the case. I shall, therefore, move that in this case the decree of the Court below be reversed, and that the costs shall come out of the estate.

The following was the order entered in the Journals: "ORDERED and ADJUDGED that the order complained of in the said appeal be, and the same is hereby reversed, and that the demurrer be allowed; without prejudice to the equities of the several parties to this suit in the suit and appeal of *Phipps* v. *Ackers* (see next case), now depending in this House. And it is further ordered, that the costs of all parties, both in the Court below and of the appeal, be paid by the Appellant, James Ackers, out of the estate."—Lords' Journ. 67, p. 651.

[702] APPEAL

FROM THE COURT OF CHANCERY.

SOPHIA PHIPPS, Widow, *Appellant;* GEORGE HOLLAND ACKERS,—*Respondent* [August 18, 31, 1835].

[Mews' Dig. i. 353; xiv. 1524. S.C. 9 Cl. and F. 583, and, in Ch., 5 Sim. 44; 1 L. J. Ch. 96. Followed in *Whitter* v. *Bremridge*, 1866, L.R. 2 Eq. 737; *Finch* v. *Lane*, 1870, L.R. 10 Eq. 503. Distinguished in *Williams* v. *Haythorne* 1871, L.R. 6, Ch. 786, and *Andrew* v. *Andrew*, 1875, 1 Ch. D. 414. And see *In re Orlebar's Settlement Trusts*, 1875, L.R. 20, Eq. 719.]

A testator devised and bequeathed all his real and personal estate to trustees, in trust, as to his lands in W., to convey them to G. H. A. when and so soon as he should attain his age of 21 years; and also to pay him £7000 upon his attaining that age; but in case he should die under 21, without leaving issue of his body, then the lands in W. given and devised to him, together with the £7000, should sink into the residue of the testator's real and personal estate, and go over. G. H. A. attained his age of 21 ten years after the testator's death. Did G. H. A. take a vested interest in the lands in W. on the testator's death, or was it contingent until he attained 21? And did the rents and profits arising from these lands in the meantime belong to him or to the testator's heir-at-law?—(*See the next preceding case.*)

Where the subjects of two appeals are so connected that the case of a party to one of them is affected by the arguments in the other, to which he is not a party, his counsel will be allowed to answer those arguments.

Mrs. Phipps, the Respondent in the preceding case, and heir-at-law of the testator therein mentioned, appealed against the Vice-chancellor's decretal order, allowing George Holland Ackers' demurrer to her Bill (*vide supra*, p. 673, and 5 Sim. 61). This appeal, as well as that of *Ackers* v. [703] *Phipps*, having abated by Mrs. Phipps' death before the hearing, they were both revived by an order of the House, in the names of her executors and devisees.

The arguments on the devise to James Ackers in the preceding case, being admitted to apply generally to the devise to the Respondent in this appeal, it was agreed, on the suggestion of Lord Brougham, that only one counsel on a side should be heard, and that the counsel for James Ackers might attend to watch his interests.

Mr. Preston for the Appellants:—The first proposition is, that the devise of the testator's real and personal estates to his trustees (*vide supra*, p. 668), and the direction to them, as to the Wheelock estate, to stand seised thereof, in trust, to convey the same to G. H. Ackers, *when and so soon as he should attain his age of* 21, has not the constituent qualities of a gift to him of the rents and profits of that estate from the testator's death till he attained the age of 21. Every devise of real estate, that will pass the intermediate rents, must vest *instanter* in the devisee; otherwise those rents result to the heir-at-law, or fall into the residue of the real estate, and they would pass under a general residuary clause; as for instance, if a testator give all his real estates to his daughter's son A., at his age of 21, and if A. die under 21, to every other son of his daughter at the age of 21, that is a good executory devise of the real estate; and then if he give all the residue of his real and personal estate to another, the intermediate rents, until the devisee of the real estate [704] attain 21, will pass with the residue. *Stephens* v. *Stephens* (Cas. Temp. Talb. 229-233); *Gibson* v. *Lord Montfort* (1 Ves. sen. 485).

The second proposition is, that the residuary clause in this will, taken in its largest sense, does not carry the intermediate rents of the real estate to James Ackers—

Mr. Knight:—James Ackers, to whom the residue of the estates real and personal is devised, does not claim the rents of the Wheelock estate.

Lord Brougham:—Mr. Knight, if I find my opinion of your client's case affected by Mr. Preston's argument, I will apprise you of it at the close.

Mr. Preston:—The argument for the Appellants must be carried to the length that the residuary clause in this will did not pass the intermediate rents of *any* of the real estates; and if this House should decide that it did, on the authority of such cases as *Genery* v. *Fitzgerald* (Jacob, 468), that decision will operate against the Appellants in this case. The judgment of Lord Eldon in *Genery* v. *Fitzgerald*, was pronounced without that learned judge's usual caution, and it was not supported by the previous cases. There was no doubt that a gift of personal estate to A. at 21, would carry the intermediate profits; but Lord Eldon held, that when a testator mixed up real and personal estate in the same clause, he thereby showed an intention that the same rule should operate on both estates. His Lordship's error was in applying a rule of construction instead of a rule of **[705]** law. The distinction between real and personal estate was truly laid down in the case of *Forth* v. *Chapman* (1 P. Wms. 663), which has never been shaken, except for a short time by *Porter* v. *Bradley* (3 T. Rep. 143), after which the law was brought back as it stood before. There was no such general rule as that alluded to by Lord Eldon in *Genery* v. *Fitzgerald*, namely, that by mixing two funds, realty and personalty, you are to apply to both the law which is applicable to one only of the funds. In the file-cutter's case, *Bullock* v. *Stones* (2 Ves. sen. 521, and Bell's Supplement, 419), the heir-at-law was held entitled to the intermediate rents of the devised estates. The devise there was, of all the testator's real and personal estate, in trust, that the first son of J. Stones, (the file-cutter,) when he came to 21, should have all the real and personal estate, and his heirs male for ever; with a direction for his maintenance and education. J. Stones had no son at the date of the will or at the testator's death. Lord Hardwicke held, that the profits of the personal estate were to accumulate, and as to the real estate, that the devise of it was a good executory devise, but that all the rents and profits descended to the heir, until a son was born to J. Stones, when they, or as much as might be necessary, should be applied to his maintenance and education; that the legal estate was in the trustees, and the gift to J. Stones was contingent. Lord Hardwicke, in his judgment, said, "Where there is an executory devise, whether of a legal estate or of a trust estate in this Court, the rents and profits go to the heir-at-law, because the legal estate in the one case or trust in the other descends in the meantime to the heir-at-law." So **[706]** again in the case of *Gibson* v. *Lord Montfort* (1 Ves. sen. 485-491), Lord Hardwicke, approving of the decision in *Stephens* v. *Stephens*, said, "in a Court of Law, it had been determined that where there is an executory devise in a will, all the rest and residue of an estate real and personal would also take in the intermediate profits of the real estate so devised in contingency, *which would otherwise go to the heir-at-law*."

Lord Brougham:—The case of *Bullock* v. *Stones* was cited to Lord Eldon in *Genery* v. *Fitzgerald*, and was more relied on than the case of *Gibson* v. *Lord Montfort*.

Mr. Preston:—The attention of Lord Eldon was not called to the question of the rents and profits; it is a misfortune that Lord Eldon did not hear counsel on both sides, and did not take time to consider the case, instead of deciding it off hand. His judgment must sooner or later be reviewed by this House, with the assistance of the judges of the courts of law, and till then it cannot be received as law. The true principles of construction, with the history of the cases from which they are derived, are stated by Chief Justice Willes in the case of *Doe d. Morris* v. *Underdown* (Willes, 293-297), where it is said that a residuary devise of real estate will not pass any benefit by reason of lapse, as such benefit belongs to the heir at law: *Wright* v. *Horne* (8 Mod. 222), *Goodright* v. *Opie* (Id. 123), *Bagwell* v. *Dry* (1 P. Wms. 700). A general devise of real estate, being a contingent devise, will not carry any immediate beneficial interest: *Duffield* v. *Duffield* (3 Bli. N.S. 260; S.C. 1 Dow and C. 395). In that **[707]** case, which was a well-considered and a most important case, this House established the opinion of the judges, that the rents and profits of the estates there devised belonged to the heir-at-law of the testator, until the estates became vested in the devisee by his attaining 21.

The third proposition was, that if the residuary clause (*vide supra*, p. 669) could be held to pass the intermediate rents of the Wheelock estate, James Coops Ackers, the residuary devisee, could not take them until he attained 24. It was impossible in arguing this case not to deal with his interests; for the inquiry was whether the testator in dealing with the objects of his bounty, intended to give them the inter-

mediate profits of the estates respectively devised to them—whether they took a present vested right to receive the rents and profits. If ever there was a will in which contingency was the object of the testator, it was this; from the whole context of the devises, it was apparent he was contemplating contingency. If, therefore, the interests of the devisees were contingent, then the heir-at-law was entitled to the rents and profits until the respective periods of vesting arrived. It is admitted that G. H. Ackers was not to have the interest of the £7000; what reason was there for implying that he was to take the rents of the freehold estate? The legacy produced no fruit to him, nor the freehold either. Could he ask for a conveyance before the age of 21? There was no gift to him but in the conveyance, and the conveyance was to be made on a contingency, which failing, there could not be a conveyance to him. If the interest of G. H. Ackers be contingent, the interest of James Ackers must be so *à* [708] *fortiori*, as he was not to take a conveyance until he attained 24, and gave the trustees satisfactory securities for due payment of the annuities and legacies given by the testator, which last condition would of itself make his interest contingent: *Chambers* v. *Brailsford* (18 Ves. 368).

After citing and observing upon a great number of cases, most of which are referred to in the preceding appeal, and adopting, occasionally, the arguments urged in that appeal, on behalf of the heir-at-law, he submitted with confidence, that the devise of the Wheelock estate, in trust to convey and assign the same unto G. H. Ackers, as soon as he should attain his age of 21 years, was future and executory, and did not vest until he attained 21, and that the beneficial interest of the rents and profits of that estate were in the meantime undisposed of by the will, and therefore fell, by way of resulting trust, to the heir-at-law, and consequently belonged to the Appellants as his representatives.

Mr. Lynch for George Holland Ackers:—Whatever should be the decision of the House in the case of James Ackers, to which Mr. Preston chiefly directed his arguments, it could not affect the interest of this Respondent. The devise of the Wheelock estate to him was clear and concise, and might well stand by itself. The words of it were quite sufficient to carry all the estate which the trustees took under the general devise, and which unquestionably included the intermediate rents "as, to, for and concerning all my messuages, lands, and premises, situate at Wheelock," etc. He read the devise of the Wheelock estate as [709] set forth, p. 668 *supra*, and insisted that by virtue thereof G. H. Ackers took a vested interest in that estate from the moment of the testator's death, and became entitled to the conveyance and possession of the estate itself on attaining his age of 21. If then he took a vested interest in the estate, he was entitled to the rents and profits as a necessary consequence, unless they were given away from him by the will. But there were no words in any part of the will disposing of those rents. By the residuary clause, the testator gave to James Ackers all the legal estate and interest of and in all his freehold and all other his real and personal estate and effects *not before given and devised*. But the Wheelock estate was before specifically devised to G. H. Ackers. The scheme of the will was this: The testator first gave the legal estate in all his real estates to trustees, with power to sell them, except the Wheelock estate, which he directed the trustees to stand seised of in trust to convey, assign, and assure the same to G. H. Ackers, when he should attain 21; but if he should die before that age, without leaving lawful issue of his body, that estate was to sink into the residue of the real estate. The question then was, whether G. H. Ackers took an immediate vested interest in the estate so devised to him. It was clear, that if he died before the age of 21, leaving issue lawfully begotten, the estate could not go over from the issue. The intention of the testator was, that G. H. Ackers should have possession of the estate at 21, and the rents and profits and a vested interest in the meantime. According to the argument for the Appellants, if G. H. Ackers died before 21, leaving children, they would take the estate before the father, had he lived, could have it. When an estate is given in possession or [710] reversion on a contingency, and is devised over in case the event do not happen, the devisee takes a vested interest before the event, liable to be devested if he died before it, and then the estate goes over: *Boraston's case* (3 Co. 19), *Edwards* v. *Hammond* (1 N. Rep. 324); *Goodtitle* v. *Whitby* (1 Burr. 228); *Doe* v. *Lea* (3 T. Rep. 41); *Bromfield* v. *Crowder* (1 N. Rep. 313). These were cases of devises in remainder, after estates in possession. *Doe* v. *Lea* was an express decision

in favour of a vesting before the time of taking in possession. In *Edwards* v. *Hammond*, it could not be held that the person there, being only of the age of 15, could recover in ejectment, except on the principle that the estate was vested. In *Doe d. Hunt* v. *Moore* (14 East, 601), which was a case of real estate in fee when the devisee should attain 21, and in case he died before 21, then over, Lord Ellenborough giving the judgment of the Court held, upon the authority of *Bromfield* v. *Crowder*, and *Goodtitle* v. *Whitby*, that the devisee took an immediate vested interest, liable to be devested upon his dying before he attained 21. And the same doctrine was held in *Doe* v. *Nowell* (1 Maule and S. 327, and 5 Dow, 202), which, as well as *Bromfield* v. *Crowder*, was affirmed in this House. There was no substantial difference between a devise to the use of G. H. Ackers and a direction to the trustees to convey to him, and one part of the case of *Stanley* v. *Stanley* (16 Ves. 491) is a direct authority on that point. The cases of *Bullock* v. *Stones*, *Duffield* v. *Duffield*, and *Chambers* v. *Brailsford*, which were urged as authorities for the claim of the heir-at-law by Mr. Preston, were all very different in [711] their circumstances from this case. On the other hand, the recent case of *Warter* v. *Hutchinson* (1 Barn. and C. 721), bringing down the acknowledgment of *Boraston's* case, and the numerous cases of that class, was quite decisive in favour of the Respondent.

It was argued on behalf of the Appellants, that as no interest was given to the Respondent in the £7000, in which he certainly took a vested interest on the death of the testator, it was therefore to be inferred that he had no right to the rents of the real estate. But it should not be forgotten that the law as affecting devises of real estate and personal estate was quite different. These were distinct devises. The Respondent's right to the rents of the real estate, up to the time of taking a conveyance of that estate, was really strengthened by the consideration that interest on the legacy of £7000 was not given to him; there was otherwise no provision for his maintenance and education during his minority, as in the case of James Ackers; and it was also of importance to consider that no power was given to the trustees to sell or exchange the Wheelock estate. The true construction of the whole will was, that the Respondent took an immediate vested interest in the estate in Wheelock, liable to be devested in the events mentioned in the will. Words seeming to import contingency in devises of this nature have been uniformly held to give a present vested estate, subject to be devested in order to effectuate the presumed intention of the testator. Besides, in this case, the estate was not given over, except in default of issue of the Respondent; in order to enable such issue to inherit, the Respondent must take a vested interest, and as the Respondent takes a [712] vested interest he must be entitled to the rents and profits as incident to his ownership.

Lord Brougham asked if the counsel in attendance for James Ackers had any observations to make in reply to Mr. Preston's application of the case of *Bullock* v. *Stones*, and the distinction taken between that case and *Genery* v. *Fitzgerald*. His Lordship, for his own part, thought these cases were reconcileable.

Sir C. Wetherell and Mr. Knight, who had argued for James Ackers in the former appeal, distinguished this case from *Bullock* v. *Stones*. The gift there was to a person unborn; it was not a gift of residue. They maintained the decision of Lord Eldon in *Genery* v. *Fitzgerald*, justified as it was by previous cases. The doctrine there laid down should not be again questioned, nor should doubts be opened on settled cases. They agreed in and adopted Mr. Lynch's arguments upon the vesting of the rents before the devisee became entitled to the possession of the estate; and upon that point, and on the effect of the residuary clause, they referred to Lord Eldon's judgment in the case of *Duffield* v. *Duffield*.

Mr. Preston, in his general reply, relied on that judgment, and insisted that it was entitled to the first consideration. *Duffield* v. *Duffield* was a later case than *Genery* v. *Fitzgerald*, which he held to be inconsistent with principle as well as with the authorities.

Lord Brougham:—This is a case of great importance. As the case of *Ackers* v. *Phipps* was unavoidably subject to be affected by the argument for the Appellants in this, the attendance of Sir Charles [713] Wetherell and Mr. Knight was proper, for the purpose of answering so much of Mr. Preston's argument as might bear against the interest of James Coops Ackers. I shall take time to look into the

authorities referred to, particularly *Bullock* v. *Stones* and *Genery* v. *Fitzgerald*, which last case Lord Eldon decided at once, without much argument, and which it has long been the opinion of Mr. Preston is not law.

I shall give my best attention to both cases; it is not likely that I shall delay them for a hearing before the common law judges, which could not possibly be had before February next. I have grave doubts on the Vice-Chancellor's decision appealed from in *Ackers* v. *Phipps*, but my opinion leans towards his in respect of the gift to George Holland Ackers. Let both cases stand over for decision together.

Lord Brougham this day (Aug. 31), after delivering judgment in the preceding case, proceeded thus:—Now we come to *Phipps* v. *Ackers*, the other appeal, in which the Vice-Chancellor decided in favour of the devisee. I had in this case less doubt than on the last, but that arose from my not having fully examined the structure of the clause, and from my attention having been very much drawn away from the argument to some matters which do not now appear to me to bear very mainly on the case. I think that the decree in the devisee's favour cannot here be supported, at least upon the same ground with the reversal of the other decree. The main feature is here wanting of a residuary gift: the only reference to residue is in the gift over, on the decease of George Holland Ackers under the age of 21, and without issue. In that event the estate of Wheelock, and the £7000 money given to him on his attaining the age of 21, are [714] directed to sink into the residue of real and personal estate, and go according to the disposition thereof subsequently expressed. But this direction must be taken to mean that the real estate shall be united with the real residue, and the personal estate with the personal residue, and that the whole shall go to the residuary devisee. Now if a question were raised whether, on the event having happened of George Holland Ackers having died under 21, and without issue, the heir-at-law, or the devisee of the residue, James Coops Ackers, took the intermediate rents and profits of Wheelock, as he would the profits of the £7000, this disposition of the Wheelock estate might, with the residuary gift to James Coops Ackers, show that they went to him. But as they can never be shown to go to him, if George Holland Ackers lives till 21, the event not having happened on which alone he is entitled, so it seems clear that those intermediate rents never can go to George Holland Ackers, because there is wanting the residuary gift to George Holland Ackers, which is the main ground of deciding against the heir-at-law in the other case, and there is no other circumstance whatever to supply its place and indicate the intention of displacing the heir. It becomes then the mere case of a gift of Wheelock to George Holland Ackers on his attaining the age of 21, which assuredly does not convey the rents intermediately received, nor can the addition of the legacy of the £7000 in the same clause alter the matter. In short, all the argument proceeding from the force of the word "residue," or of the words "other estates not disposed of" in the gift to James Coops Ackers, fails here, and the cases cited do not apply, except the case of *Bullock* v. *Stones* (2 Ves. sen. 521), which clearly does, and [715] so does what Lord Eldon says in *Genery* v. *Fitzgerald* (1 Jac. 468).

While, therefore, I am of opinion that the decree in the first case, in favour of the heir-at-law, must be reversed, I think that the decree against her in this case must, if it is to be allowed to stand at all, be rested on another ground, namely, that of the interest given to George Holland Ackers being an immediate vested interest and not a contingent interest, that is, an estate which would vest *instanter*, liable to be afterwards devested on the event happening of the decease of George Holland Ackers under 21. In favour of this view there are the cases of *Doe* d. *Hunt* v. *Moore* (14 East, 601), perhaps also *Bromfield* v. *Crowder* (1 New Rep. 313), and against it *Chambers* v. *Brailsford* (18 Ves. 368). As to *Doe* v. *Moore*, I wish to speak with the greatest possible respect of that case, but I am not the only member of the profession who has considered the language of Lord Ellenborough, in giving the judgment of the Court in *Doe* v. *Moore*, as being very strong indeed, and going a very great way, and being very difficult to be reconciled with the other cases as to the use of the word "when," and similar words. Here it is "when and so soon as," which I think makes some difference, but would rather make it to appear to sound more like contingency than the word "when" alone. There is that case at the Rolls, *Graham* v. *Hanson* (6 Ves. 239), in which Sir William Grant gravely and learnedly argues from the civil law that "when" and "if" are equivalent words as referred to legacies. It is true as

to what Lord Ellenborough says, that it may be so with respect to personal estate. But nevertheless [716] I am not satisfied that he has made out that the civil law principles support that most sweeping assertion, which would really make the case of *Doe* v. *Moore* amount to this, that a devise of Blackacre to A. when he attains 21, without any gift over,—though there was a gift over, to support which gift over the tendency of the Courts is to make it vested and not contingent,—that that devise to A. at 21 or 24 is a vested interest. It is quite impossible to say that *Bromfield* v. *Crowder* supports that position; you will find that that case does not go so far. I therefore consider that this case, to say the least of it, is encumbered with very considerable doubt; and I also consider that *Bromfield* v. *Crowder* is with the utmost difficulty reconcilable with the decision pronounced by the Court below, as I am sure it is irreconcilable with the language which the Court of King's Bench used in the case of *Doe* v. *Moore*. My opinion is, that *Phipps* v. *Ackers* cannot stand on the same ground on which *Ackers* v. *Phipps* is reversed, namely, the effect of the residuary clause, and of the circumstances indicating an intention to displace the heir, unless that main circumstance of displacing the heir is allowed to exist in this case, namely, the gift of an estate vested, only postponing the enjoyment, I mean only postponing the possession, and liable to be devested; in short, a vested defeasible estate, liable to be defeated when the event happens. If it is such a vested estate, undoubtedly the decree is supported; if it is a contingent estate, as that of James Coops Ackers was, it cannot stand on the ground on which the decision is now given in favour of James Coops Ackers.

Now this being the case, the course which I would advise your Lordships to take, is to postpone the fur-[717]-ther consideration of this appeal. My Lords, it is very painful for me to find that the case on which I entertain no doubt, is one of a large sum of money, as large a sum as £40,000, but the other is a question of so much smaller value, that I am afraid, if your Lordships were to order a second argument, and to have the judges to assist your Lordships in disposing of it, the misfortune would be that from the smallness of the stake, the expense would have to come out of an estate which is not very able to bear it, and there is no means of enabling it to be charged on the larger fund, because that belongs to James Coops Ackers. I wish to throw out these suggestions in the presence of the parties in the case of *Phipps* v. *Ackers* (in the other case there is no doubt), and to ask them, in the first place, whether it be true or not, that this estate is so trifling.

(It appeared from the answers of the agent for the Respondent, that the rents and profits of the estate devised to him, varied from £300 to £500 a year, from the testator's death in 1823 to the year 1833, when the Respondent attained his age of 21.)

Lord Brougham:—Then taking the annual income at £400, the fund is about £4000. Then there is the value of the estate.

Mr. Lynch:—In such a case as this, as the difficulty is created by the will, I should submit that the general fund should bear the expense.

Lord Brougham:—That is the question: who is here to represent the fund?

Mr. J. Russell, of counsel for James Ackers, said there was a suit for the administration, in which that question might be raised, altogether distinct from this [718] suit, which was a bill filed by the heir-at-law, claiming adversely to the will. In the appeal in which Mr. Lynch appeared, there was no party who represented the estate at all.

Lord Brougham:—Then there is nobody before us in this case, who represents the fund; but that does not prevent us from doing justice.

Mr. West, of counsel for the Respondent in *Ackers* v. *Phipps*, asked what his Lordship said as to the costs?

Lord Brougham:—All costs in *Ackers* v. *Phipps* to come out of the estate. I never gave a decision with so much pain; it is the hardest case I ever knew.

Adjourned for further consideration *sine die*.

The judgment has never been applied for, the parties having, it is understood, entered into an arrangement.

APPEAL

FROM THE COURT OF SESSION.

JAMES JOHN FRASER, W.S.,—*Appellant;* JOHN GORDON, Esq.,—*Respondent.*

[Mews' Dig. i. 352.]

On the day appointed for hearing an appeal, when its competency also was first to be argued by one counsel at a side, pursuant to an order of the House, the Respondent's counsel appeared at the bar, and, no counsel or agent appearing for the Appellant, prayed that the appeal be dismissed. The House required him to open a *prima facie* case against the appeal before they would dismiss it.

The Appellant was a writer to the signet in the city of Edinburgh, and was for some time agent for **[719]** the Respondent, Lieutenant-colonel Gordon, of Cluny, in Scotland, and had large pecuniary transactions with him. In consequence of some differences between them, they raised actions against each other in Scotland; and from two interlocutors pronounced in those actions, one by the Lord Ordinary, on the 15th of November 1834, the other by the Second Division of the Court of Session, on the 15th of January 1835, Mr. Fraser appealed. The appeal was twice dismissed for irregularity and non-compliance with the orders of the House, before it was ripe for hearing. On presenting the third appeal, Fraser appeared before the Appeal Committee, to whom the Respondent's petition, suggesting the incompetency of the appeal, and praying for its dismissal, had been referred, and he so far sustained his case that the committee recommended the appeal to be set down for hearing, and that its competency be argued at the bar by one counsel on each side, which the House ordered accordingly, and appointed a day for the hearing.

Dr. Lushington appeared as counsel for the Respondent when the appeal was called, and said he was ready to support the interlocutors complained of; but observing that no counsel appeared for the Appellant, he concluded that the appeal was abandoned; and he asked their Lordships to dismiss the appeal with costs, and affirm the interlocutors as of course.

The Appellant did not appear, nor did any counsel or agent appear for him.

Lord Devon said the Appeal Committee had been of opinion, when this case was before them, that the appeal could not be sustained, but the Appellant was very anxious for a hearing, and alleged that he should **[720]** be able to make out a clear case at the bar for reversing the orders of the Court below. The appeal was, therefore, on the report of the Appeal Committee set down for hearing for this day, and the Appellant had notice.

Lord Brougham said, even on the supposition that the Appeal was abandoned, still it was necessary for their Lordships to hear the Respondent's case opened on the merits, so that they might see that the orders complained of were well founded. As the House had to pronounce a judgment, it became requisite to hear some reasons for it. (But see *Gardiner* v. *Simmons*, ante 1 Clark and F. 35; *Ricketts* v. *Lewis*, 2 Clark and F. 100, and *Hamilton* v. *Littlejohn*, post vol. iv. See also *Mellish* v. *Richardson*, 1 Clark and F. 224).

Dr. Lushington then proceeded to state the Respondent's case.

Lord Brougham stopped him after a short time, saying the House was satisfied that a *prima facie* case was made; it was proper for their Lordships to hear so much of the case stated at the bar. His Lordship then moved that the appeal be dismissed with costs, and the interlocutors complained of be affirmed.*

Ordered accordingly.

* The Appellant within a few days after the date of this order presented a petition for a re-hearing, which was referred to the Appeal Committee, but not complied with, whereupon he lodged another appeal, which has not been heard.

[721] APPEAL

FROM THE COURT OF CHANCERY.

JOHN BUSH and ANN his Wife, and ROBERT MATTOCK,—*Appellants*:
SUSANNAH LOCKE, Widow, —*Respondent*.

[Mews' Dig. iv. 380; xii. 970; S.C. 9 Bli. N.S. 1, affirming *Locke* v. *Southwood*, 1 My. and Cr. 111. See *Moore* v. *Simkin* 1885, 31 Ch.D. 95.]

Robert Marke being seised to him, his heirs and assigns, according to the custom of the manor of Taunton Deane, of certain messuages within that manor, surrendered the same to trustees, in pursuance of articles of agreement made in contemplation of marriage, on trust, to permit him, his heirs and assigns, to enjoy the premises until the marriage, and from the solemnization thereof on trust for himself for life, and after his decease on trust for the intended wife for life, for her support and in bar of dower, and after the death of the survivor of the husband and wife, on trust to surrender the premises into the hands of the lord of the manor, to the use of the child or children of the marriage, their heirs and assigns, such surrenders to be made at the costs of the children, who should be entitled to take the same, and in default of issue of the marriage living at the death of the survivor of the husband and wife, then on this special trust, to surrender the premises into the hands of the lord of the manor, to the use of the right heirs of the settlor for ever, according to the custom of the manor; such surrender or surrenders last-mentioned to be made at the costs and charges in all things of the person or persons who by virtue of the last-mentioned condition or limitation should be entitled to take the same. The only issue of the marriage was a daughter, who survived the settlor, but died in the life-time of her mother. On the daughter's attaining 21, the premises were surrendered to the lord of the manor, to her use, and she by her will devised them to the sons of her mother by a second husband, and at the same time surrendered them to [722] the use of her will: her mother surviving her continued in possession of the premises till her own death.

HELD, by the Lords, affirming decrees of the Court below in a suit between a purchaser for valuable consideration from the devisees, and the settlor's youngest sister and customary heiress at his widow's death, that by virtue of the ultimate limitation in the articles she was entitled to the customary estates from the death of the widow. (See the note at the end of the case.)

Robert Marke, by articles bearing date the 24th of April 1769, reciting that a marriage was soon to be solemnized between him and Grace Haddon, spinster, and that he was then lawfully seised to him and his heirs and assigns for ever, according to the custom of the manor of Taunton Deane, in the county of Somerset, of certain messuages, lands, tenements, and premises therein particularly described, (all which messuages, etc. were situate in the parishes of Pitminster and Corffe, and were parcel of the customary lands of inheritance of Taunton Deane,) in consideration of the said intended marriage, and of the portion of the said Grace Haddon, and for settling and assuring the said messuages, etc. covenanted and agreed with John Haddon and John Marke, as trustees, that he, Robert Marke, would, before the solemnization of the said marriage, well and sufficiently convey and assure to the use of the said trustees, their heirs and assigns for ever, according to the custom of the said manor, all the said messuages, etc. to be held by them, and the survivor of them, and the heirs and assigns of such survivor, upon trust to permit him, Robert Marke, to enjoy the same, and receive the rents thereof until the marriage, and from and after the solemnization thereof, upon trust to permit him and his assigns to enjoy the said several messuages, [723] etc., and receive the rents thereof to his or their own use, for his life; and upon further trust, after his decease, to permit the said Grace Haddon, and her assigns, to enjoy the said messuages, etc., and receive the rents thereof to her and their use, for the term of her life, for better support, and

in full recompense of dower and thirds which she might otherwise claim out of the freehold lands, or hereditaments of the said Robert Marke: and upon this further trust, that after the death of the survivor of them, the said Robert and Grace, the trustees, etc. should surrender into the hands of the lord of the manor, for the time being, the several messuages, to the use of such children of the marriage, for such estates, and in such manner and form as the said Robert, or, in his default, the said Grace, should by deed or will appoint: and in default of appointment, then, upon trust, to surrender the said messuages, etc. to the use of all and every the child or children of the said marriage, their heirs and assigns for ever, according to the custom of the manor aforesaid, as tenants in common: and if but one such child, then to the use of such child, his or her heirs and assigns for ever, according to the custom of the said manor: such surrenders to be made at the costs and charges of such child or children, who should be entitled to take the same: *and in default of issue of the said Robert on the body of the said Grace, that should be living at the death of the survivor of them, then upon this special trust and confidence, that the trustees should surrender into the hands of the lord of the manor aforesaid, for the time being, all and singular the said several messuages, etc. to the use and behoof of the right heirs of the said Robert Marke for ever, according to the custom of the said manor, such surrender or surrenders* [724] *last mentioned to be made at the costs and charges in all things of such person or persons who, by virtue of the last mentioned condition or limitation, should be entitled to take the same.*"

On the 26th of April 1769, surrenders were made of the several messuages, in consideration of the intended marriage, and in pursuance of the articles, to the use of the trustees, who were thereupon admitted by the lord as tenants of the customary messuages, etc. therein comprised. The marriage was solemnized soon afterwards, and there was issue thereof, one child only, Elizabeth Marke. Robert Marke died in 1779, intestate as to these customary premises, leaving Grace, his widow, and Elizabeth, his daughter, and only child, him surviving. The widow afterwards, and in the lifetime of her said daughter, intermarried with James Turner, and died in 1819, leaving the said James Turner, her second husband, and two sons of that marriage, John Haddon Turner, and James Turner the younger, surviving her. She had enjoyed the said premises until her death.

On the 15th of April 1803, the then trustee duly surrendered the said messuages, etc. into the hands of the lord, to the use of the said Elizabeth Marke, her heirs and assigns for ever, according to the custom of the said manor: and she, on the 16th of February 1812, surrendered into the hands of the lord all her messuages, etc. whatsoever within the said manor, to the use of John Haddon Turner, her brother of the half blood, his heirs and assigns for ever, to be holden upon condition to perform her will. And by her will of the same date she devised all her customary lands and hereditaments in the parish of Corffe to her other half brother, James Turner; and all her other customary messuages, lands, and hereditaments to the [725] said John Haddon Turner, his heirs and assigns, according to the custom of the said manor. Upon her death in April 1812, without having been married, John Haddon Turner was admitted tenant of the messuages comprised in the said marriage articles.

In 1820 and 1824 respectively, Thomas Southwood, with notice of the said articles, purchased parcels of the said messuages, etc. for valuable consideration, from John Haddon Turner and James Turner the younger, with the privity of James Turner their father, and the same were duly surrendered to the use of Thomas Southwood, his heirs and assigns.

In May 1825, the Respondent filed her bill against T. Southwood, stating, among other things, that Robert Marke had no issue save the said Elizabeth, and that he left no brother surviving, and that the Respondent was his youngest sister, and as such sister she became and was, at the time of the death of Grace Marke, and was then the heiress of the said Robert Marke, according to the custom of the said manor; and as such customary heiress, upon the death of Grace Marke, she became and was entitled to the customary premises under and by virtue of the trusts of the said articles of agreement, and further stating the surrender thereof to the use of T. Southwood, and that he was at the time of such surrender, and still was lord of the manor, and that the legal estate of and in the said premises, by virtue of such surrender vested in him. And after charging, amongst other things, that according

to the true construction of the said articles the said premises were, upon the death of the survivor of Robert and Grace Marke, without leaving issue of their marriage then living, to be surrendered to the use of the person who should then be the customary heir of Robert Marke, the [726] bill prayed that it might be declared, that the Respondent was entitled in equity to the said customary premises, and that T. Southwood might be decreed to surrender the same to her, and her heirs and assigns, and to admit her to the same, and that an account might be taken of the rents and profits since the death of the said Grace Marke, etc.

Thomas Southwood, by his answer, admitted that the Respondent as such youngest sister became, and was at the time of the death of Grace Marke, heiress * of the said Robert Marke according to the custom of the said manor; but that also by the custom, the widow of a tenant dying seised of customary lands, parcel of the said manor, is his heir of such lands, to her and her heirs absolutely, and that Grace Marke was therefore, at the time of the death of Robert Marke, his heir according to the custom of the said manor, and he therefore denied that the Respondent, as such customary heiress as in the bill alleged, did, upon the death of Grace Marke, become, or was [727] then entitled to the said customary premises. And he admitted that the legal estate in the said premises that had been purchased by him, was then vested in him, and that he was lord of the said manor. And he submitted that he was not a trustee of the legal estate of the said premises upon the trusts of the said articles; and that, according to the true construction of them, the said premises were not upon the death of the survivor of Robert Marke and Grace his wife, without leaving issue of their marriage then living, to be surrendered to the person who should be the customary heir of the said Robert Marke, as in the bill alleged.

The cause came on to be heard before the Vice-Chancellor, on the 30th of June 1829, when his Honor decreed for the Respondent in the terms of the prayer of her bill.

Thomas Southwood presented a petition of appeal to the Lord Chancellor, but died before his appeal came to be heard, having by his will devised to the Appellant, Ann Bush, part of the hereditaments in question in the cause, and all the rest of his manors, etc., comprising the remaining part of the hereditaments in question to the Appellant, Robert Mattock. Against these devisees the Respondent filed her bill of revivor and supplement, and the suit was accordingly revived. The appeal and supplemental cause were heard by the Lord Chancellor, on the 20th of June 1831, when his Lordship affirmed the Vice-Chancellor's decree (see Report, *Locke* v. *Southwood*, 1 Myl. and C. 411).

From these decrees John Bush, and the said Ann his wife, and Robert Mattock appealed to this House. The appeal being considered to involve difficult questions of law, an order was made, on the petition of the [728] Appellants, for the attendance of the common law Judges; but the order was afterwards discharged, and the case was heard without the Judges.

Sir William Horne and Mr. Preston for the Appellants:—The ultimate limitation in the marriage articles, in default of issue of the body of Robert Marke, the settlor, on the body of Grace Haddon, living at the death of the survivor of them, to the use and behoof of the right heirs of the said Robert Marke for ever, according to

* The Appellants alleged that this admission was a mistake, and in their case before this House they set forth the custom thus:

"By the custom of the manor of Taunton Deane, if a tenant dies having a wife at the time of his death, then his widow is his heir, and as such becomes absolutely entitled to all such customary estates of her said husband as shall be undisposed of by his will, *to hold to her and her heirs for ever*, according to the custom of the said manor; and if such widow marries again, her second husband is entitled to be admitted tenant to her customary estates, and thereupon becomes absolutely entitled thereto. If a tenant dies having no wife at the time of his death, then his youngest or only son is his heir according to the custom of the said manor: and in case of no son, his youngest or only daughter is his heir according to the custom; and in case of no son or daughter, then his youngest or only brother is his heir according to the custom; and in case of no brother, then his youngest sister is his heir according to the custom of the said manor."

the custom of the manor, was a reservation of the old estate of the settlor, and revested the estate to him, subject to the previous limitations, and upon his death the same descended to and vested in his widow, as his heir according to the custom of the manor, and not, as contended for on the part of the Respondent, a limitation by purchase to an unknown and uncertain person, who by chance might happen to answer the character of customary heir at the death of the survivor of the settlor and his wife. *Thrustout* dem. *Gower* v. *Cunningham* (2 Black. 1046), *Doe* v. *Frost* (3 Barn. and Ald. 546).

By the custom of this manor of Taunton Deane, upon the death of an owner of copyhold land within the manor, leaving a widow, she is his heir, and is absolutely entitled to all his customary lands not disposed of by his will. If that be the custom, then the decree appealed from was wrong, as having declared against the right of the Appellants whose testator derived under the widow's title, having purchased the lands from her sons after her death, with the concurrence of her husband, their father. But supposing that the widow was not the heir of the settlor, then **[729]** the only other person who could be his heir according to the custom, was his daughter and only child, who, after attaining her full age, and after a surrender was made of the copyhold lands to her use, devised them to her brothers of the half blood, and directed a surrender of them to the use of her will. From these devisees Mr. Southwood made his purchase and took a surrender of the lands. So that whether the widow or the daughter of the settlor was his heir, in either case the decree was erroneous. The case on behalf of the Respondent was, that neither the widow or daughter was the *persona designata* in the ultimate limitation in the marriage articles, because the daughter dying before the widow could not answer the description in that limitation, and the widow had only a life interest and could not be heir to herself. But the case of *Holloway* v. *Holloway* (5 Ves. 399) was a direct authority to the contrary. Now, as the question, who was the right heir of the settlor, turned upon the custom of the manor, the House would, if there was any doubt on that point, direct an issue, to ascertain the fact, before their Lordships gave any judgment on the case.

The manifest object and intention of the marriage articles was confined to the making a provision for the wife of the settlor and the children of the marriage; the articles were, according to an express recital contained in them, made in consideration of the marriage, and of the marriage portion of Grace Haddon, the intended wife. If Robert Marke had survived his wife and daughter, he would have been entitled to have called on the trustees to re-surrender the customary premises to him, the sole objects and purposes **[730]** of the trusts having been spent and gone. It never could have been the intention of the settlor to settle his own estate, so that even if his wife died the day after the marriage, his interest therein should be reduced to a life estate merely, in favour of a person uncertain and undefinable during his life, and from whom no consideration, either directly or indirectly, moved to the settlor and owner of the fee. A provision for any person or object unconnected with the marriage is negatived by the first trust in the articles, viz., the trust to permit Robert Marke, his heirs and assigns, to hold and enjoy the premises until the marriage; while it is contended on the part of the Respondent, that this case is an exception to the general rule of construction in such cases, inasmuch as the trustees are, by the terms of the trust, required to do an act after the happening of the contingency, viz., to surrender the trust estate; but it is submitted that this expression is mere form, part of the *cantilena* of the trusts, and did not exclude the right of the settlor to his old reversion as a reversion.

But supposing that this view of the case is wrong, and that the right heirs of the settlor are to take by purchase, and that the ultimate limitation is not to be considered a reservation of the old use, the Appellants submit, that the contingency, upon which the same was to take effect, ceased on the death of Elizabeth Marke, the only issue of the marriage, in 1812; and that upon such event the ultimate limitation vested in Grace Turner, the widow, and heir of the testator according to the custom of the said manor. The custom of the manor, which constitutes the youngest sister heir according to the custom, applies only to a descent taking place at the death of the owner; and at that time the Respondent was not heir, or customary **[731]** heir of the owner in this case, a title adverse to that claimed by the Respondent having,

by the surrender to Elizabeth Marke in 1803, existed for near twenty-one years, at the time the Appellants' testator purchased the estate in question, and he having so purchased for a valuable and full consideration, the Respondent was barred of all title to relief in equity.

Sir Edward Sugden and Mr. Jacob for the Respondent:—The estate in question remained subject to the trusts of the articles of agreement of the 24th of April 1769, and by the ultimate limitation of those articles, it was, upon the death of the survivor of Robert Marke, and Grace his wife, without leaving issue of the marriage then living, to be surrendered to the person who should then be the customary heir of Robert Marke; and the Respondent was at that time his customary heir. *Goring* v. *Nash* (3 Atk. 186), *Ellison* v. *Ellison* (6 Ves. 656). It was quite true that a limitation to one's right heirs is, in the abstract meaning, a reservation of the old estate: but the question in this case was not of the old use, but of a new transfer of the estate. The cases of *Holloway* v. *Holloway* [5 Ves. 399] and *Doe* v. *Frost* [3 B. and Ald. 546], were not applicable to this case; but *Long* v. *Blackall* (3 Ves. jun. 486), was a strong authority for the Respondent, who was clearly the person destined by the ultimate limitation in the articles to take as heir according to the custom of the manor.

The legal estate was, by reason of the surrender before the marriage, vested in the trustees, to continue in them during the life of the survivor of the husband and wife, after which it was to be transferred to the person who should be then entitled to take **[732]** under the designation in the articles. The legal estate was out of the settlor, nothing was reserved to him but the rents and profits during his life. This was a limitation to take effect by substitution. In the case of *Thrustout* v. *Cunningham* [2 Black. 1046] the settlor reserved to himself the legal estate for his life. The rule in Shelley's case could not be applied to two estates,—one legal, the other equitable—which could not coalesce. The settlor here had only the equitable interest. The settlement was very peculiar; the children of the marriage were not to have a vested interest at 21, or marriage, as was usual in settlements, nor until after the death of the survivor of the father and mother, so that any disposition, by a child of the marriage, of this estate, while the father or mother was living, could have no effect whatever. To the case of *Holloway* v. *Holloway* [5 Ves. 399], as far as it was applicable here, the cases of *Jones* v. *Colbeck* (8 Ves. 38), and *Miller* v. *Eaton* (Coop. Chan. Cas. 272), were sufficient answers.

The most absurd consequences would follow from the supposition that this estate was, under the limitation in the articles, to revest in the right heirs of the settlor at his death; for instance, the settlor's wife would be his right heir according to the custom of the manor, as admitted by the Appellants: she was to have the estate for her life under the articles, and, according to the argument for the Appellants, she would, by her death, come into possession of the fee simple.

This being a third hearing of this case, it was hoped that the decrees below would be affirmed with costs.

Sir William Horne replied:—The estate was never out of Robert Marke. Being seised to him and his **[733]** heirs, and being about to marry, he by his marriage settlement limited the estate to himself for life, remainder to his wife for life, etc. So far then the estate was never devested, but remained in the settlor as of his old reversion, or was a resulting trust to him after the trusts of the settlement were exhausted. It could not make any difference how much of the estate was exhausted by the intermediate limitations if the whole was not so exhausted: whatever of it remained reverted to the settlor as of his old estate.

The case was not much argued in the Court below.

The Lord Chancellor said, that he had a perfect recollection of the case, and of his view of it when it was before him (it has been only lately reported, 1 Myl. and C. 441), and that he had before him a note of the argument before the Vice-Chancellor, who appeared to have had his attention called to all the bearings of the case. He recollected also that he had an hour's conversation with his Honor on the subject, and his Honor appeared to have inclined against his own argument in *Doe* v. *Frost* [3 B. and Ald. 546].

Lord Wynford:—I am free to state to your Lordships that I have not formed any decided opinion on the case. Whether, on a fuller consideration of the cases

referred to, and on a more deliberate perusal of the articles of settlement, I shall be able to make up my mind, or I may think it necessary to have another argument before the Judges, I am not prepared to say; all I ask now of your Lordships is, to postpone the further consideration of the case.

The Lord Chancellor:—I agree with my noble and learned friend in postponing the consideration of the **[734]** case, but it ought to be remembered that if we shall require to have another argument before the learned Judges, we cannot dispose of the case this session, as the Judges are gone or preparing to go their circuits. The case was thoroughly argued in the Court below; at least before me, and I certainly retain the opinion which I then held.

The case was adjourned for further consideration.

(March 9, 1835.) The Appellants presented a petition for a rehearing before the Judges; that petition was referred to the Appeal Committee, but not complied with.

Lord Brougham (Sept. 5):—When this case was last before the House, a doubt was suggested whether it ought not to be heard again by your Lordships, with the assistance of the Judges of the common law Courts. It appears to me, from what passed in the Court of Chancery when the case was there on appeal before myself, and also from what passed here on the hearing last session, that it really was not a case requiring the presence of the learned Judges. There was no doubt that the case involved matter of equity, and that it was by no means a pure question of law. The case was very fully argued in the Court of Chancery, and it was then agreed by the counsel on both sides, according to my recollection, and according to a note of the argument which I have since looked into, that it was not a fit case to be sent to a court of law. If it was not deemed to be a fit case for a court of law, your Lordships will not probably think it a case in which judgment ought to be delayed for the opinion of the Judges. The case appeared to me, even if it were **[735]** heard on the point of law said to be involved in it, not to admit of any reasonable doubt. I have carefully considered the case. I considered it at the time of the argument, and I concurred in advising your Lordships to postpone your judgment in consequence of the doubt then entertained by my noble and learned friend Lord Wynford. It has stood over a whole session, and it is hardly fair to the parties interested in the judgment to put it off longer. From the state of health of my noble and learned friend, it is all but certain that he cannot attend here during this session, and it is very doubtful, for the same reason, whether he will be able to attend next session. Under these circumstances, and having no doubt on my own mind of the correctness of the decision appealed from, I think I should not discharge my duty if I did not now advise your Lordships to affirm that decision: but I do not advise your Lordships to give the Respondent any costs, because my noble and learned friend expressed a doubt whether it was not a case fit for the opinion of the Judges.

Ordered accordingly, that the judgment complained of be affirmed, without costs.*

* See *Locke* v. *Colman*, 1 Myl. and C. 423, which was another suit by the Respondent to recover other parts of the copyhold lands comprised in the articles of agreement above-mentioned from purchasers thereof for valuable consideration. In that case an issue was directed to try who was Robert Marke's customary heir. The result was, as the reporters have been informed, that the Respondent was found not to be such heir.

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